DEPARTMENT OF THE NAVY

NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362-5101

IN REPLY REFER TO

NAVSEAINST 5720.5
OPR 09T5
22 Mar 91

NAVSEA INSTRUCTION 5720.5

From: Commander, Naval Sea Systems Command

Subj: FREEDOM OF INFORMATION ACT (FOIA) PROGRAM

Ref: (a) SECNAVINST 5720.42D

Encl: (1) FOR OFFICIAL USE ONLY (FOUO) Guidelines
(2) FOIA Exemption Guidelines

1. **Purpose.** To reissue program responsibilities and general procedures for responding to the public requesting copies of headquarters and shore activity records under the FOIA, 5 U.S.C. §552. This revision of the FOIA program instruction incorporates the following changes:

a. Deletes detailed procedures redundant to reference (a) and assigns a new identification number to the instruction.

b. Revises the list of officials having the authority to release, deny and extend time limits for responding to FOIA requests.

2. **Cancellation.** NAVSEAINST 5262.1 of 19 July 1982.

3. **Background.** Overall program policy, procedures, responsibilities, and requirements to implement the FOIA program Navy-wide are issued by reference (a). Reference (a) is distributed to all Navy components and provides references needed to maintain an effective program at Command shore activities. The references are available to shore activities through normal supply channels and are maintained in the FOIA Program Division for review by headquarters components.

4. **Responsibilities**

a. Freedom of Information and Privacy Program Division (FOIPA) (SEA 09T5). The head of the FOIPA Division is the FOIA Coordinator for the Command at headquarters. The FOIA Coordinator serves as principal point of contact on FOIA matters and is responsible for implementing and administering the Command FOIA program per paragraph 6b of reference (a).

b. Office of Counsel (SEA OOL). Provides legal advice, as required.

c. Security Office (SEA 09T)

(1) SEA 09T1. Reviews, after directorate coordination, all classified information requested under FOIA to ensure portions are properly classified or declassified. Reviews, after directorate coordination, technical data to ensure identification of unclassified critical technology.

(2) SEA 09T2. Reviews all proposed disclosures of information related to technical and operation functions of the Command.

d. Financial Management Policy and Procedures Office (SEA O1P). Processes all FOIA payments received at Command Headquarters.

e. Directorate Offices. When records are requested under the FOIA, appropriate reviewing officials will search for records under their cognizance and prepare text for a proposed response for coordination and preparation of a final release by SEA 09T5. Officials proposing withholding of data shall be prepared to furnish declarations to the court to support proposed denials. Officials also will submit justifications to support withholding classified data, critical technology, or other data. Proposed responses will be prepared following guidance in reference (a) and other directives prescribing the authority to release or withhold information of a particular record or program. Additional guidance pertaining to specific procedures, time constraints, scope of search, or other requirements will be provided by SEA 09T5 with each request. Contracts Directorate personnel normally do **not** perform the following duties.

(1) Conduct searches for clearly identifiable procurement documents (e.g., contracts, contract modifications, business clearances, abstracts, Procurement Requests, Technical Analysis Reports (TAR), reports from the Technical Evaluation Review Panel and Contract Awards Review Panel).

(2) Conduct initial reviews to sanitize responsive documents when clear releasability guidelines have been established between SEA 02 and SEA 09T5 or when the subject matter of the review requires a *technical* rather than procurement review.

(3) Physically mask and duplicate sanitized copies of requested documents.

f. Directorate FOIA Liaison Officers. Represent their directorate in all matters regarding FOIA, including liaison with SEA 09T5, assisting SEA 09T5 in developing public access policies regarding records under their directorate's custody and control, coordination and preparation of FOIA response packages, and coordinating preparation of declarations submitted to the court regarding FOIA matters, as necessary.

g. Authorized Classification Authorities. Review classified information and unclassified critical technology under their cognizance in documents that are requested under the FOIA. Identify all properly classified portions and all unclassified critical technology. Certify that security classifications are current. Submit declarations regarding reviews, as necessary.

h. Headquarters Employees. Process FOIA cases per instructions in the case package (incoming request) forwarded by SEA 09T5.

i. Command Shore Activities. Implement a local FOIA Program and designate an official as FOIA Coordinator per reference (a) and requirements in this instruction.

j. **Nuclear Propulsion Directorate (SEA 08).** Releases or denies information under SEA 08 and OP-00N cognizance, grants formal extensions of time limits, maintains a formal processing control system, and takes such other actions as are necessary to the conduct of its FOIA program, consistent with the requirements of reference (a). Obtains SEA OOL concurrence, as necessary, with proposed actions. Coordinates actions, as appropriate, with SEA 09T5. Per reference (a), acts as the sole denial and release authority for information concerning Naval Nuclear Propulsion Information (NNPI). All requests for information pertaining to naval nuclear propulsion matters shall be coordinated with SEA 08.

