

PROCESSING SPECIAL VICTIMS' COUNSEL (SVC) REQUESTS FOR RECORDS UNDER FOIA/PA RULES

This paper discusses the Freedom of Information Act (FOIA) and Privacy Act (PA) rules to apply concerning SVC/victim requests for records made in the course of the SVCs official duties. *See* DODI 1030.2, *Victim and Witness Assistance Procedures*, June 4, 2004, and AFI 51-201, *Administration of Military Justice*.

Many SVC/victim requests for records are made for Military Justice records (AF Forms 3070, non-judicial punishment actions; Article 32 reports; records of trial, etc.) and OSI records (1168 statements, OSI records of investigation) that are considered PA records under three PA System of Records Notices (SORNs): F051 AFJA I, *Military Justice and Magistrate Court Records* (July 22, 2010, 75 FR 42720); F071 AF OSI D, *Investigative Information Management System* (August 22, 2006, 71 FR 50894); and F071 AF OSI C, *Criminal Records* (June 11, 1997, 62 FR 31793).

AF/JAA has previously advised that record OPRs receiving requests for records from an SVC/victim should process the request as a functional/official use request outside the formal FOIA process. *See also* OpJAGAF 1989/58. Doing so is the appropriate and more expeditious way to process an SVC/victim request for records, or a victim's request for records that does not specifically cite the FOIA. *See* DoD 5400.7-R_AFMAN 33-302, paragraph C1.3.1.2 (discussing the application of a FOIA analysis when processing request for records made outside the FOIA process). Further, since an SVC is unable to personally sue the Air Force in court for non-release of requested records under the formal FOIA process - which is the end result of the formal FOIA process - it makes little sense to force such a request into the formal FOIA process. However, since application of the PA (b)(1) exception or (b)(3) routine use provision is discretionary, and SVC/victim record requests can also seek non-PA records that also can discretionarily not be released under an official use/functional request, this paper also discusses the analysis to apply under the FOIA exemption rules, or for when the victim makes a personal, formal FOIA request.

THE PA ANALYSIS

THE PA (b)(1) EXCEPTION: ALLOWS FOR DISCLOSURE OF APPLICABLE PA RECORDS TO OFFICERS AND EMPLOYEES AS NECESSARY FOR USE IN THE PERFORMANCE OF THEIR DUTIES

Paragraph 1 of subsection b of the PA allows for applicable PA records to be released to DoD employees. *See* 5 U.S.C. § 552a(b)(1); DoD 5400.11-R, *Department of Defense Privacy Program*; AFI 33-332; *The Air Force Privacy and Civil Liberties Program*; OpJAGAF 1989/58. Specifically, the (b)(1) exception states that records from a PA SORN may be disclosed to "those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." DoD 5400.11-R, paragraph C4.2.1, sets forth a three part test that must be met before a record from a PA SORN is provided to a DoD employee under the (b)(1) exception. If this three part test is met, the PA will not be a bar to providing appropriate records from these two PA SORNs to SVCs:

- (1) The DoD employee has a need for the record in the performance of his or her assigned duties;
- (2) the intended use of the record [by the requester] generally relates to the purpose for which the record is maintained; and
- (3) only those records as are minimally required to accomplish the intended use are disclosed (Note – #3 is essentially a relevancy test, with any applicable FOIA exemption analysis applied. The records OPR can redact unnecessary/irrelevant information contained in the records otherwise provided. And, once the intended use is completed, the records OPR can require any copies that were provided to the SVC be returned or destroyed).

SVC's requesting PA records covered by the Military Justice SORN and AFOSI SORNs can meet this test and properly be provided requested PA records when the request is made in the context of performing their assigned duties during the investigative or Article 15/courts-martial/or other Air Force disciplinary process (i.e., the purpose for which the records were created/compiled by the Air Force is similar to the SVC's intended use in the performance of their assigned duties). AFI 51-201, paragraph 7.24, further states that "[w]hen analyzing PA exceptions, consider the Air Force's interest in fostering cooperation of victims and witnesses in the instant case, whether the accused has made any disclosures about the action or disposition that would diminish his/her expectation of privacy, and other relevant factors."

