

## FREEDOM OF INFORMATION ACT

### Release of "By Name Requests" for Misconduct Reports of Investigations to Third Parties

You have asked our opinion about the release under the Freedom of Information Act (FOIA) of a "by name" request for records of a misconduct report of investigation and other related records concerning a subject, such as commander directed investigations, Inspector General reports of investigation, Air Force Office of Special Investigations/Security Forces reports of investigations, non-judicial punishment actions, and court-martial records. A "by name request" is where the requester asks for a report of investigation conducted against an individual using the name of the subject or other personal identifier, such as their position).

In your particular case, the report of investigation involved an officer above the O-6 grade concerning his inappropriate personal use of an Air Force aircraft.

The FOIA, 5 U.S.C. § 552, is implemented within the Department of Defense and Air Force by DoD 5400.7-R\_AFMAN 33-302, *Freedom of Information Act Program* (FOIA). Specific AFIs about disciplinary and other personnel actions, such as AFI 51-201, 301 and 36 series AFIs, also contain guidance on releasing these types of records.

Two primary issues will determine how much, if any portion, of these types of records will be released under the FOIA: the privacy expectation of the subject of the report and witnesses interviewed, as well as other individuals named in the report; and the status of the ROI and any related disciplinary action.

With respect to expectation of privacy issues concerning records compiled for law enforcement purposes, such as these types of records, FOIA exemption (b)(7)(C) requires the withholding of any information that, if released, "could constitute an unwarranted invasion of privacy." In determining whether a sufficient expectation of privacy exists, the OPR for the records must conduct a balancing test, weighing the privacy interest of the subject of the record (and others) against the public's interest in the information. The "public's interest" refers to the public's right to know how the Air Force accomplishes its regulatory and statutory duties. *Dep't of Justice v. Reporters Committee*, 489 U.S. 749, 773 (1989).

All of the facts and circumstances concerning the record in question will determine the resolution of the balancing test. Usually, the "expectation of privacy" we are concerned with is the subject's desire to keep from the public information that shows he was investigated for alleged misconduct, found to have engaged in misconduct, or has been disciplined. *See*, for example, the discussion in Department of Justice *Guide to the Freedom of Information Act*, page 424, and cited cases of *Buckley v. Schaul*, No. 03-03233, slip op. at 10-11 (W.D. Wash. Mar. 8, 2004) ("If these files were released, the public disclosure of allegations of impropriety against [regional counsel] and whomever else, without any findings of actual misconduct, could scar employees' personal and professional reputations") *aff'd*, 135 F. App'x 929 (9th Cir. 2005); *McQueen v. United States*, 264 F. Supp. 2d 502, 533-34 (S.D. Tex. 2003) (public interest would not be served by "disclosure of information regarding unsubstantiated allegations" made against three government employees).

Many factors go into applying the balancing test, to include: the rank of the person; the nature of the person's duties and significance of his duties to the Air Force operations as a whole; whether the alleged misconduct occurred on or off duty; whether the alleged misconduct involved the person's official duties; the seriousness of any proposed or actual disciplinary action; the seriousness of the allegations; the current public notoriety of the case; the length of time that has passed since the investigation or disciplinary action took place; the actions of the subject or individual's named in the report in making public the information; and the stage of any disciplinary actions. For instance, on this last point, a subject usually has a diminished privacy expectation in court-martial charges against him that have been preferred, where the convening authority has determined an Article 32 hearing will be convened or referred the charges to a courts-martial.

In this case, the facts and circumstances weigh against the subject having a reasonable expectation of privacy (of course, the names of witnesses interviewed and any complainant named in the report would be appropriately redacted to protect their reasonable expectation of privacy, as appropriate). Specifically, the subject was a high ranking person with significant duties that impacted a large Air Force organization; the allegation concerned the misuse of significant government property which resulted in the waste of large sums of tax payer money; and the allegation was substantiated, which resulted in career ending action against the individual. All of these factors weigh against an appropriate expectation of privacy of the subject in keeping from the public the facts and circumstances of the report of investigation.

Despite the fact that in this particular case the privacy interest of the subject will not permit withholding large portions of the report under FOIA exemption (b)(7)(C) (or (b)(6) – the privacy exemption for records that are not compiled for a law enforcement purpose), other FOIA exemptions may warrant withholding some or all of the report, such as FOIA exemption (b)(1) concerning classified information; FOIA exemption (b)(5) concerning sensitive pre-decisional, deliberative process information; and most importantly, for these types of normally unclassified records, exemptions (b)(7)(A) and (b)(7)(B). Exemption (7)(A) allows the Air Force to withhold information that, if released, would circumvent an ongoing investigation. Exemption (7)(B) allows the Air Force to withhold information that, if released, would adversely impact the ability of an individual to receive a fair hearing. *See* DoD 5400.7-R\_AFMAN 33-302, paragraphs C3.2.1.10.1.1. and C3.2.1.10.1.2.

Two important points to make concerning “by name” requests of misconduct reports of investigation: If the OPR determines that the subject of the record does have an appropriate expectation of privacy, redacting the personal information of the subject and releasing the report will not properly protect the subject's privacy interest. This is because the requester – even with the name of the subject and other personal information of the subject redacted from the report – will know that what is being provided to him is about the subject. Accordingly, in these types of cases, it is appropriate to withhold the entire report of investigation under exemptions (b)(6) and (b)(7)(C). *See*, for example, the discussion on pages 486-489 of the DOJ *Guide to the Freedom of Information Act*, 2011.

Conversely, if a requester asks for “all the reports of investigation completed against Lt Colonels at base x in 2005”, some information from the reports would most likely be releasable even if the

subjects have an appropriate expectation of privacy. In such a case, normally redacting the names and other personal information of the subject (and witnesses) from the report will sufficiently protect their identity from the requester and public because there is no public knowledge of who the reports are about.

As with all the FOIA exemptions, “one size does not fit all” with respect to redaction and release issues. This opinion is intended to address general matters and issues to consider in determining release of misconduct type reports of investigation and related disciplinary records. The above listed authorities, as well as guidance on the Department of Justice website and as contained in their current “*Guide to the Freedom of Information Act*” provides helpful information.

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