5. Officials Having Authority to Deny, Release, and Extend Time Limits on FOIA Requests

a. **Initial Denial Authority.** When information sought relates to matters within their respective areas of responsibility or chain of command, the following officials are authorized to: grant and deny requests for copies of records or examination of records, either in whole or in part; issue "other reason" responses; grant formal extensions in time limits; and grant or deny requests to waive or reduce FOIA fees. Initial denial authority cannot be delegated except per reference (a).

(1) Commander, Naval Sea Systems Command

(2) Vice Commander, Naval Sea Systems Command

(3) Acting Commander, Naval Sea Systems Command (in the absence of the Commander or Vice Commander)

(4) Director, Consolidated Civilian Personnel Office, Crystal City (see paragraph 7)

(5) Deputy Commander, Naval Nuclear Propulsion Directorate (OP-00N/SEA 08)

(6) Chief of Naval Operations (OP-09B30) ((NNWI records)

b. **Release Authority.** The following officials are authorized to furnish copies of records or to make such records available for examination, upon receipt of a perfected FOIA request. These officials also are authorized to grant fee waivers or reductions and issue "other reason" responses as defined in paragraph 10.f of SECNAVINST 5720.42D.

(1) Commanding officers and heads of Naval Sea Systems Command Shore Activities (these officials may delegate releasing authority)

(2) Head, Freedom of Information and Privacy Program Division (SEA 09T5)

(3) Head, FOIA Contract Processing Branch (SEA 09T51), (routine contractual matters only)

c. **Extensions of Time Limits.** Other officials who are authorized to grant formal extensions of time for responding to Command FOIA requests are listed below. This authority cannot be redelegated.

(1) Head, Freedom of Information and Privacy Program (SEA 09T5)

(2) Head, FOIA Contract Processing Branch (SEA 09T51)

6. Action

a. Deputy Commanders. Designate an official as FOIA Liaison Officer for the cognizant directorate. Within the Contracts Directorate, Division Directors will be the points-of-contact for FOIA requests involving contractual documentation under their cognizance. Forward the code, title, name, and telephone number of designees to SEA 09T5. Notify SEA 09T5 whenever changes occur, or at least annually with the Annual FOIA Report.

b. Individual Employees and Reviewing Officials

(1) Immediately hand carry to SEA 09T5 any FOIA request received directly through the Command mail system. The request will be date stamped, assigned a FOIA Case Number, entered into a suspense control record, and assigned to an appropriate office (excluding requests for clearly identified contract records), for action via a Directorate Liaison Officer. (FOIA requests for contract records will be processed by SEA 09T5, and coordinated with the appropriate Contract Division, if necessary.)

(2) Search for and review records sought and prepare proposed text or a complete response, whichever is appropriate, to a FOIA request coordinated by SEA 09T5. Whenever necessary, additional instructions pertaining to response time or other unique factors will be included with the request forwarded by SEA 09T5.

(3) Perform a security declassification review on classified information and obtain certification from the appropriate official having classification authority. Identify specific portions of the documents that may be released.

(4) Review requested information to identify unclassified technical data with military or space application which contains critical technology as defined in the Militarily Critical Technologies List (MCTL). The MCTL is available for review in the Security Office.

(5) Review documents containing a limited distribution statement to verify accuracy of the marking and to determine which portions may be released, if any, **or withheld per an appropriate FOIA exemption listed in enclosure (2).** Revise distribution statements as necessary. Properly used, limited distribution statements control distribution of technical information that should not be placed in the public domain. NAVSEAINST 5510.1A provides guidance pertaining to Distribution Statements.

(6) Review documents marked FOR OFFICIAL USE ONLY (FOUO) to determine whether FOIA exemptions still apply to withhold the record or portions of it. Enclosures (1) and (2) of this instruction provide guidance pertaining to the purpose and use of the term, FOUO.

(7) Send two copies of records being requested to SEA 09T5 whenever a recommendation is made to deny or partially deny the request. On one copy, use a yellow highlighter to mark portions of the proposed information to be denied. Provide written rationale to support the recommendation to withhold the information.

(8) Report the time spent for searching for records, reviewing records, or both as separate reporting items and return the report with your proposed response to SEA 09T5.

c. Directorate FOIA Liaison Officers

(1) Represent their directorate in matters regarding FOIA, including liaison with SEA 09T5.

(2) Coordinate preparation of FOIA responses within their directorate, ensuring a consolidated directorate response is properly documented.

(3) Coordinate preparation of declarations to be submitted to the court regarding FOIA matters, as required.

