

the FOUO markings. Records in file or storage need not be retrieved solely for that purpose.

(j) *Disposal.* (1) Non-record copies of FOUO material (including hard copy reports and computer printouts) may be destroyed by tearing each copy into pieces to preclude reconstructing, and disposed in regular trash containers. When local circumstances or experience indicates that this destruction method is insufficient, local authorities may direct other methods while considering the additional expense balanced against the sensitivity of FOUO information in the records. FOUO information on unclassified magnetic storage media shall be disposed of by overwriting the media one time with any one character. Storage areas within an ADP system (internal memory, buffers, registers, and similar storage areas) may be cleared by using a hardware clear switch, a power-on reset cycle, or a program designated to overwrite the storage area.

(2) Record copies of FOUO documents shall be disposed of following the disposal standards established under SECNAVINST 5212.5C (Records Disposal Manual) for the particular kind of record.

(k) *Unauthorized disclosure.* The unauthorized disclosure of FOUO records does not constitute an unauthorized disclosure of Department of the Navy information classified for security purposes. However, appropriate administrative or disciplinary action shall be taken against those responsible. Unauthorized disclosure of FOUO information that is protected by the PA may result in civil and criminal sanctions against responsible person(s). The naval activity that originated the FOUO information shall be informed of its unauthorized disclosure.

[56 FR 66574, Dec. 24, 1991, as amended at 59 FR 29722, June 9, 1994]

§ 701.10 FOIA appeals/judicial actions.

(a) *How to file an appeal.* The following guidelines should be followed by individuals wishing to appeal a denial of information, a request for waiver/reduction of fees, or a “no record” response:

(1) The appeal must be received by the cognizant appellate authority (i.e.,

NJAG or OGC) within 60 days of the date of the response.

(2) The appeal letter must be in writing and requesters should provide a copy of the IDA’s response when filing a written appeal to the Navy’s appellate authorities (OGC or NJAG, depending on subject matter), regarding an IDA’s decision that a record is exempt in whole or in part or because a naval activity denied a request for a waiver/reduction of fees. The requester should include a copy of the denial letter and provide supporting rationale on why the appeal should be granted. The requester may appeal a “no records” response if he/she believes an adequate search of files was not conducted.

(b) *Time of receipt.* The time limits for responding to a FOIA appeal commence when the appeal reaches the office of the appellate authority having jurisdiction over the record. Misdirected appeals should be referred expeditiously to the proper appellate authority.

(c) *Appellate authorities.*—(1) *Responsibility and authority.* NJAG and OGC are authorized to adjudicate appeals made to the Secretary of the Navy (SECNAV) on denials of requests for copies of Department of the Navy records or portions thereof, or refusals to waive or reduce fees on matters within their respective areas of cognizance. That includes the authority to release or withhold records, or portions thereof, waive or reduce fees, and to act as required by SECNAV for appeals under 5 U.S.C. 552 and subparts A, B, C, and D of this part. NJAG and OGC are further authorized to delegate this authority to a designated Assistant NJAG and the Principal Deputy OGC or Deputy General Counsel (Logistics), respectively, under such terms and conditions as they may deem appropriate.

(2) *Respective areas of cognizance.* As delineated in SECNAV Instructions 5430.25D and 5430.27A (NOTAL), the respective areas of cognizance of NJAG and OGC for providing legal services for the Department of the Navy are:

(i) NJAG. In addition to military law, all matters except those falling under the cognizance of OGC.

(ii) OGC. Business and commercial law aspects of:

(A) Acquisition, custody, management, transportation, taxation, and

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disposition of real and personal property and the procurement of services, including the fiscal, budgetary, and accounting aspects thereof; excepting, however, tort claims and admiralty claims arising independently of contracts, and matters relating to the naval petroleum reserves;

(B) Operations of the Military Sealift Command, excepting tort and admiralty claims arising independently of contracts;

(C) Office of the Comptroller of the Navy;

(D) Naval Computer and Telecommunications Command;

(E) Patents, inventions, trademarks, copyrights, royalty payments, and similar matters;

(F) Procurement of foreign military sales, co-production and cooperative research and development and related agreements, NATO standardization agreements, and matters relating to the Arms Exports Control Act;

(G) Department of the Navy litigation before the Armed Services Board of Contract Appeals; and,

(H) Civilian personnel law matters on employing present and former Navy civilian employees; and

(I) Environmental matters.

(d) *Addresses for appeals.* Appeals should be addressed to the cognizant appellate authority. The addresses of the SECNAV's designees are:

(1) Judge Advocate General, Navy Department, 200 Stovall Street, Alexandria, VA 22332-2400.

(2) General Counsel of the Navy, 2211 Jefferson Davis Highway, Arlington, VA 22244-5103.

