

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.