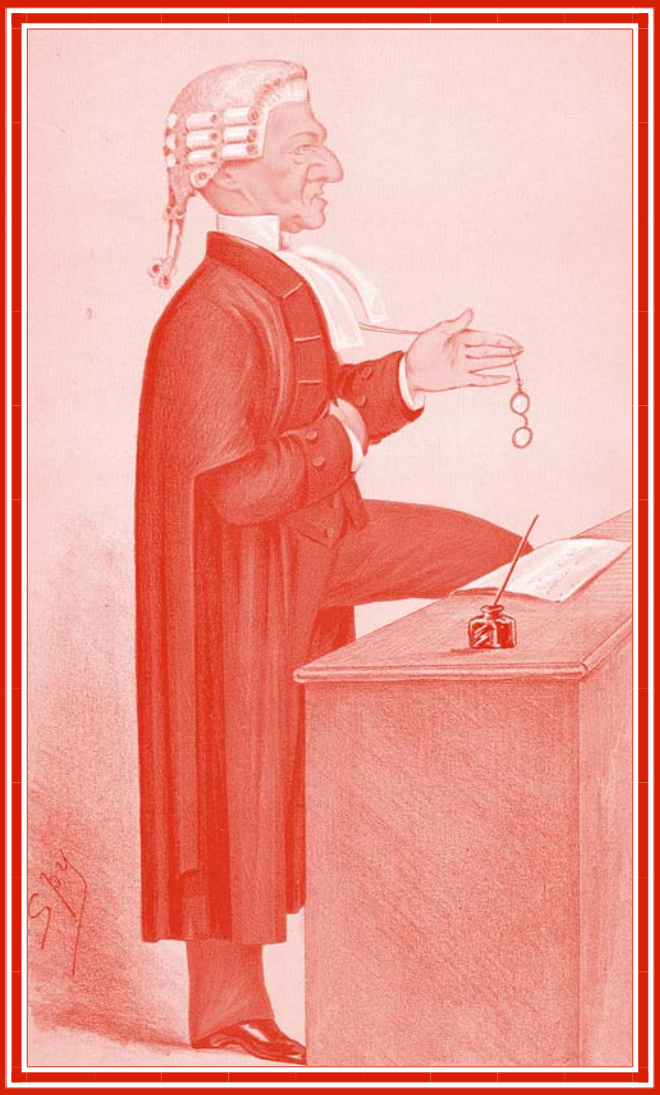
# The Reporter

December 2004

OFFICE OF THE JUDGE ADVOCATE GENERAL



AIR FORCE RECURRING PERIODICAL 51-1, VOLUME 31 NUMBER 4

# The Reporter

**EDITOR**
Captain Christopher M. Schumann

**ASSISTANT EDITORS**
Major Sean Maltbie
Major Chuck Wiedie
AFJAGS Faculty

**CONTRIBUTING AUTHORS**

PRACTICUM
Lt Col Ray T. Blank

CAVEAT
Mr. David Orser

ADMINISTRATIVE LAW
Lt Col James Roan

TORT CLAIMS AND HEALTH LAW
Mr. Joseph A. Procaccino, Jr.


## FROM THE EDITOR

This issue of *The Reporter* begins by tackling the tough issue of when environmental documents can and should be released to the general public, and the sometimes complicated laws and regulations that govern the dissemination of environmental documents. Major Michael Taylor, relying on his experience in the Tarnac Farms case, skillfully covers the touchy issue of dealing with classified information at trial. Capt Eric Merriam provides some helpful hints to our military justice professionals in the area of court member selection. And finally, Captain Kirk Samson lays out some practical advice for those tasked with the responsibility of dealing with an overseas aircraft accident. Our usual departments include current topics in military justice, administrative law, and torts claims and health law. In future issues look for the addition of an environmental law update, as well as the return of the Commandant's Corner, featuring input from Col Michael Murphy, the new Commandant of the Air Force JAG School. Dig in!

## Table of Contents




*The Reporter* is published quarterly by the Air Force Judge Advocate General School for the Office of the Judge Advocate General, United States Air Force. Views expressed herein, unless otherwise indicated, are those of the individual author. They do not purport to express the views of The Judge Advocate General, the Department of the Air Force, or any other department or agency of the United States Government.