However, even if the three part test for a (b)(1) disclosure to an SVC is met, the record OPR can choose not to provide the PA record to the other DoD/AF official requesting the record. AF/JAA does not advise that records be denied if the requirements of the provision (or the (b)(3) routine use provision as to victims, discussed below) are met. But, if records are denied under the PA (b)(1) exception or the (b)(3) routine use provision, or denied applying a FOIA analysis for those requests processed outside the formal FOIA process, the remedy for the DoD/AF employee record requester, such as an SVC, is to elevate their concern up the chain of command.

The PA (b)(3) ESTABLISHED ROUTINE USE PROVISION FOR VICTIM PERSONAL RECORD REQUESTS FOR APPLICABLE PA RECORDS

The established routine use for the Military Justice SORN, IAW 5 U.S.C. § 552a(b)(3), states that "documents may be released "to victims...for the purposes of providing information consistent with the requirements of the Victim and Witness Assistance program, the Victims' Rights and Restitution Act of 1990, and other laws and regulations governing the providing of information to victims." This routine use is narrower than the PA's (b)(1) exception, but can be interpreted and applied more expansively (or strictly) as related policies and laws change and develop.

The established routine use for the AFOSI SORN, *Investigative Information Management System*, IAW 5 U.S.C. § 552a(b)(3), states that documents may be released outside the DoD "[t]o victims ... [only] for the purposes of complying with the requirements of the Victim and Witness Assistance Program, the Sexual Assault Prevention and Response Program, and the Victims' Rights and Restitution Act of 1990." This routine use is also narrower than the PA's (b)(1) exception, but can be interpreted and applied more expansively (or strictly) as related policies and laws change and develop.

As with release under the (b)(1) exception, DoD 5400.11-R, paragraph C4.2.3.1., provides guidance as to when a record may be released under an established routine use. However, as noted above, a record OPR is not required to release records to a requester who meets the (b)(1) exception requirements or a (b)(3) routine use provision. Application of the (b)(3) routine use provision is also substantially narrower than an AF employees request for PA records under (b)(1) exception.

Accordingly, SVC requests for non-PA records (which also can be provided under an official use/functional use relevancy basis); for PA records that are not released to an SVC under the above PA (b)(1) exception provision; for PA records that are not released to a victim under a (b)(3) routine use provision; or for a victim's formal FOIA request, are releasable after applying a FOIA analysis.

Fewer records will be released to an SVC or a victim under only a FOIA analysis or pursuant to a formal FOIA request (victim's). This is so, in part, because unlike, for example, a release under PA's (b)(1) exception, once records are released under the FOIA/analysis, the requester can do whatever they want with the records. Further, although the FOIA requester may "need" the records for a particular purpose, relevancy or need is not part of a FOIA analysis/exemption.

THE FOIA ANALYSIS

DoDI 1030.2, *Victim and Witness Assistance Procedures*, June 4, 2004, paragraph 6.3.2., states that except for information that is releasable under paragraph 6.2 and subparagraph 6.3.1 of that Instruction, "requests for information relating to the investigation and prosecution of a crime (e.g., investigative reports and related documents) from a victim or witness shall be processed in accordance with DoD 5400.7-R." DoD 5400.7-R_AFMAN 33-302, *Freedom of Information Act Program*, governs requests for Air Force records pursuant to the formal Freedom of Information Act (FOIA) process, or that are made outside the formal FOIA process, but in accordance with FOIA exemption release rules. *See* DoD 5400.7-R_AFMAN 33-302, paragraph C1.3.1.2.

Likewise, AFI 51-201, *Administration of Military Justice*, requires a proper analysis under the FOIA and PA concerning the release of certain information to the victim and other third parties, unless release is specifically authorized to a victim as a matter of policy as set forth in the AFI (or, as noted, allowed under the PA (b)(1) exception paragraph or a (b)(3) routine use). *See* the following paragraphs of AFI 51-201:

Paragraph 3.7.2 ("trial counsel should distinguish between rules pertaining to discovery and rules pertaining to the release of information to a third party (such as the Freedom of Information Act or Privacy Act);

