



Views and hyperlinks expressed herein do not necessarily represent the views of The Judge Advocate General, the Department of the Air Force, or any other department or agency of the United States Government. The inclusion of external links and references does not imply any endorsement by the author(s), The Judge Advocate General, the Department of the Air Force, the Department of Defense or any other department or agency of the U.S. Government. They are meant to provide an additional perspective or as a supplementary resource.

# Show Me The Money:

## Financial Records Investigative Subpoenas and Article 30a of the Uniform Code of Military Justice (UCMJ)

BY MAJOR MICHAEL A. PIERSON AND MAJOR RYAN M. FISHER  
EDITED BY MAJOR HEATHER SMILDE  
LAYOUT EDITOR: THOMASA HUFFSTUTLER



While the Right to Financial Privacy Act (RFPA) used to be inapplicable to military practice, this article shows the new pre-referral compulsory process authorities likely make RFPA applicable in military courts-martial practice.

The Military Justice Act of 2016 (MJA '16) introduced a revolutionary step in military justice: authorizing compulsory process pre-referral. Such a power, however, comes with new responsibilities. One of these responsibilities, often overlooked, is to ensure collateral statutory frameworks are not implicated. Especially in the area of privacy protections. This article addresses one such collateral statute: the Right to Financial Privacy Act (RFPA). While RFPA used to be inapplicable to military practice, this article shows the new pre-referral compulsory process authorities likely make RFPA applicable in military courts-martial practice. Given this finding, the article goes on to discuss the functions and application of RFPA. Finally, the article provides some examples of using compulsory process and doing so in compliance with RFPA.

### COMPULSORY PROCESS PRE-MJA '16

Prior to MJA '16, any investigator or trial counsel needing evidence pre-referral could not look to the military justice system to provide a means of compulsory process to obtain evidence. Instead, investigators would often turn to other agencies within or outside the Department of Defense (DoD) to obtain compulsory process pre-referral.

MJA '16 changed this. Article 46, Uniformed Code of Military Justice (UCMJ), now authorizes two forms of compulsory process pre-referral. The first is investigative subpoenas.<sup>[1]</sup> Investigative subpoenas can be used to compel production of books, papers, documents, data (other than stored communication data), or other objects.<sup>[2]</sup> Investigative subpoenas cannot be used to compel testimony pre-referral.<sup>[3]</sup>

The second authorization is for compulsory process to produce stored wire or electronic communications.[4] However, authority to issue compulsory process for stored electronic communications is solely reserved to a military judge to issue a warrant or order for such information.[5]

When the President, under his Article 36, UCMJ authority, promulgated procedural rules for accessing stored wire or electronic communications, he provided elaborate procedural detail on the issuance of orders and warrants for electronic communication. In addition to the rules for issuance of orders and warrants, the rules also discuss processes for delaying notification to an individual whose communications were seized.[6] Most of these procedural steps were not a creation of military law, rather, it was likely the impact of a collateral statute, the Stored Communications Act (SCA), and its application history in Article III federal courts that drove this detailed procedural guidance.[7]

Investigative subpoena procedural rules are found in the broader Rule for Courts-Martial (RCM) 703 discussing production of witnesses and evidence. Comparing the procedural rules for investigative subpoenas with RCM 703A, an entire six-section rule dedicated to stored communications, creates a false impression that collateral statutes, like in the context of stored communications and the SCA, are not implicated when using investigative subpoenas. As shown below, such an inference is misplaced, as indeed collateral statutes may be implicated by use of investigative subpoenas and require similar procedural steps as those required by the SCA.

## **RFPA AND ITS APPLICATION TO MILITARY JUSTICE PROCEEDINGS**

RFPA is a Congressional statutory response to the Supreme Court's finding that no reasonable expectation of privacy exists in one's financial records under the 4th Amendment to the Constitution.[8] RFPA prohibits the Government from accessing information contained within financial records except under several limited exceptions.[9] Since RFPA is a collateral statute, like the SCA, the first question is its application to military justice proceedings.

