



DEPARTMENT OF THE NAVY

OFFICE OF THE JUDGE ADVOCATE GENERAL

200 STOVALL STREET

ALEXANDRIA, VA 22332-2400

IN REPLY REFER TO

JAGINST 5720.3

13

10 MAY 1991

JAG INSTRUCTION 5720.3

From: Judge Advocate General

Subj: FREEDOM OF INFORMATION/PRIVACY ACT POLICIES AND PROCEDURES
WITHIN THE OFFICE OF THE JUDGE ADVOCATE GENERAL

Ref: (a) SECNAVINST 5720.42E, Department of the Navy Freedom of
Information Act (FOIA) Program
(b) SECNAVINST 5211.5C, Personal Privacy and Rights of
Individuals Regarding Records Pertaining to Themselves

1. Purpose. This instruction establishes policy and assigns duties and responsibilities for implementation of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, within the Office of the Judge Advocate General (OJAG). Its purpose is to promote application of the policies and procedures contained within references (a) and (b), and to establish uniform procedures for the processing of and application of Department of the Navy (DON) policy to FOIA and Privacy Act requests for materials compiled and/or maintained by OJAG.

2. Background. Reference (a) implements the FOIA within the Department of the Navy (DON). Reference (b) implements the Privacy Act within the DON (see paragraph 6 below). Generally, FOIA provides a right of access to records of executive Federal agencies except to the extent a record, or portion thereof, is protected from mandatory disclosure under a specific FOIA exemption or exclusion.

a. A FOIA request is a written request for agency records by any person, including a member of the public, an organization or a business (but not a Federal agency or a fugitive from the law) that explicitly or implicitly invokes the FOIA, 5 U.S.C. § 552, or any implementing directive.

b. The term "agency record" includes all books, papers, maps, photographs, machine readable materials or other documentary materials, regardless of physical form or characteristics, made or received by the DON in connection with the transaction of public business and in the DON's control at the time of the FOIA request.

c. FOIA requires publication in the Federal Register for the guidance of the public certain information including descriptions of agency organization, functions and procedures; substantive rules of general applicability; and statements of general policy or interpretations of general applicability

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formulated and adopted by the agency. In addition, records of final opinions rendered in the adjudication of cases, statements of policy and interpretations adopted by the agency but not published in the Federal Register, administrative staff manuals and instructions that affect a member of the public, and similar records must be made available for public inspection.

d. Other DON records not required to be published in the Federal Register or made available for public inspection are subject to disclosure upon receipt of a proper request, unless exempt. Within OJAG, such records include, but are not limited to, formal and informal JAG opinions, letters and routine correspondence. Such records are subject to release under FOIA unless specifically exempt. Documents that are otherwise exempt from disclosure may nevertheless be released to certain requesters such as Congress or other Federal agencies. See paragraph 3 of reference (a).

e. A record may be withheld from disclosure if exempt. See enclosure (2) to reference (a) for detailed discussions of specific exemptions. Depending on the subject matter of the material requested, care should be taken to ensure that a proper declassification review is conducted of all requested materials since, in some instances, compilation of unclassified portions of requested documents can result in the classification of a record as a whole. Records that are exempt from mandatory disclosure to the public may, nevertheless, be released at the discretion of the agency. But see paragraph 4e below.

3. Responsibilities

a. OJAG Division Directors. Each Deputy Assistant Judge Advocate General (DAJAG)/Division Director shall be responsible for timely and accurate responses to FOIA and Privacy Act requests for records under his/her control and shall have commensurate authority as Initial Denial Authority (IDA) as to those records.

b. Deputy Assistant Judge Advocate General (Administrative Law). The DAJAG (Administrative Law) shall be responsible for providing policy guidance and legal advice to other OJAG divisions, SECNAV, OPNAV, CMC and DON field activities on all FOIA or Privacy Act related matters.

