

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

impede a requester from obtaining Department of the Navy records promptly. Naval activities shall provide assistance to requesters to help them understand and comply with procedures established by this instruction. Fees shall not be used to discourage requesters (see subpart D of this part).

(c) *Prompt action on requests.* When a requester complies with the procedures established in this instruction for obtaining naval records, the request shall receive prompt attention. A reply shall be dispatched within 10 working days, unless a delay is authorized. If a naval activity has a significant number of requests (i.e., 10 or more), the requests shall be processed in order of receipt. This, however, does not preclude a naval activity from acting on a request which can be easily answered, regardless of its ranking within the order of receipt. A naval activity may also expedite action on a request regardless of its ranking within the order of receipt upon a showing of exceptional need or urgency. Exceptional need or urgency is determined at the discretion of the activity processing the request.

(d) *Use of exemptions/discretionary release.* Department of the Navy policy is to make records publicly available, unless they qualify for withholding under one or more of the nine FOIA exemptions (see subpart B of this part for an in-depth review of the exemptions). Naval activities may elect to make a discretionary release. A discretionary release to one requester may, however, preclude the withholding of similar information under a FOIA exemption if subsequently requested by the same individual or someone else. Suggest the following language be included with the discretionary release of any record that could be subject to withholding:

The information you requested is subject to being withheld under section (b) of the Freedom of Information Act. The release of this material to you by the Department of the Navy is discretionary and does not constitute a waiver of our right to claim this exemption for similar records in the future.

Additionally, a discretionary release is generally not appropriate for records exempt from disclosure under exemptions (b)(1)—classified; (b)(3)—exempted by statute; (b)(4)—trade secret/proprietary; (b)(6)—personal privacy; and

(b)(7)(C)—personal information contained in investigatory records which if released would constitute an unwarranted invasion of privacy. Exemptions (b)(4), (b)(6), and (b)(7)(C) cannot be claimed for information which was supplied by the requester of the information.

(e) *Public domain.* Nonexempt records released under this instruction are considered in the public domain. Exempt records released under this instruction or other statutory or regulatory authority may be considered to be in the public domain only when their release constitutes a waiver of a FOIA exemption. When release does not constitute such a waiver, such as disclosure to a properly constituted advisory committee or a Congressional Committee, the released records do not lose their exempt status. Also, while authority may exist to disclose records to individuals in their official capacity, this instruction applies if the same individual seeks the records in a private or personal capacity.

(f) *Creating a record.* (1) A record must exist and be in the possession and control of the Department of the Navy at the time of the search to be considered subject to FOIA. Mere possession of a record does not presume departmental control; such records, or identifiable portions, should be referred to the originating activity for direct response to the requester. There is no obligation to create or compile a record to satisfy a FOIA request. A naval activity may, however, compile a new record if it is a more useful response to the requester, or less burdensome to the naval activity than providing existing records, and the requester does not object. The cost of creating or compiling such a record may not be charged to the requester unless the fee for creating the record is equal to or less than the fee which would be charged for providing the existing record. See subpart D of this part for fees.

(2) With respect to electronic data, the issue of whether records are actually or merely extracted from an existing database is not always readily apparent. Consequently, when responding to FOIA requests for electronic data

where creation of a record, programming, or particular format are questionable, naval activities should apply a standard of reasonableness (i.e., if the capability exists to respond to a request, and the effort would be a "business as usual" approach, then the request should be processed; however, the request need not be processed when the capability to respond does not exist without a significant expenditure of resources, thus not being a normal "business as usual" approach). In such instances, the requester is advised that no record exists and the FOIA does not require agencies to create or compile a record to satisfy a FOIA request.

(g) *Reasonably segregable information.* FOIA requires that all "reasonably segregable" information must be released when the meaning of these portions is not distorted by deletion of the denied portions, and when it reasonably can be assumed that a skillful and knowledgeable person could not reasonably reconstruct the excised information. When a record is denied in whole, the response to the requester will specifically state that it is not reasonable to segregate portions of the record for release.

(h) *Special mail services.* Naval activities are authorized to use registered mail, certified mail, certificates of mailing, and return receipts. However, this use should be limited to instances where it appears advisable to establish proof of dispatch or receipt of FOIA correspondence.

(i) *Authentication of records released under FOIA.* In addition to the requirements of FOIA, records provided under FOIA shall be authenticated when necessary to fulfill an official governmental or other legal function. Authentication will be made with an appropriate seal. This service is not included in the FOIA fee schedule and naval activities may charge \$5.20 for each authentication.

§ 701.5 Responsibility and authority.

(a) *Chief of Naval Operations (CNO).* CNO is designated as the official responsible for administering and supervising the execution of 5 U.S.C. 552 and Department of Defense Directives 5400.7 and 5400.7-R series, Department of Defense Freedom of Information Act

Program (see 32 CFR part 286). CNO has designated the Assistant Vice Chief of Naval Operations (N09B30) as principal Department of the Navy FOIA Coordinator to:

(1) Set Department of the Navy policy on the provisions of the FOIA.

(2) Serve as principal advisor on all FOIA matters.

(3) Oversee the administration of the FOIA program, which includes preparing the Department of the Navy Annual FOIA Report for submission to Congress.

(4) Develop a Navy-wide FOIA training program and serve as training-over-sight manager.

(5) Conduct staff assistance visits within the Department of the Navy to review compliance with 5 U.S.C. 552 and subparts A, B, C, and D of this part.

(6) Set Department of the Navy policy on the marking, handling, safeguarding and transmission of documents marked "For Official Use Only."

(b) *Commandant of the Marine Corps (CMC).* CMC is responsible for administering and supervising the execution of this instruction within the Marine Corps. The Commandant has designated the Director of Administration and Resource Management (Code AR) as the FOIA Coordinator for Headquarters, U.S. Marine Corps.

(c) *FOIA coordinator.* Each addressee is responsible for implementing and administering a FOIA program under this instruction. Each addressee shall designate a FOIA Coordinator to:

(1) Serve as principal point of contact on FOIA matters.

(2) Provide training for activity/command personnel on the provisions of 5 U.S.C. 552 and subparts A, B, C, and D of this part.

(3) Issue an implementing instruction which designates the activity's FOIA Coordinator and Initial Denial Authority(ies), provides guidance on the marking, handling, and safeguarding of documents marked FOUO, FOIA records disposition, and FOIA processing procedures.

(4) Review internal directives, practices, and procedures, including those for forms and records, for conformity with this instruction, when applicable.