Paragraphs 9.7.1.1 and 9.7.1.2 ("*Note: Ensure all records provided to the victim are redacted in accordance with the Freedom of Information Act and the Privacy Act*") (emphasis in original);

Paragraph 13.5, (concerning release of information to the public: "The release of information relating to a criminal proceeding is subject to the Air Force Rules of Professional Conduct, the Air Force Standards for Criminal Justice, implementing directives, security requirements,

judicial orders protecting information, and applicable laws such as the Privacy Act, the Freedom of Information Act (FOIA), and the Victim and Witness Protection Act”); Paragraph 13.7 (“The disclosure authority for such documents and records is the OPR for those records under the provisions of the, AFI 33-332, *Privacy Act Program* (sic), and/or DoD 5400.7-R_AFMAN 33-302, *DoD Freedom of Information Act (FOIA) Program*”);

Paragraph 13.7.1 (“The court-martial record of trial is subject to release determination under the Privacy Act and Freedom of Information Act”);

Paragraph 13.7.2 (“All other documents or records, including documents which will become part of a record of trial, and including those which are attached to the court-martial record of trial but not made a part of the record of trial under the provisions of RCM 1103 (for example, an Article 32 report and its attachments) are also subject to release determination under the Privacy Act and Freedom of Information Act”).

NOTE: An agency cannot justify withholding an entire document under the FOIA or a FOIA analysis simply because it contains some exempt material. Non-exempt material must be released after the exempt material is redacted. See [*Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 260 \(D.C. Cir. 1977\)](#). The FOIA was passed in 1966 to require the Government to release information/records when requested, unless a specific exemption or exemptions applied to withholding information contained in the requested record.

THE FOIA EXEMPTIONS

The Department of Justice (DOJ) FOIA Guide @ <http://www.justice.gov/oip/foia-guide.html> has a good discussion of the applicability and scope of each FOIA exemption. The electronic Guide is kept updated year to year. Note: If the link under the exemption number does not work, try clicking on the next link underneath the discussion of that exemption number. For instance, for 7(A), click on the “Introduction” link.

Exemption 1 protects information that is properly and currently classified under an Executive Order (the current primary EO for classified information is EO13526).

Exemption 2 protects internal personnel rules and practices of an Agency.

Exemption 3 protects information specifically withheld from release to the public under another federal statute.

Exemption 4 protects trade secrets and confidential commercial or financial information of a company or individual.

Exemption 5 protects the same privileged information that could be – but does not have to be – withheld from a party opponent engaged in civil litigation against the federal agency. The three most commonly asserted civil litigation privileges under the FOIA are the pre-decisional, deliberative process privilege; the attorney-client privilege; and the attorney work product privilege. Although use of this exemption by an Agency is discretionary, the Air Force does not

release attorney client privileged/work product privileged information unless waived by the Air Force/client.

Exemption 6 protects information that, if released, would constitute a clearly unwarranted invasion of a person’s privacy, after balancing the privacy interest of the individual against the public interest in the information requested. NOTE: This Exemption does not “implement the Privacy Act.” The PA was passed eight years after the FOIA and the creation of this exemption. Exemption 6 and its counterpart Exemption 7(C) are broader than the PA. It protects all protectable personal information contained in non-PA records too.

Exemption 7 protects information created or compiled for a law enforcement purpose. *See* discussion at <http://www.justice.gov/oip/foia-guide14/exemption7.pdf>. There are six subparts to this exemption: 7(A), (B), (C), (D), (E) and (F).

Exemption 8 protects matters that are contained or related to the examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions. Exemption 9 protects geological and geophysical information and data.

SVCs/victims do not commonly make requests for classified records, or for records that meet the withholding criteria of exemptions 2, 3, 4, 8 and 9. Further, use of Exemption 5 by the Air Force, except for attorney-client/attorney work-product privileged information unless waived by the Air Force, is discretionary.

Accordingly, we will address in detail the use of Exemption 7. The records to which this exemption may apply include records concerning the investigation of a person for alleged misconduct; background investigations, disciplinary/courts-martial documents, etc.

