

## PRIVATE ORGANIZATIONS

### Legal Assistance to Private Organizations (POs)

This memorandum is in response to your request for clarification of the guidance provided in Air Force Instruction (AFI) 51-504, *Legal Assistance, Notary, and Preventive Law Programs*, 27 Oct 03, Incorporating Change 3, 24 May 12, paragraph 1.2.8, regarding the scope of permissible support for POs. In specific, you indicated that you believe that it is permissible for JAG offices to educate POs on the requirements for tax-exempt status. You wish to know if JAG offices can, in addition, help POs prepare the tax-exempt forms and assist in correspondence with the IRS. While your specific question is answered directly in regulation,<sup>1</sup> a discussion of the criteria for evaluating requests for “PO support” seems more broadly useful.

The support that the servicing legal office can provide is limited by the scope of the staff judge advocate’s (SJA) official duties. The applicable duties fall under two categories: legal assistance and general civil law support.

#### Legal Assistance

While recognizing the importance of POs,<sup>2</sup> the DoD and Air Force are careful to set appropriate limits on legal assistance to these non-Federal organizations. The authority for the provision of legal assistance, 10 USC § 1044, provides an enumerated list of those eligible in paragraphs (a)(1) through (a)(7). This list does not include POs—or any organization whatsoever. AFI 51-504, paragraph 1.2.8, mentioned in your question, therefore properly indicates that Air Force attorneys **may not** provide legal assistance, direct or indirect,<sup>3</sup> to POs in their official capacity.

#### Civil Law Support

AFI 51-504, paragraph 1.2.8, however, elaborates on the scope of permissible support to POs outside of the legal assistance program. It notes that, “under the auspices of the Civil Law program Air Force attorneys may provide legal guidance and advice through the base private organizations monitor to ensure private organizations are properly chartered and comply with pertinent statutes and regulations.”

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<sup>1</sup> AFI 34-223, *Private Organizations (PO) Program*, 8 May 07, paragraph 10.13, specifically indicates that obtaining tax-exempt “information and forms” from the State and IRS is a PO responsibility.

<sup>2</sup> DoDI 1000.15, *Procedures and Support for Non-Federal Entities Authorized to Operate on DoD Installations*, 24 Oct 08, paragraph 4, notes, “non-Federal entity support of Service members and their families can be important to their welfare.”

<sup>3</sup> AFI 51-504, paragraph 1.2.6, prohibits advising individuals who raise legal issues or concerns on behalf of third parties. This includes the PO manager (RMFC), FSS/CC, or other official conveying a question to the legal office on behalf of a PO as if it were his or her own.

The “Civil Law” program consists of the SJA’s obligation to provide legal services as required by commanders and staff agencies.<sup>4</sup> AFI 34-223,<sup>5</sup> in paragraphs 6 through 8, and their subparagraphs, assigns responsibilities regarding POs to the installation commander, FSS commander/director, and the resource management flight chief. These or other persons managing POs in the course of their official duties may lawfully request that the servicing legal office provide legal advice and support for the conduct of those duties.

### **Evaluation Criteria**

The evaluation of PO support is twofold, respective to the discussion above. The first criteria is expressed in AFI 51-504 in the form of a requirement that advice be provided, “... through the base private organizations monitor...”<sup>6</sup> The intent of this “natural language” criteria is to avoid the provision of legal assistance to a party excluded by statute.<sup>7</sup> It is critical, therefore, that the legal office enforce substantive along with formal compliance. Employment of the PO monitor to convey third-party PO requests for legal support might create a façade of strict compliance with the AFI, but will violate the statutory basis the regulatory provision was enacted to protect. Further, under some circumstances it may expose the PO monitor and responding attorney to liability under the Joint Ethics Regulation<sup>8</sup> or rules of professional conduct.<sup>9</sup>

The second criteria describes the purpose and content of permissible advice. The advice must be provided, “to ensure private organizations are properly chartered and comply with *pertinent* statutes and regulations [emphasis added].” This phrase is intended to ensure that advice provided by a servicing legal office falls properly within the scope of the civil law program. On this basis, along with proper chartering, the SJA is authorized to advise the PO monitor (or other relevant members such as the FSS/CC)<sup>10</sup> on compliance with statutes and regulations having a sufficient nexus with the requesting individual’s official duties.<sup>11</sup>

### **Conclusion**

On the specific issue in question, tax-exempt status, the injunction in the AFI (that POs are responsible for discovering information and filing their own paperwork for tax-exempt status)<sup>12</sup> merely reinforces a conclusion that could be reached analytically. No government official under AFI 34-223 has any responsibility involving the establishment of a PO’s tax exempt status, nor do officials acknowledge or distinguish between POs on the basis of this status. Therefore, there appears to be no basis for assistance, education, or evaluation of PO tax-exemption under the civil

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<sup>4</sup> AFD 51-1, *The Judge Advocate General’s Department*, 19 Nov 93, paragraph 4.4; AFI 51-102, *The Judge Advocate General’s Department*, 19 Jul 94, paragraph 3.1.

<sup>5</sup> AFI 34-223, *Private Organizations (PO) Program*, 8 May 07, Incorporating Change 1, 30 Nov 10, Certified Current, 4 Apr 11.

<sup>6</sup> AFI 51-504, paragraph 1.2.8.

<sup>7</sup> 10 U.S.C. § 1044.

<sup>8</sup> DoD 5500.07-R, *Joint Ethics Regulation (JER)*, 17 Nov 11, Section 5-403, referencing 18 U.S.C. § 205.

<sup>9</sup> Outside the scope of official duties, the JAG may not otherwise be licensed or competent to advise the PO on civil matters.

<sup>10</sup> AFI 34-223, paragraphs 6 – 8 and their subparagraphs.

<sup>11</sup> The nexus with official duties is what makes such compliance *pertinent*.

<sup>12</sup> AFI 34-223, paragraph 10.13.

law program. Relatedly, a request for support in this area, even if ostensibly arising from the PO monitor, may more properly be characterized as a third-party representation of PO, vice government interests.

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This opinion rescinds and supersedes OpJAGAF 2006/39, 29 September 2006.