Gone Fishin'

Discovery and Personnel Records

BY CAPTAIN JAMES J. WOODRUFF II

There is little to fear when counsel has gone fishin' for personnel records as long as you follow the advice in this article.

People often desire what they cannot have and information to which they are not entitled. Such is the nature of the discovery process in civil litigation.

The Labor Law Field Support Center defends the Air Force in federal litigation against discrimination complaints and appeals over disciplinary actions brought by civilian employees. In our line of work, opposing counsel routinely ask for personnel documents such as disciplinary records, performance appraisals, and other official personnel records regarding not only their client, but the client's coworkers as well. Opposing counsel makes the request in order to establish whether their client was singled out for being a member of a protected class. The Department of the Air Force, referred to generically as "agency" in federal administrative litigation, is represented by a lawyer referred to as an agency representative. The agency representative's initial reaction upon receiving such a request is usually a well-worded objection to the requestor. The objection makes it obvious that such information is protected by the Privacy Act and therefore not discoverable, right?

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As with many legal inquiries, the proverbial answer is, it depends. A judge may find the requested information relevant and if such information is not turned over an order may be issued resulting in monetary sanctions against the Air Force. In this article, we'll walk through what we do at the Labor Law Field Support Center, how we typically interact with the office that receives a request (e.g. base legal office), and help to alleviate cumbersome "fishin' expeditions" through the process.

THE LABOR LAW FIELD SUPPORT CENTER

In 2007, the Labor Law Field Support Center (LLFSC) was established to centralize expertise in the specialized areas of employment and labor law. The mission is "to provide the full spectrum of labor and employment law litigation expertise, advice and training to ensure maximum flexibility for commanders in effective use of the civilian workforce."[1] Litigation attorneys at the LLFSC defend the Air Force before employment and labor related administrative bodies and courts worldwide.

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The LLFSC is broken into five components. There are two Administrative Litigation Branches, a Federal Litigation Branch, a Labor Relations Law Branch, and four regional offices. The Administrative Litigation Branches have differing jurisdictions. The Center's primary office is at **Joint Base Andrews** in Maryland. The four regional offices are located in California, Florida, Illinois, and Texas. The Air National Guard, the Air Force Reserve, Tinker AFB, Hill AFB, and Wright-Patterson AFB each maintain their own labor and employment resources and do not fall under the purview of the Center.

When a case arises in federal court or before a federal administrative agency, such as the **Merit Systems Protection Board** (MSPB), **Equal Employment Opportunity Commission** (EEOC) or **Federal Labor Relations Authority**, the Center's lawyers litigate the case. The MSPB handles the appeal of federal employee disciplinary actions where the employee was suspended for more than 14 days or removed from federal service. The MSPB will also hear cases involving the **Whistleblower Protection Act**. The EEOC hears discrimination and retaliation cases brought by federal employees. Cases before the federal administrative agencies are litigated by Judge Advocates and federal civilian attorneys working at the Center. Cases brought before federal courts are primarily litigated by Department of Justice attorneys with support provided by Judge Advocates and federal civilian attorneys at the Center.

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During the litigation process, the LLFSC's litigation attorney will reach out to the appropriate base legal office for assistance in retrieving documents and information for discovery and to schedule the final hearing in the related case. Additionally, a base legal office attorney may serve as co-chair in the matter being litigated. In assisting with the collection of information, the legal office may get inquiries regarding the production of information protected by the Privacy Act. If the legal office knows how the Privacy Act applies to the information sought and when such information is excluded from the Act's protection, it can make the discovery process less complicated for all involved.

THE LABOR LAW FIELD SUPPORT CENTER AND THE BASE LEGAL OFFICE

The base legal office will most commonly become involved with the LLFSC in matters involving civilian employees. The issue may be one of labor relations (e.g. Union disputes), the disciplining of a civilian employee, or a discrimination case brought by a civilian employee through the EEOC.

Sample Case

For example, Mr. John Smith is a federal civilian employee, GS-07, working in the contracting squadron at an Air Force installation.[2] While employed there he responds to a job announcement on USAJobs.gov for a GS-08 position at the same contracting squadron. He is selected for an interview along with eight other candidates. The selecting official hires Ms. Jane Doe for the position. Ms. Doe is of Asian descent and is not a member of the military reserve. Mr. Smith is a

white 40-year-old, military reservist. After learning about his non-selection, Mr. Smith goes to the Equal Employment Opportunity (EEO) office on the Air Force installation for counseling regarding his rights. Ten days later—*unrelated to his non-selection*—management provides Mr. Smith a five-day suspension for failure to follow the Air Force Instruction and Federal Acquisition Regulations when handling a procurement. Mr. Smith files a formal complaint with the EEOC through the base EEO office alleging discrimination based on race, age, gender, veteran's status, and reprisal for prior EEO activity. Following the investigation, an investigative file is compiled and provided to Mr. Smith. Upon receipt, he files a request for hearing before the EEOC.