The Court of Appeals for the Armed Forces (C.A.A.F.) answered this question affirmatively in *United States v. Dowty*.<sup>[10]</sup> In *Dowty*, the Defense asserted that the statute of limitations tolling provisions in RFPA did not apply to the statute of limitations provided in Article 43, UCMJ.<sup>[11]</sup> The Defense asserted this position despite the Accused collaterally challenging the seizure of his financial records in federal district court for violation of RFPA.<sup>[12]</sup> Articulating a "cautious" approach to applying statutes outside the UCMJ, C.A.A.F. nevertheless held, "in the...absence of a valid military purpose requiring a different result, generally applicable statutes normally are available to protect service members in their personal affairs."<sup>[13]</sup> Applying this test to RFPA, C.A.A.F. found no specific military purpose that would prevent the application of RFPA.<sup>[14]</sup> Therefore, C.A.A.F. held, "RFPA has covered applicable financial records of members of the armed forces since it was enacted in 1978."<sup>[15]</sup>

---

**Despite C.A.A.F.'s holding that RFPA generally applies to the military justice system, RFPAs protections do not apply to post-referral compulsory process (e.g. trial counsel subpoenas).**

---

Despite C.A.A.F.'s holding that RFPA generally applies to the military justice system, RFPAs protections do not apply to post-referral compulsory process (e.g. trial counsel subpoenas). Such was the finding of the Court of Military Appeals (C.M.A.) in *United States v. Wooten*.<sup>[16]</sup> In *Wooten*, the Defense moved to suppress the collection, via trial counsel subpoena, of the Accused's financial records for violation of RFPA.<sup>[17]</sup> The Government asserted that a trial counsel subpoena issued during the course of litigation is exempted from the privacy protections and process of RFPA.<sup>[18]</sup> The C.M.A. relying on 12 U.S.C. § 3413(e) of RFPA agreed. The C.M.A. noted that § 3413(e) exempts application of RFPA to records sought, "by a Government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts *in connection with litigation to which the Government authority and the customer are parties.*"<sup>[19]</sup> The court found trial counsel subpoenas issued under the authority of Article

46, UCMJ, were comparable to rules of criminal procedure when applied to a person held for court-martial.<sup>[20]</sup> Therefore, RFPAs would not apply to such records.<sup>[21]</sup>

In the context of the divergent holdings of *Dowty* and *Wooten* the question remains whether RFPAs are applicable to investigative subpoenas pre-referral. The answer must be yes. First, pre-referral process is not a tool of litigation as discussed in § 3413(e). The pre-referral process is an investigatory tool used prior to any decision on whether litigation will be initiated. Investigative subpoenas are issued under different statutory authority than trial counsel subpoenas. Second, many federal civilian court functions are conducted via the Federal Rules of Criminal Procedure but are also still governed by RFPAs. For instance, RFPAs have several procedures that apply to grand jury proceedings,<sup>[22]</sup> but, the grand jury procedure is largely set out within Rule 6 of the Federal Rules of Criminal Procedure.<sup>[23]</sup> Therefore, *Wooten's* finding that RFPAs do not apply to trial counsel subpoenas issued under Article 46, UCMJ, likely does not apply to investigative subpoenas. Therefore, RFPAs are applicable in military justice proceedings.

---

## RFPAs generally prohibit access to a customer's financial records unless permitted by limited exceptions...

---

### COMPLIANCE WITH RFPAs IN THE CONTEXT OF INVESTIGATIVE SUBPOENAS

As discussed above, RFPAs generally prohibit access to a customer's financial records unless permitted by limited exceptions provided in the statute. Before turning to the two exceptions applicable to investigative subpoenas, first, a brief comment is necessary on a category of financial information in which RFPAs' prohibition on access does not apply.

Like stored electronic communications, the statutory prohibition does not apply to basic account information or "subscriber" information.<sup>[24]</sup> So the discussion below as to customer notification, customer challenges, and statutory exceptions does not apply to this information. Further,

because the financial institution is not civilly liable for providing this information, the financial institution may be willing to share this information without compulsory process. Thus, it is important to know that RFPAs do not apply to account information—it only applies to the details or "content" of the financial record.

Practically, there are two exceptions that apply to the new investigative subpoenas: (1) administrative subpoenas and (2) judicial subpoenas. First, 12 U.S.C. § 3405 provides an exception to the general prohibition and authorizes the seizure of financial records pursuant to an administrative subpoena which is authorized by law and when the records sought are relevant to a legitimate law enforcement inquiry. This exception would likely apply to investigative subpoenas issued by trial counsel when authorized by a convening authority. Although it is possible that even these subpoenas may be construed as judicial subpoenas.<sup>[25]</sup> Second, 12 U.S.C. § 3407 provides a similar exception when the records are sought via a judicial subpoena. This exception would likely apply to subpoenas issued by a military judge under Article 30a, UCMJ.

