

(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.

Review exemptions (b)(4) and (b)(5) at § 701.26 and § 701.27 of subpart B of this part for guidance on release determinations of computer software.

(4) A record must exist and be in the possession and control of the Department of the Navy at the time of the request to be considered subject to this part and the FOIA. There is no obligation to create, compile, or obtain a record to satisfy a FOIA request.

(5) If unaltered publications and processed documents, such as regulations, manuals, maps, and related geophysical materials are available to the public through an established distribution system with or without charge, the provisions of 5 U.S.C. 552(a)(3) normally do not apply and they need not be processed under the FOIA. Normally, documents disclosed to the public by publication in the FEDERAL REGISTER also require no processing under the FOIA. In such cases, naval activities should direct the requester to the appropriate source to obtain the record.

(c) *Release authority.* Release authorities are commanding officers and heads of Navy and Marine Corps shore activities or their designee that are authorized to furnish copies of records under their cognizance for which no FOIA exemption applies.

(d) *Initial Denial Authority (IDA).* An official who has been granted authority to withhold records under FOIA, either in whole or in part, based on the FOIA exemptions. IDAs may also grant or deny requests for reduction or waiver of fees. See § 701.5 for a list of IDAs.

(e) *Appellate authority.* The Secretary of the Navy (SECNAV) has delegated his appellate authority to the Navy Judge Advocate General (NJAG) and the General Counsel (OGC) to rule on administrative appeals of denials of FOIA requests for information under their cognizance, as outlined in § 701.10.

(f) *Administrative appeal.* A request by a member of the general public, made under FOIA, asking the appellate authority to reverse the IDA's decision to withhold all or part of a requested record or to deny a request for waiver or reduction of fees. A requester may also file an administrative appeal for non-response to a FOIA request within the statutory time limits or for a "no

record" response if he/she believes an adequate search was not conducted.

(g) *Public interest.* Public interest is official information that sheds light on a naval activity's performance of its statutory duties because it falls within the statutory purpose of FOIA in informing citizens about what their government is doing. That statutory purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files that reveals little or nothing about an agency's or official's own conduct.

(h) *Electronic data.* Electronic data are those records and information which are created, stored, and retrieved by electronic means. This does not include computer software, which is the tool by which to create, store, or retrieve electronic data.

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§ 701.4 Policy.

It is Department of the Navy policy to make its records available to requesters in accordance with FOIA. When requested, Navy and Marine Corps activities shall assist requesters in complying with the administrative requirements necessary to request materials sought under the Act.

(a) *Openness with the public.* The public has a right to information concerning the activities of its government. Department of the Navy policy is to conduct its activities in an open manner and to provide the public with a maximum amount of accurate and timely information concerning its activities, consistent always with the legitimate public and private interests of the American people. A Department of the Navy record requested by a member of the public who follows rules established by proper authority shall only be withheld when it is exempt from mandatory public disclosure based on one or more of the nine FOIA exemptions.

(b) *Avoidance of procedural obstacles.* Naval activities shall ensure that procedural matters do not unnecessarily