

## FREEDOM OF INFORMATION ACT

### Release of Courts-Martial Records to the Public

You have requested guidance concerning the release of Article 32 reports of investigations (ROIs) and Courts-Martial Records of Trial (ROT) pursuant to a written Freedom of Information Act (FOIA) request from a person other than the accused (i.e., a third party). This opinion updates our previous opinion on the subject, OpJAGAF 1997/120, dated 8 October 1997.

Article 32 hearing ROIs and ROTs capture information obtained during a hearing that is usually open to the public. These Air Force records, like any other Air Force record, are subject to release to the public/third party pursuant to a written FOIA. 5 U.S.C. § 552; DoD 5400.7-R\_AFMAN 33-302, *Freedom of Information Act Program*. While the Article 32 or courts-martial proceeding underlying the requested records are usually proceedings that a member of the public can attend, that fact alone does not make records subsequently compiled as a result of those proceedings automatically releasable to a third party/public under the FOIA. For example, exhibits may have been entered into the record without ever having been specifically discussed or revealed in open court, or concern very personal facts discussed during the hearings that a reasonable person would expect to not be continually shared by the Air Force with the public outside the Article 32 or courts-martial proceedings. So, depending on the facts and circumstances of each particular criminal justice proceeding, records and information requested under the FOIA pertaining to the proceeding may be required to be withheld from release to a third party/public under the FOIA.

Because Article 32 hearing ROIs and ROTs are filed in a system of records and retrieved by the military member's name or personal identifier, they are protected by the Privacy Act. The Privacy Act prevents disclosure of Privacy Act records to third parties without the consent of the subject of the records, unless one of 12 enumerated exceptions apply. 5 U.S.C. § 552a; DoDI 5400.11-R, *Department of Defense Privacy Program*; AFI 33-332, *The Air Force Privacy And Civil Liberties Program*; AFI 51-201, *Administration of Military Justice*. One of these exceptions, Privacy Act exception (b)(2), provides for the disclosure of Privacy Act records to a third party if disclosure is required under the FOIA.

The FOIA exemption most likely to apply to a determination as to whether or not an Article 32 hearing ROI or ROT and its exhibits are releasable to a third party is Exemption 7, which concerns the release of records compiled or created for a law enforcement purpose. Exemption 7 consists of subparts (A), (B), (C), (D), (E) and (F). Of these subparts, subpart (C), is likely to be most applicable to a determination as to whether the requested records are required to be released under the FOIA.

Exemption 7(C) protects the requested record, or particular information contained in the record, from release under the FOIA if, after weighing the personal privacy interests of individuals named in the documents against the general public interest, release "could constitute an unwarranted invasion of personal privacy." Usually, the privacy interest most important to this analysis is the privacy interest of the accused, victim, and witnesses. 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).

Generally speaking, there is usually a sufficient public interest in military criminal justice proceedings to require release of some requested information. For example, such proceedings may serve to take away an airman’s liberty, and how the government did so is of general public interest. Further, the public nature of Article 32 hearings and courts-martial proceedings reduces (but does not eliminate) the personal privacy interests of information discussed by individuals involved in those proceedings. At the same time, the public nature of the proceedings serves to increase the general public’s interest. Thus, once a request for an Article 32 hearing ROI or ROT is made pursuant to the FOIA, the Air Force will usually be required to release at least some of the requested records.

Many factors should be looked at when applying the required balancing test, to include: how long in the past the [public] hearing was held; the nature and seriousness of the allegations/charges; the rank of the accused; society’s expectations/practices in protecting the identify of certain victims involved in the military criminal justice process, such as those involved in sexual assaults or child victims; the nature of particular information contained in exhibits; and whether information contained in exhibits admitted for consideration by the investigating officer and military judge/panel members was specifically discussed in open court, and to what extent.

After applying the required balancing test, Exemption 7(C) will normally protect from continued release under the FOIA sensitive, personal information about victims, prospective court members, and witnesses not directly related to the charges, to include social security numbers noted in documents only for identification purposes; home addresses; personal phone numbers; financial records; medical records; and, in certain cases, the name and other personal identifying information of the victim and witnesses. Further, in all cases when ordered by the court, sealed records would not be releasable.

So, in most if not all cases where charges against an accused have been preferred and referred to a court-martial, at least a redacted version of any Article 32 hearing ROI, ROT, and their exhibits will be releasable. By redacting appropriate information where the individual’s privacy interest outweighs the general public’s interest in the information (or where another FOIA exemption applies), the Air Force will be able to protect the appropriate personal privacy interests of the individuals involved, but also be able to properly release information where the general public’s interest in how the Air Force investigated and disposed of the underlying charges against an accused is paramount.