(4) After coordination with SEA 09T5, represent their directorate in oral communications with FOIA requesters to clarify what records were requested, confirm willingness to pay applicable fees, or identify confidential business information, if appropriate.

d. Freedom of Information and Privacy Program Division (FOIPA) (SEA 09T5)

(1) Serve as principal point of contact for the Command FOIA program.

(2) Coordinate receipt and response of official FOIA requests received by Command Headquarters.

(3) Issue release and formal time extension responses to FOIA requests. Review proposed denials of FOIA requests prior to their submission to SEA OO or 09 for signature.

(4) Issue instructions and procedural guidance to implement reference (a).

(5) Initially receive all payment of search, review, and duplication fees paid to Command Headquarters.

(6) Maintain official Command Headquarters files concerning the administration of the FOIA and FOIA case files processed at headquarters.

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

(8) Review Command procedures for conformance with marking, handling, transporting and safeguarding of FOUO information.

(9) Maintain liaison with FOIA Coordinators within DoD and external agencies.

(10) Provide or ensure proper training of personnel involved in handling FOIA requests.

(11) Compile the Annual Command FOIA Report.

(12) Develop Command policy concerning FOIA matters and provide guidance for handling FOIA requests, including scope of FOIA exemptions.

(13) Supervise or coordinate the preparation of responses to FOIA requests, as appropriate.

(14) Coordinate submission of declarations to the courts regarding processing of FOIA requests, as appropriate.

(15) Retrieve requested information and process requests for clearly identifiable procurement documents from the Contract File Room (SEA 02934). Coordinate denial or partial denial action with the appropriate Division Director within SEA 02.

e. Office of Counsel (SEA OOL)

(1) Review all proposed denials of FOIA requests before their submission to the appropriate initial denial authority.

(2) By 10 January each year, provide SEA 09T5 cost information concerning personnel assigned FOIA duties.

f. Mail Section (SEA 09D33). Route and deliver all FOIA requests to SEA 09T5 on the date of receipt.

g. Security Office (SEA 09T)

(1) SEA 09T1. Provide policy guidance for classification management to offices assigned to respond to a FOIA request.

(2) SEA 09T2. Review proposed disclosures related to technical and operation function of the Command to identify Operations Security indicators. Recommend protection of the subject matter, as appropriate.

h. Accounting Policy, Procedures, and Systems Branch (SEA 01P3)

(1) Designate a point of contact to receive FOIA payments from SEA 09T5. Date and initial each payment receipt.

(2) Send search, review and duplication fees received from SEA 09T5 to the Navy Regional Finance Center for deposit in the appropriate account.

i. **Contract File Room.** Provides SEA 09T5 with full access to all documents on file during the hours SEA 02934 employees are normally on duty.

j. **Shore Activities**

(1) FOIA Coordinator. Forward the current organizational title and name of the FOIA Coordinator, including mailing address and telephone numbers (commercial and AUTOVON), to the Command (SEA 09T5). Notify SEA 09T5 when changes occur, or at least annually with the Annual FOIA Report.

(2) Local Instruction. Issue an implementing instruction which identifies the FOIA Coordinator and release authority(ies), provide guidance on the marking, handling, and safeguarding of documents marked FOUO, and establish FOIA records disposition and processing procedures per reference (a).

(3) Control System. Establish a formal control system designed to ensure that every request for records that either explicitly or implicitly cites the FOIA is processed per this instruction and reference (a).

(4) Annual Report. Submit the Annual FOIA Report to SEA 09T5 to be received no later than close-of-business on 10 January.

(5) Naval Nuclear Weapons Information (NNWI). Forward, per instructions in paragraph 6e(4)(k) of reference (a), any request for NNWI to: Chief of Naval Operations (OP-09B30). Send a copy to SEA 09T5.

(6) Naval Nuclear Propulsion Information (NNPI). Forward, per instructions in paragraph 6e(4)(l) of reference (a), any request for information concerning NNPI (as defined in NAVSEAINST C5511.32A) to the Director, Naval Nuclear Propulsion Program (OP-00N/SEA 08). Include a copy of the requested records and a recommendation to release or withhold the records, whichever is appropriate.

(7) Technical, Operational, and Readiness Information. Prior to disclosure of information relating to the technical, operational, or readiness functions of an activity, coordinate a review and concurrence of the local Operations Security Officer. Supporting rationale for proposed withholding of information based upon operations security indicators will be the responsibility of the Operations Security Officer.

(8) Financial Control. Implement procedures to provide appropriate financial control over FOIA receipts. Forward payments (collected for search, review, and duplication fees) to the local Navy Regional Finance Center.

(9) Copy of Response. Send a copy of each FOIA response letter to the Command (SEA 09T5).

