

the General Counsel or the Judge Advocate General, as appropriate.

(2) If the determining authority concludes that the request, or any portion of it, meets the emergency test, he or she will require the requester to agree to the conditions set forth in §725.7(a). The determining authority will then orally advise the requester of the determination, and seek a written confirmation of the oral request. Thereafter, the determining authority will make a written record of the disposition of the oral request including the grant or denial, circumstances requiring the procedure, and conditions to which the requester agreed.

(3) The emergency procedure should not be utilized where the requester refuses to agree to the appropriate conditions set forth in §725.7(a) or indicates unwillingness to abide by the limits of the oral grant, partial grant, or denial.

§ 725.8 Considerations in determining to grant or deny a request.

(a) *General considerations.* In deciding whether to authorize release of official information, or the testimony of DON personnel concerning official information (hereafter referred to as “the disclosure” under a request conforming with the requirements of §725.7, the determining authority shall consider the following factors:

(1) The DON policy regarding disclosure in §725.2;

(2) Whether the request or demand is unduly burdensome or otherwise inappropriate under applicable court rules;

(3) Whether disclosure, including release in camera (*i.e.*, to the judge or court alone), is appropriate under procedural rules governing the case or matter in which the request or demand arose;

(4) Whether disclosure would violate or conflict with a statute, executive order, regulation, directive, instruction, or notice;

(5) Whether disclosure, in the absence of a court order or written consent, would violate 5 U.S.C. 552a;

(6) Whether disclosure, including release in camera, is appropriate or necessary under the relevant substantive law concerning privilege (*e.g.*, attorney-client, attorney work-product, or

physician-patient in the case of civilian personnel);

(7) Whether disclosure, except when in camera (*i.e.*, before the judge alone) and necessary to assert a claim of privilege, would reveal information properly classified under the DOD Information Security Program under DOD 5200.1-R⁷, withholding of unclassified technical data from public disclosure following OPNAVINST 5510.161; privileged Naval Aviation Safety Program information (OPNAVINST 3750.6Q (NOTAL))⁸, or other matters exempt from unrestricted disclosure under 5 U.S.C. 552, 552a;

(8) Whether disclosure would unduly interfere with ongoing law enforcement proceedings, violate constitutional rights, reveal the identity of an intelligence source or source of confidential information, conflict with U.S. obligations under international agreement, or be otherwise inappropriate under the circumstances;

(9) Whether attendance of the requested witness at deposition or trial will unduly interfere with the military mission of the command; and

(10) Whether, in a criminal case, requiring disclosure by a defendant of detailed information about the relevance of documents or testimony as a condition for release would conflict with the defendant’s constitutional rights.

(b) *Specific considerations*—(1) *Documents, interviews, depositions, testimony, and views (where the United States is, or may become, a party).* All requests pertaining to such matters shall be forwarded to the Judge Advocate General or the General Counsel, as appropriate under §725.6(c).

(2) *Documents (where the United States is not, and is reasonably not expected to become a party)*—(i) *Unclassified Navy and Marine Corps records.* Where parties or potential parties desire unclassified naval records in connection with a litigation matter, the subpoena duces tecum or court order will be served, under 32 CFR 257.5(c), upon the General Counsel of the Navy, along with a written request complying with §725.7.

⁷ See footnote 1 to §725.1.

⁸ See footnote 1 to §725.1.

§ 725.8

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(A) If the determining authority to whom the matter is referred determines to comply with the order or subpoena, compliance will be effected by transmitting certified copies of records to the clerk of the court from which process issued. If, because of an unusual circumstance, an original record must be produced by a naval custodian, it will not be removed from the custody of the person producing it, but copies may be placed in evidence.

(B) Upon written request of one or more parties in interest or their respective attorneys, records which would be produced in response to a court order signed by a judge as set forth above may be furnished without a court order, but only upon a request complying with § 725.7 and only when such records are not in a "system of records" as defined by the Privacy Act (5 U.S.C. 552a). In determining whether a record not contained in a "system of records" will be furnished in response to a Freedom of Information Act (FOIA) request, SECNAVINST 5720.42E⁹ controls.

(C) Generally, a record in a Privacy Act "system of records" may not be released under a litigation request except with the written consent of the person to whom the record pertains or in response to a court order signed by a judge. See SECNAVINST 5211.5C¹⁰ and 5 U.S.C. 552, 552a for further guidance.

