

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

52. Services: Victim notification regarding the use of mental health records:

a. Is there a policy addressing victim notification when the government seeks a victim’s mental health records?

USA	<p>Depending on the method of request under DoD 6490.18-R, the Military Treatment Facility (MTF) may not be required to provide notification to the victim. Further, there is a provision that allows law enforcement to request that the MTF not inform a patient that a request for medical records has occurred. As a result, the MCIO may request in writing that the MTF temporarily not disclose to the patient and specify the time that such a suspension is required because such disclosure would be reasonably likely to impede the MCIO's activities. <i>See</i> DoD 6490.18-R, C13.1.2.1. Once the suspension expires, the patient will know who has obtained their health information and for what purpose. However, absent a patient’s request for an accounting, there is no requirement to affirmatively notify a patient that a disclosure for law enforcement purposes has been made.</p> <p>If a healthcare provider receives an order, warrant, or subpoena signed by a judge, magistrate, or administrative tribunal with jurisdiction over the provider, the health care provider would comply with the order, warrant, or subpoena. (45 C.F.R. § 164.512(e)(1)(i), (f)(1) and DoD 6025.18-R, C7.5.1.1). In such cases, the HIPAA Privacy Rule presumes that the patient’s privacy interests are protected because an independent judicial or administrative officer has considered and ordered the disclosure.</p> <p>If the method is through a subpoena issued post-referral of charges to a court-martial by Trial Counsel, discovery request, or other lawful process, that is not accompanied by an order of a court, the victim will be notified of the request. <i>See</i> DoD 6490.18-R, C7.5.1.2.1.</p>
USAF	<p>In accordance with AFI 44-172, <i>Mental Health</i>, Atch 4, the mental health staff provides patients with a written Informed Consent/Patient Information Sheet at the initial visit. This form includes a section on disclosure policies and informs the patient that mental health providers provide the minimum amount of information to satisfy the purpose of required disclosures.</p> <p>There is no current Air Force Medical Service (AFMS) policy specifically requiring victim notification when the government seeks the victim’s mental health records. However, DoD 6025.18-R, <i>DoD Health Information Privacy Regulation</i>, when the covered entity discloses protected health information (PHI) of an individual, that individual has a right to receive an accounting of those disclosures, with certain exceptions listed in DoD 6025.18-R, para. C13.1.1. Disclosures of a victim’s mental health records by the MTF under a court order or as otherwise required by law, would result in an accounting. Under DoD 6025.18-R, para. C13.2, the accounting of each disclosure will include:</p> <ol style="list-style-type: none"> 1. The date of the disclosure; 2. Name of the entity or person who received the PHI and address of such entity or

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	<p>person; a brief description of the PHI disclosed; and</p> <p>3. A brief statement of the purpose of the disclosure so the individual is informed of the basis for the disclosure.</p> <p>If the records are requested pursuant to a subpoena or discovery request for use in a judicial or administrative proceeding, and such request is not accompanied by a court order, the procedures outlined in DoD 6025.18-R, para. C7.5.1.2. would be followed. This paragraph requires that the MTF receive satisfactory assurance from the party seeking the information that they have made reasonable efforts to give the individual notice of the request, or to secure a qualified protective order. If the records are subject to MRE 513, the records would not be provided unless the victim waived the privilege.</p> <p><u>References:</u></p> <ul style="list-style-type: none"> - AFI 44-172, <i>Mental Health</i> http://static.e-publishing.af.mil/production/1/af_sg/publication/afi44-172/afi44-172.pdf - DoD 6025.18-R, <i>DoD Health Information Privacy Regulation</i> http://www.dtic.mil/whs/directives/corres/pdf/602518r.pdf
USN	No. However, trial counsel and NCIS are trained on all applicable rules and regulations governing mental health records.
USMC	Yes. <i>See</i> Question 14. Additionally, MRE 513(e) requires that a MJ conduct a hearing prior to ordering the production of MRE 513 information to which the patient shall be afforded a reasonable opportunity to attend the hearing and be heard. RCM 703(f) permits a custodian of evidence to request relief from compliance with the subpoena or order of production upon showing that such production would be unreasonable or oppressive.
USCG	There is no policy requiring victim notification. However, in practice, counsel for the government or the CGIS agent ask the victim for consent to disclose the records, thus putting the victim on notice that the government is seeking the record.

b. If a victim’s mental health records are in the possession of the United States Government and are requested by the defense, is the victim notified?

USA	If the victim is approached by the Defense and requested to authorize access to behavioral health records and voluntarily does so, the victim would obviously have notice. If the Defense requests Trial Counsel to subpoena the records, the victim has notice. <i>See</i> subparagraph a above.
USAF	There is no current AFMS policy to notify a victim when a defense counsel seeks their medical or mental health records because such records would not be disclosed by the MTF to a defense counsel upon simple request. As provided in DoD 6025.18-R, C7.5.1.2., before a victim’s medical or mental health records would be disclosed in response to a subpoena or discovery request, the MTF would have to receive satisfactory assurance from the party seeking the information that they have made reasonable efforts to give the individual notice of the request, or to secure a qualified protective order. If the records are subject to MRE 513, the records would not be

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	<p>provided unless the victim waived the privilege.</p> <p><u>References:</u></p> <ul style="list-style-type: none"> - DoD 6025.18-R, <i>DoD Health Information Privacy Regulation</i> http://www.dtic.mil/whs/directives/corres/pdf/602518r.pdf
USN	Yes, trial counsel are trained to notify victims if this occurs and if the victim has a VLC then VLC also notify the victim. TCAP has also trained NCIS on access to victim's mental health records and often times if the records may be relevant then the records are presented to the military judge for in camera review.
USMC	Yes, pursuant to MRE 513 and the policy stated in Question 14.
USCG	There is no policy requiring the victim be notified when the defense seeks his or her medical records, although the victim is usually notified by the trial counsel when it receives a request for the defense to obtain the medical records, as it is common practice for the trial counsel to first ask the victim for consent.

c. Prior to issuance of a subpoena to a mental health facility seeking a victim's records, is the victim notified?

USA	No. The victim is only notified as part of the subpoena process, not before. See subparagraph a above.
USAF	<p>DoD 6025.18-R, para. C7.5.1.2., would apply to such a request. Again, this paragraph requires that the MTF receive satisfactory assurance from the party seeking the information that they have made reasonable efforts to give the individual notice of the request, or to secure a qualified protective order. If the records are subject to MRE 513, the records would not be provided unless the victim waived the privilege.</p> <p><u>Reference:</u></p> <ul style="list-style-type: none"> - DoD 6025.18-R, <i>DoD Health Information Privacy Regulation</i> http://www.dtic.mil/whs/directives/corres/pdf/602518r.pdf
USN	Yes. While the Rules for Courts-Martial do not require that notice be issued to a victim when the government issues a subpoena to a mental health facility seeking a victim's records, in practice, government counsel do not issue such subpoenas until after a hearing under MRE 513 has been held and the judge has made a ruling regarding whether or not such records are privileged and/or should be the subject of an in-camera review. The victim will be notified and has the right to attend the hearing under MRE 513; therefore, victims are generally aware of a pending subpoena for their records. Additionally, VLC commonly request written notification by the government of subpoenas issued to third parties for information in which a victim may have a privacy interest.
USMC	Yes. See Question 14 and response above.
USCG	There is currently no policy in place requiring notification. However, in practice, the trial counsel first requests the victim's consent to disclose the medical information, thus putting the victim on notice that the government may seek a subpoena to obtain the records.