

PRIVACY ACT/FREEDOM OF INFORMATION ACT

Special Victims' Counsel Requests for Air Force Records Under the Privacy Act and Freedom of Information Act

You have asked the scope of records/information a Special Victims' Counsel (SVCs) can receive under the Privacy Act and Freedom of Information Act (FOIA), pursuant to an SVC request for records/information requested in the course of performing their assigned duties. SVC requests for Air Force records made in the course of their official Air Force SVC duties are not made pursuant to a written FOIA request, but should be processed and released, as appropriate, as a functional use/official use request within the Air Force to another AF employee.

Many SVC requests for records are made for Military Justice records (AF Forms 3070, non-judicial punishment actions; Article 32 reports; records of trial, etc.) and AF Office of Special Investigation (AFOSI) records (1168 statements, OSI records of investigation) that are considered Privacy Act records under three Privacy Act 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). SVCs may also request non-Privacy Act records they believe are necessary for them to perform their assigned SVC duties.

DoDI 1030.2, 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." *See*, also, DoD 5400.7-R_AFMAN 33-302, paragraph C1.3.1.2.

Likewise, AFI 51-201 requires a proper analysis under the FOIA and Privacy Act concerning the release of certain information to a victim and other third parties, unless release of information/records is specifically authorized to a victim as set forth in the AFI. *See* AFI 51-201, paras. 3.7.2; 9.7.1.1; 9.7.1.2; 13.5; 13.7; 13.7.1; 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").

The Privacy Act Analysis for Privacy Act Records/Information

Paragraph 1 of subsection b of the Privacy Act allows for relevant/necessary Privacy Act records to be released to DoD employees. *See* 5 U.S.C. § 552a(b)(1). Specifically, the (b)(1) exception to the normal "consent" rule required from the subject individual states that records from a Privacy Act 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, *Department of Defense Privacy Program*, paragraph C4.2.1, sets forth a three part test that must be met before a record from a Privacy Act SORN is provided to a DoD employee under the (b)(1) exception. If this three part test is met, the Privacy Act will not be a bar to providing appropriate Privacy Act records/information to SVCs as necessary for the SVC to perform their assigned SVC duties:

(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. 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 to be returned or destroyed. While in their control, SVCs (as with any other AF employee handling Privacy Act records for official purposes) must also understand and comply with appropriate disposition/further dissemination controls and protections for any Privacy Act records or information released to the SVC under the (b)(1) exception.¹

Non-Privacy Act records can also be provided to an SVC on an official use/functional use basis (and properly controlled during their use), applying relevancy and appropriate FOIA exemption principles.

CONCLUSION

Requests from SVCs for Air Force records associated with an accused’s conduct toward the victim, absent specific guidance on the type of information that is releasable to an SVC/victim, are properly addressed under Privacy Act and FOIA principles, as noted in DODI 1030.2 and AFI 51-201. Depending on what an SVC seeks and why, requests for records associated with a Privacy Act SORN may be released and properly protected by Air Force employees under the Privacy Act’s (b)(1) exception. In the absence of release under that exception, or to the victim under the PA (b)(3) routine use provision, release of Privacy Act records is governed under FOIA exemption principles. *See* 5 U.S.C. § 552a(b)(2) (release of Privacy Act records required to be released under the FOIA). Non-Privacy Act record requests from SVCs are also addressed as functional use/official use requests, applying a relevancy standard and any applicable FOIA exemption rules.

OpJAGAF 2014/3 1 July 2014

¹ The Military Justice Privacy Act SORN and an AFOSI Privacy Act SORN also allow for the discretionary, limited release of Privacy Act records requested by the victim under the routine use provision - section (b)(3) - of the Privacy Act.

