
Agency Report 1



DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
104 ARMY PENTAGON
WASHINGTON DC 20310-0104

November 21, 2008

USOSC HQ DC '08NOV26
PM3:31

Ms. Catherine A. McMullen
Chief, Disclosure Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

Re: Whistleblower Investigation—Fort Bragg Office of the
Inspector General (OSC File Nos. DI-06-1645 and DI-06-1904)

Dear Ms. McMullen:

The Department of the Army appreciates the opportunity to provide its recommendations to the Office of Special Counsel (OSC) regarding the release of its report in the above referenced case.

Background –

On December 21, 2007, the Department of the Army submitted to the OSC its report in the captioned case.

We understand that the report has been processed to the stage at which its release outside OSC is required. The report submitted by the Army to OSC contains the names and other identifying information of witnesses. The Army interposes no objection to OSC's disclosure of the report, in its entirety, to the complainant, the President, and to Congress for review provided that none of these entities release the report to the public. We understand, however, that the OSC places copies of reports in an open reading room for review by the general public. Pursuant to the rationale set forth below, the copy of the report made available to the public should be redacted in compliance with the Privacy Act, as reflected in Enclosure 1.

Analysis Pertaining to the Redaction of Department of the Army Information -

The Office of Special Counsel (OSC) is required to make available to the public reports from heads of agencies made under 5 U.S.C. § 1213(g)(1), but only to the extent that these reports do not contain any information, the disclosure of which is prohibited by law. 5 U.S.C. § 1219(a), (b). The Privacy Act (PA) prohibits an agency from disclosing any record which is contained in a system of records, except pursuant to the prior written consent of the individual to whom the record pertains or in those cases in which an exception applies. 5 USC § 552a(b). As discussed below, it appears as though OSC's investigative case files, to include the instant file, are contained in a system of records regulated by the PA. Therefore, under our reading of the statute, records made available to the public under § 1219 may be released only to the extent that disclosure is consistent with the PA.

OSC's system notice indicates that OSC's investigation case files are contained in a PA system of records. *See* OSC/GOVT-1, OSC Complaint, Litigation and Political Activity Files. This suggests that OSC would not render its investigative case files public absent either the consent of the individual to whom the record pertains, or an exception that allows for disclosure without consent.

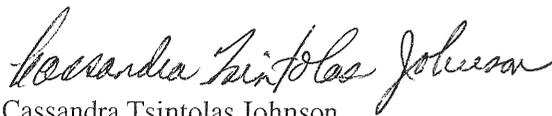
In this case, there is no indication that the consent of the individuals named in the report will be sought. Absent such consent, the only exception we have identified that might permit the disclosure of the OSC record to the general public is that of a routine use. The OSC system notice governing this system of records contains a routine use permitting the disclosure of these files to the public in only the following circumstances: 1) the matter under investigation has become public knowledge; 2) the Special Counsel determines that disclosure is necessary to preserve confidence in the integrity of the OSC investigative process or is necessary to demonstrate accountability of OSC officers, employees, or individuals covered by this system; or 3) the Special Counsel determines that there exists a legitimate public interest, except to the extent that the Special Counsel determines that disclosure would constitute an unwarranted invasion of personal privacy.

At this point, we are not aware that the investigation has become public knowledge nor does it appear to us that disclosure would be necessary to demonstrate the integrity of the OSC. Therefore, under our view of the PA, the OSC may disclose this investigative file if it determines that there is a legitimate public interest in doing so. However, if you choose to do so, we recommend that the record be redacted to ensure that its release would not constitute an unwarranted invasion of personal privacy.

We have redacted these reports in a manner that is designed to protect the privacy of the individuals involved in and associated with this investigation. Because the language of the applicable PA routine use mirrors the language of the Freedom of Information Act's (FOIA) exemption (b)(6), we have relied upon FOIA principles in redacting the report. Additionally, we have relied upon several DoD policy memoranda that have interpreted exemption (b)(6) of the FOIA to permit the redaction of information that personally identifies DoD personnel. (Enclosure 3).

We note that recently, the Department of the Army and the OSC were sued in Federal Court by the individual subject of an OSC investigative case file that was released publicly, in its entirety, by OSC. (Enclosure 4). The plaintiff in this case alleges that this public release violated his rights under the PA. We believe that limiting public release of the redacted report in the instant case complies with the PA, fulfills the mandate of OSC accountability to the public as set forth in your constituting statute, and minimizes litigation risk to both Army and OSC.

We appreciate the opportunity to present the Department of the Army's views on these matters. Should you have any questions, please do not hesitate to contact me at 703-614-3500.