Exemption 7(A) pertains to records created or compiled for a law enforcement purpose if release “could reasonably be expected to interfere with enforcement proceedings” [pending or prospective]. The use of this exemption is temporal, that is it can apply only during the course of the law enforcement proceeding. *See* discussion at DOJ FOIA Guide, http://www.justice.gov/oip/foia_guide09/exemption-7A-2009.pdf.

7(A) is less likely to apply after preferral of charges, after referral (less likely), or after the Article 32 hearing (even less likely). In other words, the further down the disciplinary/courts-martial process, the less likely this exemption will apply. And, after the disciplinary action itself – even if there is an appeal avenue such as post-courts-martial conviction – this exemption subpart is unlikely to apply.

Exemption 7(B) pertains to records created or compiled for a law enforcement purpose if release “would deprive an individual of the right to a fair trial or impartial adjudication.”

This exemption is rarely used because it is difficult to meet. For instance, the DOJ FOIA Guide devotes only two pages to a discussion of this subpart, as opposed to devoting 39 pages to a discussion of subpart 7(C). *See* discussion at <http://www.justice.gov/oip/foia->

[guide14/exemption7b.pdf](#). This is so because in order for this exemption to apply, release of the requested information must actually “deprive” an individual of any right to a fair trial or impartial adjudication. But see two part test of *Washington Post* decision, stating that release must show “that is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings.” *Washington Post Co. v. DOJ*, 863 F.2d 96 (D.C. Cir. 1988).

Use of this exemption is also temporal.

Exemption 7(C) pertains to records created or compiled for a law enforcement purpose if release “could reasonably be expected to constitute unwarranted invasion of [an individual’s] privacy.”

This Exemption 7 subpart is the most applicable exemption that supports withholding information or records created/compiled for a law enforcement purpose.

See <http://www.justice.gov/oip/foia-guide13/exemption7c.pdf>. Review of the FOIA Guide materials addressing Exemption 6, <http://www.justice.gov/oip/foia-guide14/exemption6.pdf>, will also be helpful because the interests involved are similar, although the two Exemptions are somewhat differently applied.

When reviewing records created/compiled for a law enforcement purpose to an SVC or victim, the release of personal information concerning the victim to the SVC/victim is not an issue. Accordingly, the required balancing test under 7(C) is only applicable to assess the privacy interest of the accused/subject and third parties other than the victim, such as witnesses named in the documents.

The privacy interest of the subject/accused will primarily be the privacy interest that supports withholding records or information requested by an SVC or victim, unless the public interest in release outweighs the privacy interest. Sometimes, the privacy interest of witnesses and other personnel named in requested documents can be properly protected by redacting their name, duty title and other identifying personal information (PII).

For example, the privacy interest of the accused/subject in release of investigative and associated court-martial records is greatest at the start of an investigation. The accused’s privacy interest begins to diminish as the accused moves through the process of, for example, preferral of charges, an Article 32 hearing, referral of charges, the posting of the courts-martial trial date on the Air Force website, the court-martial itself, etc. Each of these stages increases the public interest/exposure of the charges/allegations against the accused to the public.

The fact a request for records is being made by the SVC or the victim is a factor to consider in balancing the privacy interest of the accused/subject against the public interest. This is so because Congress and the DoD have created statutes and rules that have put an accused/subject on notice that when it comes to the victim, the victim will be entitled to more information about the accused/subject’s conduct toward the victim than other third party requesters, such as “Joe Q” citizen¹. Accordingly, the accused/subject’s reasonable expectation of privacy vis-à-vis the production of records to the victim/SVC during the investigatory/discipline/courts-martial

¹ For example, AFI 51-201 lists information a victim is entitled to receive during the process.

process is diminished, while the public interest in release of requested records to the SVC/victim in such situations is increased. The attached document lists information noted in DODI 1030.2 and AFI 51-201 that must be provided to a victim. To the extent the information is also contained in a record specifically requested by the SVC/victim, the record would also be releasable.

NOTE: DODI 1030.2 has been sent to the Air Force and other Services for revision/update, with a suspense date of July 11th. Revisions may provide further specific release authority to SVCs/victims.

Other factors applicable to the balancing test analysis include the rank/grade of the accused/subject; seriousness of the charges; publicity, etc.

