



## **Protect Our Defenders Comment on Victims' Access to Information and the Privacy Act**

At every stage of the military justice process, victims of sexual assault face significant challenges in obtaining information during the adjudication of their sexual assault report. Frequently, the Privacy Act is used to justify denying survivors and their counsel information that is crucial for protecting victims' rights or learning what action is taken against their assailant, if any. The inability to access investigative records, motions, or court-martial filings hinders Special Victims Counsel (SVCs) and civilian attorneys from providing appropriate representation and interferes with victims' ability to fully exercise their rights.

### **LACK OF ACCESS TO CRUCIAL INFORMATION THROUGHOUT THE MILITARY JUSTICE PROCESS**

The difficulty often begins during the investigation and initial adjudication process, when the Convening Authority makes the decision of whether to hold an Article 32 preliminary hearing or a court-martial. It continues through the military justice process itself.

#### **Issue 1: Victims and their counsel are routinely denied access key investigative materials, including their own statements to investigators**

Victims of sexual assault are regularly denied access to investigative materials, even when such information is critical to exercising their rights. SVCs are also often barred from accessing evidentiary materials, as well as filings and motions during court-martial proceedings, which significantly interferes with their ability to advise or advocate for their client. In the civilian federal system, in contrast, such materials are routinely shared through the Public Access to Court Electronic Records (PACER) system. As a result, victims in the military have significantly less access to records than their civilian counterparts.

In addition, there is currently no concrete policy or rationale governing whether a victim is able to get a copy of their own witness statement. Rather, the decision seems to be arbitrary, based on factors that vary widely across service branches, bases, investigators, or statement format (written vs. video).

**Case Example 1:** In this Navy case, the victim's statement to investigators was video-taped, consuming over 5 hours of video. In preparation for an interview with trial counsel, the victim and her VLC requested a copy of her statement, which was denied. The VLC was informed that, had the statement been in another format (written), the victim may have been able to receive it, and that in the past statements were routinely provided to victims. The VLC was only granted the right to watch the video at a designated Navy facility, which was a burden to arrange and did not allow for the VLC to work with the content of the video at their office and convenience.

The Navy has further refused to provide the victim or her VLC with a copy of the text messages and other information that the Navy took from the victim's phone as part of its investigation. Further, the Navy has refused to date repeated requests for a written explanation of the basis of the denial of the victim's statement and related information provided by the victim.

The trial counsel then made the recommendation not to proceed to an Article 32, and the VLC is at an extreme disadvantage in responding to this recommendation without being able to see the evidence on which this decision was made.

**Case Example 2:** In this Army case, the SVC wrote the following:

“Our ability to further define and highlight additional evidence is directly impacted by the fact that [Special Victims Counsel] has not received the investigative material which formed the basis of the recommendation not to proceed with the assault charges. Should you decide not to proceed with criminal proceedings, we respectfully request that you delay your decision and provide [victim] with an opportunity to review the evidence which led the government not to recommend proceeding to an Article 32. Access to these materials is essential to give meaning to [victim's] right to confer with the Government as required by law.”

**Issue 2: Victims are shut out of administrative and non-judicial proceedings concerning the accused, limiting their ability to participate or access case information**

Victims are not entitled to information concerning the nature or outcome of administrative and non-judicial action taken against their perpetrator, which often occurs in lieu of criminal prosecution. According to the Department of Defense, in 2014 alone, 950 service members (36% of cases reviewed for possible disciplinary action) received non-judicial punishment, administrative discharge, or other adverse administrative action as a result of a sexual assault report.

Under the Department of Defense's interpretation of the Privacy Act, victims are routinely (though not consistently) barred from knowing the outcome of these actions, even when the perpetrator is disciplined for causing them direct harm. Without knowing the outcome, many victims struggle to receive closure, and have to live without knowing whether justice was done.

