DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
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JAG/CNLSCINST 5720.3B
Code 13
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JAG/COMNAVLEGSVCCOM INSTRUCTION 5720.3B

From: Judge Advocate General
Commander, Naval Legal Service Command

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

Ref: (a) SECNAVINST 5720.42 (series)
(b) SECNAVINST 5211.5 (series)
(c) JAGINST 5800.7 (series)
(d) SECNAV M-5210.1 (series)
(e) OPNAVINST 5215.17A (series)

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) and Naval Legal Service Command (NLSC). 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 and NLSC.

2. Cancellation. JAGINST 5720.3A of 26 April 04.

3. Background. Reference (a) implements the FOIA within the DON. Reference (b) implements the PA within the DON. Generally, the FOIA provides 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. The purpose of the Privacy Act is to balance the government's need to maintain information about individuals with the rights of individuals to be protected against unwarranted invasions of their privacy stemming from federal agencies' collection, maintenance, use, and disclosure of personal information about them.

4. Responsibilities

a. Release Authorities. Release authorities are authorized to grant requests on behalf of the Office of the Secretary of the Navy (SECNAV) for agency records in their possession and control for which no FOIA exemption applies; to respond to requesters concerning refinement of their requests; to provide fee estimates and waivers; and to offer appeal rights for adequacy of

search or fee estimates to the requester. Each OJAG division and NLSC command is a release authority for agency records under its control. Before conducting a discretionary release of records, see paragraph 5(c) below.

b. Initial Denial Authorities (IDA). An IDA is the lowest level official with the authority to deny access to information. IDA responsibilities may be delegated and are similar under both references (a) and (b) with certain caveats listed below:

(1) The following OJAG officers serve as FOIA and PA IDAs on behalf of the Judge Advocate General (JAG):

(a) Deputy Assistant Judge Advocates General (DAJAG)/Division Directors. Each 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 IDA for those records.

(b) DAJAG (Admiralty Law) (Code 11) is the IDA for all Admiralty Letter reports prepared by DON personnel.

(c) DAJAG (Claims, Investigations and Tort Litigation) (Code 15) is the IDA for all Litigation Reports prepared by DON personnel, including those prepared by OJAG (Code 14).

(d) DAJAG (Criminal Law) (Code 20) is the IDA for all records of trial.

(2) The following NLSC officers serve as FOIA and PA IDAs on behalf of Commander, NLSC:

(a) Chief of Staff, Region Legal Service Offices (COS RLSO). COS RLSO is the IDA for records under the control of RLSO commands and the Trial Counsel Assistance Program, excluding records of trial.

(b) Chief of Staff, Defense Service Offices (COS DSO). COS DSO is the IDA for records under the control of DSO commands and the Defense Counsel Assistance Program.

(c) Chief of Staff, Victims' Legal Counsel Program (COS VLCP). COS VLCP is the IDA for records under the control of VLCP offices.

(d) Commanding Officer, Naval Justice School (CO NJS). CO NJS is the IDA for records under the control of the NJS.

c. FOIA/PA Program Manager. The DAJAG (Administrative Law) (Code 13) shall be responsible for providing policy guidance and legal advice on all FOIA or PA related matters to other OJAG divisions, NLSC commands, SECNAV, the Office of the Chief of Naval Operations (OPNAV), the Commandant of the Marine Corps (CMC), and DON field activities. DAJAG (Administrative Law) (Code 13) will act as the IDA for the Judge Advocate General, the Deputy Judge Advocate General, Commander, NLSC, and OJAG (Executive Staff). DAJAG (Administrative Law) (Code 13) is also responsible for submitting the OJAG and NLSC

quarterly FOIA and PA reports, for submitting the annual FOIA report, and for maintaining and updating the JAG FOIA webpage and JAG Reading Room on the official website of the Navy JAG Corps.

d. Appellate Authority. The DAJAG (General Litigation) (Code 14) shall have the authority to adjudicate all FOIA and PA appeals submitted to the JAG, and shall have cognizance over all FOIA/PA cases that involve litigation over a FOIA/PA request.

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

a. Proactive Disclosures. OJAG divisions and NLSC commands shall routinely make operative documents and frequently requested records proactively available to the public without waiting for a FOIA request. Operative documents include: (1) final opinion and orders, including concurring and dissenting opinions, made in the adjudication of cases; (2) statements of policy and interpretations which have been adopted by JAG, Commander, NLSC (CNLSC), an OJAG division, or NLSC command; and (3) administrative staff manuals and instructions to staff that affect a member of the public. "Frequently requested records" are records that have become or are likely to become the subject of subsequent requests for substantially the same record. If an OJAG division or NLSC command receives three FOIA requests for the same or substantially similar records, in whole or in part, and those records are releasable, the OJAG division or NLSC command must submit a properly redacted copy of the record(s) to Code 13 for posting in the JAG Reading Room on the official website of the Navy JAG Corps. Moreover, OJAG divisions and NLSC commands are encouraged to proactively submit for posting any records that are likely to be of interest to the public, even before the first request is received.

