

## INSPECTOR GENERAL

### Legal Review of Allegation of Restriction

We have reviewed the above-referenced Inspector General (IG) Report of Investigation (ROI) which included allegations of restriction and sexual harassment. In accordance with AFI 36-2706, para. 3.35.4.2, State X National Guard, Inspector General conducted investigation of all allegations based on the requirement for the IG to investigate all allegations of restriction. This legal review only addresses the allegation of restriction, as the portion of the ROI dealing with the other allegations was reviewed through Equal Opportunity (EO) channels. The restriction allegation against one responsible management official (RMO) was **not substantiated** by the IO. The ROI and underlying investigation comply with the requirements of AFI 90-301, *Inspector General Complaints Resolution*. We find the IO's findings and conclusions regarding the restriction allegation to be legally sufficient and forward this case for a final determination in accordance with AFI 90-301.

### **PROCEDURAL BACKGROUND**

Complainant is a C-130 navigator assigned to an Airlift Squadron, which falls under the Operations Group and Airlift Wing. On 9 Feb 12, complainant sent an email to DoD IG concerning an 8 Jan 12 officers call hosted by AS Director of Operations, and AS Chief of Current Operations.<sup>1</sup> Complainant made allegations of sexual harassment, hostile work environment, and restriction against the AS Director of Operations and AS Chief of Current Operations. On 11 Feb 12, complainant provided the same email to AW/CC, and OG/CC.<sup>2</sup> On 4 May 12, DoD IG referred the complaint to SAF/IGQ for action.<sup>3</sup>

According to the IO's report, AW/CC sought guidance from AW/JA, JFHQ-State X SJA, and NG State X-IG. Based on the guidance he received, AW/CC contacted complainant on 15 Feb 12 and advised him some of his statements pushed the responsibility for this investigation to the IG. AW/CC obtained complainant's permission to forward the email to NG State X-IG and it was subsequently sent to an Investigation and Inquiries Specialist.<sup>4</sup>

On 22 Feb 12, the Investigation and Inquiries Specialist contacted complainant for clarification on the allegations and informed him the State X NG-IG would conduct a thorough inquiry.<sup>5</sup> On 23 Feb 12, the Investigation and Inquiries Specialist completed a complaint analysis of the allegations, which analysis identified two EO issues and one restriction issue. The complaint analysis recommended an investigation be conducted to determine the facts

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<sup>1</sup> Sec III, Tab B-2

<sup>2</sup> Sec III, Tab B

<sup>3</sup> Sec III, Tab B-2

<sup>4</sup> Sec II, Tab B, p. 5

<sup>5</sup> Sec I, Tab G

surrounding the allegations.<sup>6</sup> Due to the requirement for IG to investigate restriction cases and to avoid EO and IG conducting two concurrent investigations, the decision was made in accordance with AFI 36-2706, para. 3.35.4.2, that the IG would investigate all allegations. On 28 Feb 12, the Adjutant General, State X National Guard ( State X ANG/TAG), appointed the Investigation and Inquiries Specialist to conduct an IG investigation into all aspects of the facts and circumstances concerning allegations of restriction and sexual harassment by members of the AS.<sup>7</sup>

The investigation was conducted from 28 Feb 12 to 3 May 12. The IO determined the restriction allegation was not substantiated, but did find the EO allegations were substantiated. On 18 May 12, JFHQ-State X, provided a legal review and found the investigation legally sufficient and concurred with the IO's finding that the restriction allegation was not substantiated.<sup>8</sup> On 22 May 12, the appointing authority concurred with the findings and conclusions of the investigating officer regarding all the allegations. This included the EO allegations.<sup>9</sup> On 31 May 12, NG State X-EO was notified regarding the findings of the investigation.<sup>10</sup> On 19 Sep 12, SAF/IGQ requested clarification regarding the complainant's interview and one witness interview. The individuals were re-interviewed and the ROI revisions were completed on 2 Nov 12. The case was transferred to SAF/IGQ for review.

SAF/IGQ reviewed the revised ROI and re-interviews, and the SAF/IGQ Director made the decision that SAF/IGQ would conduct additional interviews regarding the restriction allegation. On 6 Jan 13, SAF/IGQ conducted three additional interviews.

