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26 Oct 01

From: Chief of Naval Operations
To: EMail Distribution List (FOIA)
Subj: POLICY CHANGES TO THE DON FOIA PROGRAM
Ref: (a) SECNAVINST 5720.42F
(b) DOD 5400.7-R

1. This policy memo addresses a myriad of changes being made to the DON's FOIA Program. It is being emailed/faxed to you for immediate implementation and dissemination to those activities that report to you. As always, our policy letters are posted under FOIA Resource Materials at foia.navy.mil/.

2. On 12 Oct 01, Attorney General (AG) Ashcroft issued new FOIA policy. His memo supersedes the FOIA policy statement that was issued by AG Reno in 1993. A copy of the memo and analysis by the Department of Justice (DOJ) is downloadable (see <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>).

3. As a result of the AG memo, the following changes to FOIA policy are effective immediately. These changes will be incorporated into the rewrite of reference (a), once reference (b) is reissued.

a. DON activities will no longer use the "foreseeable harm" standard when adjudicating whether to release/deny information. Rather, DON activities will adopt the "Sound Legal Basis" standard reflected in the AG memo. DON activities will be responsible for presenting a rationale for denial that DOJ will be able to defend if the denial is litigated.

b. While the memo does not eliminate the ability to make a discretionary disclosure, DON activities are no longer encouraged to do so.

c. Exemption low (b) (2) is available for use by DON activities to protect routine housekeeping information that is relatively trivial in nature. Activities are encouraged to consult the DOJ "Freedom of Information Act Guide & Privacy Act Overview" for an in depth discussion of low (b) (2).

d. DON activities should consider using high (b) (2) to protect vulnerability assessments, stockpile information, and security assessments.

4. On 18 Oct 01, the Deputy Secretary of Defense (DepSecDef) issued a memorandum entitled "Operations Security Throughout the Department of Defense." The DepSecDef memo states "Much of the information we use to conduct DOD's operations must be withheld from public release because of its sensitivity. If in doubt, do not release or discuss official information except with other DOD personnel."

5. It has been the policy of DOD to release the names of personnel in response to a FOIA request unless those persons are assigned overseas, routinely deployable, or assigned to a sensitive activity. Today, regardless of their duties, DOD personnel are at increased risk solely by association with the on-going military efforts. Thus when responding to a FOIA request for lists of DON personnel (particularly computer data base lists) these lists shall be withheld. This is to include military members, civilian personnel, members of the Guard and Reserves, and Coast Guard personnel when it is operating as a service in the Navy. This information should be considered exempt under high (b) (2) because its release would result in circumvention of DOD statutes and regulations concerning the security of DOD personnel and operations and under exemption (b) (6) because release would result in a clearly unwarranted invasion of personal privacy. To this end, DON activities shall:

a. Withhold lists of DON personnel in response to FOIA requests for such information. For example:

(1) Under exemption (b) (3), specifically 10 U.S.C. 130b, continue to withhold lists of names, addresses, and other information concerning individuals who are stationed overseas or assigned to a routinely deployable or sensitive unit. This includes both civilian and military personnel.

(2) Under exemptions high (b)(2) and (b)(6), withhold lists of individuals under FOIA that do not fall under subparagraph 5a(1).

b. With regard to the release of individual names, DON activities should weigh heavily the public's right to know versus the individual's personal privacy. For example, activities may determine the release of names of high ranking officials (i.e., both flag rank and civilian equivalent) and those individuals that interact with the public as their primary job are releasable.

c. Case law is still evolving on the issue of high (b)(2). In some litigation cases, the courts have held that information must be "predominantly internal" in order to qualify for withholding under high (b)(2). This poses a potential problem in making arguments based solely on the premise that information should be denied because release would cause circumvention of agency regulations. DOJ maintains that it will be difficult to defend withholding information that has been previously released but may now pose a security risk.

6. Impact of Policy Changes on Documents Placed in Our FOIA Electronic Reading Rooms:

a. We must continue to comply with the requirements of E-FOIA by placing frequently requested documents in our Electronic Reading Rooms.

b. We continue to receive frequent requests for impact credit card holders. DON activities shall discontinue releasing the names of individuals and when posting lists in the reading room, only list the office code, address, and telephone number.

c. Telephone directories and organizational charts are also frequently requested. DON activities shall continue to release and post such documents subject to redacting the names and other personal information on individuals.

d. Proactive placement of documents in E-FOIA Reading Room. DON activities should play careful attention to the kinds of documents that are being placed in their reading rooms in light of DepSecDef's memo on Operations Security

Throughout the Department of Defense which further states "We must ensure that we deny our adversaries the information essential for them to plan, prepare or conduct further terrorist or related hostile operations against the United States and this Department."

e. This change in policy does not apply to public affairs releases of information, the Navy locator, or SMARTLINK. Offices having cognizance over these matters will establish their own policies.

7. Unit Prices

a. A recent joint reverse FOIA court decision, MCI v. GSA and Sprint v. GSA, has resulted in a change in the guidance concerning the release of unit prices. In light of this opinion, the Office of Information and Privacy (OIP), Department of Justice, advises that submitter notification, in accordance with Executive Order 12,600, should be made whenever an agency receives a FOIA request for documents that contain unit prices. Accordingly, depending upon the submitter's response, the release of unit prices should be made on a case-by-case basis.

b. Currently, the Department of Justice is discussing whether this decision will be appealed. Once that decision is made, OIP will issue further guidance concerning the release of unit prices. We will advise you of any new guidance from OIP as soon as it is received.

