

## FREEDOM OF INFORMATION ACT

### Release of Report of Investigation of a Retired Officer

You have asked whether a substantiated report of investigation (ROI), concerning misconduct a retired colonel engaged in two to three years ago, is required to be released to a requester (other than the colonel) under the Freedom of Information Act (FOIA). In our opinion, after balancing the general public interest today in the ROI against the personal privacy interest of the colonel under FOIA exemption (b)(7)(C), the request for the ROI should be denied.

ROIs that are created and compiled in order to address allegations of misconduct by Agency employees are records compiled for law enforcement purposes. 5 U.S.C. § 552(b)(7); DoD 5400.7-R\_AFMAN 33-302, *Freedom of Information Act Program*; *Jefferson v. DOJ*, 284 F.3d 172, 178 (D.C. Cir. 2002); see also discussions in Department of Justice Freedom of Information Act Guide, Exemption 7, at <http://www.justice.gov/oip/doj-guide-freedom-information-act>.

Accordingly, the primary FOIA exemption that will determine how much information is releasable under the FOIA when such an ROI is requested is FOIA exemption 7, which protects from release Air Force records created or compiled for a law enforcement purpose. In particular for purposes of our analysis in this case, concerning a closed investigation where no disciplinary action is contemplated, or where the disciplinary action is otherwise complete, FOIA Exemption (b)(7)(C) is applicable. 5 U.S.C. § 552(b)(7)(C); DoD 5400.7-R\_AFMAN 33-302.

Specifically, exemption (b)(7)(C) protects records, or information in records, compiled for a law enforcement purpose that could, if released, constitute an unwarranted invasion of personal privacy. In applying this exemption, a balancing test must be done, weighing the privacy interests of individuals named in a record against the appropriate public interest in disclosure. The public interest in disclosure is one that will “shed light on an agency’s performance of its statutory duties.” *Dep’t of Justice v. Reporters Committee*, 489 U.S. 749, 773 (1989). Current DoD employees of the O-6 grade/civilian equivalent and below usually have a sufficient privacy interest in protecting their names, phone numbers, e-mail addresses, home addresses and similar personal information from disclosure. DoD 5400.7-R\_AFMAN 33-302, *Freedom of Information Act Program*. However, even for lower level employees, if the balancing test tilts toward the public’s interest outweighing the privacy interest of the subject of the ROI, the requested record is releasable unless another FOIA exemption applies to withholding information in the record.

In many cases, an active duty or current reserve/Guard colonel who is also a commander will not have a sufficient privacy interest in keeping from release under the FOIA an ROI that substantiated recent work related misconduct that resulted in his removal from command. In those cases, the public’s interest into knowing why commanders, especially higher ranking commanders, were involuntarily removed from command is paramount.

In your case, it is our understanding the substantiated misconduct involved inappropriate kissing and hugging with a GS-12 civilian subordinate by a colonel who was a commander at the time,

but is now retired. The conduct occurred nearly three years ago and did not result in his being involuntarily removed from his command, because it was discovered years after the fact.

Other pertinent facts (some more weighty than others) to consider in applying the required balancing test in a case like this include whether the subordinate was a civilian employee or military member; whether the subordinate was in the direct chain of command/supervisory chain of the subject; whether the conduct occurred while on duty or off-duty; whether the inappropriate relationship involved a military trainee in basic training; if the subject was not a commander, what was the nature of the subject's duties at time of misconduct; whether there has been any prior publicity in the case/investigation and, if so, whether the prior publicity occurred because of information released by the subject; was the subject married (adultery is a separate criminal offense under the UCMJ); and any other pertinent facts relevant to determining the reasonable privacy interest of the subject and the general public interest.

In our view, after applying the required balancing test analysis to relevant facts, the privacy interest of the retired colonel outweighs the public's interest in this ROI. Most importantly, the underlying situation involves a closed, two to three year old ROI involving a relatively minor allegation concerning a now retired officer that happened years ago, and which does not have any relevance to current Air Force operations/missions. Of course, reasonable people can differ concerning the reasonable privacy interests of individuals, as well as what is or should be a reasonable "public interest." But, for closer questions of this nature, universal agreement on a release decision is not always expected, or necessary. Rather, it is critical that the Initial Denial Authority reviews the relevant appropriate facts and circumstances, applies the appropriate balancing test, and reaches a defensible, reasonable release decision.

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