On 22 Feb 13, the Commander, State X Air National Guard (State X ANG/CC) issued subjects each a letter of reprimand (LOR) for the inappropriate comments of a sexual nature they made at the 8 Jan 12 officers call.<sup>11</sup> Both subjects elected not to provide comments to the LOR.<sup>12</sup>

## **FACTUAL BACKGROUND**

In his email to the IO, complainant stated on 8 Jan 12, he was directed to attend an officers call in the Heritage Room of AS.<sup>13</sup> The officers call was hosted by subjects. According to complainant, during the course of the officers call, "subjects told all of the officers that they were not allowed to file IG complaints for things said in the [H]eritage [R]oom." During a clarification interview on 22 Feb 12, complainant stated subject 1 was the person that told everyone they could not go to the IG.<sup>14</sup>

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<sup>6</sup> Sec I, Tab K

<sup>7</sup> Sec III, Tab A

<sup>8</sup> Sec I, Tab B

<sup>9</sup> Sec II, Tab D

<sup>10</sup> Sec I, Tab

<sup>11</sup> Sec III, Tab E-6 and Tab E-7

<sup>12</sup> Sec III, Tab E-7 and Tab E-8

<sup>13</sup> Sec III, Tab B-2

<sup>14</sup> Sec III, Tab D-6, p. 1

The purpose of the officers call was to increase morale and camaraderie within the squadron. It was supposed to generate funny stories about those in the squadron.<sup>15</sup> A recent unit climate assessment identified low morale in the squadron and the officers call was an attempt to improve morale.<sup>16</sup> Subject 1 thought one way to increase morale would be to make people aware of squadron history.<sup>17</sup> He decided to read the existing rules of the Heritage Room at the officers call. He thought this would be a fun way to let everyone know about the rules and to learn some squadron history. At one time, there had been specific rules regarding people allowed in the Heritage Room and acceptable/authorized behavior once inside the Heritage Room. The intent of the 8 Jan 12 officers call was to “lay the groundwork” for Heritage Room rules of engagement. Subject 1 did not expect the rules to be followed at this officers call, but he did want to make the squadron aware of the rules with the expectation rules would be implemented and followed at some point in the future. He was hoping this would help bring some heritage back to the squadron.<sup>18</sup> These Heritage Room rules formed the basis of the sexual harassment and hostile work environment allegations that were also investigated as part of the ROI. It is clear from Subject 1’s testimony that he did not understand the rules were inappropriate.<sup>19</sup>

Approximately 20-25 people attended the officers call. They were advised there would be graphic overtones and if they did not want to participate, they were welcome to leave.<sup>20</sup> Based on the testimony, no one left the officers call. Prior to reading the rules, those attending the officers call were told it was all in jest and should not be taken seriously.<sup>21</sup> This was something to do at the end of guard drill and the purpose was to pick on each other and have a good time. Both subjects made it clear the intent of the reading of the rules was to improve morale within the squadron.<sup>22</sup> There is conflicting testimony regarding exactly what Subject 1 said in the Heritage Room. However, Subject 1 confirmed his intent was for the Heritage Room officers call to be a squadron only event. Although the exact words are in dispute, Subject 1 testified if someone had said “let’s keep this between us” or “you guys can’t report me to the IG,” he would have endorsed the comment.<sup>23</sup>

Subject 1 read the rules as they were originally written, and Subject 2 translated each rule into modern day English.<sup>24</sup> The rules included such things as if a woman came into the Heritage Room, she had to leave her bra or panties in the room when she left; only those men with “silver leg spreaders” are allowed in the room (silver leg spreaders are pilot or navigator wings); and the only thing allowed on the bar is women’s privates. A copy of the original rules is included as an exhibit in the ROI, but the modern day translation could not be located.<sup>25</sup>

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<sup>15</sup> Sec III, Tab D-15, p. 2