Cassandra Tsintolas Johnson
Associate Deputy General Counsel
(Human Resources)

Enclosures

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ADMINISTRATION AND
MANAGEMENT

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

SEP 1 2005

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTOR, NET ASSESSMENT
DIRECTOR, FORCE TRANSFORMATION
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Withholding of Information that Personally Identifies DoD Personnel

This guidance was previously issued on February 3, 2005, but its importance mandates that it be published again to reinforce significant security considerations.

Organizations outside the Federal Government often approach DoD personnel to obtain updated contact information for their publications, which are then made available to the general public. The information sought usually includes names, job titles, organizations, phone numbers, and sometimes room numbers.

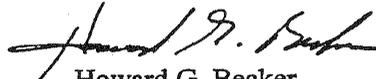
The Director, Administration and Management, issued a policy memorandum on November 9, 2001 (attached) that provided greater protection of DoD personnel in the aftermath of 9/11 by requiring information that personally identifies DoD personnel be more carefully scrutinized and limited. Under this policy, personally identifying information may be inappropriate for inclusion in any medium available to the general public. A December 28, 2001, memorandum from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (attached) issued a policy limiting publication of personally identifying information on web sites.

The following policy augments the above cited memoranda and is in effect with regard to publication of information that personally identifies DoD personnel in publications accessible by the general public. In general, release of information on DoD personnel will be limited to the names, official titles, organizations, and telephone numbers for personnel only at the office director level or above, provided a determination is made that disclosure does not raise security or privacy concerns. No other information, including room numbers, will

OSD 17746-05

normally be released about these officials. Consistent with current policy, as delineated in the referenced memoranda issued in 2001, information on officials below the office director level may continue to be released if their positions or duties require frequent interaction with the public.

Questions regarding this policy should be directed to Mr. Will Kammer, Office of Freedom of Information, at 703-696-4495.


Howard G. Becker
Deputy Director

Attachments:
As Stated

cc: Secretary of Defense
Deputy Secretary of Defense



ADMINISTRATION AND
MANAGEMENT

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

FEB 03 2005

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
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OSD 02421-05

may continue to be released if their positions or duties require frequent interaction with the public.

Questions regarding this policy should be directed to Will Kammer, Office of Freedom of Information, at 703-697-1171.



Raymond F. DuBois
Director

Attachments:

As Stated

cc: Secretary of Defense

Deputy Secretary of Defense



OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 203014950



ADMINISTRATION &
MANAGEMENT

November 9, 2001

Ref: OI-CORR-101

MEMORANDUM FOR DOD FOIA OFFICES

SUBJECT: Withholding of Personally Identifying Information Under the Freedom of Information Act (FOIA)

The President has declared a national emergency by reason of the terrorist attacks on the United States. In the attached memorandum, the Deputy Secretary of Defense emphasizes the responsibilities all DoD personnel have towards operations security and the increased risks to US military and civilian personnel, DoD operational capabilities, facilities and resources. All Department of Defense personnel should have a heightened security awareness concerning their day-to-day duties and recognition that the increased security posture will remain a fact of life for an indefinite period of time.

This change in our security posture has implications for the Defense Department's policies implementing the Freedom of Information Act (FOIA). Presently all DoD components withhold, under 5 USC § 552(b)(3), the personally identifying information (name, rank, duty address, official title, and information regarding the person's pay) of military and civilian personnel who are assigned overseas, on board ship, or to sensitive or routinely deployable units. Names and other information regarding DoD personnel who did not meet these criteria have been routinely released when requested under the FOIA. Now, since DoD personnel are at increased risk regardless of their duties or assignment to such a unit, release of names and other personal information must be more carefully scrutinized and limited.

I have therefore determined this policy requires revision. Effective immediately, personally identifying information (to include lists of e-mail addresses) in the categories listed below must be carefully considered and the interests supporting withholding of the information given more serious weight in the analysis. This information may be found to be exempt under 5 USC § 552(b)(6) because of the heightened interest in the personal privacy of DoD personnel that is concurrent with the increased security awareness demanded in times of national emergency.

- Lists of personally identifying information of DoD personnel: All DoD components shall ordinarily withhold lists of names and other personally identifying information of personnel currently or recently assigned within a particular component, unit, organization or office with the Department of Defense in response to requests under the FOIA. This is to include active duty military personnel, civilian employees, contractors, members of the National Guard and Reserves, military dependents, and Coast Guard personnel when the Coast Guard is operating as a service in the Navy. If a particular request does not raise

security or privacy concerns, names may be released as, for example, a list of attendees at a meeting held more than 25 years ago. Particular care shall be taken prior to any decision to release a list of names in any electronic format.