(10) Informal Extension of Time. Negotiate an informal extension of time with requesters when a total release is contemplated. When an extension of time is necessary to respond and the requester will not agree to an extension, contact SEA 09T5 to obtain a formal extension of the time limit and a Command FOIA Case Number.

(11) Denial or Partial Denial Notification. Contact SEA 09T5 before 10 workdays have elapsed from receipt when a request is expected to be denied or partially denied. A Command FOIA Case Number will be assigned and a formal extension of the time limit will be issued by SEA 09T5.

(12) Preparing Denial or Partial Denial Recommendations. Send proposed denial or partial denial recommendations prepared per this instruction to the Command (SEA 09T5) via an express mail service within 5 days of the date-of-receipt of the FOIA request unless a formal extension has been granted by SEA 09T5. When an extension has been granted, the proposed response recommendation should be forwarded as soon as possible via first class mail or parcel post and should cite the FOIA Case Number assigned by SEA 09T5. Bulky shipments that otherwise qualify under postal regulations may be sent fourth-class mail if a formal extension has been issued. Include, as a minimum, the following data in proposed denial or partial denial recommendations:

(a) Brief Sheet. Explain the issues, including governmental purpose jeopardized by releasing the requested data.

(b) Forms. Attach DD Form 2086, DD Form 2086-1, or other form used to identify cost of general or technical data, whichever is appropriate.

(c) Original Request. Attach the incoming request and any other relevant correspondence from and to the requester.

(d) Other Correspondence. Include correspondence to and from any submitter of data requested.

(e) Copies of Records Requested. Attach two copies of the records requested. On one copy, use a yellow highlighter to mark portions of the proposed information to be denied.

(f) Other. Include any other relevant reference or background information.

7. Special Procedure for Civilian Personnel Records. The Director, Consolidated Civilian Personnel Office (CCPO) Crystal City, is authorized to release, deny, or partially deny requests for records in the custody of CCPO upon receiving appropriate written concurrence from the FOIA Coordinator in the command having primary interest in the requested records. Send a copy of the response to the FOIA Coordinator in the appropriate command. Further delegation of initial denial authority is not authorized. In the absence of concurrence, the Director or the Director's designee shall forward a proposed response to the appropriate FOIA Coordinator per procedures above in paragraph 6j(12).

8. Schedule for Disposal of FOIA Files

a. Retain partial denial or denial case files for 6 years.

b. Retain administrative appeal files for 6 years after final determination by the agency or 3 years after final adjudication by the courts, whichever is later.

c. Retain FOIA Tracking and Control Files for 6 years.

d. Retain all other FOIA files for 2 years.

9. FOR OFFICIAL USE ONLY (FOUO) Guidelines. The term FOUO is to be used to mark and identify unclassified and nontechnical information that may be withheld from the public under FOIA exemptions (b)(2) through (9). FOIA exemptions are discussed in enclosure (2). Extracts from reference (a), enclosures (1) and (2), provide guidance to mark, handle, and safeguard documents meeting FOUO criteria.

10. Reports and Forms. Consolidation of FOIA Reports at Command Headquarters is assigned Reports Control Symbol (DD-PA(A)1365(5720) by reference (a). Form, Record of Freedom of Information Processing Cost (DD Form 2086), is available in the Navy Supply System, NAVSUP P-2002, per reference (a). Local reproduction is authorized to maintain stock of form, Processing Cost for Technical Data (DD Form 2086-1).

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Vice Commander

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FOR OFFICIAL USE ONLY (FOUO)

GUIDELINES

(THE FOLLOWING INFORMATION BEGINNING AS PARAGRAPH 8 IS A VERBATIM EXTRACT FROM SECNAVINST 5720.42D)

QUOTE:

8. FOR OFFICIAL USE ONLY (FOUO)

a. General

(1) FOR OFFICIAL USE ONLY applies to information not given a security classification under the criteria of an Executive Order, but which may be withheld from the public under FOIA exemptions (b) (2) through (b) (9). **No other material shall be considered or marked FOR OFFICIAL USE ONLY**, as FOUO is not authorized as a classification to protect national security interests.

(2) Prior FOUO Application. The prior application of FOUO is not a conclusive basis for withholding a record requested under FOIA. When such a record is requested, it shall be evaluated to determine whether FOIA exemptions still apply in withholding the record or portions of it. Information which can be reasonably segregated and does not fall under an FOIA exemption(s), must be released to the requester. If an exemption applies, it may be released when it is determined that no governmental interest will be jeopardized.

(QUOTATION CONTINUED NEXT PAGE)

(3) Historical Papers. Records such as notes, working papers, and drafts retained as historical evidence of DON actions have no special status apart from FOIA exemptions.