<sup>16</sup> Sec III, Tab D-3, p. 4

<sup>17</sup> Sec III, Tab D-1

<sup>18</sup> Sec III, Tab D-1, p. 4

<sup>19</sup> Sec III, Tab D-1

<sup>20</sup> Sec III, Tab D-1, p. 4

<sup>21</sup> Sec III, Tab D-2, p. 6

<sup>22</sup> Sec III, Tab D-2, p. 6

<sup>23</sup> Sec III, Tab D-1, p. 7

<sup>24</sup> Sec III, Tab D-2

<sup>25</sup> Sec III, Tab E-1

The acting OG/CC, approved the officers call. Although the acting OG/CC asked Subject 1 and Subject 2 what they were going to discuss in the officers call, they never provided him the information.<sup>26</sup> They only told the OG/CC they were going to go over some rules for the Heritage Room. The day after the officers call, the acting OG/CC called both Subject 1 and Subject 2 into his office and verbally counseled them. He expressed his extreme displeasure and disappointment in the content of the officers call and told them he never would have approved the reading of the rules if he had seen them in advance. The OG/CC told them their behavior is not appropriate for the workplace, even if it is after duty hours. He explained some officers were offended, despite being told they could excuse themselves, if needed. The OG/CC gave Subject 1 and Subject 2 a direct order to cease and desist all officer call activity that involved inappropriate language and questionable house rules. The following month, the OG/CC had another officers call and explained the previous officers call was inappropriate and that type of conduct would not be tolerated.<sup>27</sup>

During the course of this investigation, the IO interviewed Subjects 1 and 2, and 15 witnesses. Complainant and the AS, Assistant Flight Commander, were the only witnesses that testified they heard complainant make a comment along the lines of “don’t report this to the IG”<sup>28</sup> The remaining witnesses testified they heard comments like “what is said here, stays here.” In addition, Subjects each provided testimony regarding this issue. Subject 1 testified that he did not make a statement that he could not be reported to the IG.<sup>29</sup> Subject 2 testified that he did not recall anything being said about not going to the IG.<sup>30</sup>

Complainant and the AS, Assistant Flight Commander were re-interviewed to obtain additional information regarding the IG-related comment. When re-interviewed, complainant testified he knew he could contact the IG.<sup>31</sup> Complainant was asked specifically if he felt he was restricted from contacting the IG or if Subject 1’s comments prevented him from contacting the IG. Complainant responded, “I thought he was completely out to lunch and I could do whatever I wanted, because to me, he had...I had lost confidence in him right there, and I didn’t think that...I didn’t respect him at that point.”<sup>32</sup> Complainant also testified, “[E]verybody talked to each other afterwards, like oh my goodness, he’s lost his mind.”<sup>33</sup>

The AS, Assistant Flight Commander, when re-interviewed, testified she was not sure of the exact words used, but Subject 1 said, “[H]ey don’t go to the IG with this, ha, ha, ha.”<sup>34</sup> She felt when Subject 1 realized people were shocked regarding the content of the “rules” they were discussing, he said, “Hey, don’t go to the IG with this.”<sup>35</sup> She felt this was not meant as a threatening statement, but he really did want the information to stay in the room.<sup>36</sup> She also

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<sup>26</sup> Sec III, Tab D-3, p. 7

<sup>27</sup> Sec III, Tab D-3, p. 9-11

<sup>28</sup> Sec III, Tab D-6, p. 5, Tab D-7, p. 2

<sup>29</sup> Sec III, Tab D-1, p. 6

<sup>30</sup> Sec III, Tab D-2, p. 6

<sup>31</sup> Sec III, Tab D-6, p. 6

<sup>32</sup> Sec III, Tab D-6, p. 6

<sup>33</sup> Sec III, Tab D-1, p.7

<sup>34</sup> Sec III, Tab D-7, second interview, p. 4

<sup>35</sup> Sec III, Tab D-7, p. 5

<sup>36</sup> Sec III, Tab D-7, p. 7

testified, “[H]e was not serious and forceful. He was, it almost sounded like a joke that went over badly.”<sup>37</sup> The AS. Assistant Flight Commander testified the comments were not threatening and she felt they did not meet the definition of restriction. However, she felt that based on the climate in the State X Air National Guard, if anyone went to the IG they may be reprimed against.<sup>38</sup>