Finding an applicable exception, however, does not end the Government's duties under RFPAs. The Government must also comply with the notice and challenge provisions prior to executing the administrative or judicial process. Under 12 U.S.C. §§ 3405 and 3407, once compulsory process is issued, the Government must then provide the customer notice and an opportunity to challenge the compulsory process for collection of the records. In the court-martial context, this should provide the customer the right to move a military judge to quash the subpoena.<sup>[26]</sup>

Given that customer notice may often be problematic in the context of a criminal investigation, the statute provides a delayed customer notification option, but such delay must be ordered by a presiding judge.<sup>[27]</sup> Further, the presiding judge must find that:

- (1) the investigation being conducted is within the lawful jurisdiction of the Government authority seeking the financial records;
- (2) there is reason to

believe that the records being sought are relevant to a legitimate law enforcement inquiry; and (3) there is reason to believe that such notice will result in (a) endangering [life or safety], (b) flight from prosecution, (c) destruction of or tampering with evidence, (d) intimidation of potential witnesses, or (e) otherwise seriously jeopardizing an investigation or official proceeding....[28]

The initial delay cannot exceed ninety days, but may be extended in periods of up to ninety days when granted by the presiding judge.[29] Once the delay period expires, the Government must still provide notice to the customer even though the Government has already seized the records.[30] The Department of Justice Criminal Resource Manual (DoJ CRM) has a wealth of information about the applicability of RFPA. Customer notice templates are available and can be tailored for military justice purposes.[31]

---

**When a financial institution acts in good faith in providing records relying upon a certificate of compliance, RFPA absolves the financial institution of civil liability for any improper disclosure of records.**

---

Finally, because financial institutions can be civilly liable for violating RFPA, the statute directs the Government to issue a certificate of compliance with RFPA to the financial institution complying with the compulsory process.[32] This document serves as a sort of “get out of jail free” card for any potential civil liability for improper disclosure. When a financial institution acts in good faith in providing records relying upon a certificate of compliance, RFPA absolves the financial institution of civil liability for any improper disclosure of records.[33] A trial counsel should only issue such a certificate when all the requirements of RFPA have been satisfied.

## **VIOLATIONS OF RFPA**

In addition to the procedures and authorizations, RFPA also sets out statutory remedies for violations of RFPA. 12 U.S.C. § 3417 authorizes a civil action against either the Government or the financial institution for violation of RFPA. The authorized recovery is \$100 regardless of the volume of records involved.[34] Additionally, a party may recover actual damages as a result of the violation, court costs, and reasonable attorney fees.[35] Punitive damages are recoverable if the violation was willful or intentional.[36] However, at least three federal district courts and the C.M.A. in *Wooten* held that suppression of the fruits of a RFPA violation is not a remedy.[37] The sole remedy is the civil one.

## **EXAMPLES OF USING RFPA WITH INVESTIGATIVE SUBPOENAS**

Since MJA '16 took effect on 1 January 2019, trial counsel at both Yokota Air Base and Kadena Air Base, Japan have seized financial records in compliance with RFPA.

The first investigation, at Kadena Air Base, sought the financial records of an Airmen who had deserted his unit and appeared to have traveled to Europe. Trial counsel in that case applied for a military judge to issue an investigative subpoena. The trial counsel in the request notified the court of the belief that RFPA applied to these records and to the court’s issuance of an investigative subpoena. Further, trial counsel notified the court they intended to request a delayed customer notification from the court. Trial counsel asserted this was necessary to prevent the Airmen’s awareness that the Government was using his financial records to track his whereabouts.

The military judge assigned agreed. The military judge not only issued an investigative subpoena, but also ordered the financial institutions to whom the subpoenas were issued to delay customer notification for a period of 90 days in accordance with RFPA. Thus, while applying RFPA can seem to be a matter of mere compliance with law, here, the delayed customer notice created a lawful duty for the financial institution to not tell the customer of the record production. Given commercial vendors have recently tried to place a primacy on the privacy of records in their possession,

the additional enforceability of a delayed customer notification order is a good step to take.

The second use at Yokota Air Base was also for a deserter. In this case, evidence suggested the Airmen intended self-harm when he deserted. Given the bank is on the hook for RFPA violations, it is prudent to give them every assurance that the process issued is lawful and protective of their interests. This includes protecting them from liability under RFPA for properly issued compulsory process like investigative subpoenas. This is not only the right thing to do, but also saves the time of needless litigation over the validity of the compulsory process.

---

**While these collateral statutes create more procedural hurdles, they also may aid investigators with tools like the delayed customer notification provisions of RFPA.**

---

With that in mind, and needing the information expeditiously, trial counsel followed the same procedure employed in the case at Kadena Air Base. Here, a different military judge was assigned, but came to the same conclusion issuing both an investigative subpoena and delayed customer notification order.

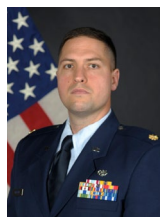
In both cases, the investigative subpoena and the delayed customer notification greatly aided the investigation. In the first case, the financial records tracked down the Airmen to Europe and availed investigators of means to seek his return to military custody. In the second, the records were used to track the Airmen's financial activity leading investigators to a region of ATMs where money was being taken out on a routine basis. Upon investigators visiting one of these locations the Airmen walked into the facility leading to his apprehension. Had the trial counsel not sought the delayed customer notification in either case, it is possible the financial institution would have complied with RFPA and notified the customer. In the second case, such a notification may have furthered the Airmen's instability and resulted in self-harm.

