

**JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 1**

49. Services: What regulations and policies govern how military law enforcement, trial counsel, defense counsel obtain mental health records of military victims? What procedures do MCIOs, prosecutors, and defense counsel follow to obtain a military victim’s mental health records?

USA	<p>Regulations and Policies:</p> <ul style="list-style-type: none"> - 5 USC § 552a, Privacy Act. See http://www.gpo.gov/fdsys/pkg/USCODE-2010-title5/html/USCODE-2010-title5-partI-chap5-subchapII-sec552a.htm. - Health Insurance Portability and Accountability Act (HIPAA) of 1996, Public Law 104-191 (1996). See http://www.gpo.gov/fdsys/pkg/PLAW-104publ191/html/PLAW-104publ191.htm. - DoD 6025-18R, DoD Health Information Privacy Regulation. - See http://www.dtic.mil/whs/directives/corres/pdf/602518r.pdf. - Rules for Courts Martial 703, 905, and 906. See http://www.apd.army.mil/pdffiles/mcm.pdf. - Army Regulation 340-21, The Army Privacy Program. - See http://www.apd.army.mil/pdffiles/r340_21.pdf. - Army Regulation 40-66, Medical Records Administration and Health Care Documentation. - See http://www.apd.army.mil/pdffiles/r40_66.pdf. - Army Regulation 195-2, Criminal Investigation Activities. - See http://www.apd.army.mil/jw2/xmldemo/r195_2/main.asp. - Army Regulation 190-2, Military Police Investigations. <p>The Department of Defense revised its policy concerning access to personally identifiable health information of individuals to conform to the requirements of the Health Insurance Portability and Accountability Act (Pub. L. 104-191) effective April 14, 2003. As a general matter, such information shall not be used or disclosed except for specifically permitted purposes.</p> <p>There is no specific exception that would allow trial counsel or commanders access to the mental health records of Soldiers. Covered entities of the Military Health System may disclose protected health information in a judicial or administrative proceeding only if the request for the information is through an order from a court or administrative tribunal. Such information may also be disclosed in response to a subpoena, discovery request, or other lawful process if certain assurances regarding notice to the individual or a protective order are provided.</p> <p>Access to mental health records by law enforcement is limited to six circumstances and subject to specified conditions:</p> <ol style="list-style-type: none"> (1) as required by law (including court orders, court-ordered warrants, subpoenas) and administrative requests; (2) to identify or locate a suspect, fugitive, material witness, or missing person;
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(3) in response to a law enforcement official's request for information about a victim or suspected victim of a crime;

(4) to alert law enforcement of a person's death, if the covered entity suspects that criminal activity caused the death;

(5) when a covered entity believes that protected health information is evidence of a crime that occurred on its premises; and

(6) by a covered health care provider in a medical emergency not occurring on its premises, when necessary to inform law enforcement about the commission and nature of a crime, the location of the crime or crime victims, and the perpetrator of the crime.

Psychotherapy notes are subject to additional limitations under military privacy policy. Psychotherapy notes include notes recorded (in any medium) by a healthcare provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes exclude medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.

Release or use of psychotherapy notes requires patient authorization unless disclosure is necessary to carry out treatment, training, defensive litigation, healthcare operations, avert a serious and imminent threat to the health or safety of a person or the public, or is required by law.

"Required by law" includes, but is not limited to, court orders and court-ordered warrants; subpoenas or summons issued by a court, grand jury, an inspector general, or an administrative body authorized to require the production of information; an authorized investigative demand; and statutes or regulations that require the production of information.

Special Victim Counsel have filed Petitions for Extraordinary Relief to prevent *in camera* reviews when the military judge orders the production of a victim's mental health record for *in camera* review without conducting the evidentiary hearing required by Mil. R. Evid. 513(e)(2). In a recent case, the Army Court of Criminal Appeals ruled in favor of the victim and ordered the military judge to comply with Mil. R. Evid. 413(c)(2) prior to deciding whether to order production of Petitioner's mental health records for *in camera* review. See Enclosure 15