Officer in Charge, Command Post, testified Subjects said, “[L]et’s just keep this between us.” She thought this meant she should keep the information from the officer’s call “in house.”<sup>39</sup> Officer in Charge, Command Post testified the officers call was to improve morale and camaraderie and it was to generate funny stories about each other.<sup>40</sup> Officer in Charge, Command Post was re-interviewed by SAF/IGQ and testified she never felt like she was unable to talk about what happened in the officers call. In fact, immediately after the officers call, she was approached by a squadron commander and they, along with other officers that were in attendance at the officer’s call, discussed the rules that were read. Officer in Charge, Command Post testified they all agreed there was inappropriate content, but no one indicated they felt unable to contact the IG or Congress.<sup>41</sup> When asked if she felt she could go up her chain of command or contact the IG or Congress, Officer in Charge, Command Post testified she would have done so if she felt it was necessary.<sup>42</sup>

Lt DK testified the room was packed with people during the officers call, everybody was laughing, and it was only after the announcement that there would be an officers call every drill that people started talking about the inappropriate comments that were made.<sup>43</sup> He also stated, “At no point did anybody indicate, like, oh, I can’t believe this, I don’t know who I’m going to talk to.”<sup>44</sup> Lt DK’s understanding of “what happens in the Heritage Room stays in the Heritage Room” is the drinking, joking, and poking fun at people is what should not be talked about outside the Heritage Room.<sup>45</sup> Lt DK testified he never felt like he could not talk to someone about what happened in the Heritage Room and he was not aware of anyone that attended that felt they could not talk to someone about what happened.<sup>46</sup> Lt NR thought that unofficially what happened in the officer’s call should not be discussed outside the Heritage Room, but he just brushed it off.<sup>47</sup> Lt NR’s understanding is that Subject 1 was asking for an opportunity to discuss any issues with a complainant before they went up the chain of command or to the IG.<sup>48</sup>

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<sup>37</sup> Sec III, Tab D-7, p. 8

<sup>38</sup> Sec III, Tab D-7, p. 9

<sup>39</sup> Sec III, Tab D-15, p. 2

<sup>40</sup> Sec III, Tab D-15, p. 2

<sup>41</sup> Sec III, Tab D-15(A), p. 4

<sup>42</sup> Sec III, Tab D-15(A), p. 5

<sup>43</sup> Sec III, Tab D-16(A), p. 3

<sup>44</sup> Sec III, Tab D-16(A), p. 4, line 7-8

<sup>45</sup> Sec III, Tab D-16(A), p. 4, lines 19-22

<sup>46</sup> Sec III, Tab D-16 (A), p. 4-5

<sup>47</sup> Sec III, Tab D-17(A), p. 3-4

<sup>48</sup> Sec III, Tab D-17(A), p. 5

## STANDARDS

The standard of proof for substantiating allegations investigated by The Inspector General is a preponderance of the evidence—a determination, considering all the evidence gathered, that it is more likely than not that events have occurred as alleged.<sup>49</sup>

### Restriction

Restriction and restricted access are defined under 10 U.S.C. §1034, DoDD 7050.06, *Military Whistleblower Protection*, 23 Jul 07, and AFI 90-301, *Inspector General Complaints Resolution*, 23 Aug 11.<sup>50</sup> Under 10 U.S.C. §1034, a military member may not be restricted from communicating with a member of Congress or an IG. AFI 90-301, Attachment 1, defines restriction as “[p]reventing or attempting to prevent members of the Armed Forces from making or preparing to make lawful communications to members of Congress and/or an IG.” To properly examine claims of restricted access, IOs should examine how the RMO limited or attempted to limit the member’s access to an IG or member of Congress, the intent of the RMO, and whether a reasonable person under similar circumstances as the member would believe he or she was actually restricted from making a lawful communication with the IG or a member of Congress based on the RMO’s actions.<sup>51</sup>

An RMO is defined as (1) one who influenced or recommended to the deciding official that he/she take, withhold, or threaten a management/personnel action, (2) one who decided to take, withhold, or threaten the management/personnel action, or (3) any other official who approved, reviewed, or indorsed the management/personnel action.<sup>52</sup>

## ANALYSIS

**Allegation:** On 8 Jan 12, Subject 1, AS Director of Operations, improperly restricted members under his charge from making a lawful communication to the IG in violation of 10 U.S.C. § 1034.