(4) Time to Mark Records. Marking records at their creation provides notice of FOUO content and facilitates review when a record is requested under FOIA. The originator or higher authority is responsible for marking FOUO on all or part of the document that may qualify for withholding from the public under FOIA exemptions (b) (2) through (b) (9). Records requested under FOIA not bearing such markings shall not be assumed releasable without examination for the presence of information that requires continued protection and qualifies as exempt from public disclosure under the FOIA.

(5) Distribution Statement. Information in a technical document that requires a distribution statement under reference (i) shall bear that statement and not be marked FOUO. However, the document shall be afforded the same physical protection as a document marked FOUO.

b. Location of Markings

(1) An unclassified document containing FOUO information shall have FOR OFFICIAL USE ONLY typed, stamped, or printed in capital letters centered at the bottom edge on the first and last page of the document. For documents with cover or title pages, the same procedure shall be followed and FOR OFFICIAL USE ONLY shall be typed, stamped, or printed in capital letters centered at the bottom on the front cover and on the outside of the back cover.

(2) Within a classified document, an individual page containing both FOUO and classified information shall be marked at the top and bottom with the highest security classification of information appearing on the page.

(3) Within a classified or unclassified document, an individual page with FOUO information, but no classified information, shall have FOR OFFICIAL USE ONLY typed, stamped, or printed in capital letters centered at the bottom edge of the page.

(4) Other records, such as photographs, films, cassette tapes, movies, or slides, shall be marked FOR OFFICIAL USE ONLY so that a recipient or viewer knows the status of the information therein.

(5) Unclassified automatic data processing (ADP) media with FOUO information shall be marked as follows:

(a) An unclassified deck of punched or aperture cards with FOUO information shall be marked as a single document with FOR OFFICIAL USE ONLY marked on the face of the first and last card, and on the top of the deck.

(b) An unclassified magnetic tape, cassette, or disk pack with FOUO information shall have FOR OFFICIAL USE ONLY marked externally on a removable label. The resulting hard copy report or computer printout shall reflect the FOR OFFICIAL USE ONLY marking on the top and bottom of each page. This may be accomplished by using a programmable header or marking the hard copy manually.

(6) FOUO material transmitted outside DON requires an expanded marking to explain the significance of the FOUO marking. This may be accomplished by typing or stamping the following statement on the record before transfer:

> This document contains information EXEMPT FROM MANDATORY DISCLOSURE under the FOIA. Exemption(s)...apply(ies).

c. Release and Transmission Procedures. Until FOUO status is terminated, the following release and transmission instructions apply:

(1) FOUO information may be disseminated within DON activities and between officials of DON and contractors and grantees who conduct official business for DON. Transmission shall be by means that preclude unauthorized public disclosure and documents should inform recipients of the status of such information.

(2) Holders of FOUO information may convey such information to officials in other

departments and agencies of the executive and judicial branches to fulfill a governmental function, subject to any limitations contained in the Privacy Act (PA) and reference (e) on disclosure of personal information from PA record systems. When transmitting these records, ensure they are marked FOR OFFICIAL USE ONLY, and the recipient is advised the information may be exempt from public disclosure under FOIA and any special handling instructions, if applicable. For purposes of disclosing records, the Department of Defense is an "agency."

(3) Records released to Congress or the Government Accounting Office (GAO) should be reviewed to see if the information warrants FOUO status. If not, prior FOUO markings shall be removed. If the withholding criteria are met, the records shall be marked FOUO and the recipient provided an explanation for such exemption and marking. Alternatively, the recipient may be requested, without marking the record, to protect it against public disclosure for reasons that are explained.

(4) Each part of electrically transmitted messages containing FOUO information shall be marked appropriately. Unclassified messages containing FOUO information shall contain the abbreviation "FOUO" before the beginning of the text. Such messages shall be transmitted per communications security procedures in reference (j) for FOUO information.

d. Transporting FOUO Information. Records containing FOUO information shall be transported in a manner that precludes disclosure of contents. If not commingled with classified information, FOUO information may be sent via first-class mail or parcel post. Bulky shipments that otherwise qualify under postal regulations may be sent fourth-class mail.

e. Safeguarding FOUO Information

(1) During normal working hours, records with FOUO information shall not be left unattended in work areas accessible to non-governmental personnel.

(2) At the close of business, FOUO records shall be stored to preclude unauthorized access. Filing such material with other unclassified records in unlocked files, desks, or similar containers is adequate when U.S. Government or government-contractor internal building security is provided during nonduty hours. When internal security control is not exercised, locked buildings or rooms normally provide adequate after-hours protection. If such protection is not considered adequate, FOUO material shall be stored in locked receptacles, such as file cabinets, desks, or bookcases.