8. foia.navy.mil

a. We continue to update our FOIA On-Line Resource Site and add new resource materials and points of contact. For example, we recently added an Electronic Reading Room door for the Naval Supply Systems Command. Now, information pertaining to the Fleet Industrial Supply Centers (FISCs) will appear behind that door.

b. If you are an Echelon 2 command and have a FOIA page on your activity's web site, please check foia.navy.mil to see if your activity is listed under "Points of Contact." If it's not, email your URL to navyfoia@hq.navy.mil so we can add you to our site.

9. FOIA Annual Report Changes for FY 2002 Report Submission (1 Oct 01 - 30 Sep 02): As a result of a GAO

review, DOJ has requested that agencies make changes in how they collect and report information in the FOIA Annual Report. The four main areas of guidance from DOJ requiring adjustments in reporting for the FOIA Annual Report are: (1) Using only one determination per action; (2) Calculating processing days; (3) Itemizing requests for expedited access; and (4) Counting Privacy Act requests as FOIA requests. Accordingly,

a. When you complete the action on a FOIA request, only one determination may be made per action. If you have multiple actions on a single request, the predominant action will carry the weight in making the determination for reporting purposes. Therefore, on the FOIA Annual Report form (DD Form 2564), Block 1a (total initial requests processing during the FY) must equal the total of Blocks 1b, c, d and e. Block 1e, "Other Reasons" must be broken out in Blocks 2b1 through 2b9 and the total must equal Block 1e. The same process applies to appeal actions in Blocks 3a-f and 4b1-9.

b. The calculation of the processing days' median age reported in Blocks 5 and 7 will be done in "working days" and not "calendar days".

c. An additional reporting requirement beginning with the FY 2002 report is to report the number of requesters who asked that their request receive expedited processing. This is different from the number currently being reported as the number of cases that you granted expedited processing. The new requirement will be typed in the blank space after "Expedited Processing" in Block 7c. It should be represented as such: "Requests Rec'd: ##".

d. Clarification is also needed on the relationship of the Privacy Act (PA) and FOIA requests for purposes of the FOIA Annual Report. Paragraph 10d of reference (a) states that "Requesters who seek records about themselves that are contained in a PA system of records and who cite or imply the FOIA or both Acts will have their requests processed under the provisions of both the PA and the FOIA." This policy is to be continued, to include instances in which formal PA requests (written or local form) are made by first party requesters for non-exempt systems of records, and a total release is made.

(1) FOIA offices will count first party PA requests under Blocks 1a and 1b and complete Blocks 5 and 7 as they apply. No fees or program costs will be reported under Blocks 8 and 9, as fees still remain under the PA. However, you can count full and part time staff. DON activities that allow first party requesters to seek walk-in access to non-exempt records (e.g., personnel or medical files) without completing a PA form or requesting a signed letter may continue to follow their local procedures without counting such requests under the FOIA.

(2) First party PA requests for access to records that are exempt under the (j)(2) provision of the PA will continue to be processed under the provisions of both Acts and counted in Blocks 1a and 1c. In Block 2a, only count the FOIA exemptions claimed. You will complete Blocks 5 through 7 as they apply. Do not report fees or costs under Blocks 8 and 9, as such costs remain under the provisions of the PA, but you will reflect the number of full or part time staff.

(3) First party PA requests for access to records that are exempt under the (k) exemptions of the PA will continue to be processed under the provisions of both Acts. In Block 1, count the request once under "total requests" and once under "denied in part." If you cite to a FOIA exemption, report it in Block 2a. This report does not collect information on PA exemptions claimed. Complete Blocks 5 through 7 as they apply. Do not report fees or costs under Blocks 8 and 9, as such costs remain under the provisions of the PA, but you will reflect the number of full time or part time staff.

10. In view of the above, please discontinue using enclosure (9) to reference (a) as a tool to collect information for the Annual FOIA Report. This form will be revised in the next revision to reference (a). Note: These changes do not impact your FY 2001 submission.
FINAL REMINDER: FY 2001 Submission by CMC, OGC, JAG, and Echelon 2 Commands are due to CNO (N09B10) by 5 Nov 01.

11. Fee Status. DFOISR advised Mr. John Greenewald Jr., in a letter dated 15 Oct 01, that his fee status was being changed from "academic" to "commercial" requester since he is operating a fee for service company on the internet at www.foiaservices.com. Accordingly, all open requests and future requests made by Mr. Greenewald will be charged

under the commercial requester fee schedule (i.e., all fees for search, review, and duplication are applicable if fees exceed \$15).

12. I will be representing DON at a meeting with DFOISR and the other military components to discuss changes to the DOD's FOIA Directive. If you have any recommended changes or concerns or wish issues discussed, please email your concerns to me at navyfoia@hq.navy.mil by 9 Nov 01.

13. This office strives to provide you with customer service and support. Accordingly, if you are in a time zone that makes us difficult to reach by telephone, please address your questions in an email and we will be happy to respond promptly. Our email address is navyfoia@hq.navy.mil. You can also fax us at (202) 685-6580, DSN 325-6580.

14. Finally, please accept my gratitude for the professionalism you continue to display in working your FOIA program. Ours is a tough job interacting with the public and meeting the demands of our respective commands. With little to no resources, we have creatively built impressive FOIA web sites, designed data bases to track requests, responded to complex and difficult requests in record time, and continue to weigh issues and bring up concerns in an effort to improve our program. I appreciate the interaction and proactivity that you have shown.

DORIS M. LAMA

By direction

(202) 685-6545/DSN 325-6545