

PRIVACY ACT/FREEDOM OF INFORMATION ACT

Special Victims' Counsel Requests for Air Force Records Under the Privacy Act and Freedom of Information Act

You have asked whether Special Victims' Counsel (SVCs) can, under the Privacy Act and Freedom of Information Act (FOIA), receive Air Force Privacy Act records and Air Force non-Privacy Act records they have requested in the course of performing their assigned SVC duties. Under the Privacy Act, SVCs can, at the discretion of the record OPR, obtain relevant Air Force Privacy Act records that are necessary to perform their assigned duties. *See* 5 U.S.C. § 552a(b)(1); DODI 1030.2, *Victim and Witness Assistance Procedures*, June 4, 2004; AFI 51-201, *Administration of Military Justice*. SVCs can also obtain relevant non-Privacy Act records pursuant to their functional/official use request for such records. In addition to a relevancy standard, the application of appropriate FOIA exemption rules may be warranted. *See* 5 U.S.C. § 552; DoD 5400.7-R_AFMAN 33-302, *Freedom of Information Act Program*.

Many SVC requests for records are made for Military Justice records (AF Forms 3070, non-judicial punishment actions; Article 32 reports; records of trial, etc.) and AF Office of Special Investigation (AFOSI) records (1168 statements, OSI records of investigation) that are considered Privacy Act records under three Privacy Act System of Records Notices (SORNs): F051 AFJA I, *Military Justice and Magistrate Court Records* (July 22, 2010, 75 FR 42720); F071 AF OSI D, *Investigative Information Management System* (August 22, 2006, 71 FR 50894); and F071 AF OSI C, *Criminal Records* (June 11, 1997, 62 FR 31793). SVCs may also request non-Privacy Act records they believe are necessary for them to perform their assigned SVC duties.

Currently, DoDI 1030.2, paragraph 6.3.2., states that except for information that is releasable under paragraph 6.2 and subparagraph 6.3.1 of that Instruction, "requests for information relating to the investigation and prosecution of a crime (e.g., investigative reports and related documents) from a victim or witness shall be processed in accordance with DoD 5400.7-R." *See*, also, DoD 5400.7-R_AFMAN 33-302, paragraph C1.3.1.2.

Likewise, AFI 51-201 requires a proper analysis under the FOIA and Privacy Act concerning the release of certain information to a victim and other third parties, unless release of information/records is specifically authorized to a victim as set forth in the AFI. *See* AFI 51-201, paras. 3.7.2; 9.7.1.1; 9.7.1.2; 13.5; 13.7; 13.7.1; 13.7.2 ("All other documents or records, including documents which will become part of a record of trial, and including those which are attached to the court-martial record of trial but not made a part of the record of trial under the provisions of RCM 1103 (for example, an Article 32 report and its attachments) are also subject to release determination under the Privacy Act and Freedom of Information Act").

The Privacy Act Analysis

Paragraph 1 of subsection b of the Privacy Act allows for relevant/necessary Privacy Act records to be released to DoD employees. *See* 5 U.S.C. § 552a(b)(1). Specifically, the (b)(1) exception to the normal “consent” rule required from the individual the Privacy Act record pertains to before the record can be released to a third party states that records from a Privacy Act SORN may be disclosed to “those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties.” DoD 5400.11-R, *Department of Defense Privacy Program*, paragraph C4.2.1, sets forth a three part test that must be met before a record from a Privacy Act SORN is provided to a DoD employee under the (b)(1) exception. If this three part test is met, the Privacy Act will not be a bar to providing appropriate Privacy Act records to SVCs as necessary for the SVC to perform their assigned SVC duties:

- (1) The DoD employee has a need for the record in the performance of his or her assigned duties;
 - (2) the intended use of the record [by the requester] generally relates to the purpose for which the record is maintained; and
 - (3) only those records as are minimally required to accomplish the intended use are disclosed
- Note – #3 is essentially a relevancy test. The records OPR can redact unnecessary/irrelevant information contained in the records otherwise provided. And, once the intended use is completed, the records OPR can require any copies that were provided to the SVC to be returned or destroyed. While in their control, SVCs (as with any other AF employee handling Privacy Act records for official purposes) must also understand and comply with appropriate disposition/further dissemination controls and protections for any Privacy Act records or information released to the SVC under the (b)(1) exception.

However, even if the three part test for a (b)(1) disclosure to an SVC is met, the record OPR can choose not to provide the Privacy Act record to the SVC. In such a case, the requested Privacy Act records should be provided to the SVC if release would otherwise be required to the victim under a FOIA analysis.¹ Non-Privacy Act records can also be provided to an SVC on an official use/functional use basis (and properly controlled during their use), applying relevancy and appropriate FOIA exemption principles.

CONCLUSION

Requests from SVCs for Air Force records associated with an accused’s/subject’s conduct toward the victim and subsequent investigatory/disciplinary action, absent specific guidance on the type of information that is releasable to an SVC/victim, are properly addressed under Privacy Act and FOIA principles, as noted in DODI 1030.2 and AFI 51-201. Depending on what an SVC seeks and why, requests for records associated with a Privacy Act SORN may be releasable under the Privacy Act’s (b)(1) exception. In the absence of release under that exception, or to the victim under the PA (b)(3) routine use provision, release of Privacy Act records is governed

¹ The Military Justice Privacy Act SORN and an AFOSI Privacy Act SORN also allow for the discretionary, limited release of Privacy Act records requested by the victim under the routine use provision - section (b)(3) - of the Privacy Act.

under FOIA exemption rules. *See* 5 U.S.C. § 552a(b)(2) (otherwise governing release of Privacy Act records required to be released under the FOIA). Non-Privacy Act record requests from SVCs are also addressed as functional use/official use requests, applying a relevancy standard and any applicable FOIA exemption rules.

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