(3) Guidance for safeguarding media marked FOUO and processed by an ADP system, activity, or network is addressed in reference (k).

f. Termination. The originator or other competent authority, such as an IDA or appellate authority, will terminate FOUO markings or status when the information no longer requires protection from public disclosure. When FOUO status is terminated, all known holders shall be notified as practical. Upon notification, holders shall remove the FOUO markings. Records in file or storage need not be retrieved solely for that purpose.

g. Disposal. Copies of FOUO materials (including hard copy reports and computer printouts) may be destroyed by tearing each copy into pieces to preclude reconstructing, and disposed in regular trash containers. When local circumstances or experience indicates that this destruction method is insufficient, local authorities may direct other methods while considering the additional expense balanced against the sensitivity of FOUO information in the records. FOUO information on unclassified magnetic storage media shall be disposed of by overwriting the media one time with any one character. Storage areas within the ADP system (internal memory, buffers, registers, and similar storage areas) maybe cleared by using a hardware clear switch, a power-on reset cycle, or a program designated to overwrite the storage area.

h. Unauthorized Disclosure. The unauthorized disclosure of FOUO records does not constitute an unauthorized disclosure of DON information classified for security purposes. However, appropriate administrative or discipli-

(paragraph 8h of quotation continued)

nary action shall be taken against those responsible. Unauthorized disclosure of FOUO information that is protected by the PA may result in criminal and civil sanctions against responsible person(s). The naval activity that originated the FOUO information shall be informed of its unauthorized disclosure.

UNQUOTE.

FOIA EXEMPTION GUIDELINES

(THIS IS A VERBATIM TRANSCRIPT FROM SECNAVINST 5720.42D)

The following exemptions may apply to naval records requested under FOIA:

1. Exemption (b)(1) - Exempts those records properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under criteria established by Executive Order (i.e., Executive Order 12356) and implemented by regulations. The following general rules apply:

a. The request must be referred, with information and recommendations, to an official authorized under paragraph 6d of this instruction to deny requests and who has cognizance of the classified matters in the records, if the basis of the classification is:

(1) An approved security classification guide issued under OPNAVINST 5510.1G;

(2) Resource document originated by another naval activity or government agency;

(3) An original classification determination with written justification for classification, and the justification remains valid; or,

(4) Not readily identifiable, but classification is believed warranted because of classification criteria in OPNAVINST 5510.1G.

b. If the original classifier of a record receives a request for the record and upon review determines that there is no basis for continued classification, either in whole or part, the record or portions of it should be declassified. It must be reviewed to determine whether any other FOIA exemptions apply to the declassified information, and, if so, whether a governmental interest would be jeopardized by its release. All "reasonably segregable" information must be released to the requester.

c. In some instances, the compilation of unclassified paragraphs may result in the classification of the record as a whole.

d. Material is classified at the time of the FOIA request may undergo a classification review to determine whether the information should be classified. (The provisions of reference (i) regarding classification of information after receipt of an FOIA request are to be strictly complied with.)

2. Exemption (b)(2) - Exempts those records "related solely to the internal personnel rules and practices of an agency," such as rules, regulations, orders, manuals, directives, and instructions. Release to the public would substantially hinder the effective performance of a significant function of DON and the rules and practices do not impose requirements directly on the public. It includes two distinct categories of information:

a. Internal matters of a relatively trivial nature created primarily for housekeeping purposes. They may be withheld if the administrative burden of disclosure, including consequential burdens of release, such as distributing large amounts of personal mail, outweighs any legitimate public interest. Factors to consider in determining public interest are whether the requester serves the public, a nonprofit association which provides a tangible benefit to those individuals on the roster, or the request is for a purely private commercial purpose. For example, lists of DON personnel (civilian and military) names and duty addresses.

b. More substantive internal matters, the disclosure of which would allow circumvention of a statute or agency regulations. Examples include:

(1) Security classification guides. (Note: Those security classification guides which are classified shall be denied under exemptions (b)(1) and (b)(2).)

(2) Operating rules, guidelines, and manuals for investigators, inspectors, auditors, or examiners, and certain schedules or methods of operation which would reveal:

(a) negotiating and bargaining techniques;

(b) bargaining limitations and positions;

(c) inspection schedules and methods; or,

(d) audit schedules and methods.

(3) Personnel and other administrative matters, such as examination questions and answers used in training courses or in the determination of the qualifications of candidates for employment, entrance on duty, advancement, or promotion.

