

TOPIC

Authority available to Command in requesting permission to release an unredacted copy of a substantiated SAF/IG Report of Investigation (ROI) to a federal civilian employee who was the subject of the ROI.

TEXT OF THE DECISION

This opinion is in response to a request for a review of a command request for permission to release an unredacted copy of a substantiated SAF/IG Report of Investigation (ROI) to a federal civilian employee who was the subject of the ROI. The employee is now facing disciplinary action for the alleged wrongdoing. SAF/IG is the release authority for its own investigations.¹

BACKGROUND

Command requested permission to release an unredacted copy of a substantiated SAF/IG ROI to a federal civilian employee who was the subject of the ROI. For this case the requested material included the necessary and relevant material for the civilian employee and his attorney to respond to the command's proposed disciplinary action, including the witness statements relied upon by the command to support the disciplinary action.

It was proposed that the ROI be significantly redacted to withhold third party witness statements and opinions of the inquiry officer.

GUIDANCE

Privacy Act of 1974, 5 U.S.C. § 552a(b)(1)

DoD 5400.11-R

AFI 36-704, *Discipline and Adverse Actions of Civilian Employees*, 2 July 2018

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OpJAGAF 2012/12, *Privacy Act*, 18 September 2012

DISCUSSION

The SAF/IG ROI is considered a Privacy Act record, as the ROI is a record retrieved/managed/kept by the Air Force under the subject's name or other personal identifier of the subject. The Privacy Act of 1974, 5 U.S.C. § 552a(b)(1), permits a federal agency to provide part or all of its Privacy Act records to any agency employee or agency office as necessary to accomplish official duties. See DoD 5400.11-R, *Department of Defense Privacy Program*. AFI 36-704, *Discipline and*

¹ See AFI 90-301, paragraph 13.18.1.

Adverse Actions of Civilian Employees, paragraph 25.2, also provides that a civilian employee will receive evidentiary material relied upon by supervisors to support the reasons for the proposed disciplinary action against the employee.

The proposal to significantly redact the ROI to withhold third-party witness statements and opinions of the inquiry officer, based on Freedom of Information Act withholding exemptions (b)(5), (b)(6), and (b)(7C), is not supportable. Because this is an Official Use Request, the Freedom of Information Act withholding exemptions are not applicable. Further, as noted above, the Privacy Act does not prohibit the providing of relevant Air Force Privacy Act records to the subject (or any other Air Force individual or office) for internal Air Force Official Use purposes.

Accordingly, in the case of releases to civilian personnel² facing administrative disciplinary action—or for any other valid official use purpose within the Air Force—there is no Privacy Act or regulatory prohibition that the names of witnesses, witness statements, or other relevant evidentiary material be redacted prior to release of an ROI to the Air Force employee or military member facing the proposed disciplinary or other adverse action.³

There may be valid reasons for wanting to redact information about a third party in such cases, such as a reasonable (not speculative) belief that release of certain information would expose witnesses to reprisal actions, or unnecessarily compromise other privacy interests of witnesses. These concerns are not legal prohibitions. Although other official use purposes for other documents might be discretionary on the part of the Air Force, as noted in AFI 36-704, the MSPB requires federal civilian employees facing disciplinary action to be afforded the ability to review all relevant information that was used to determine the disciplinary action.⁴ Accordingly, as noted in OpJAGAF 2012/12, *Privacy Act*, 18 September 2012, these other concerns must be balanced with the understanding that disciplinary action against civilian employees under civil service rules may not be possible if relevant evidence is not released to the employee; or the Air Force may not be able to properly support the administrative disciplinary action to a proper higher authority, such as in response to congressional inquiries or complaints.

CONCLUSION

Based on the foregoing, it is our conclusion that SAF/IG holds the release authority for its own investigations. Normally, due principals mandate release of all relevant documents relied upon by the official taking/proposing any adverse actions against federal civilian employees. However, redaction may be used in specific circumstances where a reasonable (not speculative) belief that

² This principle applies equally when a military member is the subject of the proposed disciplinary action.

³ Note. Constitutional Due Process requires that all other relied upon materials (e.g., witness statements) supporting an adverse action considered by the discipline authority are provided to the respondent.

⁴ See AFI 36-704, paragraph 5.1.1.4.

release of certain information would expose witnesses to reprisal actions or unnecessarily compromise other privacy interests of witnesses; for other legally sanctioned reasons (e.g. law enforcement, compromise of investigation), when redactions are made, they must be done based on an articulable legal principle that does not violate due process requirements and AFI 36-704 concerning federal employee access to such material.

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