



PERSONNEL AND  
READINESS

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DEC 11 2014

The Honorable Elizabeth Holtzman  
Chair  
Judicial Proceedings Panel  
One Liberty Center  
875 N. Randolph Street, Suite 150  
Arlington, VA 22203

Dear Madam Chair:

I am writing to provide supplemental information following the Judicial Proceedings Panel's November 14, 2014 public meeting, based on a question which was asked during the briefing on Victims' Counsel Programs and Victim Access to Information. Specifically, Mr. Victor Stone asked whether the Freedom of Information Act (FOIA) and Privacy Act allow or prohibit disclosure of information to a Special Victims' Counsel/Victims' Legal Counsel (SVC/VLC) or victim. Please note, as I stated during my testimony before the Panel, that my office is not the proponent for the Department of Defense issuances discussed below. To answer this question, I have coordinated the following response with the Department's subject matter experts in these policy areas.

**SVC/VLC Requests for Records**

The FOIA and Privacy Act do not prevent SVCs/VLCs from receiving appropriate Privacy Act records associated with an accused's alleged conduct toward a victim that are needed in the performance of their official duties.

The disclosure of records maintained in a Privacy Act system of records is governed by DoD Directive (DoDD) 5400.11, "DoD Privacy Program," October 29, 2014. Rules of Conduct for DoD personnel and DoD contractors are established in Enclosure 2 of the Directive. Disclosure of records about an individual from a system of records is prohibited except with his or her consent or as otherwise authorized by Section 552a of Title 5, United States Code (U.S.C.), also known as "the Privacy Act," as implemented by DoDD 5400.11 and DoD 5400.11-R, "Department of Defense Privacy Program." One of the exceptions, 5 U.S.C. § 552a(b)(1), permits, but does not require, disclosure to a DoD employee or office for an appropriate "official use" purpose. Only information that is minimally required to accomplish the intended official use is to be disclosed.

**Victim Requests for Records (when not represented by SVC/VLC)**

Victims may also make personal requests for records, but those requests are governed by the FOIA and Privacy Act without application of the Privacy Act's (b)(1) official use exception. Within the DoD, the FOIA is implemented by DoDD 5400.07, "DoD Freedom of Information Act (FOIA) Program," January 2, 2008, and DoD 5400.7-R, "Freedom of Information Act

Program,” September 1998. Pursuant to a FOIA analysis, agencies may withhold information from public release if one or more of nine statutory FOIA exemptions apply.

With respect to release of records under FOIA principles, commonly applicable FOIA exemptions for investigative, disciplinary and courts-martial records are Exemption 6 and Exemption 7C. Both exemptions protect the personal privacy of individuals, as well as governmental interests. Exemption 7 and its subsections specifically apply to the release of records for law enforcement purposes.

### **Privacy Act Records Normally Releasable Under Both Procedures**

As noted during the recent meeting, the Military Services provide guidance to trial counsel and SVC/VLCs concerning the release of specific information and records to represented victims and non-represented victims. While specific practices may differ somewhat among the Services, it is our understanding that SVCs and VLCs, for official use purposes, are being provided with copies of Privacy Act records such as the charge sheet, a victim’s statement, filed motions and responses relating to Military Rules of Evidence 412, 513, and 514, and other Privacy Act records of the victim. SVC/VLCs and victims (with appropriate redactions) are also normally authorized to receive a copy of the record of trial, pursuant to Article 54(e), Uniform Code of Military Justice and Rule for Courts-Martial 1103 (g)(3). These same records are also usually releasable under the FOIA to a victim, depending on the facts and circumstances of the particular case. Other Privacy Act records may also be releasable to an SVC/VLC for an appropriate official use purpose, as well as to victims who make a formal FOIA request.

### **SVC/VLC and Victim Remedies to Denial of Records**

Prior to referral of a case to trial, if a request for access to information made to the Government is denied, an SVC/VLC may seek to renew the request with a higher military authority, such as the applicable staff judge advocate or commander. The denial of a personal request by a victim made under the FOIA may be challenged in federal court.

After referral, SVC/VLCs who have not received requested records may renew their request with the military judge, who may order disclosure of records in the record of trial that pertain to a victim’s rights. This request for relief may become less common, however, as the release of certain records becomes routine. There is continuing progress being made at the Service level in obtaining records for an official use by SVC/VLCs in the representation of crime victims.

Sincerely,



Ryan D. Oakley, Lt Col, USAF  
Deputy Director, Legal Policy