3. Exemption (b)(3) - Exempts those records containing matters that a statute specifically exempts from disclosure by terms

that permit no discretion on the issue, or under criteria established by that statute for withholding or referring to particular types of matters to be withheld. Authorization or requirement may be found in the statute itself or in Executive Orders or regulations authorized by, or in implementation of a statute. The Privacy Act, 5 U.S.C. 552a is not an applicable statute under 5 U.S.C. 552(b)(3). Examples include:

a. Public Law 86-36 (50 U.S.C. 402 note) -- National Security Agency Information Exemption, P.L. 86-36, Section 6.

b. 35 U.S.C. 181-188, Patent Secrecy -- any records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy Orders have been issued.

c. 42 U.S.C. 2162 -- Restricted Data and Formerly Restricted Data.

d. 18 U.S.C. 798 -- Communication Intelligence.

e. 50 U.S.C. 402(d)(3) and (g) -- Intelligence sources and methods.

f. 21 U.S.C. 1175 -- Drug abuse prevention/rehabilitation. Records of the identity, diagnosis, prognosis, or treatment of any patient maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly assisted by any department or agency of the U.S., unless expressly authorized.

g. 42 U.S.C. 4582 -- Alcohol abuse prevention/rehabilitation.

h. 10 U.S.C. 130 -- Authority to withhold from public disclosure unclassified technical data with military or space application which contains critical technology in the possession of, or control of, a DOD component or naval activity which may not be exported lawfully without an approval, authorization, or license under Executive Order 12470 or the Arms Export Control Act.

i. 10 U.S.C. 1102, Confidentiality of Medical Quality Records.

4. Exemption (b)(4) - Exempts those records containing trade secrets or commercial or financial information that a naval activity receives from a person or organization outside the Government with the understanding that the information or record

will be retained on a privileged or confidential basis. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information, impair the government's ability to obtain necessary information in the future, or impair some other legitimate government interest. Examples include records that contain:

a. Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals, and privileged information or information received in confidence such as trade secrets, inventions and discoveries, or other proprietary data.

b. Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor.

c. Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

d. Financial data provided in confidence by private employers in connection with local wage surveys used to fix and adjust pay schedules applicable to the prevailing wage rate for employees within the DON.

e. Scientific and manufacturing processes or developments concerning technical or scientific data or other information submitted with an application for a research grant, or with a report while research is in progress.

f. Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, or developed in part with federal funds and in part at private expense, where the contractor or subcontractor retains a legitimate proprietary interest in the data under 10 U.S.C. 2320-2321 and DOD Federal Acquisition Regulation Supplement (DFARS), Subpart 27.4. Technical data developed exclusively with federal funds may be withheld under exemption (b)(3) if it meets the criteria of 10 U.S.C. 130.

5. Exemption (b)(5) - Exempts those records containing internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in records

pertaining to the decision-making process of an agency, whether between agencies or between DOD and DON components, except as provided in subsections 5b through e.

a. Examples include:

(1) Nonfactual portions of staff papers, to include after-action reports and situation reports containing staff evaluations, advice, opinions, or suggestions.

(2) Advice, suggestions, or evaluations prepared on behalf of DON individual consultants or by boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups formed for the purpose of obtaining advice and recommendations.

(3) Nonfactual portions of evaluations by DON personnel or contractors and their products.

(4) Information of a speculative, tentative, or evaluative nature on proposed plans to procure, lease, or otherwise acquire and dispose of materials, real estate, facilities, or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate government functions.

(5) Trade secrets or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interests.

(6) Records that are exchanged among agency personnel and between DON, DOD, or other agencies in preparation for anticipated administrative proceeding by an agency or litigation before any federal, state, or military court, as well as records that qualify for the attorney-client privilege.

(7) Portions of official reports of inspection, reports of the Inspector Generals, audits, investigations, or surveys pertaining to safety, security, of the internal management, administration, or operation of one or more naval activities, when these records have traditionally been treated by courts as privileged against disclosure in litigation.

b. If any such intra- or interagency record or reasonably segregable portion of such record would be made available routinely through the "discovery process" (the legal process by which litigants obtain information from each other relevant to the issues in a trial or hearing) in the course of litigation

with DON, such record, should not be withheld even though discovery has not been sought in actual litigation. If, the information could only be made available through the discovery process by special order of the court based on the needs of a litigant balanced against the interests of DON in maintaining its confidentiality, the record or document need not be made available.

c. Intra- or interagency memoranda or letters that are factual, or those reasonably segregable portions that are factual, are routinely available through "discovery" and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

d. A direction or order from a superior to a subordinate contained in internal communication cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decision-making process.

e. An internal communication on a decision subsequently made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporated by reference in the record containing the decision.

6. Exemption (b)(6) - Exempts information in personnel and medical files, and similar personal information in other files, that if disclosed to the requester would result in a clearly unwarranted invasion of personal privacy.

a. Examples of files other than personnel and medical files containing similar personal information include:

(1) Those compiled to evaluate or adjudicate the suitability of candidates for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information.