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A few years after the filing of the complaint and the request for hearing, an administrative judge with the EEOC files an Acknowledgment Order in the case.[3] That Order provides both parties thirty days to initiate civil discovery. Mr. Smith takes advantage of his discovery rights and files a request for interrogatories and production of documents. A number of those requests seek information regarding the other employees within the contracting squadron. The request seeks each employee's race, age, gender, veteran's status, and prior EEO activity. It also seeks the disciplinary history of all employees within the contracting career field Air Force-wide. At this point, the base legal office may get a question from either the attorney at the Center, from the base EEO office, or the base Civilian Personnel Office regarding Mr. Smith's requests. When presented with these questions, the base legal office will need to know what information may and may not be released. This will often lead to an analysis of the Privacy Act and any exceptions.

THE PRIVACY ACT AND ROUTINE USES

Federal agencies commonly maintain collections of records that include information about individuals, including their employees. The collected records may include official personnel records, military records, criminal investigations, and other similar records collected in the process of regulatory investigation and compliance. The collection is called a "system of records."[4] In order to qualify as a system of records, the information in the record must be retrievable by an individual's name, number, symbol, or any other unique identifier that has been assigned to the individual.[5] A system of records may be anything from a collection of civilian personnel records to criminal records. When a system of records is established, a federal agency must publish a **system of records notice** (SORN) in order to comply with the Privacy Act. The federal agencies are required to publish their SORNs in the Federal Register. The Department of Defense's Defense Privacy, Civil Liberties, and Transparency Division provides a searchable SORN database.[6]

Penalties for violating the Privacy Act are civil and criminal in nature.

The **Privacy Act** was established because Congress determined that "the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies."[7] Federal agencies are concerned about the Privacy Act because it prohibits the nonconsensual disclosure of information found in a system of records.[8] It also provides the public the right to access and amend records within a system of records regarding the inquiring individual.[9] Penalties for violating the Privacy Act are civil and criminal in nature. The civil penalties focus on the agency and include a minimum of $1,000 in actual damages, reasonable attorney's fees, and other costs.[10] The criminal penalties focus on the individual agency employee and include a misdemeanor charge with a fine up to $5,000.[11]

Even with the significant protections of an individual's privacy, the Privacy Act actually allows for the disclosure of a non-party employee's personnel information. There are several exceptions even though the Privacy Act states that records subject to the Act are not to be disclosed by "any means of communication to any person or to another agency."[12]

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The key exception that many of the discovery requests will fall under is the **"routine uses" exception**.[13] In order to qualify, the routine use has to have been specifically described in the Federal Register.[14] Federal civilian employee records are managed by the **Office of Personnel Management** (OPM).[15] While each federal agency creates and maintains each employee's records, the regulatory authority for the use of such records as well as the management of the federal civilian workforce is with the OPM.[16] Therefore, the OPM is the agency responsible for the proper handling of personnel records and has published routine uses of those records in the Federal Register.[17]

Under the OPM's established routine uses of records there are three exceptions to the Privacy Act relevant to our discussion. **First,** Privacy Act information may be disclosed to another Federal agency, party, or court in a Federal administrative proceeding or court proceeding where the government is a party.[18] **Second,** disclosure is allowed in response to discovery requests as long as the information sought "is relevant to the subject matter involved in a pending judicial or administrative proceeding."[19] **Third,** disclosure is allowed to the Office of Special Counsel or MSPB in connection with appeals, investigations, and other functions authorized by law.[20]

Returning to the hypothetical case of Mr. Smith, the LLFSC attorney would provide the base legal office with a copy of the discovery requests. After receiving the requests, the base legal office would begin collecting the requested documents from the various base level organizations such as the civilian personnel office, equal opportunity office, those who have been named as allegedly engaging in discriminating conduct, and the employee's squadron. Once this information is collected it would be provided to the LLFSC attorney for review and, if appropriate, disclosure to the opposing party. If information is not determined to be relevant an objection will be made to the discovery request and the irrelevant information will not be turned over.

If the opposition has met the initial burdens necessary to acquire the information sought, it may still not be a good idea to hand it over. The Agency should seek a protective order in an effort to not only protect the coworker's information but the Agency as well.

REDACTIONS, PROTECTIVE ORDERS AND SEALING RECORDS

Even though the records may be turned over as a routine use, this does not mean a coworker's information should be made freely available. The Privacy Act provides important protections for information regarding individuals collected and maintained by the government. Redaction of information identifying the individual should be made as necessary prior to releasing the information to another federal agency or litigant. Such redactions ensure the goals of the Privacy Act are met by the federal government. Additionally, a protective order and order sealing the records may be necessary depending on the type of records being produced.