(D) Whenever compliance with a court order or subpoena duces tecum for production of DON records is denied for any reason, the subpoena or court order and complete copies of the requested records will be forwarded to the appropriate Deputy Assistant Judge Advocate General (General Litigation) or the Associate General Counsel (Litigation) for action, and the parties to the suit notified in accordance with this part.

(ii) *Classified Navy and Marine Corps records.* Any consideration of release of classified information for litigation purposes, within the scope of this instruction, must be coordinated within the Office of the Chief of Naval Oper-

ations (OP-09N) per OPNAVINST 5510.1H.¹¹

(iii) *Records in the custody of the National Personnel Records Center.* Court orders or subpoenas duces tecum demanding information from, or production of, service or medical records of former Navy and Marine Corps personnel in the custody of the National Personnel Records Center will be served upon the Director, National Personnel Records Center, 9700 Page Boulevard, St. Louis, MO 63132. If records responsive to the request are identified and maintained at the National Personnel Records Center, that Center shall make appropriate certified (authenticated) copies of the information requested. These copies will then be forwarded, along with the request, in the case of Navy personnel, to Chief, Bureau of Naval Personnel (Pers-06), Washington, DC 20370-5000, or his delegate, who will respond. In the case of Marine Corps personnel, the copies and request will be sent to the Commandant of the Marine Corps (MMRB-10), Quantico, VA 22134-0001, who will respond. Those requests that do not constitute legal demands will be refused by the Director, National Personnel Records Center, and written guidance provided to the requester.

(iv) *Medical and other records of civilian employees.* Production of medical certificates or other medical reports concerning civilian employees is controlled by Federal Personnel Manual, chapter 294 and chapter 339.1-4.¹² Records of civilian employees, other than medical records, may be produced upon receipt of a court order and a request complying with § 725.7, provided no classified or for official use only information, such as loyalty or security records, are involved. Disclosure of records relating to compensation benefits administered by the Office of Workers' Compensation Programs of the Department of Labor are governed by Secretary of the Navy Instruction 5211.5C (Privacy Act implementation) and Secretary of the Navy Instruction 5720.42E (Freedom of Information Act implementation), as appropriate. Where information is furnished per this

⁹ See footnote 1 to § 725.1.

¹⁰ See footnote 1 to § 725.1.

¹¹ See footnote 1 to § 725.1.

¹² See footnote 1 to § 725.1.

subparagraph in response to a court order and proper request, certified copies rather than originals should be furnished. Where original records must be produced because of unusual circumstances, they may not be removed from the custody of the official producing them, but copies may be placed on the record.

(v) *JAGMAN investigations (other than to next of kin)*. The Deputy Assistant Judge Advocate General having cognizance over the records at issue for litigation or prospective litigation purposes may release the records if a complete release will result. The Assistant Judge Advocate General (Civil Law) will make determinations concerning the release of the records specified in this subparagraph if a release of less than the complete requested record will result. A release to next of kin of incompetent or deceased DON personnel or their representatives is exempt from these requirements and this part.

(vi) *Affirmative claims files*. Affirmative claims files (including Medical Care Recovery Act files), except to the extent they contain copies of JAGMAN investigations prepared under the Manual of the Judge Advocate General, or classified or privileged information, may be released by the commanding officer of the Naval Legal Service Office having cognizance over the claim at issue, without compliance with this instruction, to: insurance companies to support claims; to civilian attorneys representing injured service persons, their dependents, and the Government's interests; and to other DOD components. When a request for production involves material related to claims in favor of the Government, either the cognizant Command Counsel or the Naval Legal Service Office having territorial responsibility for the area should be notified.

(vii) *Accounting for disclosures from "systems of records."* When compliance with a litigation request or demand for production of records is appropriate, or when release of records is otherwise authorized, and records contained in a "system of records," are released, the releasing official will consult Secretary of the Navy Instruction 5211.5C

regarding disclosure accounting requirements.

(viii) *Pay records*. Official pay records of active-duty, reserve, retired, or former Navy members should be requested from Director, Defense Finance and Accounting Service (DFAS), Cleveland Center, Anthony J. Celebrezze Federal Building, Cleveland, OH 44199-2055. Official pay records of active-duty, reserve, retired, or former Marines should be requested from Director, Defense Finance and Accounting Service, Kansas City Center (Code G), Kansas City, MO 64197-0001.

