

FREEDOM OF INFORMATION ACT

Releasing Legal Opinions to Congress

You have asked whether AF/JA is required to release its legal opinions to individual Senators, Congressman, and staff made on the individual's representatives behalf, or – as occurs in some cases – requests made on behalf of a State's congressional delegation.

Consistent with the law and Department of Defense (DoD) policy, release of Air Force records to individual representatives or State congressional delegations on their own behalf as members of Congress is permissible to the same extent the Air Force would release records to any individual requester under the Freedom of Information Act (FOIA) or Privacy Act. Accordingly, requested records should not be released to individual representatives and staff unless the Air Force is prepared to release the same documents to a member of the media or other individual who seeks the record under the FOIA.

IAW DoD Regulation 5400.7/Air Force Supplement, *The DoD Freedom of Information Act Program*, paragraph C1.4.2., and AFI 90-401, *Air Force Relations With Congress*, paragraph 1.3., information is provided as requested to congressional committees and subcommittees with jurisdiction over the subject matter of the requested information, subject, of course, to procedural requirements, such as handling of classified records and proper clearances for review of classified records. So, a request from a chairman or another member on behalf of a congressional committee with jurisdiction over the subject matter of the requested record will usually result in the requested records being released. There are exemptions, such as a proper assertion of executive privilege. But, generally speaking, release of the requested information to the Congress as an entity or a proper committee will occur. Such releases do not impede the Air Force's ability to withhold the same information from other requesters, such as a request from a contractor, a member of the media, or another individual pursuant to a FOIA request.

However, requests from individual Congressman, Senators, or their staff – either for themselves or on behalf of a constituent are processed in accordance with the Freedom of Information Act exemptions (or the Privacy Act (PA), for Privacy Act records), as such requesters are treated as any other FOIA requester or requester for a PA record. The staff member/representative is not required to “file” a formal FOIA request – that is a normal exception extended to members of congress and their staff – but the Air Force should only provide records requested by individual representatives and their staff members that it will be comfortable releasing to any other FOIA requester. This is because once the Air Force releases a record to an individual representative or staff member acting on their own behalf as an individual member of Congress or congressional staffer, the Air Force has no legal basis to withhold it from any other person who files a formal FOIA request.

So, with respect to JA legal opinions requested under the FOIA that are not part of a Privacy Act record that does not claim a proper Privacy Act exemption, the Air Force can withhold them in their entirety under FOIA Exemption (b)(5). The Air Force is not required to withhold such documents under exemption (b)(5) – the Air Force can release legal opinions if it wants to – but

it has been long standing policy not to release legal opinions, especially those dealing with ongoing policy debates, recent, current, or future personnel actions, other sensitive issues, or issues that are likely to arise again in the future.

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