### **Question 1: How did the RMO limit or attempt to limit the member’s access to an IG or a member of Congress?**

There is conflicting testimony regarding exactly what Subject 1 said in the Heritage Room. However, Subject 1 confirmed his intent was for the Heritage Room officers call to be a squadron only event. Although the exact words are in dispute, Subject 1 testified if someone had said “let’s keep this between us” or “you guys can’t report me to the IG” he would have endorsed

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<sup>49</sup> AFI 90-301, *Inspector General Complaints Resolution*, 23 Aug 11, para. 3.48; Atch 1. This is the version of the AFI in effect at the time of the investigation. Further review, clarification, and follow-up interviews occurred after the implementation of Change 1 to AFI 90-301 on 6 Jun 12; however, those changes did not affect the substance of the referenced portions of the AFI.

<sup>50</sup> 90-301, *Inspector General Complaints Resolution*, 23 Aug 11, is the version of the AFI in effect at the time of the alleged restriction.

<sup>51</sup> AFI 90-301, Table 7.2

<sup>52</sup> AFI 90-301, Atch 1

the comment.<sup>53</sup> Regardless of what words were actually said, it appears, based on testimony that something was said or endorsed by Subject 1 about not disclosing what was discussed in the Heritage Room officers call to anyone that was not in attendance.

## **Question 2: What was the intent of the RMO?**

(a) Reasons for restricting or taking action that created barriers to making protected communications:

Subject 1 testified the objective of the officers call was for people to have fun.<sup>54</sup> He also said, “[Y]ou know when you do a heritage thing, you want it to be a squadron thing. You don’t want things to just get out, you know, but hey, I don’t care, stories are stories.”<sup>55</sup> Finally, he stated, “But again, the intent is for everyone to learn, not that this guy screwed up, it’s that hopefully he will laugh about it and not have thin skinned [sic], such thin skin that he[,] you know, can’t learn, everyone can’t learn from his or her mistakes.”<sup>56</sup> Subject 1’s intent was to increase morale and camaraderie within the squadron. He felt the best way to improve morale and camaraderie was to have an officers call in the Heritage Room and not discuss anything that happened in the Heritage Room with people that did not attend. By encouraging or endorsing that those in attendance should not share the content of the officers call with people that did not attend, Subject 1 was trying to be funny and create an atmosphere to improve morale and camaraderie between the members of the squadron.<sup>57</sup> Although Subject 1 could have made better decisions regarding how he went about increasing morale and camaraderie, the evidence establishes he did not intend to restrict anyone from contacting the IG. The preponderance of evidence supports Subject 1’s assertion that the comments at the officers call were intended to improve morale and camaraderie, and were not intended to restrict anyone from contacting the IG or Congress.

(b) Reasonableness of the RMO’s actions:

Subject 1 wanted to improve morale and camaraderie within the squadron. He thought that a heritage event, kept within the squadron, would increase morale.<sup>58</sup> By encouraging or endorsing that those in attendance should not share the content of the officers call with people that did not attend, Subject 1 was trying to improve morale and camaraderie between the members of the squadron.<sup>59</sup> Prior to reading the rules, those attending the officers call were told it was all in jest and should not be taken seriously.<sup>60</sup> Further, Subject 1’s comments about not sharing what was said at the event, to include any references to the IG, were made in a joking manner.<sup>61</sup> While it is not appropriate for an Air Force officer to say that events that take place at the workplace cannot be shared with anyone outside the event, to include the IG, the evidence

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<sup>53</sup> Sec III, Tab D-1, p. 7

<sup>54</sup> Sec III, Tab D-1, p. 4

<sup>55</sup> Sec III, Tab D-1, p. 7

<sup>56</sup> Sec III, Tab D-2, p. 8

<sup>57</sup> Sec III, Tab D-15, p. 2

<sup>58</sup> Sec III, Tab D-2, p. 8

<sup>59</sup> Sec III, Tab D-15, p. 2

<sup>60</sup> Sec III, Tab D-2, p. 6

<sup>61</sup> Sec III, Tab D-1, p. 8; Tab D-16(A), p. 3

suggests Subject 1's comments, based on the context in which they were made, were not totally unreasonable.

