

TOPIC

Releasing a first party individual's personal information to a third party Freedom of Information Act (FOIA) requester, when it is determined the first party has a privacy interest that is not outweighed by the general public's interest in the requested information.

TEXT OF THE DECISION

In OpJAGAF 2018-41, we noted the “general” rule (always exceptions) that releasing a first party individual's personal information to a third party FOIA requester (such as a copy of a subject's Commander Directed Investigation (CDI)) is not permissible under the FOIA when it is determined the first party individual has a privacy interest that is not outweighed by the public interest under the balancing test of the FOIA privacy exemptions, (b)(6) and/or (b)(7)(C). We also noted, however, there are “situations in which a third party FOIA requester is able to receive a redacted record” involving another person. This OpJAGAF discusses those situations.

BACKGROUND

An Equal Employment Opportunity (EEO) complainant made a FOIA request for a copy of an EEO investigative report against her supervisor/subject for allegedly illegally discriminating against her. The allegations made against the subject were not substantiated, and a general ‘public interest’ in the particular investigation (other than from the requester) was non-existent.

GUIDANCE

Privacy Act of 1974, 5 U.S.C. § 552a (b)(2)

Freedom of Information Act, 5 U.S.C. § 552 (b)(6); (b)(7)(C)

DoD 5400.11-R, Department of Defense Privacy Program

DoDM 5400.07_AFMAN 33-302, Freedom of Information Act

Air Force EEO System of Records Notice (SORN) F036 AF DP G, Equal Opportunity and Sexual Assault Prevention and Response Records

DISCUSSION

Unlike most situations where an investigative report against a particular subject is considered the Privacy Act record of the subject, the Air Force considers an EEO investigative report against a subject alleged to have discriminated against an EEO complainant to be the Privacy Act record of the complainant. See SORN F036 AF DP G, *Equal Opportunity and Sexual Assault Prevention and Response Records*. Assuming the specific Privacy Act exemption for EEO records is available

to withhold information from an EEO investigative report to the EEO complainant under the Privacy Act; or the general Privacy Act exemption can be used (5 U.S.C. § 552a(d)(5)), a complainant's request for their EEO investigative report will also be processed under the FOIA. *See* DoDM 5400.07_AFMAN 33-302, paragraph 3.9a(1), *Freedom of Information Act Program*. Accordingly, an EEO complainant will always get 'something' under either the Privacy Act or the FOIA from an investigative report in which he or she was the complainant alleging discrimination personal to them. Redactions can still be made to protect any recognized privacy interest of the subject or other person named in the report viz-a-viz the public, assuming that Privacy Act release rules do not otherwise require release of that information from the record to the complainant (i.e., the appropriate Privacy Act exemptions have been claimed and can be taken for the EEO record). *See* DoD 5400.11-R, *Department of Defense Privacy Program*.

Other situations in which a third party requester will usually be able to receive information under the FOIA about a first party, or from a first party's Privacy Act record, include consent being given by the first party to release the information under the FOIA to a specific (or any) FOIA requester; release of reprisal/restriction investigation reports against a subject to the complainant IAW the provisions of 10 U.S.C. § 1034; or an applicable Privacy Act SORN "routine use" permits the Air Force to release information from a person's Privacy Act record to a specific individual, such as to a complainant involving an Inspector General (IG) investigative report/document handled by the DoD IG, or victims of crimes.

CONCLUSION

Based on the foregoing, it is our conclusion that an EEO investigative report, concerning a subject alleged to have discriminated against the complainant who is the FOIA/Privacy Act complaint requester, is releasable – at least in part – to the requester, notwithstanding the fact the allegations may not have been substantiated, or that because of the rank or status of the subject privacy considerations would otherwise prohibit release of the same record to anyone else under the FOIA.

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