Headquarters U.S. Air Force

Integrity - Service - Excellence

Freedom of Information Act Training Exemption 7



Mr. Mike McIntyre, AF/JAA

U.S. AIR FORCE



Exemption 7

Created or compiled for a law enforcement purpose

- **7(A) “could reasonably be expected to interfere with enforcement proceedings” [pending or prospective]**
- **7(B) “would deprive an individual of the right to a fair trial or impartial adjudication”**
- **7(C) “could reasonably be expected to constitute an unwarranted invasion of privacy”**
- **7(D) “could reasonably be expected to disclose the identity of a confidential source ...”**
- **7(E) “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**
- **7(F) “could reasonably be expected to endanger the life or physical safety of any individual”**



Exemption 7 threshold

U.S. AIR FORCE

- Withholds appropriate information contained in a record created or compiled for a law enforcement purpose
- What is considered a record compiled or created for a law enforcement purpose is very broad: criminal and civil investigations of misconduct against an individual; background security investigations; etc
- **Compiled:** records not initially created for a law enforcement purpose can become part of such a record (such as one of its attachments). In that case, the otherwise non-law enforcement created record is treated as a record compiled for a law enforcement purpose **WHEN** it is otherwise *associated* with the underlying report that is a record created for a law enforcement purpose
 - Example: medical records



U.S. AIR FORCE

Exemption 7

- **No *per se* rule on withholding or releasing records compiled for a law enforcement purpose when requested**
- **Generally speaking, a First Party (who the record is about) will get more information when requested under the FOIA than a Third Party (everyone else)**
 - **See Dept of Justice narrative discussion of what is considered a record compiled or created for a law enforcement purpose @ http://www.justice.gov/oip/foia_guide09/exemption7.pdf, pages 491-521**



U.S. AIR FORCE

Exemption 7(A)

- **Narrative discussion on pages 523-558 of DOJ FOIA Guide very helpful**

- **Two part test:**
 - **Whether law enforcement proceeding is pending or contemplated**
 - **Whether release of information about it could reasonably be expected to cause some articulable harm**

- **Temporal**



Exemption 7(B)

- **Release would “deprive” a person of a right to a fair trial or an impartial adjudication**
 - **No balancing test, but...**

- **Rarely used. See pages 559-560 of DOJ FOIA Guide for narrative discussion. There is only one page of discussion of this exemption for a reason.... Rarely used because test very difficult to meet**



- **Read narrative portion of pages 561-601 of DOJ FOIA Guide**

- **Release “could reasonably be expected to constitute an unwarranted invasion of personal privacy”**
 - **Conduct the privacy interest v. public interest balancing test**



7(C) - *The Balancing Test*

U.S. AIR FORCE

- Many factors can/are considered when conducting the balancing test with respect to the release of a person's personal info or info about himself (usually concerning alleged misconduct investigations):
 - Rank/Grade of person
 - For misconduct reports, were allegations substantiated?
 - Seriousness of misconduct. Disciplined?
 - Whether the information is about an AF wide policy
 - Whether information sought is related to an employee's job function, or, rather, is of a personal nature
 - Is the person whose records are requested considered a public figure
 - Role of individual in publicly providing the requested information
 - Did he go to the public first?



The Balancing Test con't

U.S. AIR FORCE

- **The current general public knowledge in the underlying facts and circumstances concerning the records requested**
 - **Pre or post-trial conviction?**
- **Personal sensitivity of information requested**
- **How long ago in the past the underlying info/conduct occurred**
- **The individual's role in making public the underlying nature of the subject matter**
- **How the requested information affects the public**
- **Courts have generally held that the public interest in learning of a government employee's official conduct or misconduct “increases as one moves up an agency's hierarchical ladder“**
- **When all is reviewed, would release constitute an unwarranted invasion of an individual’s privacy? If yes, withhold. If no, release**



U.S. AIR FORCE

Exemption 7(C) con't.

- **There may be privacy interests in old information that once was public – the practical obscurity standard**
- **The identity of the requester is usually not considered in determining *what should* be released**
- **Should not consider the purpose(s) for which the request is being made**
 - **If the requester wants to use the records to have a bonfire, that fact has nothing to do with a release decision**



Exemption 7(D)

- Pages 603-635 of DOJ FOIA Guide (no balancing test/harm)

- Release could reasonably be expected to disclose the *identity* of a confidential source, to include a state, local, foreign agency or private institution confidential source. **AND also**, “in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, *information furnished by a confidential source.*”

- IDENTITY of source
 - Except for valid law enforcement purposes
 - Can be much more than just the “name” of the source – see pages 625, 626 of DOJ Guide

 - Express confidentiality or under circumstances from which such an assurance could be reasonably inferred
 - Underlying Agency Office/official must be authorized to ensure confidentiality



U.S. AIR FORCE

7(D) con't

- **Confidential Source INFORMATION (pages 627-631 of DOJ FOIA Guide)**

- **Waiver (Pages 631-635)**



Exemption 7(E)

- Pages 637-651 of DOJ FOIA Guide

- Can withhold 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.”