b. Referrals and Consultations. Requests for records in the possession of OJAG divisions and NLSC 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. The DAJAG (Criminal Law) (Code 20) is the IDA for records of trial.

c. Discretionary Releases. Records or portions thereof otherwise exempt from release may, at the discretion of the release authority, be released if upon review the determination has been made that there is no foreseeable harm to the Government for releasing such information. 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 disclosures do not apply to FOIA exemptions (b)(1), (b)(3), (b)(4), (b)(6) and (b)(7)(C) or records protected under the Privacy Act. OJAG divisions and NLSC commands shall consult with Code 13 in all cases where a discretionary release is contemplated for exempt records or documents of a type not previously or usually provided.

d. 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 DAJAG (Admiralty Law) (Code 11) is the IDA for these reports.

e. JAGMAN Reports of Investigation

(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. Chapter 2 of reference (c) identifies release authorities for most investigation types.

(a) 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) and/or (b)(7)(C). Additionally, because of the sensitivities associated with death investigations, see Chapter 2, part f, of reference (c) for additional instructions on the release of death investigations.

(b) 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.

(c) 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 DON 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 IDA for all Litigation Reports prepared by DON personnel, including those prepared by Code 14. See section 0210 of reference (c) 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 section 0211 of reference (c).

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

a. The OJAG division or NLSC command 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. Additionally, NLSC commands will notify their respective Chief of Staff once a request has been received and will coordinate a response accordingly.

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. See also paragraph 11(c) of reference (a).

c. If several OJAG divisions maintain records responsive to the request, the Assistant Judge Advocate General (Civil Law) shall designate one division to coordinate OJAG's response to the requester.

d. If several NLSC commands maintain records responsive to the request, the responsible COS shall coordinate a response. If both RLSO and DSO commands maintain records responsive to the request, then COS RLSO and COS DSO will coordinate the response to the request.

e. The release of OJAG and NLSC records shall be determined in accordance with the policies and principles set forth in references (a) and (b) and this instruction.

f. Significant FOIA requests. A "significant" FOIA request is one where the subject matter of the released documents may reasonably be expected to generate media, JAG, CNLSC, DON, or Department of Defense (DoD) senior leadership interest. Any requests involving the current administration, previous administrations, Members of Congress (correspondence, travel, or otherwise), or current or previous DON/DoD leadership would be included. If an OJAG division or NLSC command receives a significant FOIA request, contact Code 13 within 24 hours of receipt. Code 13 will coordinate the recipient OJAG division's/NLSC command's response with Director, Navy Staff (DNS-36). Recipients of significant FOIA requests cannot respond to the requester until DNS-36 clears the documents for release. Because of this additional approval authority for release, it is imperative that recipients of significant FOIA requests inform Code 13 immediately in order to facilitate the approval process.

7. The Privacy Act. OJAG and NLSC maintain many records subject to the PA. These include investigations; ethics files; Article 138, UCMJ, complaints; Article 1150, U.S. Navy Regulations, complaints; records of trial; claims files; and legal assistance files. Generally, PA records shall 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. Reference (b) provides further guidance.

8. OJAG and NLSC Quarterly and Annual FOIA Reports. DAJAG (Administrative Law) (Code 13) is responsible for coordinating and forwarding the OJAG and NLSC Quarterly and Annual FOIA Reports in accordance with paragraph 16e(2) of reference (a). All OJAG divisions and

NLSC commands shall provide Code 13 with their input for the FOIA consolidated reports when required.

9. OJAG and NLSC Quarterly PA Reports. Section 803 of Public Law 110-53, "Implementing Recommendations of the 9/11 Commission Act of 2007," requires DoD privacy officers and civil liberties officers to periodically, but not less than quarterly, submit a Privacy Act report to Congress. DAJAG (Administrative Law) (Code 13) is responsible for coordinating and forwarding the OJAG and NLSC Quarterly PA Reports to DNS-36. All OJAG divisions and NLSC commands shall provide Code 13 with their input for the PA consolidated reports when required.

10. Records Management. Records created as a result of this instruction, regardless of media and format, must be managed per reference (d).

11. Review and Effective Date. Per reference (e), Code 13 will review this instruction annually on the anniversary of its effective date to ensure applicability, currency, and consistency with applicable laws, regulations, and policies using OPNAV 5215/40 Review of Instruction. This instruction will automatically expire five years after the effective date unless reissued or canceled prior to the 5-year anniversary date, or an extension has been granted.

a. Recommended changes or modifications to this instruction should be forwarded to Code 13 for action and coordination.

b. For information or assistance in the implementation of this instruction, contact Code 13, at (703) 614-7479, DSN 224-7479.

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Releasability and distribution:
This instruction is cleared for public release and is publicly available via the Navy JAG Corps website, jag.navy.mil.