(c) Motive for the RMO's action:

The motive for the officers call was to increase morale, because a recent unit climate assessment identified low morale in the squadron.<sup>62</sup> The officers call was to increase morale and camaraderie within the squadron by making people aware of squadron history.<sup>63</sup> Although it is unclear exactly what Subject 1 said regarding going to the IG, the testimony supports it is clear the expectation was that the content of the officers call would not be shared with anyone that did not attend the officers call. Typically, the motive for restricting someone from going to the IG or Congress is to prevent the disclosure of wrongdoing. In this case, based on Subject 1's testimony, he did not realize the content of the officers call was inappropriate and had no motive to restrict people from contacting the IG or Congress.<sup>64</sup> It appears Subject 1 was trying to increase morale and camaraderie by making people laugh and by limiting the people that knew about the content of the officers call.<sup>65</sup> By limiting the people that know about the content of the officers call to the squadron, it increases morale and builds camaraderie because this shared common experience creates feelings of unity and togetherness. The exclusivity creates a common bond. Thus, the motive behind the statement about sharing the content of the officers call does not appear to be focused on restricting someone in attendance from reporting misconduct to the IG or Congress. The preponderance of evidence supports Subject 1's motive for making or endorsing statements about sharing information was to increase morale and camaraderie within the squadron by creating a common bond, not to restrict anyone from contacting the IG or Congress.

**Question 3: Would a reasonable person, under similar circumstances, believe he or she was actually restricted from making a lawful communication with the IG or a member of Congress based on the RMO's actions? No.**

It is clear the content of the officers call was inappropriate and comments were made regarding not disclosing what happened in the Heritage Room officers call to anyone that did not attend. However, based on witness testimony, Subject 1's comments were not interpreted as an attempt to prevent anyone from contacting the IG or Congress.

Complainant, when re-interviewed, was asked specifically if he felt he was restricted from contacting the IG or if Subject 1's comments prevented him from contacting the IG. Complainant responded, "I thought he was completely out to lunch and I could do whatever I wanted, because to me, he had...I had lost confidence in him right there, and I didn't think that...I didn't respect him at that point."<sup>66</sup> Complainant also testified many people that attended the officers call thought Subject 1 had "lost his mind."<sup>67</sup> It is not reasonable for people to think

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<sup>62</sup> Sec III, Tab D-3, p.4

<sup>63</sup> Sec III, Tab D-15, p. 2

<sup>64</sup> Sec III, Tab D-1

<sup>65</sup> Sec III, Tab D-1, p. 8; Tab D-16(A), p. 3

<sup>66</sup> Sec III, Tab D-6, p. 6

<sup>67</sup> Sec III, Tab D-1, p. 7

that Subject 1 “lost his mind” but also think they were restricted based on statements made during the same officers call. If they thought he “lost his mind,” they would not have interpreted his comments in a way that prevented them from contacting the IG or Congress. It is reasonable that people in attendance concluded they did not have to adhere to the comments made because they did not take Subject 1 seriously.

The witness interviews are clear that any comments made by Subject 1 were made during what was intended to be a fun event to increase morale and camaraderie. Prior to reading the rules, those attending the officers call were told it was all in jest and should not be taken seriously.<sup>68</sup> The AS, Assistant Flight Commander felt Subject 1’s comments were a joke that went over badly.<sup>69</sup> Lt DK also testified everyone in attendance was laughing.<sup>70</sup> He also explained that he felt the drinking, joking, and poking fun at people is what should not be talked about outside the Heritage Room.<sup>71</sup> The joking manner in which the officers call was conducted appears to be an unsuccessful attempt to build morale and camaraderie within the squadron. Immediately after the event, the Officer in Charge, Command Post discussed the content of the officers call with others that attended, and the conversations focused on the inappropriate sexual comments, not on restriction. She testified that everyone agreed the content of the officers call that included sexual overtones was inappropriate. However, the Officer in Charge, Command Post did not feel restricted and was not aware of anyone that felt restricted.<sup>72</sup> Although the content of the officers call was inappropriate, several of the witnesses testified they recognized Subject 1 was trying to improve morale and squadron camaraderie by encouraging people not to share the information outside the squadron.<sup>73</sup>

