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Subpart A—Department of the Navy Freedom of Information Act Program

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§ 701.1 Purpose.

Subparts A, B, C, and D of this part implement the Freedom of Information Act (5 U.S.C. 552), and the Department of Defense Directives 5400.7 and 5400.7-R series¹, Department of Defense Freedom of Information Act Program, (See 32 CFR part 286) and promote uniformity in the Department of the Navy Freedom of Information Act (FOIA) Program. It is written to provide guidance to members of the public on how and where to submit FOIA requests and appeals within the Department of the Navy.

§ 701.2 Applicability.

Subparts A, B, C, and D of this part apply throughout the Department of the Navy. It governs disclosure of agency records to “any person,” which means that any individual, to include foreign citizens, partnerships, corporations, associations and foreign, state, or local governments, may use the FOIA to obtain information. The exception to that policy is that it does not apply to Federal agencies or to fugitives from justice.

(a) *Requests from state or local government officials.* Requests from state or local government officials for naval records are treated the same as any other requester.

(b) *Requests from foreign governments.* Requests from foreign governments for naval records are treated the same as any other requester. However, requests from foreign governments that do not

¹ Copies may be obtained if needed, from the U.S. Naval Publications and Forms Center, Attn: Code 1053, 5801 Tabor Avenue, Philadelphia, PA 19120.

invoke the FOIA shall be referred to appropriate foreign disclosure channels and the requester so notified.

(c) *Privileged release to U.S. Government officials.* Naval records may be authenticated and released to U.S. Government officials if they are requesting them on behalf of Federal governmental bodies, whether legislative, executive, administrative, or judicial. For example:

(1) To a committee or subcommittee of Congress, or to either House sitting as a whole.

(NOTE: Requests from Members of Congress who are not seeking records on behalf of a Congressional Committee, Subcommittee, or either House sitting as a whole, but on behalf of their constituents, are treated the same as any other requester).

(2) To the Federal courts, whenever ordered by officers of the court as necessary for the proper administration of justice.

(3) To other Federal agencies, both executive and administrative, as determined by the head of a naval activity or designee.

In those instances, naval activities shall mark the records as "Privileged" and "Exempt from Public Disclosure." Any special handling instructions shall also be annotated on the records. Because such releases are not made under the provisions of the FOIA, they do not impact on future decisions to release/deny requests for the same records to other requesters.

(d) *Publication and public availability of special classes of records.* The requirements of 5 U.S.C. 552 that certain classes of Department of the Navy regulatory, rulemaking, and organizational records must be published in the FEDERAL REGISTER for the guidance of the public and made available for public inspection and copying are implemented in 32 CFR part 701, subpart C.

(e) *Public affairs regulations.* Subparts A, B, C, and D of this part are intended to complement, not restrict, the conduct of Department of the Navy public affairs, media relations, community relations and internal relations functions and practices authorized in Secretary of the Navy Instruction 5720.44 series, "Department of the Navy Public Affairs Regulations." Should the practices authorized in that instruction

conflict in any respect, the provisions of these subparts shall be controlling.

(f) *U.S. Navy Regulations.* Release of a record to a member of the public under FOIA shall be deemed to have occurred in the discharge of official duties (Article 1120, U.S. Navy Regulations (1990)). Process a request by a member of the public under the instructions outlined in Section 3 of Chapter 11, U.S. Navy Regulations.

(g) *Other directives.* The following directives, and other directives and instructions cited in part 701, to the extent they do not conflict, provide additional information relating to subparts A, B, C, and D of this part. Should the practices authorized in the directives conflict in any respect, the provisions of these subparts shall be controlling.

(1) Marine Corps Manual, paragraph 1015 (NOTAL); Marine Corps Order P5720.56, Availability to the Public of Marine Corps Records (NOTAL); and for Headquarters, U.S. Marine Corps, HQO P5000.12, Chapter 10 (NOTAL) and HQO 5720.9 (NOTAL).

(2) Federal Personnel Manual, chapters 293, 294, 297, 335, 339, and 713 (NOTAL)—release of information from active and inactive civilian personnel records.

(3) Manual of the Medical Department, U.S. Navy (NAV MED P-117), Chapters 23-70 through 23-79 (NOTAL) release of information from active and inactive medical records.

(4) JAGINST 5800.7C, Manual of the Judge Advocate General (JAGMAN), Chapter V (NOTAL).

(h) *Relationship between FOIA and the Privacy Act (PA).* Not all requesters are knowledgeable of the appropriate statutory authority to cite when requesting records. In some instances, they may cite neither Act, but will imply one or both Acts. For those reasons, the following guidelines are provided to ensure that requesters receive the greatest amount of access rights under both Acts.

(1) Requesters who seek records about themselves contained in a PA system of records and who cite or imply PA, will have their requests processed under the provisions of PA (see subpart F of this part).

(2) Requesters who seek records about themselves which are not contained in a PA system of records and who cite or imply PA, will have their requests processed under FOIA provisions, since they have no access under PA.

(3) Requesters who seek records about themselves which are contained in a PA system of records and who cite or imply FOIA or both Acts will have their requests processed under the time limits of FOIA and the exemptions and fees of PA. That is appropriate since greater access will be received under PA.

(4) Requesters who seek access to agency records and who cite or imply PA and FOIA, will have their requests processed under FOIA.

(5) Requesters who seek access to agency records and who cite or imply FOIA, will have their requests processed under FOIA.

If the requester has failed to cite the appropriate Act, naval activities shall apprise the requester in the final response under which Act his/her request was processed.

§ 701.3 Definitions.

(a) *FOIA request.* A written request for Department of the Navy records, made by "any person," including a member of the public (U.S. or foreign citizen), an organization, or a business, but not including a Federal agency or a fugitive from the law that either explicitly or implicitly invokes 5 U.S.C. 552, Department of Defense Directives 5400.7 and 5400.7-R series, "Department of Defense Freedom of Information Act Program" (see 32 CFR part 286) and/or subparts A, B, C, and D of this part.

(b) *Agency record.* (1) The products of data compilation, such as all books, papers, maps, and photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and in Department of the Navy's possession and control at the time a FOIA request is made.

(2) The following are not included in this definition:

(i) Objects or articles, such as structures, furniture, paintings, sculpture, three-dimensional models, vehicles, equipment, and parts of wrecked aircraft and ships, whatever their historical value, or value as evidence.

(ii) Administrative tools by which records are created, stored, and retrieved, if not created or used as sources of information about organizations, policies, functions, decisions, or procedures of a naval activity. Normally, computer software, including source code, object code, and listings of source and object codes, regardless of medium are not agency records (that does not include the underlying data which is processed and produced by such software and which may in some instances be stored with the software). Exceptions to this position are outlined in § 701.3(b)(3).

(iii) Anything that is not a tangible or documentary record, such as an individual's memory or oral communication.

(iv) Personal records of an individual not subject to agency creation or retention requirements, created and maintained primarily for the convenience of an agency employee, and not distributed to other agency employees for their official use.

(v) Information stored within a computer for which there is no existing computer program for retrieval of the requested information.

(3) In some instances, computer software may have to be treated as a agency record and processed under the FOIA. Such situations are rare and shall be treated on a case-by-case basis. Examples of when computer software may have to be treated as an agency record are:

(i) When the data is embedded within the software and cannot be extracted without the software. In that situation, both the data and the software must be reviewed for release or denial under FOIA.

(ii) Where the software itself reveals information about organizations, policies, functions, decisions, or procedures of a naval activity, such as computer models used to forecast budget outlays, calculate retirement system costs, or optimization models or travel costs.