

FREEDOM OF INFORMATION ACT

Legal Review

We have reviewed the subject request under the Freedom of Information Act (FOIA) and the Privacy Act (PA). We concur that some information is properly withheld under FOIA exemption (b)(5) and (b)(6), as discussed below.

On 17 October 2009, Subject requested under the FOIA and the Privacy Act (PA) “all documents related to and relied upon by the Secretary of the Air Force in making his recent Officer Grade Determination pertaining to me, to include the findings and recommendations of the AF Review Boards Agency, and the supporting documents and related information such review panel considered.” This legal review pertains to documents from SAF/MRBP. The documents include some of Subject’s performance reports, emails, an executive summary of the Officer Grade Determination (OGD) recommendation, a SAF/GC legal review, a memorandum to SECAF from SAF/MRBP, a Board Findings and Worksheet document, and a list of Air Force General Officer OGD cases, 1990 to present.¹

SAF/MRBP recommends all of the records be denied under the Privacy Act’s exemption (j)(2), but that most information (except for some information redacted IAW FOIA Exemption (b)(5) and (b)(6)) be released as required under the FOIA. We understand all the responsive documents in the FOIA case file come from SAF/MRBP’s OGD file on Subject, as noted in SAF/MRBP’s undated memorandum to SAF/MR. As SAF/MRBP implies, Subject’s OGD file maintained by the Personnel Council is a Privacy Act record.

DoD 5400.7/AF Supplement, *DoD Freedom of Information Act Program*, paragraph C1.5.13, provides guidance on the relationship between the FOIA and the PA and releasing records to individuals under those statutes. Requestors who seek government records about themselves contained in a PA system of records will have their request processed under the PA and, if applicable, under the FOIA. Accordingly, we must first analyze Subject’s request under the PA. Only if the PA allows the Air Force to withhold the records are the records then processed under the FOIA.

The PA mandates that the Air Force provide a copy of all information in an individual’s record that is about the individual upon request by the individual. However, there are exemptions to the PA that permit the Air Force to deny a PA record to the subject individual. For a PA exemption to apply to a particular Air Force PA record, however, the Air Force must have claimed the exemption in the System of Records Notice (SORN) that governs the PA information in question – in this case, OGD records.

¹ Only records that are “retrieved” by an Agency using a name or other personal identifier are considered PA records that require compliance with the PA. We understand the OGD files are filed by “type” (it is not clear what “type” refers to), but that individuals OGD in this “type” file are filed and retrieved using the subject’s name or other personal identifier. Further, SAF/MRBP processed this case under the Privacy Act and FOIA, as it has done for similar cases in the past. Processing under the Privacy Act is only required for records considered a PA record.

SAF/MRBP asserts that the records of the Personnel Council are exempt from release to Subject because of PA exemption (j)(2). Exemption (j)(2) protects records from mandatory release under the PA of any federal agency or component whose principal function is criminal law enforcement, as well as the activities of prosecutors, courts, correctional, probation, pardon or parole authorities.

A review of all applicable Air Force PA SORNs reveals that exemption (j)(2) (or any other applicable PA exemption) has not been asserted for PA records of the Personnel Council, the Air Force Clemency Review Board, or for OGD records in particular. For instance, the PA SORN applicable to military records processed by the Air Force Correction Board claims no PA exemption. The PA SORN applicable to General Officer Personnel Data System records claims only PA exemption (k)(7). Exemption (k)(7) allows the Air Force to withhold information in the PA record to the extent the information would reveal the identity of a confidential source. Assuming this SORN would be applicable to the records in question, none of the information in the record reveals the identity of a confidential source.

The same result applies in reviewing other AF PA SORNs that might apply to the records in question, such as *Officer Promotion and Appointment* records, *Officer Performance Reports* records, *Military Personnel* records, *Effectiveness/Performance Reporting* records, *Separation Case* records, *Promotion Documents/Records Tracking* records, *Officer Utilization* records, *Promotion Documents/Records Tracking* records, and *Correction of Military Records System* records. A further review of SORNs applicable government-wide or drafted by the DoD did not find any that would allow the Air Force to withhold the OGD records under a specifically asserted PA exemption.

However, the PA contains an exemption – exemption (d)(5) – that automatically applies to any information in a PA record that was compiled in reasonable anticipation of a civil action or proceeding. In this case, the records were compiled for a Board recommendation and decision by the Secretary as to whether Subject should be retired in a lower grade. The Board process is a civil action or administrative adjudicative proceeding as defined in AFI 33-332, *Privacy Act Program*, paras. 1.1.4.6 and 4.4. Accordingly, the records are appropriately denied under the PA's exemption (d)(5). As discussed above, we now turn to the FOIA and process the request under that Act.