- Verification of status of named individuals: DoD components may determine that release of personal identifying information about an individual is appropriate only if the release would not raise security or privacy concerns and has been routinely released to the public.
- Names in documents that don't fall into any of the preceding categories: Ordinarily names of DoD personnel, other than lists of names, mentioned in documents that are releasable under the FOIA should not be withheld, but in special circumstances where the release of a particular name would raise substantial security or privacy concerns, such a name may be withheld.

When processing a FOIA request, a DoD component may determine that exemption (b)(6) does not fully protect the component's or an individual's interests. In this case, please contact Mr. Jim Hogan, Directorate of Freedom of Information and Security Review, at (703) 697-4026, or DSN 227-4026.

This policy does not preclude a DoD component's discretionary release of names and duty information of personnel who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons.



D. O. Cooke
Director

Attachment:
As stated



COMMAND, CONTROL,
COMMUNICATIONS, AND
INTELLIGENCE

ASSISTANT SECRETARY OF DEFENSE

6000 DEFENSE PENTAGON
WASHINGTON, DC 20301-6000

December 28, 2001



MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

**SUBJECT: Removal of Personally Identifying Information of DoD Personnel from
Unclassified Web Sites**

In accordance with DoD 5400.7-R, "DoD Freedom of Information Act Program," unclassified information which may be withheld from the public by one or more Freedom of Information Act (FOIA) exemptions is considered For Official Use Only (FOUO). DoD Web Site Administration policy (www.defenselink.mil/webmasters), issued by Deputy Secretary of Defense memorandum, December 7, 1998, prohibits posting FOUO information to publicly accessible web sites and requires access and transmission controls on sites that do post FOUO materials (see Part V, Table 1).

The attached November 9, 2001, memorandum from the Director, Administration and Management (DA&M), citing increased risks to DoD personnel, states that personally identifying information regarding all DoD personnel may be withheld by the Components under exemption (b)(6) of the FOIA, 5 USC §552. This action makes the information which may be withheld FOUO and inappropriate for posting to most unclassified DoD web sites.

Thus, all personally identifying information regarding DoD personnel now eligible to be withheld under the FOIA must be removed from publicly accessible web pages and web pages with access restricted only by domain or IP address (i.e., .mil restricted). This applies to unclassified DoD web sites regardless of domain (e.g., .com, .edu, .org, .mil, .gov) or sponsoring organization (e.g., Non-Appropriated Fund/Morale, Welfare and



Recreations sites; DoD educational institutions). The information to be removed includes name, rank, e-mail address, and other identifying information regarding DoD personnel, including civilians, active duty military, military family members, contractors, members of the National Guard and Reserves, and Coast Guard personnel when the Coast Guard is operating as a service in the Navy.

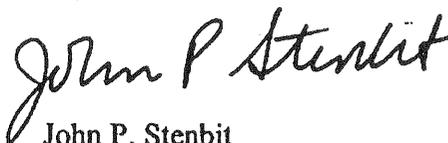
Rosters, directories (including telephone directories) and detailed organizational charts showing personnel are considered lists of personally identifying information. Multiple names of individuals from different organizations/locations listed on the same document or web page constitutes a list. Aggregation of names across pages must specifically be considered. In particular, the fact that data can be compiled easily using simple web searches means caution must be applied to decisions to post individual names. If aggregation of lists of names is possible across a single organization's web site/pages, that list should be evaluated on its merits and the individual aggregated elements treated accordingly.

Individual names contained in documents posted on web sites may be removed or left at the discretion of the Component, in accordance with the DA&M guidance. This direction does not preclude the discretionary posting of names and duty information of personnel who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons. Posting such information should be coordinated with the cognizant Component FOIA or Public Affairs office.

In keeping with the concerns stated in the referenced memorandum and in the October 18, 2001, DepSecDef memorandum, "Operations Security Throughout the Department of Defense," the posting of biographies and photographs of DoD personnel identified on public and .mil restricted web sites should also be more carefully scrutinized and limited.

Sites needing to post contact information for the public are encouraged to use organizational designation/title and organizational/generic position e-mail addresses (e.g., office@organization.mil; helpdesk@organization.mil; commander@base.mil).

Questions regarding Web Site Administration policy may be directed to Ms. Linda Brown. She can be reached at (703) 695-2289 and e-mail Linda.Brown@osd.mil. Questions regarding Component-specific implementation of the DA&M memorandum should be directed to the Component FOIA office.



John P. Stenbit

Attachment
As stated