- No balancing test
 - Courts have disagreement as to whether harm must be found when techniques and procedures involved, but in general agreement that technique or procedure must not be well known to public to allow for withholding

 - Remember that Air Force [public] Instructions are filled with guidelines, techniques and procedures....



Exemption 7(F)

- **Release “could reasonably be expected to endanger the life or physical safety of any individual”**
- **No balancing test**
- **See pages 653-658 of DOJ FOIA Guide**
 - **Can protect the names and identifying information of non-law enforcement federal employees and other third persons in connection with particular law enforcement matters**
 - **But, most likely appropriate to use in conjunction with 7(C) concerning the protection of U.S. military/civilian government personnel.**
 - **Post-court testimony; after retirement, etc**



Special Exclusions

- **Under 5 U.S.C. § 552(c)(2), a criminal law enforcement agency can entirely exclude records from the FOIA process when necessary to avoid divulging the existence of a confidential source relationship. Specifically, that section states:**
 - **Whenever informant records 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 officially confirmed**



Special Exclusions con't

U.S. AIR FORCE

- **5 U.S.C. § 552(c)(1), an Agency may treat records as not subject to 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 disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings**
- **This can only be done only during such time as these circumstances continue/exist**



U.S. AIR FORCE

FOIA

Questions?

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

FREEDOM OF INFORMATION ACT

Witness FOIA Request For a Copy of Their Witness Statement

You have asked whether a witness who provides written testimony during the course of an investigation is ‘automatically’ entitled to receive an un-redacted copy of their statement pursuant to a Freedom of Information Act (FOIA) request. The answer is “No.”

A witness may be entitled by Air Force regulations or other authority to review a copy of their testimony/statement for accuracy or for some other official Air Force purpose, but under the FOIA process, pursuant to a written FOIA request, a witness is not automatically entitled to a copy of the written testimony that they provided for an investigation of another individual (the subject of the investigation). Various FOIA exemptions, primarily the FOIA ‘privacy’ exemptions (b)(6) and (b)(7)(C), may preclude release of the statement taken against the subject to the witness (or any other third party) pursuant to a FOIA request. *See* 5 U.S.C. § 552; DoD 5400.7-R_AFMAN 33-302, *Freedom of Information Act Program*.

The primary issue that will determine whether the witness statement is releasable will be the subject’s reasonable privacy expectation in keeping records associated with an investigation against him from public release under the FOIA. The privacy interest the subject has is balanced against the general public’s interest (not the witness’s personal interest) in knowing how the Air Force carries out its statutory and regulatory duties. After applying this balancing test, a witness FOIA request for his witness statement will be withheld partially or completely denied to the witness in part or whole if release is determined to reasonably be an unwarranted invasion of the subject’s privacy interest. *See* DoD 5400.7-R_AFMAN 33-302, paragraph C3.2.1.10.1.3.

The following factors (not all inclusive) help determine the privacy expectation of a subject under this balancing test: the higher the person’s rank, the less expectation of privacy; the more “important” and significant the individual’s official duties to the Air Force, the less expectation of privacy; the more serious the allegation, the less expectation of privacy; there is less of an expectation of privacy in substantiated allegations than unsubstantiated allegations; the more public and notorious the alleged misconduct, the less expectation of privacy; misconduct involving official duties provides less of an expectation of privacy than minor personal misconduct; the greater the individual’s role in making “public” the allegations against him, the less their expectation of privacy; and the public nature of the investigatory/discipline process.

Accordingly, a FOIA request from a witness, complainant, news-media, or other third party for documents associated with an investigation made against another person (the subject) will generally result in the same information being released to the third party FOIA requester. If it is determined the subject of the investigation/report has a privacy interest that outweighs the public interest in the report, then the third party requester will get very little, if anything from the report of investigation pursuant to a FOIA request. This includes a witness who requests a copy of the statement/testimony they provided during the course of the investigation against the subject.