c. Assistant Judge Advocate General (AJAG) (Civil Law). The AJAG (Civil Law) shall have authority to adjudicate all FOIA and Privacy Act appeals submitted to the JAG. Whenever the AJAG (Civil Law) is unavailable to adjudicate an appeal, the Principal

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Deputy Assistant Judge Advocate General (O6A) shall have the authority to adjudicate appeals.

d. Deputy Assistant Judge Advocate General (Litigation). The DAJAG (Litigation) shall review all FOIA and Privacy Act appeals submitted to the JAG and provide the AJAG (Civil Law) a specific recommendation as to appropriate action in disposing of the appeal. In addition, the DAJAG (Litigation) shall take cognizance over all FOIA/Privacy Act cases that involve litigation over a FOIA/Privacy Act request.

4. Policy. The OJAG maintains many types of records that may be subject to requests for release under FOIA. The policy guidance in this instruction addresses the most common types of records maintained within OJAG and is intended to supplement, not supplant, guidance contained in references (a) and (b).

a. Requests for records in the possession of OJAG divisions but originated by another agency or naval activity shall not normally be granted or denied without consultation with or referral to that other agency or activity. Reports of JAG Manual (JAGMAN) investigations and records of trial are exceptions to this policy. JAG is the release authority for JAGMAN investigations and records of trial.

b. Requests for records not under OJAG possession or control shall be referred to the cognizant agency or activity for direct reply to the requester. Coordination with that activity should be accomplished before referring the FOIA or Privacy Act request and copies of the requested documents for direct response. Requesters shall be notified of any referrals.

c. Creation of records in order to reply to a FOIA request is not required. A record may be created or compiled if it is a more useful response to the requester or a lesser burden to the naval activity than providing existing records, and the requester does not object. Costs of creating or compiling a record may not be charged to the requester unless the fee is less than or equal to the fee that would be charged for providing the existing record.

d. A request for a record from the person to whom that record pertains shall be treated as a request under both FOIA and the Privacy Act.

e. Records or portions thereof otherwise exempt from release may, at the discretion of the release authority, be released. The following language should be included with the

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discretionary release of any record that would normally be exempt from disclosure:

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.

Discretionary release is not permitted, however, under exemptions (b)(1), some exemption (b)(3) statutes, and exemption (b)(6) for Privacy Act records. Divisions will consult with the DAJAG (Administrative Law) in all cases where a discretionary release is contemplated for exempt records or documents of a type not previously or usually provided.

f. Not all actions on FOIA or Privacy Act requests constitute final determinations. Examples include notifying the requester of failure to comply with agency regulations (e.g., an inadequately descriptive request or an untimely appeal); confirming with the requester that the appeal has been withdrawn; responding that the appeal has been referred to the Office of General Counsel; returning it to the IDA for initial action if the IDA never received the request; responding that no responsive records exist; and notifying the requester that the requested record is not an agency record within the meaning of FOIA.

g. JAGMAN Reports of Investigation

(1) Completed JAGMAN reports of investigation and their enclosures, properly endorsed by reviewing authorities within the chain of command, should normally be released in the public interest in response to a proper FOIA request, subject to applicable exemptions [see enclosure (2) to reference (a)] and the guidance set forth in subparagraph (2) below.

(2) Release of JAGMAN investigations that involve sensitive material, include recommendations for changes in law or DON policy, or have received high public or official interest, should be coordinated with the officer endorsing the investigation, the command investigating the incident, and other officials as appropriate.

(3) Requests for classified information must be referred to the appropriate authority who has cognizance over the classified subject matter of the request.