ENCLOSURE 15: SVC Petition to the Army Court of Criminal Appeals

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USAF	<p><u>Regulations and Policies</u></p> <p>Mental health records are protected from release by 45 C.F.R. Part 164, Subpart E, <i>Privacy of Individually Identifiable Health Information</i>, DoD 6025.18-R, <i>DoD Health Information Privacy Regulation</i>, AFI 33-332, <i>The Air Force Privacy and Civil Liberties Program</i>, AFI 44-172, <i>Mental Health</i>, and AFI 44-109, <i>Mental Health, Confidentiality, and Military Law</i>.</p> <p>See a complete list of references below for the regulations and policies that govern how military law enforcement, trial counsel, and defense counsel obtain mental health records of military victims who seek mental health treatment from a Military Treatment Facility (MTF).</p> <p><u>Procedures</u></p> <p>All protected health information (PHI), including information that may be protected by MRE 513 is protected from unauthorized disclosure pursuant to DoD 6025.18-R, <i>DoD Health Information Privacy Regulation</i>. That regulation adopts HIPAA's Privacy Rule, establishing specific standards for the use and disclosure of health information. All medical records are also Privacy Act records, protected under 5 U.S.C. § 552a.</p> <p>Commanders and legal representatives only have access to mental health records when they have a need to know in the official performance of their duties. AFI 44-109, paras. 2.1 and 3.6.1.4. A MTF may disclose the protected health information of an active duty member to the member's commander only if the information is needed to determine the member's fitness for duty or fitness to perform any particular mission, assignment, order, etc. However, only the minimum amount of protected health information necessary to effectuate the purpose of the disclosure may be provided.</p> <p>Disclosure to law enforcement during the investigative stages is governed by DoD 6025.18-R, para. C7.6. PHI may be released for a law enforcement purpose to a law enforcement official, in compliance with and as limited by relevant requirements of a subpoena, summons or investigative demand, if the information sought is relevant and material to a legitimate law enforcement inquiry. The request must be in writing, specific and limited in scope to the information that is sought, and information that does not identify the individual could not reasonably be used. PHI may be released in response to a law enforcement official's request for such information regarding a crime victim only if the victim consents; or, if the victim is unable to consent or there is some other emergency circumstance. If the victim is unable to consent, law enforcement must represent that the information won't be used against the victim and the information is necessary to investigate a crime committed by someone other than the victim.</p> <p>AFOSI agents request access to military members' mental health records using a sample request template that is contained in an attachment to the AFOSIMAN 71-118,</p>
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Volume 4. That attachment requires an explanation of why requested mental health records are releasable under MRE 513. Access to AFOSIMAN 71-118, Volume 4, is restricted and is not attached.

Investigators work with their installation legal office to appropriately tailor the request. The MTF will evaluate the request, discuss it as necessary with the Medical Law Consultant, and release the minimum amount of information to satisfy the purpose of the disclosure. If the investigator disagrees with the MTF response, the investigator may discuss the request and response with the medical law consultant.

In general, defense counsel have no ability to obtain mental health records without the consent of the victim or pursuant to an order from a military judge. As discussed in response to RFI #46, the generally accepted approach is for defense counsel to ask the victim (during cross examination if the victim testifies at the Article 32 hearing) if they have sought treatment because of the allegations at issue in the case, and without going into privileged specifics, if they discussed these allegations with the mental health provider. This information gives the defense counsel a preliminary basis to consider whether to file an MRE 513 motion at trial.

Most victims elect not to provide consent for review of their records. However, some have consented to release of records to defense counsel and some have consented to an *in camera* review of the records by the military judge.

While not routinely requested, a victim can consent to release of such records and fill out the applicable form required by a particular medical institution. Generally, trial counsel do not seek consent to release of such records, but some counsel have sought non-military victims' assistance in securing such records, sealed, in anticipation of litigation under MRE 513(d)(8) regarding *in camera* review. Such a practice may be beneficial as it may avoid a delay in trial. Trial counsel routinely object to review and release of such information and aggressively litigate the issues in pretrial proceedings. Trial counsel routinely advocate for application of the *Klemick* test during MRE 513 motion practice as discussed in response to RFI #46. *U.S. v. Klemick*, 65 M.J. 576 (N.M.C.C.A. 2006)

If the military judge orders release of the victim's mental health records, the trial counsel will forward the order to the MTF for a response. The Medical Law Consultant will assist in the response as appropriate.

References:

- Health Insurance Portability and Accountability Act (HIPAA) of 1996
- Code of Federal Regulations (CFR), Title 45, Section 164.502, *Uses and Disclosures of Protected Health Information*
- 42 U.S.C. 290dd-2 – *Confidentiality of Records*
<http://www.law.cornell.edu/uscode/text/42/290dd-2>
- DoD 6025.18-R, *DoD Health Information Privacy Regulation*, Chapter 7, "Uses