*Contributions* from all readers are invited. Items are welcome on any area of the law, legal practice or procedure that would be of interest to members of The Air Force Judge Advocate General's Corps. Items or inquiries should be directed to The Air Force Judge Advocate General School, CPD/JAR (150 Chennault Circle, Maxwell AFB AL 36112-6418) (Comm (334) 953-2802/DSN 493-2802)

*Subscriptions*: Paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402

*Citation*: Cite as [Author], [Title], *The Reporter*, [date], at [page number]

*Distribution*: Special, Air Force legal offices receive *The Reporter* from AFLSA/CCQ, Bolling AFB, D.C. 20332-6128 (Comm (202) 757-1515/DSN 297-1515).

# Information Law and Dissemination of Environmental Documents

Lieutenant Colonel Barbara Altera
Major Richard S. Pakola

Air Force organizations generate a myriad of environmental documents, but only a small number of these documents are written for public review and comment. Under the Freedom of Information Act[1] some environmental documents are prohibited by statute from being released to the public, while other documents must be released to state and local entities. Many environmental documents contain information on vulnerabilities and hazardous substances that could be used to target military infrastructure and personnel. Because of this, all environmental documents should be properly marked at the time of their creation in a manner that protects information and anticipates whether the documents will be provided to a state or local entity or to the public at large.

This article first provides a general overview of the Freedom of Information Act (FOIA) and highlights the exemptions most likely to apply to environmental documents. Next it addresses the releasability of Environmental Compliance Assessment and Management Program (ECAMP)/Environmental, Safety, and Occupational Health Compliance Assessment and Management Program (ESOHCAMP) documents. This article will also address issues concerning the release of information to the Environmental Protection Agency (EPA) and to state and local agencies. The final section highlights other issues that may affect the protection of information, including issues surrounding contractor-generated documents and legal comments that are rolled into spreadsheets along with comments from other functional groups. Additionally, Attachment 1 is a practical checklist for protecting environmental information, Attachment 2 is suggested For Official Use Only (FOUO) markings, and Attachment 3 is suggested transmittal letter language.

*Lt Col Barbara Altera (B.S., United States Air Force Academy; M.S., Northeastern University; J.D., University of Georgia; LL.M., George Washington University Law School) is currently the Deputy Regional Environmental Counsel , Eastern Region. She is a member of the Georgia Bar.*

*Maj Rick Pakola (B.A., University of Pennsylvania; J.D., Fordham University School of Law; LL.M., George Washington University Law School) is currently a Compliance Attorney at the Air Force Legal Services Agency, Environmental Law and Litigation Division in Rosslyn, VA. He is a member of the Pennsylvania and New York bars.*

*In preparing this article, the authors gratefully acknowledge Lt Col Phillip Kauffman, Chief of Information and Privacy, Air Force Administrative Law Division, for his detailed review and valuable comments.*

## Part I: Freedom of Information Act[2]

The Freedom of Information Act (FOIA) generally provides to the public an enforceable right of access to federal records held by agencies of the executive branch of the Federal Government, except when such records or portions thereof are protected from disclosure by one of nine exemptions or by one of three special law enforcement record exclusions.[3] The nine exemptions are summarized in the table at Attachment 4.[4]

Generally, the exemptions are discretionary rather than mandatory.[5] In October 2001, Attorney General John Ashcroft established a new standard governing the Department of Justice's decisions on whether it will defend an agency's FOIA decisions when they are challenged in court.[6] In summary, the DOJ will defend decisions "unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."[7] This "sound legal basis" standard supercedes the "foreseeable harm" standard that Attorney General Janet Reno established in 1993.[8]

## Part II: FOIA Exemptions & Environmental Documents

While each of the FOIA exemptions should be evaluated to determine whether it protects an environmental document from release, the FOIA exemptions that are most likely to apply to environmental documents are Exemptions 2 ("High 2"), 3, 5 and 6, each of which is discussed below.

### A. Exemption 2 ("High 2")

Given the threat of terrorist activity, the Air Force should consider the applicability of the "High 2" basis to withhold internal environmental information. This exemption applies when release of the document would enable someone to circumvent the Air Force's

legal responsibilities (such as the requirement to provide safe drinking water or to transport hazardous substances safely). Examples of environmental information that may be exempt from FOIA release based on Exemption 2, "High 2" are the following: (1) location of hazardous or toxic materials; (2) vulnerability assessments; (3) emergency response plans; and (4) procedures/plans governing the transportation of hazardous substances.[9] The May 2004 DOJ FOIA Guide provides the following guidance concerning Homeland Security-Related Information and the applicability of Exemption 2:

