

record does not make it readily available (*i.e.*, when the record is in a deteriorated state or on magnetic tape). DON activities may either prepare an extract or recopy the document and mark it "Best Copy Available."

(m) *Personal notes.* (1) Certain documents under the physical control of a DON employee and used to assist him/her in performing official functions are not considered "agency records" within the meaning of this instruction. Uncirculated personal notes and records that are not disseminated or circulated to any person or organization (e.g., personal telephone lists or memory aids) that are retained or discarded at the author's discretion and over which the DON activity does not exercise direct control, are not considered "agency records." However, if personnel are officially directed or encouraged, either in writing or orally, to maintain such records, they may become "agency records," and may be subject this subpart and subpart G of this part.

(2) The personal uncirculated handwritten notes of unit leaders, office supervisors, or military supervisory personnel concerning subordinates are not systems of records within the meaning of this instruction. Such notes are an extension of the individual's memory. These notes, however, must be maintained and discarded at the discretion of the individual supervisor and not circulated to others. Any established requirement to maintain such notes (such as, written or oral directives, regulations, or command policy) make these notes "agency records" and they then must be made a part of a system of records. If the notes are circulated, they must be made a part of a system of records. Any action that gives personal notes the appearance of official agency records is prohibited, unless the notes have been incorporated into a system of records.

(n) *Compiled in anticipation of litigation.* An individual is not entitled to access information compiled in reasonable anticipation of a civil action or proceeding. Accordingly, deny access under 5 U.S.C. 552a(d)(5) and then process under FOIA (SECNAVINST 5740.42F) to determine releasability.

#### § 701.108 Amendment of records.

Amendments under this subpart and subpart G of this part are limited to correcting factual or historical matters (*i.e.*, dates and locations of service, participation in certain actions of activities, not matters of opinion (e.g., evaluations of work performance and assessments of promotion potential contained in employee evaluations, fitness reports, performance appraisals, or similar documents)) except when such matters of opinion are based solely on inaccurate facts and the accuracy of those facts has been thoroughly discredited.

(a) *Individual review and correction.* Individuals are encouraged to make periodic reviews of the information maintained about them in systems of records and to avail themselves of the amendment procedures established by 5 U.S.C. 552a, this subpart and subpart G of this part, and other regulations to update their records.

(b) *Eligibility.* An individual may request amendment of a record retrieved by his/her personal identifier from a system of records, unless the:

(1) System has been exempt from the amendment procedure under 5 U.S.C. 552a and/or

(2) Record is covered by another procedure for correction, such as by the Board for Correction of Naval Records.

(c) *Amendment requests.* Amendment requests shall be in writing, except for routine administrative changes, such as change of address.

(1) An amendment request must include: a description of the factual or historical information to be amended; the reason for the amendment; the type of amendment action sought (e.g., deletion, correction, or addition); and copies of available documentary evidence that support the request.

(2) The burden of proof rests with the individual. The individual must demonstrate the existence of specific evidence establishing the factual or historical inaccuracy, and in the case of matters of opinion, must specifically discredit the underlying facts. General allegations of error are inadequate.

(3) The individual may be required to provide identification to prevent the inadvertent or intentional amendment of another's record.

(d) *Limits on attacking evidence previously submitted.* (1) The amendment process is not intended to permit the alteration of evidence presented in the course of judicial or quasi-judicial proceedings. Any amendments or changes to these records normally are made through the specific procedures established for the amendment of such records.

(2) Nothing in the amendment process is intended or designed to permit a collateral attack upon what has already been the subject of a judicial or quasi-judicial determination. However, while the individual may not attack the accuracy of the judicial or quasi-judicial determination under this instruction, he/she may challenge the accuracy of the recording of that action.

(e) *Sufficiency of a request to amend.* DON activities shall consider the following factors when evaluating the sufficiency of a request to amend: the accuracy of the information itself and the relevance, timeliness, completeness, and necessity of the recorded information for accomplishing an assigned mission or purpose.

(f) *Time limits.* Within 10 working days of receiving an amendment request, the systems manager shall provide the individual a written acknowledgement of the request. If action on the amendment request is completed within the 10 working days and the individual is so informed, no separate acknowledgment is necessary. The acknowledgment must clearly identify the request and advise the individual when to expect notification of the completed action. Only under exceptional circumstances should more than 30 working days be required to complete the action on an amendment request.

(g) *Granting an amendment request in whole or in part.* A record must be accurate, relevant, timely, complete, and necessary. If the record in its present state does not meet each of the criteria, the requester's request to amend the record should be granted to the extent necessary to meet them.

(1) *Notify the requester.* To the extent the amendment request is granted, the systems manager shall notify the individual and make the appropriate amendment.