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	<p>and Disclosures for Which an Authorization or Opportunity to Agree or Object is Not Required” http://www.dtic.mil/whs/directives/corres/pdf/602518r.pdf</p> <ul style="list-style-type: none"> - AFPD 71-1, <i>Criminal Investigations and Counterintelligence</i> http://static.e-publishing.af.mil/production/1/saf_ig/publication/afpd71-1/afpd71-1.pdf - AFI 44-109, <i>Mental Health, Confidentiality and Military Law</i> (including changes made in AFGM 2014-01) http://static.e-publishing.af.mil/production/1/af_sg/publication/afi44-109/afi44-109.pdf - AFI 44-172, <i>Mental Health</i> http://static.e-publishing.af.mil/production/1/af_sg/publication/afi44-172/afi44-172.pdf - AFI 33-332, <i>The Air Force Privacy and Civil Liberties Program</i> http://static.e-publishing.af.mil/production/1/saf_cio_a6/publication/afi33-332/afi33-332.pdf - AFOSIMAN 71-118, Volume 4, <i>General Investigative Methods</i>, Chapter 6, “Records Checks” - TMA Privacy and Civil Liberties Office, Information Paper, <i>Uses and Disclosures of PHI for Law Enforcement Purposes</i>, February 2011 http://www.tricare.mil/tma/privacy/downloads/20121210/Uses_and_Disclosures_of_PHI_for_Law_Enforcement_Purposes_Updated_February_2011.pdf - TMA Privacy and Civil Liberties Office, Information Paper, <i>14 Uses and Disclosures When an Authorization is Not Required</i>, March 2010 http://www.health.mil/~media/MHS/Fact%20Sheet%20Files/14_Uses_and_Disclosures_When_an_Authorization_is_Not_Required_Updated_March_2010%20(1).ashx <p>ATTACHMENTS:</p> <ul style="list-style-type: none"> - Atch 49.1 – Defense Counsel Memo on Obtaining Mental Health Records of Military Victims (3 Oct 2014) - Atch 49.2 – Defense Motion to Compel Discovery of Mental Health Records (Sample) - Atch 49.3 – <i>U.S. v. Klemick</i>, 65 M.J. 576 (N.M.C.C.A. 2006)
<p>USN</p>	<p>There are no formal regulations outside general guidelines on the use of military medical records. Trial and defense counsel both follow the procedures of Military Rule of Evidence 513 to request the mental health records of a victim when the victim does not authorize release. They file a motion with the court describing the records they are seeking and must notify the patient. Under <i>United States v. Klemick</i>, 65 M.J.576 (N.M.C.C.A. 2006), they must make a showing that there is “a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would lead to” admissible evidence. The Military Judge then conducts a hearing, which may be closed. If necessary, the Military Judge will conduct an in camera review of the documents before producing them. If an in camera review is not necessary, the Military Judge will directly issue an order to produce the documents. MCIOs and trial counsel are trained to provide heightened care over personal information including medical and mental health records. If records are material to the preparation of the case/investigation, they are requested directly from the military medical provider. Unless specifically relevant to the determination of probable cause,</p>

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	<p>behavioral health records are separated from medical records and sealed unless directed open by a military judge.</p>
<p>USMC</p>	<p>Regulations and Policies:</p> <p>5 USC § 552a, Privacy Act. <i>See</i> http://www.gpo.gov/fdsys/pkg/USCODE-2010-title5/html/USCODE-2010-title5-partI-chap5-subchapII-sec552a.htm.</p> <p>Health Insurance Portability and Accountability Act (HIPAA) of 1996, Public Law 104-191 (1996). <i>See</i> http://www.gpo.gov/fdsys/pkg/PLAW-104publ191/html/PLAW-104publ191.htm.</p> <p>DoD 6025-18R, DoD Health Information Privacy Regulation. <i>See</i> http://www.dtic.mil/whs/directives/corres/pdf/602518r.pdf.</p> <p>Rules for Courts Martial 703, 905, and 906. <i>See</i> http://www.apd.army.mil/pdffiles/mcm.pdf.</p> <p>Department of the Navy Privacy Program. <i>See</i> http://doni.daps.dla.mil/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-200%20Management%20Program%20and%20Techniques%20Services/5211.5E.pdf</p> <p>Enclosure (15) provides the procedures for obtaining medical and mental health records.</p> <p>ENCLOSURE (15): SECNAV Instruction 5430.107 - (Mission and Functions of the Naval Criminal Investigative Service) (28 Dec 2005)</p>
<p>USCG</p>	<p>Disclosure of mental health records of military victims being treated at a Coast Guard facility is governed by Commandant Instruction Manual 5260.3, Coast Guard Freedom of Information and Privacy Acts Manual. Before obtaining a military victim's health record, trial counsel will ask the victim whether he or she is willing to allow access to the record. In most cases the victims consent to the disclosure. If the victim consents, the trial counsel will obtain a sealed copy of the medical record and deliver it directly to the military judge with the request that the military judge review the material <i>in camera</i> before releasing to the defense and government counsel. If the victim refuses and the government believes that it needs the records to pursue the case, prosecutors and CGIS may ask the facility to disclose the record after explaining the official purpose behind the request. If defense counsel requests the record through discovery and trial counsel does not believe that the defense counsel has a legitimate reason for the request (such as if trial counsel believes that the defense is asking for the record solely to intimidate the victim), trial counsel will deny the request, which allows the defense the opportunity to motion the court to compel compliance after an <i>in camera</i> review.</p>