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(4) Death generally extinguishes the privacy interests of the deceased. As a result, JAGMAN investigations in death cases are normally releasable. Information the release of which would be particularly embarrassing or injurious to the privacy interests of the deceased's survivors/next of kin or other third parties, however, may be withheld under FOIA exemption (b)(6).

h. Records of trial. Because records of trial are retrieved by name, they are records subject to the Privacy Act, 5 U.S.C. § 552a. Because the Privacy Act does not prohibit release of records required by FOIA, a record of trial may be released after consideration of applicable FOIA exemptions. Specifically, exemption (b)(6) could require redaction of information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy of the accused about whom the record is maintained or other persons who may have a privacy interest in such a record, such as the victim of a crime.

5. Procedures. OJAG divisions shall comply with the following procedures in responding to FOIA/Privacy Act requests:

a. The division with cognizance over the subject matter to which a FOIA/Privacy Act request pertains shall make a reasonable effort to search its records systems for records responsive to the request.

b. If the description provided by the requester is inadequate to enable persons familiar with the files to locate the requested records with reasonable effort, the requester shall be notified and accorded an opportunity to perfect his request. FOIA does not authorize "fishing expeditions," nor are divisions required to respond to blanket requests for all documents. See also paragraph 7c of reference (a).

c. If several divisions maintain records responsive to the request, the AJAG (Civil Law) shall designate one division to take the lead in coordinating OJAG's response to the requester.

d. Releasability of OJAG records shall be determined in accordance with the policies and principles set forth in references (a) and (b) and this instruction.

e. If a requested record is exempt from release, notify the requester that the record is being withheld, of the specific exemption that applies, of the identity of the official responsible for denial of the request, and of his/her appeal rights. If information that is exempt from disclosure can

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reasonably be segregated from other portions of the record that are not exempt, those portions should be released.

f. Determine, if requested, the requester's entitlement to waiver/reduction of fees. If the IDA denies the request, the requester shall be informed of the right to appeal. If the requester appeals the denial of the waiver/reduction of fees, the release of the records may be withheld until the fee is paid or the appellate authority grants a waiver/reduction of fees.

g. Time limits. FOIA requests should be answered within 10 working days of date of receipt. Privacy Act requests must be acknowledged within 10 working days and a determination rendered, if reasonably possible, within 30 working days. If reply is not possible within that time, either:

(1) Formally extend the time for reply by informing the requester of the reasons for delay, of his right to treat the delay as an initial denial of the request, and of his appeal rights; or

(2) informally extend the time for reply by negotiating a mutually acceptable extension with the requester. (This does not require the IDA's signature.)

(3) See subparagraphs 8b(1) and (2) of reference (a) for additional guidance.

6. The Privacy Act. The OJAG maintains many records subject to the Privacy Act (5 U.S.C. § 552a). These include investigations, ethics files, Article 138, UCMJ, complaints, records of trial, claims files, and legal assistance files. Generally, Privacy Act records may not be disclosed unless pursuant to a written request by or with the prior written consent of the person who is the subject of the record. Additional Privacy Act nondisclosure exceptions are those cases involving a court order signed by a Federal or State judge, a routine use previously published in the Federal Register, or a statutory exemption.

a. If disclosure of a record is required by FOIA, the Privacy Act does not prohibit its release.

b. If a FOIA exemption [usually exemption (b)(6)] applies to information in a Privacy Act record, no discretionary release is permissible.

c. In order to withhold a record from the person to whom it pertains, both FOIA and Privacy Act exemptions must apply.

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7. Annual FOIA/Privacy Act Reports. The DAJAG (Administrative Law) is responsible for coordination and forwarding of the Annual FOIA/Privacy reports in accordance with paragraph 13 of reference (a) and paragraph 14 of reference (b). All OJAG divisions shall provide the DAJAG (Administrative Law) with their input for the FOIA consolidated report not later than 15 January each year and for the Privacy Act consolidated report not later than 15 February each year.

8. Administration

a. Recommended changes or modifications to this instruction should be forwarded to the DAJAG (Administrative Law) for action/coordination.

b. For information or assistance in the implementation of this instruction, contact the DAJAG (Administrative Law), AUTOVON 224-1781, commercial (703) 614-1781.

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