

GENERAL GUIDING PRINCIPLES IN RESPONDING TO SPECIAL VICTIMS' COUNSEL OFFICIAL USE REQUESTS FOR AF RECORDS

Special Victims' Counsel (SVCs) make official use requests for Air Force records in the course of their representation of clients. Usually, these are Privacy Act records. Requests from SVCs for records they believe they need to perform their SVC duties are not processed as FOIA requests, or by applying only FOIA release principles. Requested Air Force records can legally be provided to SVCs for official use purposes if the proper criteria - as with any official use request - are met. Neither the Freedom of Information Act, Privacy Act 'prohibits' a legal office or investigative office from providing appropriate requested records/information to an SVC for official use purposes. *See DoD 5400.11-R, Department of Defense Privacy Program*, paragraph C4.2.1 (sets forth test to apply in processing any official use request for Privacy Act records or records containing personal information/Privacy Act record information).

This guidance paper provides some general principles (not *per se* or concrete rules that always must apply, but general guidance) to help legal offices and others in making release decisions of investigatory and administrative/military justice process records related to a military member's conduct toward an alleged victim/victim which are requested by an SVC for official use purposes.

1. Reliance on the SVC's reasonable explanation as to why a particular Privacy Act or non-Privacy Act record is necessary for them to carry out their official duties is usually sufficient to meet the official use request test under DoD 5400.11-R, *Department of Defense Privacy Program*. This is so because the SVC is in the best position to know the scope of their Air Force duties and why they need information in order to perform their duties. However, it is ultimately the responsibility of the record OPR who is releasing the record pursuant to ensure the requested records are properly releasable under the official use request test of DoD 5400.11-R.
2. There is no *per se* rule that an SVC will 'automatically' receive less, the same or more requested documents than a defense counsel, or receive similar documents at similar moments in the process. For example, an SVC may be entitled to obtain copies of their client's own personnel, medical, etc., records that otherwise might not be provided to a defense counsel or other Air Force office/employee; or they may have an official purpose to obtain documents in those cases where no administrative or criminal disciplinary action is intended to be pursued against an accused. As with any official use request from any DoD/Air Force office, the minimal amount of records that will properly satisfy the request is provided. This rule, of course, does not mean that an SVC "automatically" receives fewer records than requested, if providing the records requested is appropriate for an official use purpose.
3. Records that contain the type of information that AFI 51-201 and DoDI 1030.02 state an alleged victim/victim is entitled to receive during the investigatory/discipline/criminal proceeding process (at the appropriate time, if applicable) are more likely be releasable

pursuant to an SVC official use request.

4. Records that are related to alleged or charged conduct between the alleged victim/victim and the accused are more likely to meet the official use request test. The more directly related, the more likely to meet the test.
5. Non-relevant sensitive personal data can be properly redacted from an otherwise releasable record under an official use request, such as social security numbers, personal email addresses, home addresses, etc. For example, when an “action authority” is considering an SVC request for all or part of an AFOSI report of investigation under AFI 71-101V1, *Criminal Investigations Program*, paragraph 1.5.2, confidential informant source information not otherwise required to be released by a military judge’s order is properly redacted.
6. AFI 51-201, paragraph 7.12.16, states that a victim of a crime punishable under Article 120 of the Uniform Code of Military Justice who testified at the proceedings is entitled to receive a copy of the record of proceedings as soon as authenticated. Accordingly, an official use request by the SVC for the record of proceedings after authentication must take into consideration this paragraph.
7. SVCs – as with any other Air Force employee receiving an Air Force Privacy Act or non-Privacy Act record for an official use purpose - must properly protect records received for an official use purpose from unauthorized access/release outside of the DoD. AFI 33-332, paragraph 2.2. When release of a record is not affirmatively required by other statute or regulation (e.g. a record of trial or under the FOIA to anyone), the government may place a restriction that it be returned at the conclusion of trial once official use has concluded. See, *Gray v. Mahoney*, 39 MJ 299 (CMA 1994).
8. A hypothetical concern that an SVC/victim could improperly use or disseminate records is not a proper basis to deny an official use request.
9. Non-relevant records/information that may be requested pursuant to an official use request are not required to be withheld if they would otherwise be required to be released to the public at the time requested pursuant to a formal FOIA request. See DoD 5400.11-R, *Freedom of Information Act Program*, paragraph C1.3.1.2.

For any questions concerning this guidance, contact Mr. [REDACTED]