

FREEDOM OF INFORMATION ACT

Release of Misconduct ROIs With Substantiated And Unsubstantiated Allegations

You have requested guidance concerning the release under the Freedom of Information Act (FOIA) to a third party (not the subject) of misconduct type investigations, such as commander directed reports of investigations and Inspector General reports of investigation, when the report of investigation (ROI) substantiated some allegations but did not substantiate other allegations. We agree that although some allegations may have been substantiated and information related to the subject allegations is releasable under the FOIA, information concerning the allegations that were not substantiated is properly withheld from public release under the FOIA. The exception concerns 10 U.S.C. § 1034 allegations, where Congress has otherwise mandated that the complainant will receive a copy of a properly redacted ROI.

In this case, the allegations concerned the writing of a document and a colonel wing commander's alleged improper involvement in the writing of the document. The investigation was completed five years ago, with three of the four allegations not substantiated. The one allegation that was substantiated found the wing commander was derelict in the performance of his duties by not ensuring that the document was accurate.

The Initial Denial Authority recommends the complete ROI be released, to include the unsubstantiated allegations and their analyses, except as redacted IAW FOIA Exemptions (b)(6) and (b)(7)(C).

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." The FOIA exemption 7(C) privacy protection is broader, requiring withholding of information in records compiled for a law enforcement purpose where disclosure "could constitute an unwarranted invasion of personal privacy." In applying these exemptions, a balancing test is 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." *Dep't of Justice v. Reporters Committee*, 489 U.S. 749, 773 (1989); DoD 5400.7_R_AFMAN 33-302, *Freedom of Information Act Program*. Further, a government employee generally has a privacy interest in any file that reports on an investigation that could lead to the employee's discipline, especially where, as here, an allegation against the employee was found to be without merit. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 376-77 (1976). Accordingly, DoD employees and military members, even of a high rank, usually have a sufficient privacy interest in keeping from public release under the FOIA ROIs conducted against them were the allegations were not substantiated. We also note that the Supreme Court has also recognized that a contemporary privacy interest in information may exist, although the information was at one time public. *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 767 (1989).

Historically, the Air Force has withheld reports of investigation in their entirety from public release under the FOIA when the reports have been requested by the name of the subject and the allegations were not substantiated. OpJAGAF 2003/3. This is particularly true where, as here, the allegations are specific to one individual or one organization's internal operating procedures, and/or do not involve Air Force-wide operations. Of course, on a case by case basis, unsubstantiated allegations contained in ROIs may be releasable when it is determined that the appropriate public interest outweighs the privacy interest of subjects.

But, in this case, there is no overriding public interest in these unsubstantiated allegations. Any public interest in knowing the particulars of how this document was written is not significant enough to overcome the privacy interest the subject has in not publicly releasing the results of the unsubstantiated allegations under the FOIA. The unsubstantiated allegations are not of any media interest, are relatively minor in nature, and were not otherwise already known to the general public. Further, the conduct concerning the unsubstantiated allegations occurred over four years ago.

Therefore, we agree with your analysis that, IAW FOIA exemption (b)(7)(C) and after applying the balancing test, release of the unsubstantiated allegations and the discussion of the unsubstantiated allegations contained in the ROI "could be an unwarranted invasion of privacy" of the subject. Under the FOIA, if exemption (b)(7)(C) applies to the information requested, the Air Force does not have the discretion to otherwise release the information.

Release of the substantiated allegation and its discussion (properly redacted to withhold the names of individuals other than the subject) is a closer question. Significantly, the subject, a wing commander, received a written letter of counseling, an indication of the seriousness his chain of command considered the matter. Under these facts and circumstances, releasing the substantiated allegation and its discussion, properly redacted, is legally sufficient.

Accordingly, we recommend the unsubstantiated allegations and the discussion of those allegations be withheld in their entirety under Exemptions (b)(6) and (b)(7)(C), in order to properly protect the privacy interest of the subject and the other individuals named in the report. Release of the unsubstantiated allegations in this case would constitute an unwarranted invasion of privacy that is not outweighed by the appropriate public interest. Further, releasing the unsubstantiated allegations, but redacting the subject's name and other identifying information, will not sufficiently protect his privacy interest as the requester specifically asked for the ROI by the subject's name.