(3) *Interviews, depositions, and testimony (where the United States is not, and is reasonably not expected to become, a party)*—(i) *Factual matters*. DON policy favors disclosure of factual matters when disclosure does not violate the criteria stated in this section. Distinguishing between factual matters and expert or opinion matters (where DON policy favors non-disclosure) requires careful analysis. Opinion matters are defined at §725.4(c).

(ii) *Expert, opinion, or policy matters*. Such matters are to be determined, under the delegation in §725.6, by the cognizant Deputy Assistant Judge Advocate General or by General Counsel. General considerations to identify expert or opinion testimony are in §725.4(c). DON personnel shall not provide, with or without compensation, opinion or expert testimony concerning official information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice. Upon a showing by the requester of exceptional need or unique circumstances, and that the anticipated testimony will not be adverse to the interests of the DOD or the United States, the appropriate DON official designated in §725.6, may grant, in writing, special authorization for DON personnel to appear and testify at no expense to the United States. In determining whether exceptional need or unique circumstances exist, the determining official should consider whether such expert or opinion testimony is available to the requester from any other source. The burden of demonstrating such unavailability, if any, is solely upon the requester.

(iii) *Visits and views (where the United States is not, and is reasonably not expected to become, a party).* Such disclosures are normally factual in nature and should not be accompanied by interviews of personnel unless separately requested and granted. The authority of the commanding officer of the activity, ship, or unit at issue is not limited by this part. Accordingly, he or she may prescribe appropriate conditions as to time, place, and circumstances (including proper restrictions on photography).

(iv) *Non-DOD information.* A request for disclosure under this part, particularly through the testimony of a witness, may involve both official information and non-DOD information (e.g., in the case of a person who has acquired additional and separate knowledge or expertise wholly apart from Government employment). Determining whether or not official information is at issue is within the purview of the determining authority, not the requester. A requester's contention that only non-DOD information is at issue is not dispositive. The requester must still comply with this instruction to support that contention. If non-DOD information is at issue in whole or in part, the determining authority shall so state in the written determination described in § 725.9. He or she shall make no other determination regarding that non-DOD information.

§ 725.9 Action to grant or deny a request.

(a) The process of determining whether to grant or deny a request is not an adversary proceeding. This part provides guidance for the operation of DON only and is not intended to, does not, and may not be relied upon to, create any right or benefit, substantive or procedural, enforceable at law against the United States, DOD, or DON.

(b) 32 CFR part 97 and this part apply to testimony by former naval personnel and former civilian employees of DON. A proper request must be made, under § 725.7, to obtain testimony by former personnel regarding official DOD information. However, this part is not intended to place unreasonable restraints upon the post-employment conduct of such personnel.

Accordingly, requests for expert or opinion testimony by such personnel will normally be granted unless that testimony would constitute a violation of the U.S. Code (e.g., 18 U.S.C. 201 *et seq.*), conflict with pertinent regulations (e.g., Secretary of the Navy Instruction 5370.2H), or disclose properly classified or privileged information.

(c) A determination to grant or deny should be made as expeditiously as possible to provide the requester and the court with the matter at issue or with a statement of the reasons for denial. The decisional period should not exceed 10 working days from receipt of a complete request complying with the requirements of § 725.7, absent exceptional or particularly difficult circumstances. The requester should also be informed promptly of the referral of any portion of the request to another authority for determination.

(d) Except as provided in § 725.7(d), a determination to grant or deny shall be in writing.

(e) The determination letter should respond solely to the specific disclosures requested, stating a specific determination on each particular request. When a request is denied in whole or in part, a statement of the reasons for denial should be provided to fully inform a court of the reasons underlying the determination if it is challenged.

(f) A copy of any denial, in whole or in part, of a request, should be forwarded to the cognizant Deputy Assistant Judge Advocate General or the Associate General Counsel (Litigation), as appropriate. Such notification is likewise appropriate when the litigation request has been treated under 5 U.S.C. 552, 552a and § 725.5(f). Telephonic notification is particularly appropriate where a judicial challenge or contempt action is anticipated.

(g) In cases in which a subpoena has been received and the requester refuses to pay fees or otherwise comply with the guidance and requirements imposed by this part, or if the determining authority declines to make some or all of the subpoenaed information available, or if the determining authority has had insufficient time to complete its determination as to how to respond to the request, the determining authority