Exemption 7(D) pertains to records created or compiled for a law enforcement purpose if release “could reasonably be expected to disclose the identity of a confidential source.” *See* DOJ FOIA Guide, <http://www.justice.gov/oip/foia-guide13/exemption-7d.pdf>.

Exemption 7(E) pertains to records created or compiled for a law enforcement purpose if release “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” *See* <http://www.justice.gov/oip/foia-guide13/exemption7e.pdf>.

Exemption 7(F) pertains to records created or compiled for a law enforcement purpose if release “could reasonably be expected to endanger the life or physical safety of any individual.” *See* DOJ FOIA Guide, <http://www.justice.gov/oip/foia-guide13/exemption7-f.pdf>.

Two other provisions of the FOIA (not exemptions) permit withholding of records under a FOIA analysis. 5 U.S. C. § 552(c)(1) allows an Agency to treat requested records as not subject to release under the FOIA if an investigation or proceeding involving a possible violation of criminal law is ongoing; and there is reason to believe the subject is not aware of the proceeding (and we do not want him at the time to be aware); and disclosure of the existence of records could reasonably be expected to interfere with enforcement proceedings. Use of this provision is temporal – the ability to use the provision ceases when the proceeding ends. This provision is usually most applicable at the start of an investigation, prior to the time investigators would normally inform the subject of the proceeding/investigation, or the subject would otherwise reasonably know of the proceeding/investigation. *See* DOJ FOIA Guide, <http://www.justice.gov/oip/foia-guide13/exclusions.pdf#p3>.

5 U.S.C. § 552(c)(2) allows a criminal law enforcement agency to entirely exclude records from the FOIA process when necessary to avoid divulging the existence of a confidential source relationship. Specifically, this provision states “Whenever an informant record maintained by a criminal law enforcement agency under an informant’s name or personal identifier are requested by a third party according to the informant’s name or personal identifier, the agency may treat the records as not subject to the requirements [of the FOIA] unless the informant’s status as an informant has been official confirmed.” *See* DOJ FOIA Guide, <http://www.justice.gov/oip/foia-guide13/exclusions.pdf#p7>.

This (c)(2) provision is not commonly invoked as the determination has to be made that release of the informant record itself, even if redacted, would confirm that a person is a confidential informant (which could be the case if the records were requested by the requester using the informant's name or other personal identifier. In that case, even if the Air Force could remove all PII of the informant, the requester would still know the records are associated with the informant named by the requester in his request.

CONCLUSION

Requests from SVCs/victims for Air Force records associated with an accused's/subject's conduct toward the victim and subsequent investigatory/disciplinary action, absent specific guidance on the type of information or records that are releasable to an SVC/victim, are properly addressed as a functional use/official use request under PA ((b)(1) exception), and FOIA principles, as appropriate, as noted in DODI 1030.2 and AFI 51-201. SVC requests for records should be directly responded to by the OPR for the record.

Depending on what an SVC seeks and why, requests for records associated with the Military Justice and AFOSI PA SORNs may be releasable to an SVC under the Privacy Act's (b)(1) exception. Further, SVCs must properly protect PA records/information provided to them for official use/functional use purposes. In the absence of release under that exception, or to the SVC/victim under the PA (b)(3) routine use provision, release is governed under FOIA release principles. FOIA rules also apply to any victim formal FOIA request. Fewer records will be releasable to an SVC (for PA or non-PA records) under only a FOIA analysis, or to a victim pursuant to a formal FOIA request.

Additional guidance on applying the FOIA/PA analysis to a request for records can be found in the FOIA, Privacy Act, DOJ FOIA Guide, DoD 5400.7-R_AFMAN 33-302; Office and Management and Budget Guidance concerning the PA; the authorities cited in this paper; as well as information on AF/JAA's Information Access Law site at <https://aflsa.jag.af.mil/AF/lynx/jaa/>.

AF/JAA provides regular FOIA DCO training at 1200hrs every Wednesday, unless otherwise noted in TJAG's Online News Service. Mr. Mike McIntyre, AF/JAA, is also available to provide individual organizational/office FOIA training via DCO, or in person.

Attachment: DODI 1030.2 and AFI 51-201 Victim Information Disclosures