

Department of the Navy, DoD

§ 701.28

(4) Information of a speculative, tentative, or evaluative nature on proposed plans to procure, lease, or otherwise acquire and dispose of materials, real estate, facilities, or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate government functions.

(5) Trade secret or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interests.

(6) Records that are exchanged among agency personnel and between Department of the Navy, Department of Defense, or other agencies in preparation for anticipated administrative proceeding by an agency or litigation before any federal, state, or military court, as well as records that qualify for the attorney-client privilege.

(7) Portions of official reports of inspection, reports of the Inspector Generals, audits, investigations, or surveys pertaining to safety, security, of the internal management, administration, or operation of one or more naval activities, when these records have traditionally been treated by courts as privileged against disclosure in litigation.

(8) Computer software meeting the standards of §701.3(b)(3) which is deliberative in nature, the disclosure of which would inhibit or chill the decision making process. In that situation, the use of software must be closely examined to ensure its deliberative nature.

(9) Planning, programming, and budgetary information which is involved in the defense planning and resource allocation process.

(b) If any such intra- or interagency record or reasonably segregable portion of such record would be made available routinely through the "discovery process" (the legal process by which litigants obtain information from each other relevant to the issues in a trial or hearing) in the course of litigation with Department of the Navy, such record, should not be withheld even though discovery has not been sought in actual litigation. If, the information could only be made available through

the discovery process by special order of the court based on the needs of a litigant balanced against the interests of the Department of the Navy in maintaining its confidentiality, the record or document need not be made available under this instruction. Consult with legal counsel to determine whether exemption (b)(5) material would be routinely made available through the discovery process.

(c) Intra- or interagency memoranda or letters that are factual, or those reasonably segregable portions that are factual, are routinely available through "discovery" and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

(d) A direction or order from a superior to a subordinate contained in internal communication cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decision-making process.

(e) An internal communication on a decision subsequently made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporated by reference in the record containing the decision.

§ 701.28 Exemption (b)(6).

Information in personnel and medical files, and similar files, that if disclosed to the requester would result in a clearly unwarranted invasion of personal privacy. Release of information about an individual contained in a Privacy Act (PA) system of records that would constitute a clearly unwarranted invasion of privacy is prohibited, and could subject the releaser to civil and criminal penalties.

(a) Examples of files other than personnel and medical files containing similar personal information include:

(1) Those compiled to evaluate or adjudicate the suitability of candidates

for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information.

(2) Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

(b) Home addresses are normally not releasable without the consent of the individuals concerned. In addition, lists of Department of the Navy military and civilian personnel's names and duty addresses who are assigned to units that are sensitive, routinely deployable, or stationed in foreign territories can constitute a clearly unwarranted invasion of personal privacy.

(1) Privacy interest. A privacy interest may exist in personal information even though the information has been disclosed at some place and time. If personal information is not freely available from sources other than the Federal Government, a privacy interest exists in its nondisclosure. The fact that the Federal Government expended funds to prepare, index and maintain records on personal information, and the fact that a requester invokes FOIA to obtain these records indicates the information is not freely available.

(2) Published telephone directories, organizational charts, rosters and similar materials for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories are withholdable under exemption (b)(6).

(c) This exemption is relevant to a request for information that is intimate to an individual or that possibly could have adverse effects upon that individual or his or her family if disclosed. Subpart F of this Part 701 lists several examples of non-derogatory information about the official character of a naval member or employee that can routinely be disclosed to a member of the public without constituting a clearly unwarranted invasion of personal privacy of the individual concerned.

(d) Individuals' personnel, medical, or similar files may be withheld from

them or their designated legal representative only to the extent consistent with PA.

(e) When determining whether a release is "clearly unwarranted," the public interest in release must be balanced against the sensitivity of the privacy interest threatened. For example, lists of names and duty addresses of Department of the Navy personnel (civilian and military) assigned to units that are sensitive, routinely deployable, or stationed in foreign territories must be withheld because release could aid in the targeting of Department of the Navy employees and their families by terrorists. See paragraph (p) of §701.8 regarding requests for mailing lists.

(f) When withholding information solely to protect the personal privacy of the subject of the record, information should not be withheld from that individual or from his or her designated representative. The personal privacy of others discussed in that record may constitute a basis for deleting reasonably segregable portions of the record even when providing it to the subject of the record. This exemption shall not be exercised in an attempt to protect the privacy of a deceased person but may be used to protect the privacy of the deceased person's family.

(g) Individual's personnel, medical, or similar file may be withheld from them or their designated legal representative only as consistent with SECNAVINST 5211.5C, "Personal Privacy and Rights of Individuals Regarding Records Pertaining to Themselves."

(h) A clearly unwarranted invasion of the privacy of the persons identified in a personnel, medical, or similar record may constitute a basis for deleting those reasonably segregable portions of that record, even when providing it to the subject of the record. When withholding personal information from the subject of the record, legal counsel should first be consulted.

§ 701.29 Exemption (b)(7).

Records or information compiled for law enforcement purposes, (i.e., civil, criminal, or military law, including