## CONCLUSION

In *McDonough v. Windall*, Judge Lewis Babcock of the Federal District Court of Colorado took the Air Force to task for “facially inadequate and defective” compliance with RFPA and stated, “the Air Force may not avoid the requirements of the RFPA merely because it is a branch of the military.”<sup>[38]</sup> As shown here, with the authority now for pre-referral process and more robust authorities to military judges, collateral statutes, like the SCA and RFPA, may now be implicated by military justice practice. As the trial counsel did here with the application of RFPA, practitioners should seek awareness of collateral statutes impacting compulsory process requests. While these collateral statutes create more procedural hurdles, they also may aid investigators with tools like the delayed customer notification provisions of RFPA. Ultimately, compliance with implicated collateral statutes will help show the professionalism of the military justice system and encourage even broader authorities pre-referral in the future.

## ABOUT THE AUTHORS

---



### Major Michael A. Pierson

Deputy Staff Judge Advocate, 374th Airlift Wing, Yokota AB, Japan, B.S. Truman State University 2005, J.D. Case Western Reserve University 2009, Admitted to the Bars of the Supreme Court of Ohio and the United States Supreme Court.



### Major Ryan M. Fisher

Associate Professor of National Security Law, The Judge Advocate General Legal Center and School, Charlottesville, VA, B.S. Brigham Young University 2009, J.D. Brigham Young University 2013, Admitted to the Bar of the Supreme Court of Utah.

## ENDNOTES

---

- [1] See Article 46(d)(2), UCMJ
- [2] See Discussion to RCM 405(h)(3)
- [3] See *Id.*
- [4] See Article 46(d)(3), UCMJ
- [5] See *Id.*
- [6] See RCM 703A
- [7] See 18 U.S.C.S §§ 2701-2713 (Lexis 2020)
- [8] See *United States v. Dowty*, 48 M.J. 102, 107-108 (C.A.A.F. 1998); *United States v. Miller*, 425 U.S. 435 (1976).
- [9] See 12 U.S.C.S. § 3402 (Lexis 2019).
- [10] See *Dowty*, 48 M.J. 102.
- [11] See *Id.* at 105. Article 43, UCMJ, establishes a statute of limitations for all punitive offenses.
- [12] See *Id.* at 104.
- [13] *Id.* at 107.
- [14] See *Id.* at 109.
- [15] *Id.*
- [16] See *United States v. Wooten*, 34 M.J. 141 (C.M.A. 1992).
- [17] See *Id.*
- [18] See *Id.* at 145.
- [19] *Id.*
- [20] See *Id.* at 146.
- [21] See *Id.*
- [22] See 12 U.S.C.S. §§ 3413(i) and 3420 (Lexis 2019).
- [23] Fed. R. Crim. P. 6.
- [24] See 12 U.S.C.S. § 3413(g) (Lexis 2019).
- [25] See *United States v. Curtin*, 44 M.J. 439, 441 (C.A.A.F. 1996) (finding that trial counsel subpoenas are judicial subpoenas under Article 46, UCMJ akin to functions of a clerk of court of a United States District Court)
- [26] See 12 U.S.C.S. § 3410 (Lexis 2019). However, if a GCMCA issued subpoena was interpreted to be an administrative subpoena and not a judicial subpoena then the customer's sole avenue of relief under RFPA is likely application for an injunction in federal district court. See *McDonough v. Widnall*, 891 F. Supp. 1439 (D. Colo. 1995)
- [27] See 12 U.S.C.S. § 3409 (Lexis 2019).
- [28] *Id.*
- [29] See *id.*
- [30] See *id.*
- [31] See *Criminal Resource Manual*, Department of Justice, §§ 400-488, <https://www.justice.gov/jm/criminal-resource-manual-401-499> (last visited Mar. 29, 2019).
- [32] See 12 U.S.C.S § 3404 (Lexis 2019)
- [33] See 12 U.S.C.S. § 3417 (Lexis 2019)
- [34] See *supra* note 31.
- [35] See § 3417
- [36] See *id.*
- [37] See *Wooten*, 34 M.J. at 146; *United States v. Kington*, 801 F.2d 733, 737 (5th Cir. 1986); *United States v. Frazin*, 780 F.2d 1461, 1466 (9th Cir. 1986).
- [38] *McDonough* 891 F. Supp. at 1448, 1450 (D. Colo. 1995).