(2) Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

b. This exemption is relevant to a request for information that is intimate to an individual or that possibly could have adverse effects upon that individual or his or her family if disclosed. Paragraph 7b(2) of reference (e) lists several examples of nonderogatory information about the official character of a naval member or employee that can routinely be disclosed to a member of the public without constituting a clearly unwarranted invasion of personal privacy of the individual concerned.

c. In determining whether the release of information would result in a "clearly unwarranted invasion of personal privacy," consider the stated or ascertained purpose of the request. When determining whether a release is "clearly unwarranted," the public interest in release must be balanced against the sensitivity of the privacy interest threatened. For example, lists of names and duty addresses of DON personnel (civilian and military) assigned to units that are sensitive, routinely deployable, or stationed in foreign territories must be withheld because release could aid in the targeting of DON employees and their families by terrorists. See paragraph 10h regarding requests for mailing lists.

d. When withholding information solely to protect the personal privacy of the subject of the record, information should not be withheld from that individual or from his or her designated representative. The personal privacy of others discussed in that record may constitute a basis for deleting reasonably segregable portions of the record even when providing it to the subject of the record. This exemption shall not be exercised in an attempt to protect the privacy of a deceased person but may be used to protect the privacy of the deceased person's family.

e. Individual's personnel, medical, or similar file may be withheld from them or their designated legal representative only as consistent with reference (e).

f. A clearly unwarranted invasion of the privacy of the persons identified in a personnel, medical, or similar record may constitute a basis for deleting those reasonably segregable portions of that record, even when providing it to the subject of the record.

7. Exemption (b)(7)

a. Exempts those records or information compiled for law enforcement purposes, (i.e., civil, criminal, or military law, including the implementation of Executive orders or regulations

issued pursuant to law). This exemption applies, however, only to the extent that the production of such law enforcement records or information:

(1) could reasonably be expected to interfere with enforcement proceedings (5 U.S.C. 552(b)(7)(A));

(2) would deprive a person of the right to a fair trial or an impartial adjudication (5 U.S.C. 552 (b)(7)(B));

(3) could reasonably be expected to constitute an unwarranted invasion of personal privacy (5 U.S.C. 552(b)(7)(C));

(4) could reasonably be expected to disclose the identity of a confidential source, including a source within the DON, a state, local, or foreign agency or authority, or any private institution which furnished information on a confidential basis, and in the case of record or information compiled by a criminal law enforcement agency conducting a lawful national security intelligence investigation, information furnished by a confidential source (5 U.S.C. 552(b)(7)(D));

(5) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions, if such disclosure could reasonably be expected to risk circumvention of the law (5 U.S.C. 552(b)(7)(E)); or,

(6) could reasonably be expected to endanger the life or physical safety of any individual (5 U.S.C. 552(b)(7)(F)).

b. Examples include:

(1) Statements of witnesses and other material developed during the course of the investigation and all materials prepared in connection with related government litigation or adjudicative proceedings.

(2) The identity of firms or individuals investigated for alleged irregularities involving contracting with DOD or DON when no indictment has been obtained nor any civil action filed against them by the United States.

(3) Information obtained in expressed or implied confidence, in the course of a criminal investigation by a criminal law enforcement agency or office within DON, or a lawful national security intelligence investigation conducted by an authorized agency or office within the DON. National security intelligence investigations include background security

investigations and those investigations conducted for the purpose of obtaining affirmative or counterintelligence information.

c. When the subject of an investigative record is the requester of the record, it may be withheld only as authorized by reference (e).

d. Exclusions. In certain narrowly defined situations agencies may treat certain records compiled for law enforcement purposes as not subject to the requirements of the FOIA. These exclusions differ from the b(7) exemption in that, where applicable, the appropriate agency response denies the existence of the record itself, rather than simply denying its release. Two such exclusions are applicable to the DON.

(1) An agency may treat a request for law enforcement records compiled in the course of an ongoing criminal investigation as not subject to the requirements of the FOIA when:

(a) there is no reason to believe the subject of the investigation is aware of its pendency; and

(b) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings.

The agency may treat such records as outside the FOIA only as long as those circumstances exist. The proper response to the requester states that no records were found.

(2) Request for informant records maintained by a criminal law enforcement agency of the DON under the informant's name or personal identifier may be treated as not subject to the requirements of the FOIA when:

(a) the request is made by a third party according to the informant's name or personal identifier; and

(b) the informant's status as an informant has not been officially confirmed.

The proper response to the requester should state that no records were found.

8. Exemption (b)(8) - Exempts those records contained in or related to examination, operation, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

9. Exemption (b)(9) - Exempts those records containing geological and geophysical information and data, including maps, concerning wells.