

PRIVACY ACT

Protected Communication – Expectation of Privacy

This opinion is in response to a request from PACAF/IGQ on whether information contained within a member's Congressional complaint can be used for a discharge action or if it is a protected communication. For reasons that follow, our opinion is that you may use the information provided by an individual to a Member of Congress because according to FOIA case law an individual has no expectations of privacy when the individual makes the information public¹ and the information provided was not perceived as a disclosure under the Whistleblower Protection Act.

Members of the United States Congress hold their office by the vote of their citizen constituents. U.S. Public Law entitles constituents to correspond with their elected officials, who, in turn, will seek answers, information, and resolutions from government agencies. Therefore, service members and their families, civilian employees, or any interested parties may ask their elected officials to help them with a matter involving the Department of the Defense (DoD). For DoD Congressional Inquiries, the Office of the Assistant Secretary of Defense for Legislative Affairs is responsible for coordinating requests for information from Congress. Replies to Congressional inquiries and requests shall be as responsive and expeditious as possible pursuant to DoD 5110.4-M (Reference (1))²

Information contained within requests to Congress is not bound by the Privacy Act of 1974, because Congress is not subject to said law.³ When an individual provides information to a Member of Congress, not perceived as a disclosure under the Whistleblower Protection Act⁴, that information is not considered protected communication. Therefore, Congress may use that information as they deem appropriate. When Congress then provides that information, given by the individual, to a government agency, the information is not considered a protected communication and may be used by the Agency for official purposes.

We therefore conclude that you may use the information provided by an individual to a Member of Congress in accordance with FOIA case law as it was not perceived as a disclosure under the Whistleblower Protection Act.

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¹ National Magazine v. U.S. Custom Services, 71 F. 3d 885 (D.C. Cir. 1995), and Billington V. DOJ, 245 F. Supp. 2d 79 (D.D.C. 2003).

² DoDI 5400.04, *Provision of Information to Congress*, 17 March 2009.

³ 5 U.S.C. 552a (a)(1).

⁴ The Whistleblower Protection Act provides statutory protections for federal employees who engage in "whistleblowing," that is, making a disclosure evidencing illegal or improper government activities. See Public Law 101-12 – Whistleblower Protection Act of 1989; DoDD 7050.06, *Military Whistleblower Protection*, 23 July 2007; and Public Law 112-199 – Whistleblower Protection Enhancement Act of 2012.