(2) *Notify previous recipients.* Notify all previous recipients of the information (as reflected in the disclosure accounting record) that the amendment has been made and provide each a copy of the amended record. Recipients who are no longer retaining the record need not be advised of the amendment. If it is known that other naval activities, DOD components, or Federal Agencies have been provided the information that now requires amendment, or if the individual requests that these agencies be notified, provide the notification of amendment even if those activities or agencies are not listed on the disclosure accounting form.

(h) *Denying an amendment request.* If an amendment request is denied in whole or in part, promptly notify the individual in writing and include the following information in the notification:

(1) Those sections of 5 U.S.C. 552a, this subpart or subpart G of this part upon which the denial is based;

(2) His/her right to appeal to the head of the activity for an independent review of the initial denial;

(3) The procedures for requesting an appeal, including the title and address of the official to whom the appeal should be sent; and

(4) Where the individual can receive assistance in filing the appeal.

(i) *Requests for amendment of OPM records.* The records in an OPM Government-wide system of records are only temporarily in the custody of DON activities. See the appropriate OPM Government-wide systems notice at <http://www.defenselink.mil/privacy/govwide> for guidance on how to seek an amendment of information. The custodian DON denial authority may deny a request, but all denials are subject to review by the Assistant Director for Workforce Information, Office of Merit Systems Oversight and Effectiveness, Office of Personnel Management, 1900 E Street, NW., Washington, DC 20415.

(j) *Individual's statement of disagreement.* (1) If the review authority refuses to amend the record as requested, the individual may submit a concise statement of disagreement listing the reasons for disagreeing with the refusal to amend.

(2) If possible, DON activities shall incorporate the statement of disagreement into the record. If that is not possible, annotate the record to reflect that the statement was filed and maintain the statement so that it can be readily obtained when the disputed information is used or disclosed.

(3) Furnish copies of the statement of disagreement to all individuals listed on the disclosure accounting form (except those no longer retaining the record), as well as to all other known holders of copies of the record.

(4) Whenever the disputed information is disclosed for any purpose, ensure that the statement of disagreement is also disclosed.

(k) *Statement of reasons.* (1) If the individual files a statement of disagreement, the DON activity may file a statement of reasons containing a concise summary of the activity's reasons for denying the amendment request.

(2) The statement of reasons shall contain only those reasons given to the individual by the appellate official and shall not contain any comments on the individual's statement of disagreement.

(3) At the discretion of the DON activity, the statement of reasons may be disclosed to those individuals, activities, and agencies that receive the statement of disagreement.

#### § 701.109 Privacy Act (PA) appeals.

(a) *How to file an appeal.* Individuals wishing to appeal a denial of notification, access, or amendment of records shall follow these guidelines:

(1) The appeal must be received by the cognizant review authority (*i.e.*, ASN (M&RA), OJAG, OGC, or OPM) within 60 calendar days of the date of the response.

(2) The appeal must be in writing and requesters should provide a copy of the denial letter and a statement of their reasons for seeking review.

(b) *Time of receipt.* The time limits for responding to an appeal commence when the appeal reaches the office of the review authority having jurisdiction over the record. Misdirected appeals should be referred expeditiously to the proper review authority and the requester notified.

(c) *Review authorities.* ASN (M&RA), JAG, and GC are authorized to adjudicate appeals made to SECNAV. JAG and GC are further authorized to delegate this authority to a designated Assistant JAG or Deputy Assistant JAG and the Principal Deputy General Counsel or Deputy General Counsel, respectively, under such terms and conditions as they deem appropriate.

(1) If the record is from a civilian Official Personnel Folder or is contained on any other OPM forms, send the appeal to the Assistant Director for Workforce Information, Personnel Systems and Oversight Group, Office of Personnel Management, 1900 E Street, NW., Washington, DC 20415. Records in all systems of records maintained in accordance with the OPM Government-wide systems notices are only in the temporary custody of the DON.

(2) If the record pertains to the employment of a present or former Navy or Marine Corps civilian employee, such as Navy or Marine Corps civilian personnel records or an employee's grievance or appeal file, send it to the General Counsel of the Navy, 1000 Navy Pentagon, Washington, DC 20350-1000.

(3) If the record pertains to a present or former military member's fitness reports or performance evaluations, send it to the Assistant Secretary of the Navy (Manpower and Reserve Affairs), 1000 Navy Pentagon, Washington, DC 20350-1000.

(4) All other records dealing with present or former military members should be sent to the Office of the Judge Advocate General, 1322 Patterson Avenue SE., Suite 3000, Washington Navy Yard, DC 20374-5066.

(d) *Appeal procedures.* (1) If the appeal is granted, the review authority shall advise the individual that his/her appeal has been granted and provide access to the record being sought.

(2) If the appeal is denied totally or in part, the appellate authority shall advise the reason(s) for denying the appeal, citing the appropriate subsections of 5 U.S.C. 552a or this subpart and subpart G of this part; the date of the appeal determination; the name, title, and signature of the appellate authority; and a statement informing the requester of his/her right to seek judicial relief in the Federal District Court.