The evidence supports Subject 1 made an inappropriate comment about not sharing what happened during an officers call to anyone who did not attend the officers call. Witness testimony establishes that Subject 1’s comments were made in jest and no one felt they were actually restricted from communicating with the IG or Congress. Witness testimony from people who attended the officers call supports that a reasonable person attending a jovial officers call focused on the Heritage Room rules would have recognized the intent of a statement about sharing information about the event was to keep the information within the squadron to increase morale, not to restrict people from going to the IG or Congress. It is reasonable to expect that an officer, when told the activities at the officers call were in jest and should not be taken seriously, will not take them seriously. Therefore, a reasonable person under similar circumstances would not believe he or she was actually restricted from making a lawful communication with the IG or a member of Congress.

### ***Conclusion***

The IO concluded Subject 1 did not restrict the complainant from talking to the IG during the officers call on 8 Jan 12. However, the IO determined Subjects did make unwelcome sexual

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<sup>68</sup> Sec III, Tab D-2, p. 6

<sup>69</sup> Sec III, Tab D-1, p. 8

<sup>70</sup> Sec III, Tab D-16(A), p. 3

<sup>71</sup> Sec III, Tab D-16(A), p. 4, lines 19-22

<sup>72</sup> Sec III, Tab D-15(A), p. 4

<sup>73</sup> Sec III, Tab D-3, p. 4; Tab D-5, p. 3; Tab D-15, p. 2; Tab D-16, p. 2

comments and commit an adverse act. As a result, they each received an LOR and have been held accountable for their inappropriate behavior at the 8 Jan 12 officers call. Although the facts of this case do not make this an easy decision, after careful analysis, we agree the preponderance of evidence supports the IO's findings and conclusion that Subject 1 did not restrict anyone from contacting the IG or Congress based on his comments at the 8 Jan 12 officers call.

## **ERRORS AND ANOMALIES**

The majority of the testimony in this ROI is summarized, not transcribed, testimony. In addition, the IO failed to ask many of the witnesses appropriate follow-up questions regarding the restriction allegation. However, it appears he had sufficient information to analyze the allegation, and after SAF/IGQ completed additional interviews, we found sufficient information to conduct our legal review. Therefore, the legal sufficiency of the investigation is not affected.

Subject 1 is the only subject investigated regarding the restriction allegation. The officers call was conducted by both Subjects. The ROI leaves open the possibility that Subject 2 may have said or endorsed comments regarding not talking about the officers call to anyone outside the squadron. Although Subject 2 was not investigated regarding the restriction allegation, we believe the evidence regarding an allegation would be the same as the evidence contained in the ROI and the allegation would be not substantiated. Therefore, this anomaly does not affect the legal sufficiency of the investigation.

The AS, Assistant Flight Commander testified that based on the climate in the State X Air National Guard, if anyone went to the IG, they may be reprimed against.<sup>74</sup> Based on previous cases from the State X Air National Guard, we believe this comment refers to institutional problems regarding contacting the IG and is not specifically directed at Subject 1.<sup>75</sup>

## **CONCLUSION**

The framed allegation has been addressed; it alleges a violation of law; the IO reasonably applied the preponderance of the evidence standard in arriving at the finding; the IO's conclusions are supported by and consistent with the finding; and the investigation complies with all applicable legal and administrative requirements. The preponderance of the evidence supports the finding that Subject 1 did not restrict complainant from contacting the IG or members of Congress. We concur with the IO that this allegation is **NOT SUBSTANTIATED**. The ROI is legally sufficient and the case may be closed in accordance with AFI 90-301.

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<sup>74</sup> Sec III, Tab D-7, p. 9

<sup>75</sup> SAF/IGS has previously conducted investigations addressing the institutional problems in the Nevada Air National Guard.