(e) *Time limits for filing FOIA appeals.*

(1) The requester should file the appeal so it reaches the appellate authority not later than 60 calendar days from the date of the initial denial letter. At the end of 60 calendar days, the case may be considered closed; however, the requester may file litigation for denial of the appeal. If the requester was provided several incremental determinations for a single request, the time limit for filing the appeal begins when the requester receives the last response. Records which are denied shall be retained for a period of six years to meet the statute of limitations of claims requirement.

(2) Final determinations on appeals shall normally be made within 20 working days after receipt.

(f) *Delay in responding to a FOIA appeal.* If additional time is needed due to unusual circumstances, the final decision may be delayed for the number of working days (not to exceed 10), that were not utilized as additional time for responding to the initial request. If a determination cannot be made and the requester is notified within 20 working days, the appellate authority shall acknowledge to the requester in writing the date of receipt of the appeal, circumstances for the delay, and anticipated date for substantive response. Requesters may be advised that if the delay exceeds the statutory extension or is for reasons other than "unusual circumstances," they may consider their administrative remedies exhausted. Further, requesters should be advised that they may wait for a substantive response without prejudicing their right to judicial remedy. The appellate authority shall continue to process the case expeditiously whether or not the requester seeks a court order for release of the record(s). A copy of any response provided subsequent to filing of a complaint shall be forwarded to the Department of Justice.

(g) *Action upon receipt.* Upon receipt of a FOIA appeal, NJAG or OGC shall inform the cognizant IDA of receipt of the appeal. The appellate authority will seek documentation from the IDA from which to make a determination. Normally, the IDA will be requested to forward a copy of the initial request, a copy of the response, a copy of excised and unexcised documents, and supporting rationale for continued withholding (if applicable) to the appellate authority within 10 working days.

(h) *Consultation/coordination.* (1) The Assistant for Naval Investigative Matters and Security (OP-09N) may be consulted to resolve inconsistencies or disputes involving classified records.

(2) Direct liaison with appropriate officials within the Department of the Navy and other interested federal agencies is authorized at the discretion of the appellate authority, who also coordinates with appropriate Department

of Defense officials and Justice as prescribed by directives of the Secretary of Defense (SECDEF).

(3) SECNAV or appropriate Civilian Executive Assistants shall be consulted and kept advised of cases with unusual implications. CHINFO shall be consulted and kept advised on cases having public affairs implications.

(i) *Response to the requester.* (1) When an appellate authority makes a determination to release all or a portion of records withheld by an IDA, a copy of the records released should be promptly forwarded to the requester after compliance with any procedural requirements, such as payment of fees.

(2) Final denial to provide a requested record or to approve a request to waive or reduce fees must be made in writing by the appellate authority. The response shall include the following:

(i) An explanation of the basis for the denial including the applicable statutory exemption(s) invoked.

(ii) If the final denial is based in whole or in part on a security classification, the explanation shall include a determination that the record meets the cited criteria and rationale of the governing Executive Order, is based on a declassification review, and the review confirmed the continuing validity of the security classification.

(iii) The response shall advise the requester that the material denied does not contain reasonably segregable portions.

(iv) The response shall advise the requester of the right to judicial review.

(v) The final denial shall include the name and title of the official responsible for the denial.

(vi) An information copy, less attachments, should be provided to CNO (N09B30).

(j) *Judicial actions.* A requester may seek an order from a U.S. District Court to compel release of a record after exhaustion of administrative remedies, i.e., the IDA or appellate authority denied release or when a naval activity failed to respond within the prescribed time limits.

(1) *Burden of proof.* The naval activity has the burden of proof to justify its refusal to provide a record. The court

evaluates the case de novo (anew) and may examine any requested record in camera (in private) to determine whether the denial was justified.

(2) *Actions by the court.* (i) When a naval activity fails to make a determination within the statutory time limits but can demonstrate due diligence in exceptional circumstances, the court may retain jurisdiction and allow the naval activity additional time to complete its review of the records.

(ii) If the court determines that the requester's complaint is substantially correct, it may require the United States to pay reasonable attorney fees and other litigation costs.

(iii) When the court orders the release of denied records, it may also issue a written finding that the circumstances surrounding the withholding raise questions whether civilian personnel acted arbitrarily and capriciously. In these cases, the special counsel of the Merit Systems Protection Board will conduct an investigation to determine whether or not disciplinary action is warranted. The naval activity is obligated to take the action recommended by the special counsel.

(iv) When a naval activity fails to comply with the court order to produce records that have been withheld improperly, the court may punish the responsible official for contempt.

(3) *Non-United States Government source information.* A requester may bring suit in a U.S. District Court to compel the release of records obtained from a non-government source or records based on information obtained from a non-government source. The source shall be notified promptly of the court action. If the source advises that it is seeking court action to prevent release, the naval activity shall defer answering or otherwise pleading to the complaint as long as permitted by the Court or until a decision is rendered in the court action initiated by the source, whichever is sooner.

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