> Since the horrific events of September 11, 2001, and given the possibilities for further terrorist activity in their aftermath, all federal agencies are concerned with the need to protect critical systems, facilities, stockpiles, and other assets (often referred to as "critical infrastructure") from security breaches and harm -- and in some instances from their potential use as weapons of mass destruction in and of themselves. Such protection efforts, of course, necessarily must include the protection of agency information that reasonably could be expected to enable someone to succeed in causing the feared harm, not all of which can appropriately be accorded national security classification as a practical matter. In addressing these heightened homeland security concerns, all agencies should be aware of the protection that is available under Exemption 2, perhaps foremost among all other FOIA exemptions, for such sensitive information.
>
> The types of information that may warrant Exemption 2 protection for homeland security-related reasons include, for example, agency vulnerability assessments and evaluations of items of critical infrastructure that are internal to the government. Since September 11, 2001, all courts that have considered nonclassified but nonetheless highly sensitive information, such as container-inspection data from a particular port or maps of the downstream flooding consequences of dam failure, have justifiably determined -- either under Exemption 2 or, upon a finding of a law enforcement connection, under Exemptions 7(E) or 7(F) -- that such information must be protected from disclosure in order to avoid the harms described both in the recent Presidential Directive concerning Homeland Security and by Congress in the exemptions to the Freedom of Information Act. (See also the discussions of related exemptions under Exemption 7, Exemption 7(E), and Exemption 7(F), below.) Agencies should be sure to avail themselves of the full measure of Exemption 2's protection for their critical infrastructure information as they continue to generate more of it, and assess its heightened sensitivity, in the wake of the September 2001 terrorist attacks.
>
> Lastly, whatever the safeguarding label that an agency might (or might not) use for the information maintained by it that has special sensitivity -- e.g., "for official use only" (FOUO), "restricted data" (a Department of Energy designation), or "sensitive homeland security information" (SHSI) -- whenever predominantly internal agency records may reveal information the disclosure of which could reasonably be expected to cause any of the harms described above, responsible federal officials should carefully consider the propriety of protecting such information under Exemption 2.[10]

### B. Exemption 3

There are several statutory prohibitions on the release of environmental information under FOIA, and there are other statutory prohibitions that may provide a basis to withhold environmental information.[11] Two such statutory prohibitions are contained in the Safe Drinking Water Act (SDWA),[12] and the Clean Air Act (CAA).[13]

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act)[14] amended the SDWA to require community water systems, including those on Air Force bases,[15] serving populations of greater than 3,300 persons to conduct antiterrorism water vulnerability assessments[16] and develop a water system Emergency Response Plan (ERP) incorporating the results of the vulnerability assessments.[17] According to the DoD Policy on Drinking Water Vulnerability Assessments and Emer-

gency Response Plans:[18]

> DoD has many water systems that are not specifically addressed by [Bioterrorism Act's amendments to the SDWA]. Nevertheless, the unquestionable threats and unique missions executed at DoD facilities warrant additional efforts to protect our people, our critical assets, and our mission…. To adequately assess drinking water systems, all facilities having a public water system serving greater than 25 DoD consumers shall, at a minimum, address the assessment areas established by Section 401 [of the Bioterrorism Act].

The Air Force Policy on Potable Water Vulnerability Assessments and Emergency Response Plans[19] also requires all drinking water systems serving more than 25 people to comply with the Bioterrorism Act requirements.

In short, according to the Bioterrorism Act and the DoD and Air Force policies mentioned above, Air Force water systems serving over 25 persons must conduct vulnerability assessments, certify to EPA that they have conducted vulnerability assessments, and submit their vulnerability assessments to EPA.[20] Although these assessments must be provided to EPA, the Act exempts vulnerability assessments and "all information derived therefrom" from release under the FOIA.[21] The Act requires EPA to develop protocols for the protection of the assessments from unauthorized disclosure.[22]

Although the SDWA exempts vulnerability assessments from release under FOIA, the SDWA does not address releasability under state FOIA laws.[23] Once we provide a document to an entity that is subject to the state FOIA law, the Air Force may lose control of that document.[24] Because of this, the Air Force must mark documents and obtain agreements from the entity that address document protection.

Once a vulnerability assessment has been developed and provided to the EPA in accordance with the statute, the state may request a copy for its review. The SDWA specifically addresses this issue, stating that "[n]o community water system shall be required under State or local law to provide a [vulnerability assessment] to any State, regional, or local governmental entity *solel*y by reason of the requirement set forth in paragraph (2) that the system submit such assessment to the Administrator."[25] If the entity has a reason other than the SDWA requirement, then the Air Force will need to evaluate the State requirement and ways to protect the document from further release. In such cases, the base environmental attorney and SJA, should consult and work with their MAJCOM, Regional Counsel, JACE and JAA.

