

## REPRISAL

### Communications Protected Under 10 U.S.C. § 1034

This responds to your request for our opinion as to whether complaints to Air Force safety offices and unit Fraud, Waste and Abuse (FWA) monitors qualify as “protected communications” within the meaning of 10 U.S.C. § 1034, *Protected communications; prohibition of retaliatory personnel actions*. You also ask whether petitions to the Air Force Board for Correction of Military Records (AFBCMR), to the Secretary of the Air Force Personnel Council (SAFPC) or to the Air Force Personnel Center (AFPC) are similarly protected. We conclude that complaints to safety offices and FWA monitors are “protected communications” if they allege one of the specific categories referenced in the statute (see 10 U.S.C. § 1034(c)(2)). Petitions made to the AFBCMR may also be protected. Written documents submitted by military members seeking corrective action by SAFPC or AFPC may also qualify as protected communications within the meaning of the statute.

In analyzing this issue, we turn first to the language of the statute. Although the primary focus of your request for opinion is 10 U.S.C. § 1034(b)(1)(B)(iv), that section of the statute must be read in context with the surrounding provisions of which it is a part. In this regard, 10 U.S.C. § 1034(b)(1)(B) prohibits reprisal against members of the armed forces for making complaints or disclosures described in section (c)(2) of the statute to:

- (i) a Member of Congress;
- (ii) an Inspector General . . .;
- (iii) a member of a Department of Defense audit, inspection, investigation, or law enforcement organization;
- (iv) any person or organization in the chain of command;
- (v) a court-martial proceeding; or
- (vi) any other person or organization designated pursuant to regulations or other established administrative procedures for such communications;

Section (c)(2) in turn defines communications falling under the above restriction as those “that the member reasonably believes constitute evidence” of:

- (A) A violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violation of . . . articles 120 through 120(c) of the Uniform Code of Military Justice, sexual harassment or unlawful discrimination.
- (B) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.
- (C) A threat by another member of the armed forces or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to members of the armed forces or civilians or damage to military, Federal, or civilian property.

The above statutory provisions are implemented through DoDD 7050.6, *Military Whistleblower Protection*, and AFI 90-301, *Inspector General Complaints*. The Air Force specifically includes “personnel assigned to DoD audit, inspection, investigation, law enforcement, equal opportunity, safety, or family advocacy organizations” as potential recipients of protected communications. AFI 90-301, Attachment 1.

Safety is delineated in AFI 90-301. In addition FWA monitors are charged with auditing, inspecting and investigating complaints of fraud, waste or abuse. As such, they fall within AFI 90-301.

In our opinion, petitions to the AFBCMR also may qualify as protected communications under 10 U.S.C. § 1034, as the AFBCMR can be considered an organization designated pursuant to regulations or other established administrative procedures for such communications. AFI 36-2603, *Air Force Board for the Correction of Military Records*, 5 Mar 12, sets procedures for correction of military records to remedy error or injustice. AFI 36-2603, paragraph 4.12, authorizes the board to identify DoD or Air Force policies, instructions, or guidance that lead or may lead to unsound business decisions, unfair results, waste of government funds or public criticism. The board will forward such observations directly to the appropriate offices of the Secretariat and/or Air Staff for review and evaluation. Thus, the petitions the board receives for consideration may contain information that indicates a violation of law or regulation or any of the other types of information about misconduct enumerated in section (c)(2).

In that vein, if a military member files a petition alleging that a letter of reprimand should be removed from his or her records because the commander abused his/her authority in giving it, then the petition would constitute a protected communication, as it provided information of a violation of law or regulation. The petition asks the Board to act to redress the error or injustice. Further, by statute, the AFBCMR may consider allegations of reprisal. (*Ref.* 10 U.S.C. § 1034(g)). That statutory mandate is implemented through AFI 36-2603, paragraphs 2.2 and 4.7.1. Because the AFBCMR is designated by statute and regulation to receive and act on allegations of reprisal, petitions to the board alleging reprisal are protected under 10 U.S.C. § 1034. However, we note that not every petition to the AFBCMR may constitute a protected communication under 10 U.S.C. § 1034; the determination rests on the facts and circumstances of each petition.

Similarly, complaints or statements to SAFPC or AFPC may qualify as a protected communication under 10 U.S.C. § 1034. AFI 36-2023, *The Secretary of the Air Force's Personnel Council and the Air Force Personnel Board*, establishes SAFPC's area of responsibility, and AFMD 37, *Air Force Personnel Center (AFPC)*, establishes AFPC's mission and areas of responsibility. What is key is not whether these organizations are established to receive and act on allegations of misconduct of the type listed in 10 U.S.C. § 1034. Key is whether these organizations are designated to receive such communications, irrespective of their charter. For example, a military member submits written matters to the Air Force Discharge Review Board regarding his or her administrative separation, claiming that the commander failed to provide follow established procedures—a violation of Air Force regulation. The Discharge Review Board is the organization designated to review the military member's record and submissions to determine whether to discharge or change the characterization of service/reason

for the discharge. Therefore, the military member's statement is protected, as it contained information about a potential violation of a regulation, made to an organization designated to receive such communications. As with the AFBCMR, however, not all statements, petitions, or letters to SAFPC and AFPC constitute protected communications. The determination rests on the facts and circumstances of each communication.

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This opinion rescinds and supersedes OpJAGAF 2000/39, 6 June 2000.