**Case Example 1:** In this Army case, a female service member accused two male service members of sexual assault. The Army declined to press charges. The legal office told the victim that her assailants' command was considering giving them letters of reprimand (LOR). When she followed up, the legal office reversed course, stating they could not give her information about any administrative action. The victim wanted her assailants to receive permanent (rather than local) LORs, but was not able to express her preference to their commander. The victim has never learned if any steps were taken to hold her assailants accountable.

**Case Example 2:** In this Navy case, a female service member accused a fellow sailor of violently raping her. He pled to lesser charges, and the Navy held a separation board. The victim received no notice of this hearing and, because her testimony was not requested, she

was not allowed to participate, effectively shutting her out of the proceeding. It is uncertain if she would have known about the hearing or its result had a family member not been called to testify. Her assailant ultimately received a General Under Honorable discharge as a result of his misconduct.

**Issue 3: Victims and SVCs are frequently forced to use the FOIA request process to obtain routine information during the military justice process or administrative proceedings**

The FOIA process is lengthy, burdensome, and thoroughly insufficient for attorneys attempting to represent their clients during ongoing military justice proceedings. Further, the FOIA process routinely denies information provided in open court, such as individuals identified in testimony, and typically does not provide for the disclosure of information pertaining to administrative proceedings. As a result, victims' and SVCs' efforts are hampered during the military justice process, and victims remain cut out of any administrative proceedings related to misconduct perpetrated against them.

**Case Example:** In this Air Force case, a female civilian reported being raped by an active-duty airman. After an Article 32 hearing, charges were dropped due to the statute of limitations, and the Air Force moved to discharge her assailant through an administrative separation board. The victim attended and testified at the hearing, and she was devastated to learn that the board decided not to discharge the accused. The victim submitted a Freedom of Information Act request to better understand the decision, but because the separation board was technically an administrative proceeding, her request was denied under the Air Force's reading of the Privacy Act. Her appeal is pending.

**Issue 4: The Privacy Act is inconsistently applied for victims and the accused, creating a double standard that materially harms victims**

Before the conclusions of a criminal investigation, the accused does not have a right to criminal investigative records. However, in several cases, we have seen the accused be provided such records, including documentation containing victim information that may be protected by the Privacy Act, for use in civil proceedings involving the victim. Meanwhile, the victim is regularly barred the same access, often under the auspices of the Privacy Act. This reading of the Privacy Act and other regulations in favor of the accused often works against victims in critical proceedings, such as divorce proceedings, custody cases, and protection order hearings.

**Case Example 1:** In this Army case, the spouse of an Army member reported her husband had raped her. During the investigation, her husband was given access to a significant amount of investigative materials, including CID interviews and summary reports from investigators, which he used in their custody dispute. The victim had never seen these materials before and was not given access to any investigative records.

**Case Example 2:** In this Army case, a female civilian reported an officer for physically and sexually assaulting her. The trial counsel recommended against sexual assault charges. The victim disagreed, but her SVC had difficulty advising her on how best to respond, as their request for the materials underlying this decision was denied. Trial counsel later refused to tell

the victim or her SVC the outcome of the case, stating that the Privacy Act prevents disclosure of administrative punishments. The victim has been left in fear of the assailant, with no knowledge of the outcome of her report.

During the investigation, the victim filed for a civilian protection order against the accused. She requested her statement and other documents from CID for the proceeding but was denied. She was finally able to get copies of her statements only through a Congressional inquiry. In the meantime, during an ongoing investigation, the Army provided investigative materials to the accused, including information about the victim's mental health care, possibly in violation of the Privacy Act and Military Rule of Evidence 513. The accused then used these materials during the civilian protection order hearing.

### **PROPOSED SOLUTIONS**

In order to ensure that victims are able to exercise their rights and that SVCs are able to fully represent their clients, the DoD should implement procedures that allow victims and SVCs access to all motions, pleadings, and court records. Further, victims must be allowed to provide input in any proceedings against their assailant and to learn the outcome of such proceedings.