The MSPB and the EEOC both have procedures for seeking **protective orders**.[21] A protective order is an order prohibiting a party from, among other things, sharing information.[22] The motion should demonstrate the privacy interest of the coworker whose information is being disclosed and that disclosure of the information would result in annoyance, embarrassment, or oppression.[23] It should also limit the opposing party's use of such information. Any

motion for protective order should likely include a request that the judge require the complainant or appellant to notify those impacted by the disclosure of the information. Often, opposing counsel is agreeable to the entry of a protective order in cases and will consent to the entry of such an order.

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An order sealing the records placed into the administrative agency's file may also be sought as those files may be subject to a **Freedom of Information Act** (FOIA) request. The request seeking to seal the records should be narrowly tailored to demonstrate the need for additional protection. Beware, however, if the case is high-profile or has garnered media interest, there may be third-parties who will fight the sealing of such records under the First Amendment.

These steps should be taken as the administrative agencies are subject to FOIA requests. Once the protected Privacy Act information is provided to the MSPB or EEOC, those agencies have a responsibility to protect the information and limit its disclosure.

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The ultimate issue with protective orders becomes enforceability. While federal courts have various enforcement means at their disposal, this is not true for federal administrative bodies. Other than sanctioning the offending party for its misconduct there is little an administrative body can do.[24] Any additional penalty is criminal in nature and would require the interest of a prosecutor's office. This ultimately leaves the offending party and representatives with access to information that they may wrongfully use without any real threat of punishment.

CONCLUSION

There is little to fear when counsel has gone fishin' for personnel records as long as you follow the advice in this article. When coworker information is sought in discovery, the first thing that should be assessed is whether that information is relevant. Once such information is found to be relevant, the coworker information is discoverable and must be turned over. Mr. Smith, from the example provided earlier in the article, may be able to receive information regarding his co-worker's race, age, gender, veteran's status, and prior EEO activity. The information provided may be in table form with the co-worker's names redacted. He may also be able to acquire the disciplinary history of current and prior employees within the unit limited to some reasonable time frame.

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The base legal office should ask for the initial complaint underlying the action currently subject to discovery requests. By understanding the complaints being raised, the legal office can provide better advice to the Wing on what is relevant. Once that is known, the base legal office can also advise the Wing on the proper redaction of documents and information to be turned over in the litigated manner. After all, success in fishing is often a matter of finding the right pond and the right rig for the desired fish. If the plaintiff's attorney's is interested in largemouth bass then she should not be seeking or receiving information on catfish. Knowing the type of information sought is akin to knowing the sought after fish and knowing the relevancy of the information sought is the equivalent of the right lure. Using the right lure for the right fish is essential to avoiding Privacy Act issues and ensuring the proper catch.

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ENDNOTES

[1] Labor Law Field Support Action Officer Handbook 3 (January 8, 2018).

[2] This is a completely fictional case and used purely for purposes of illustrating how a base legal office may become involved in such a case. No identification with actual persons (living or deceased) or places is intended or should be inferred.

[3] The time it takes for a complaint to move from the formal complaint stage, through the post-formal complaint 180-day investigation period, and to move through the crowded EEOC docket can result in cases routinely taking *more than three years* to process from start to finish.

[4] 5 U.S.C. § 552a(a)(5).

[5] 5 U.S.C. § 552a; 43 C.F.R. § 2.221; and 45 C.F.R. § 5b.1.

[6] Department of Defense, *System of Records Notices (SORNS)*, **https://dpcld.defense.gov/Privacy/SORNs.aspx** (last visited Mar 8, 2019).

[7] Pub. L. 93–579, § 2, Dec. 31, 1974, 88 Stat. 1896.

[8] 5 U.S.C. § 552a(b)

[9] *Id.*

[10] 5 U.S.C. § 552a(g).

[11] 5 U.S.C. § 552a(i).

[12] 5 U.S.C. § 552a(b).

[13] 5 U.S.C. § 552a(b)(3); 32 C.F.R. § 505.7.

[14] 5 U.S.C. § 552a(b)(3).

[15] 5 C.F.R. §§ 293.301-303.

[16] 5 C.F.R. § 250.101-103 & 5 U.S.C. § 1104.

[17] 77 Federal Register 73,696-73,697.

[18] 77 Fed. Reg. 73696.

[19] 77 Fed. Reg. 73697.

[20] *Id.*

[21] 5 U.S.C. § 1204(e)(1)(B); 5 C.F.R. § 1201.55(d); MD-110, Ch. 7, III.D.6., II.D.12, & IV.B.4.

[22] Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).

[23] *Id*, at 28.

[24] 5 C.F.R. § 1201.43 and 29 C.F.R. § 1614.109.