

**SVC DISCUSSIONS WITH VICTIM CONCERNING INFORMATION CONTAINED IN PA RECORDS RECEIVED BY THE SVC FROM AN AIR FORCE OFFICE UNDER THE PRIVACY ACT'S (B)(1) EXCEPTION**

During the recent June 2014 FOIA/PA DCO concerning discretionary release of Privacy Act (PA) records requested by an SVC under the PA's (b)(1) exception (for another DoD/AF employee's 'need to know' for official duty purposes), a question was asked about the propriety of an SVC then discussing the content of those PA records/information with the victim.

Absent constitutional requirements or specific statutory/regulatory authority, an SVC (or any other AF employee) is not 'automatically' entitled under the PA to discuss all PA records/information with the victim (or other third party) he or she otherwise properly receives under the (b)(1) exception. See 5 U.S.C. § 552a(b); DoD 5400.11-R; *Department of Defense Privacy Program*; AFI 33-332, *The Air Force Privacy and Civil Liberties Program*. An SVC (or any other AF employee) has to be careful about what PA record information of another person they discuss with the victim or other individual contained in PA records he/she receives pursuant to a Privacy Act (b)(1) exception release. This is so because the record/information was released to the SVC under the (b)(1) exception for the SVC's official duty purposes, to be properly protected by the SVC.

So, what information released to the SVC under the PA (b)(1) exception can the SVC further discuss with the victim depends on what the information is about. Some general examples of permissible discussions:

- Victim's statement/testimony. Discussion of information necessary to prepare victim's testimony or SVC court filings
- Charge sheet, information/evidence related to victim's conduct and accused's conduct toward victim/collateral conduct of victim; information related to charges concerning accused's conduct toward victim
- Article 32 report or transcript/evidence discussing/related to the accused's conduct (or vice-versa) toward the victim
- Victim's medical records/information, victim's personnel file, and other personal information of the victim contained in Air Force records
- Record of trial information related to charges concerning victim
- Information that is otherwise publicly available to the public
- Information listed in AFI 51-201 and DODI 1030.2 that is the type of information the Air Force must provide the victim
- Information consistent with a PA (b)(3) routine use provision applicable to release of PA record information to a victim (AFOSI and JA each have one System of Records Notice (SORN) that has a (b)(3) use provision applicable to victims).
- With Air Force employees/victim who are properly assisting the SVC with their duties (consulting) or who are also authorized to know the information as part of their assigned Air Force duties – i.e., an extension of the PA (b)(1) exception rule.
  - o This general rule applies with other AF employees, such as the SVC's supervisor(s)/chain of command, trial counsel, defense counsel, SJA/Deputy SJA, convening authority,

investigators, other legal personnel/AF personnel properly providing advice/information such as various AFLOA offices, AFOSI, Security Forces, etc.<sup>1</sup>

Some general examples of usually impermissible dissemination of information to victims obtained by SVCs from otherwise properly released PA records/information under the (b)(1) exception:

- Discussion about unrelated/irrelevant personal information of another person, including the accused, which can include home addresses, medical information, social security numbers, financial information, background security checks information, and any other information not pertinent to the accused's conduct toward the victim. Note: Usually, this type of information can also be redacted from the PA record prior to a (b)(1) release

A concern that an SVC (or any other employee receiving PA records/information under a (b)(1) exception analysis) will improperly share the information with another individual can be a factor for the record OPR to consider in deciding whether to release the record/information under the PA (b)(1) exception, but should not, by itself, be a legal impediment to otherwise providing the PA record/information under the (b)(1) PA exception if the three-part test of DODI 5400.11-R for a (b)(1) release is met. Rather, the SVC must fully understand the PA rules that apply to his or her further dissemination to other individuals of the PA record/information they receive under the (b)(1) exception.

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<sup>1</sup> *Jones v. Department of the Air Force*, 947 F.Supp 1507, 1515-16 (D. Colo. 1996); *Gard v. U.S. Dep't of Educ.*, 789 F. Supp 2d 96, 110 (D.D.C. 2011) (finding a permissible intra-agency disclosure where information was disclosed to an "occupational medicine consultant" under contract with the Department of Education for purposes of evaluating employee's risk to coworkers); *Viotti v. Department of the Air Force*, 902 F.Supp 1331, 1337 (D. Colo. 1995), *aff'd*, 153 F.3d 730 (10th Cir. 1998); *Pippinger v. Rubin*, 129 F.3d 519, 529-531 (10th Cir. 1997) (supervisor disclosure to staff members for proper official purpose); *Gamble v. Dep't of Army*, 567 F. Supp 2d 150, 156 (D.D.C. 2008); *Bigelow v. DOD*, 217 F.3d 875, 879 (D.C. Cir. 2000). Courts have also recognized appropriate discussion/disclosure of Privacy Act records/information with other agency employees (to include hired contractors/volunteers) for consulting purposes. *Bengle v. Reilly*, No. 88-587, 1990 U.S. Dist. LEXIS 2006, at \*21 (D.D.C. Feb. 28, 1990) (disclosure to personnel consulted by employee's supervisors in order to address employee's complaints); *Gard v. U.S. Dep't of Education*. This consultation purpose could also be applicable to SVC discussions with the victim, who is an Air Force employee, when there is an SVC valid need to have the victim's consultation on a specific official matter to which the specific Privacy Act records/information is relevant.

However, these cases do not necessarily stand for the proposition that an agency employee can simply choose to "consult" with any other employee he chooses about information contained in another person's Privacy Act record, or for other than a reasonable official purpose/reason. Rather, there should be some connection between the Air Force employee properly receiving the record under the exception (b)(1) and his consultation with the other agency employee, such as the consulted employee's specific expertise that would be helpful; the consulted employee's similar official duties to the consulting employee; the consulted employee's supervisory position; direct impact on the consulted employee of the agency decision to be made; or the consulted employee's need to know in order for the consulted employee to properly exercise rights set forth in agency regulations. And, finally, it should be necessary for the agency employee to divulge the specific information in the Privacy Act record in order to effectuate the otherwise valid consultation purpose(s). In other words, if the consulted employee does not need to know specific information in the Privacy Act record in order to provide their requested opinion, there is no reason to provide the information.