Protect Our Defenders believes the following policy reforms must be implemented:

#### **Public and Timely Access to Court-Martial Records**

In order to ensure that the military justice system is as transparent as the civilian justice system, the DoD should create an online document system that is open to the public and contains records from all court-martial and appellate proceedings. This system should be similar to the civilian PACER system in its operations, with timely updates and access to all motions and filings and with appropriate redactions for privacy and security. This recommendation was also included in the Congressional Conference Report for the National Defense Authorization Act (NDAA) for Fiscal Year 2016.

The Panel should investigate whether the Privacy Act precludes any such disclosure. To the extent that it does, Congress should amend the Privacy Act to exempt the military from such requirements, to the degree needed to disclose such information to the general public.

#### **Full Access to Records for SVCs During the Military Justice Process**

Victims and victims' attorneys must have timely and thorough access to all records they require to represent their client and protect their rights. While a PACER-like system would be a key tool, due to the sensitive nature of many issues affecting clients, SVCs require more extensive access to investigative materials, pleadings, motions, and court rulings, and the Department of Defense should develop and implement policies to grant them such access.

The Panel should investigate whether the Privacy Act precludes any such disclosure. To the extent that it does, Congress should amend the Privacy Act to exempt the military from such requirements, to the degree needed to disclose such information to SVCs.

### **Clarify Department of Defense Regulations on the Privacy Act**

To address the ongoing ambiguity and inconsistencies in the application of the Privacy Act, the DoD should issue clear regulations on the Privacy Act in sexual assault and other criminal cases. Such regulations must address all issues identified above and provide guidance for every step of the process resulting from a report of sexual assault, including the investigation and adjudication of such cases, the appellate process, and non-judicial and administrative proceedings. Such regulations would clarify the types of records to which victims, SVCs, and defendants are entitled, and they will also allow for litigation of this interpretation of the Privacy Act.

### **Victims' Right to Participate in Non-Judicial Punishment and Administrative Proceedings**

Similar to victims' ability to participate in sentencing, the DoD should update its regulations to regularly solicit victim input when determining whether administrative action against an accused service member is appropriate or when determining the type of adverse action to take. Such a policy should include, at a minimum, the ability for victims to submit written testimony to commanders with decision-making authority and in-person or written testimony to administrative separation boards.

Congress should also pass legislation to enact this right into law. The initial version of the National Defense Authorization Act (NDAA) for Fiscal Year 2016 passed by the House of Representatives contained a provision partially addressing this issue by granting victims the ability to participate in non-judicial punishment and administrative separation proceedings (Sec. 546. Participation by Victim in Punitive Proceedings and Access to Records), although this provision was not included in the final bill. Protect Our Defenders supports the passage and implementation of such reforms.

### **Victims' Right to Information on Non-Judicial Punishment and Administrative Proceedings**

When a victim is blocked from knowing or understanding the outcome of a sexual assault report, he or she often feels unheard, revictimized, and that nothing was done in their case. As a result, these service members are less likely to recommend others report or, since many victims are sexually assaulted more than once, to report subsequent assaults. Action must be taken so that victims are informed of what administrative action, if any, is taken against the accused, and they should be provided with copies of letters of reprimand or counseling, as well as records from NJP and administrative separation proceedings, free of charge.

This policy may involve the establishment of Department of Defense guidance on the Privacy Act granting victims such access to records, Congressional mandate (e.g. as in the case of the proposed FY 2016 NDAA provision referenced above, which also granted victims access to such records), and/or Congressional amendment of the Privacy Act. Protect Our Defenders recommends that the Panel explore the best method for ensuring victims full access to

information about adverse actions taken against an assailant as a result of their report of sexual assault.

### **Public Administrative Separation Boards Based on Misconduct**

Congress should mandate that administrative discharge boards for serious misconduct be open to the public. Currently, discharge boards are closed hearings and the board's findings and recommendations are kept from the public. When military members are being discharged for serious misconduct, including felony convictions by military and civilian courts, the military should not be able to shield the public and victims from knowing who testified at the board, what the testimony entailed, and whether the military member was retained or discharged. Such transparency would enhance public confidence that the military holds those who commit criminal offenses accountable.