But, what information from the witness statement is released to the witness when the public interest in the report **outweighs** the subject's privacy interest? The third party - whether the news-media, a witness, complainant, or other person - will get more information. But, in this situation, although the subject may not have a sufficient privacy interest to prevent release of records concerning his misconduct, other third parties named in the witness statement may have a sufficient privacy interest to protect at least their identity from disclosure. Accordingly, the witness statement would be released after redacting sufficient other third party identifying information. From a common sense standpoint, if the third party requester was also a witness who was interviewed, or was the complainant, their name contained in their statement about the subject's conduct, or other personal information about themselves in the report, would not be redacted if the privacy interest of the subject otherwise allowed for release of the witness statement. Other FOIA exemptions may also preclude release of information to the FOIA requester.

CONCLUSION

A third party FOIA request for documents associated with an individual's report of investigation is releasable to the third party unless a FOIA exemption requires or allows the Air Force to withhold the requested record/information. Under the FOIA, a witness is not entitled to special access to the witness statement they provided during the course of the subject's investigation. Application of the balancing test under FOIA exemptions (b)(6) and (b)(7)(C), and application of any other FOIA exemption, will determine what, if any, information concerning a subject's investigation – including the statement provided by the witness - the witness receives under the FOIA.



Special Victims' Counsel (SVC) Records Requests

U.S. AIR FORCE

- **SVC requests for records made in the course of their official duties are processed by the record OPR as official use/functional use requests**
 - **The Freedom of Information Act (FOIA) record request process is not appropriate to respond to SVC official use requests. AFMAN 33-302, *Freedom of Information Act Program*, paragraph C1.4.3.**
- **Neither the FOIA, Privacy Act, or Air Force policy is a bar to an SVC receiving relevant records from an Air Force office (as determined by the record OPR with SVC input) that is necessary to accomplish their official SVC duties. DoD 5400.11-R, *Department of Defense Privacy Program*; OpJAGAF 1989/58; OpJAGAF 2014/3**
- **AF/JAA's website provides further guidance, to include a power point slide presentation and SVC records response letter template.**
<https://aflsa.jag.af.mil/AF/lynx/jaa/>
- **AF/JAA recorded DCO presentations concerning the release of records to an SVC can also be found at <https://connect.dco.dod.mil/p9lmi4kfc7/> and <https://connect.dco.dod.mil/p7p7mcjkn8g/>**



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE LEGAL OPERATIONS AGENCY (HQ AFLOA)

MEMORANDUM FOR [SVC NAME]

FROM:

SUBJECT:

We are in receipt of your [Freedom of Information Act (FOIA)] request concerning the court-martial [investigation/disciplinary disposition] records of XXXX [*United States v Airman xxxxx*]. [Please be advised that we have closed the FOIA request based on guidance for processing Special Victims' Counsel requests for records for official purposes, as federal agency personnel cannot make FOIA requests for agency records they may need in order to perform their official duties. DoD 5400.7-R_AFMAN 33-302, *Freedom of Information Act Program*, paragraph C1.4.3].

Accordingly, we have processed your request as a functional use/official use request under the Privacy Act's (PA) (b)(1) exception and in accordance with , which allows for the release of Privacy Act records of this nature to other Air Force employees/military members as necessary to perform their Air Force duties. Please note that we have withheld or redacted information from the requested records that have been determined to be irrelevant to the charges against the accused involving the victim, to include social security numbers, home addresses, and personal email or phone numbers. *See* DoD 5400.11-R, *Department of Defense Privacy Program*, paragraph C4.2.1.

While you may also discuss relevant information contained in these documents with your client to help her [him] understand the outcome of the trial or other proceeding, or otherwise assist you in performing your Special Victims' Counsel duties as they relate to your client, it is imperative that you do not release any documents outside of the Department of Defense, or share the documents with other DoD personnel except for official duty purposes, without the approval of this office. The documents have been provided to you for official duty purposes and must be properly protected from unauthorized disclosure in accordance with the Privacy Act.

If your client decides to pursue a formal, personal FOIA request for these documents, the documents will undergo a FOIA analysis and less information may be provided because of the application of specific FOIA exemptions, such as exemption (b)(6) and (b)(7)(C), which deal with protecting certain personal information from public release pursuant to a FOIA request.

If you have any questions or require additional information concerning the release of these records for official purposes, please contact us at the above address or call xxxxxx.

Signature Block

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.¹

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.

¹ *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.

