

OpJAGAF 2018-20, 6 August 2018, FREEDOM OF INFORMATION ACT & PRIVACY ACT/OFFICIAL USE REQUESTS

TOPIC

Release of Record of Trial information when accused is acquitted.

TEXT OF THE DECISION

This opinion is in response to an inquiry about the propriety of releasing, under official use request procedures, a transcript or other records – beyond the acquittal Record of Trial (ROT). An official use request release to a DoD entity or individual is appropriate if the three-part test for releasing Privacy Act records is met.

BACKGROUND

In cases when an Airman is acquitted by courts-martial, what is the propriety of releasing, under official use request procedures, a transcript or other records – beyond the acquittal Record of Trial (ROT) - that have not yet been destroyed in accordance with record disposition procedures, as well as releasing the same documents to someone other than the accused Airman under the Freedom of Information Act (FOIA).

GUIDANCE

DoD 5400.11-R, *Department of Defense Privacy Program*, paragraph C4.2.1.

DoDM 5400.07-R_AFMAN 33-302, *Freedom of Information Act Program*

10 U.S.C. § 854(e) Record of Trial, (copy to victim)

5 U.S.C. § 552a. (Added Privacy Act statute cite, as noted under Discussion as source of Guidance too).

DISCUSSION

An official use request or FOIA request for “all records” associated with an Airman’s court-martial that ended in acquittal would include not only the official acquittal ROT, but also any records still in the possession of an Air Force office, to include “working papers,” such as copies of motions, etc., irrespective of records disposition schedules that should have resulted in their destruction. *See* DoDM 5400.07_AFMAN 33-302, *Freedom of Information Act Program*

An official use request release to a Special Victim’s Counsel or other DoD entity or DoD individual is appropriate if the three-part test for releasing Privacy Act records is met under DoD 5400.11-R, *Department of Defense Privacy Program*, paragraph C4.2.1:

- C4.2.1.1.1. The requester has a need for the record in the performance of his or her assigned duties. The requester shall articulate in sufficient detail why the records are required so that the custodian of the records may make an informed decision regarding their release;
- C4.2.1.1.2. The intended use of the record generally relates to the purpose for which the record is maintained; and
- C4.2.1.1.3. Only those records as are minimally required to accomplish the intended use are disclosed. The entire record is not released if only a part of the record will be responsive to the request.

For instance, the SVC may need certain documents, such as a transcript of the proceedings or witness testimony, to explain to his/her client why he or she believes the case resulted in an acquittal. Any documents released to the SVC or other DoD office or employee, pursuant to an official use request, must be properly protected by the SVC or other DoD office or employee from inappropriate handling or release. Or, as another example, an Area Defense Counsel may request relevant documents to assist his or her client in responding to a letter of reprimand. Ultimately, it is for the DoD/AF employee seeking the records for official purposes to explain why the records are required, with their opinion given appropriate deference as being in the best position to determine what their required duties are and what Air Force records they need to carry out their official duties.

Personal third party requests under the FOIA, to include from the alleged victim, are handled differently. As noted, the Airman/accused's acquittal court-martial records are considered the Privacy Act record of the accused. They are only released to a third party under the FOIA if the FOIA or other law requires release of the information. *See* 5 U.S.C. § 552a(b)(2); DoD5400.11-R; DoDM 5400.07-R_AFMAN 33-302; 10 U.S.C. § 854(e) (Uniform Code of Military Justice, Article 54(e) (release of record of proceedings to victims of certain offenses)).

For the majority of third party FOIA requests, we would expect that Exemption (b)(7)(C) of the FOIA would result in the denial under the FOIA of a personal copy for themselves of records associated with an Airman's court-martial acquittal - unless it is determined that the appropriate public interest in the requested document(s) outweighs the Airman's privacy. *See American Civil Liberties Union v. Dep't of Justice*, 750 F.3d 927 (D.C. Cir. 2014) (recognizing heightened privacy interest an individual has in protecting from public release records associated with an acquittal).

CONCLUSION

Based on the foregoing, an official use request release of protected materials to a DoD entity or DoD employee is appropriate if the three-part test for releasing Privacy Act records is met under DoD 5400.11-R, paragraph C4.2.1. Requests from third party individuals in their purely private capacity for such materials, are only made when legally mandated (the Privacy Act and FOIA and implementing regulations) or otherwise legally permitted (e.g., a written waiver of an accused's Privacy Act rights has been obtained that allows release of their personal information in such records to a third party individual).