DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
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WASHINGTON NAVY YARD DC 20374-5066

IN REPLY REFER TO

JAGINST 5720.3A
Code 13
26 April 2004

JAG INSTRUCTION 5720.3A

From: Judge Advocate General

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

Ref: (a) SECNAVINST 5720.42F, Department of the Navy Freedom of Information Act (FOIA) Program
(b) SECNAVINST 5211.5D, Department of the Navy Privacy Act (PA) Program

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 (PA), 5 U.S.C. § 552a, within the Office of the Judge Advocate General (OJAG). It promotes the policies and procedures in references (a) and (b). It also establishes uniform procedures for processing and applying Department of the Navy (DON) policy to FOIA and PA requests for materials compiled and/or maintained by OJAG.

2. Cancellation. JAGINST 5720.3 of 10 May 91.

3. Background. Reference (a) implements the FOIA within the DON. Reference (b) implements the PA 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 of certain information in the Federal Register for the guidance of the public. This includes descriptions of agency organization, functions, and procedures; substantive rules of general applicability; and statements of general policy or interpretations of general applicability 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 in a room accessed by the general public and/or in the JAG Reading Room on the official website of the Navy JAG Corps. These records must be indexed in order to facilitate public access. See paragraph 9 of reference (a). Any record(s) that are released under FOIA deemed likely to be subject to subsequent FOIA requests shall be placed in the JAG Reading Room.

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 13 of reference (a).

e. A record may be withheld from disclosure if exempt. See enclosure (4) 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. <u>But see</u> paragraph 4e below.

4. <u>Responsibilities</u>

a. OJAG Division Directors. Each Deputy Assistant Judge Advocate General (DAJAG)/Division Director shall be responsible

for timely and accurate responses to FOIA and PA requests for records under his/her control and is the Initial Denial Authority (IDA) for those records.

b. DAJAG (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 PA related matters.

c. DAJAG (General Litigation). The DAJAG (General Litigation) shall have authority to adjudicate all FOIA and PA appeals submitted to the JAG, and shall take cognizance over all FOIA/PA cases that involve litigation over a FOIA/PA request.

5. Policy. 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. Records of trial are exceptions to this policy. JAG is the release authority for 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 PA request. 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 PA.

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 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 <u>not</u> permitted, however, under exemptions (b)(1), some exemption (b)(3) statutes, and exemption (b)(6) for PA 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 PA 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. Admiralty Letter Reports. These reports are prepared in anticipation of litigation by attorneys representing the interests of the United States. As such, they are considered to be attorney work product and normally not released. The Admiralty Division (Code 11) is the denial authority for these reports.

h. <u>JAGMAN Reports of Investigation</u>

(1) Command investigations. Completed command investigations 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 (4) to reference (a)) and the guidance set forth below. See JAGMAN 0220, which identifies release authorities

for most investigation types. See JAGMAN sections 0234, 0241, and 505 and JAGINST 5830.1A paragraph 14:

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

ii. Release of JAGMAN investigations that involve sensitive material, including 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.

iii. Requests for classified information must be referred to the appropriate authority who has cognizance over the classified subject of the request.

(2) Litigation Reports. Litigation Reports prepared by or under the supervision of an attorney in contemplation of litigation are privileged from disclosure. The primary purpose of a Litigation Report is to prepare to defend the legal interests of the Department of the Navy and the United States. As a result, Litigation Reports may be exempt from disclosure under FOIA exemption (b)(5). The DAJAG (Claims, Investigations and Tort Litigation) (Code 15) is the release authority for all Litigation Reports prepared by Department of the Navy personnel, including those prepared by the General Litigation Division (Code 14). See JAGMAN 0210 for further guidance.

(3) Reports of Courts of Inquiry/Boards of Inquiry. No member, the president or counsel for the court, or other person officially connected with the inquiry shall disclose or publish any findings, opinions, or recommendations of the court or the individual members without prior approval of the cognizant Echelon II Commander. See JAGMAN 0220(e). With the exception of the convening authority and subsequent reviewers in the convening authority's chain of command, no copies of the record of proceedings may be provided to any person, including parties, without the approval of the Secretary of the Navy (Judge Advocate General). See JAGINST 5830.1A, paragraph 13(f).

i. Records of Trial. Because records of trial are retrieved by name, they are records subject to the PA. Because

the PA 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 which, if disclosed, 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 the record, such as the victim of a crime.

6. Procedures. OJAG divisions shall comply with the following procedures in responding to FOIA/PA requests:

a. The division with cognizance over the subject matter to which a FOIA/PA request pertains shall make a reasonable effort to search its records systems for records responsive to the request. Reasonable efforts include a search of electronic records.

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 afforded an opportunity to perfect the request. FOIA does not authorize "fishing expeditions," nor are divisions required to respond to blanket requests for all documents. See also paragraph 11c 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. The release 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 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 20 working days of date of receipt. PA 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/her right to treat the delay as an initial denial of the request, and of his/her 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 subparagraph 11g of reference (a) for additional guidance.

7. The Privacy Act. OJAG maintains many records subject to the PA. These include investigations; ethics files; Article 138, Uniform Code of Military Justice (UCMJ), complaints; records of trial; claims files; and legal assistance files. Generally, PA 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 PA 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 PA does not prohibit its release.

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

c. To withhold a record from the person to whom it pertains, both FOIA and PA exemptions must apply.

8. Annual FOIA Report. The DAJAG (Administrative Law) is responsible for coordinating and forwarding the Annual FOIA Report in accordance with paragraph 16e(2) of reference (a). All OJAG divisions shall provide the DAJAG (Administrative Law)

with their input for the FOIA consolidated report not later than 24 October of each year.

9. Administration

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

b. For information or assistance in the implementation of this instruction, contact the DAJAG (Administrative Law), DSN: 664-8228, commercial: (703) 604-8228.

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Distribution:
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