SAF/MRBP recommends release of the responsive records except as redacted IAW FOIA Exemption (b)(5) and (b)(6).

FOIA Exemption 5, 5 U.S.C. § 552 (b)(5), allows an Agency discretion to withhold records that would be withheld under the Federal Rules of Civil Procedure in civil litigation under the deliberative process privilege. To qualify, the record must be an interagency or intra-agency document that is both deliberative in nature and “predecisional.” This privilege is designed to protect the quality of agency decisions in three ways: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact

ultimately the grounds for an agency's action. Generally, this privilege does not extend to factual portions of the document; however, factual portions still fall under Exemption 5 in two circumstances. The first circumstance is where the author has selected specific facts out of a larger group of facts in a deliberative manner, such as preparing a summary of lengthy testimony. The second circumstance is where the factual information is so inextricably connected to the deliberative material that revealing the factual information is equivalent to revealing the agency's deliberations.

Exemption 5 also allows the Air Force discretion to exempt records from disclosure that would be withheld under the Federal Rules of Civil Procedure in civil litigation under the attorney work product privilege and attorney client privilege. To qualify under the attorney work product privilege, the document must have been prepared by an attorney in anticipation of civil, administrative, or criminal proceedings. See *Jordan v. U.S. Dept' of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978). To qualify under the attorney client privilege, the document must concern a confidential communication between an attorney and client relating to a legal matter for which the client sought professional advice. See *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). All facts – not just opinions and recommendations – can be withheld from attorney client privilege and attorney work product documents.

FOIA Exemption 6, 5 U.S.C. § 552(b)(6), requires withholding of information in personnel, medical, and similar files where disclosure “would constitute a clearly unwarranted invasion of personal privacy.” Lower-level DoD employees (below O-6 and civilian equivalent, unless a Director) have a privacy interest in protecting their names, phone numbers, e-mail addresses, home addresses and similar information from disclosure.²

In applying Exemption 6 a balancing test must be done weighing the privacy interests of the individuals named in a document against the public interest in disclosure of the information requested. The public interest in disclosure is one that will “shed light on an agency's performance of its statutory duties.”³

In this case, we concur with all the proposed (b)(5) and (b)(6) redactions, except as follows:

In Attachment B, only the recommendation should be redacted. The words “AFRC/CC recommended Subject be retired . . .” are releasable.

In Attachment C, D, and other attachments, only the names are redacted, not ranks such as “Col” or Lt Gen.”

² OSD Administration and Management Memo, Subject: *Withholding of Information that Personally Identifies DoD Personnel*, 3 Feb 05 (“In general, release of information on DoD personnel will be limited to names, official titles, organizations, and telephone numbers for personnel only at the officer director level or above . . .”). See *Kimmel v. DoD*, No. 04-1551, 2006 WL 112682 (D.D.C. Mar. 31, 2006)(protecting names of DoD employees below O-6).

³ *Dep't of Justice v. Reporters Committee*, 489 U.S. 749, 795 (1989).

In Attachment 5, Col G is a Director. Accordingly, under the DoD policy in effect since 9/11, as discussed above, her name and duty title are not redacted. Her signature can be lined through to protect against misuse. In that same attachment, all of paragraph 4 can be released as that paragraph does not refer to a particular grade determination recommendation and it is common knowledge that Subject's case was referred to a Board for an OGD determination. Further, in paragraph 2c., only the specific OGD recommendation by AFRC/CC should be redacted – not the fact that AFRC/CC made a recommendation. Finally, at the top of Attachment F, the signatures are redacted under (b)(6), as the coordinators are all high ranking officials. Their signatures can be lined through to help protect against misuse.

We recommend Attachment G be released in its entirety. The recommendation for a grade determination does not need to be kept private, as it is well known that in order for Subject to have been retired in his lower grade an OGD had to be accomplished. No other recommendation is made in this document and we do not believe it is necessary to assert an attorney client privilege or attorney work product privilege under FOIA Exemption (b)(5).

FOIA Exemption (b)(6) should also be asserted to withhold Attachment L.

The words "Lt Gen, USAF" are not redacted on the last page of Attachment M. Likewise, "Lt Gen, USAF" and titles are not redacted from the signature blocks in Attachment N, nor is the date "9-10-09" redacted under FOIA exemption (b)(6). This is not information that, if released, would clearly constitute an unwarranted invasion of an individual's privacy.

Attachment P is withheld in its entirety as attorney client privileged information IAW FOIA Exemption (b)(5). However, we recommend Attachment Q be released as it says nothing specific about any legal advice, nor does it provide a sensitive recommendation that, if released, would implicate a governmental concern that FOIA Exemption (b)(5) was created to protect against.

In Attachment R only the complete paragraph containing the recommendation is withheld. The memorandum was not written by an attorney, which otherwise would allow the Air Force to withhold the entire document.