The Clean Air Act, section 112(r), also contains a prohibition on releasing environmental information under FOIA. Specifically, this provision applies to stationary sources that process more than the threshold amount of listed chemicals that are "known to cause or may reasonably be anticipated to cause death, injury, or serious adverse effects to human health or the environment."[26] Covered facilities, which include federal facilities,[27] must develop risk management plans (RMPs) that include a hazard assessment. The statute refers to this assessment as an off-site consequence analysis (OCA). Congress passed the Chemical Safety Information, Site Security, and Fuels Regulatory Relief Act (CSISSFRRA),[28] which exempted OCA from FOIA for one year.[29] The promulgation of regulations[30] on August 4, 2000 kept the exemption in place without a sunset provision.[31] Files containing "OCA data are only available to 'covered persons' as defined by CSISSFRRA."[32] Covered persons include U.S., State, or local government officers, employees, agents and contractors.[33]

### C. Exemption 5

Exemption 5 generally exempts from release those documents that are normally privileged in the civil discovery context.[34] Consequently, many environmental documents will be protected from release under Exemption 5, particularly draft documents, predecisional documents, and those documents that are authored by attorneys.

The deliberative process privilege covers documents that are predecisional and a direct part of the deliberative process (i.e., make recommendations or express opinions on legal or policy matters.)[35] Generally, draft reports and memoranda will fall under this privilege. Documents prepared by or for an attorney in contemplation of litigation are protected from release by the attorney work-product privilege.[36] To invoke this privilege, a claim that is likely to lead to litigation must have arisen.[37] The third common Exemption 5 privilege is the attorney-client privilege, which covers "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice."[38] Discretionary disclosures of documents that fall within any of these privileges must be assessed under the new "sound basis" standard.[39]

### D. Exemption 6

Exemption 6 would be the basis to withhold those

portions of environmental documents containing information about a specific individual, where release of the information would be a clearly unwarranted invasion of his or her personal privacy.[40] This exemption would most likely apply to documents relating to an environmental tort claim because such documents may contain personal information, such as an individual's medical information, home address and home phone number.[41]

## Part III: Releasability of ECAMP/ESOHCAMP Documents and Information

The releasability of documents concerning an internal or external ECAMP/ESOHCAMP continues to be questioned, though the publication of the Air Force instruction governing ECAMPs[42] and guidance from AFLSA/JACE[43] should provide answers to some of the questions.

Once approved by the Major Command, the Final Compliance Assessment Report is generally releasable under FOIA.[44] Other ECAMP/ESOHCAMP documentation, however, should be released only in accordance with FOIA.[45] Documents that are not final would be protected from release under the deliberative process privilege, Exemption 5.[46] Consistent with this exemption, the documents should be appropriately labeled as pre-decisional or draft documents.[47]

In addition to addressing the releasability of ECAMP documents, the Air Force ECAMP AFI also provides the following guidance concerning release of non-compliance information:

> Installation environmental managers must coordinate with the MAJCOM environmental office before disclosing any non-compliance detected during an ECAMP to a regulatory agency. Legal reviews will be conducted prior to: releasing the Final Compliance Assessment Report; releasing other documentation; or disclosing findings.[48]

## Part IV: Release of Information to the EPA and to State and Local Agencies

There are many statutory and regulatory provisions requiring the Air Force to submit documents to the EPA. For example, the Air Force must submit a copy of its Facility Response Plan to the EPA,[49] and permits generally contain provisions requiring the submission of reports and monitoring data. In addition, the Air Force may voluntarily submit documents to the EPA to further partnering efforts. These submissions are not released to the public under the FOIA, and Air Force personnel should appropriately mark any documents submitted outside of the Air Force to maximize the protection of the information.[50]

Because there are waivers of sovereign immunity in most of the major environmental statutes, the Air Force must comply with many state and local environmental laws. Some of these laws require the Air Force to provide information to state and local entities, even when such information would be exempt from release under the FOIA. For example, state water pollution laws may require spill prevention and control plans and response plans to be submitted to local fire and law enforcement entities.

States, however, are not bound by the FOIA, and states have FOIA-type laws of their own. To best protect any sensitive but unclassified information, the Air Force must restrict further distribution of the information and ensure that the entity will safeguard the information. Prior to releasing sensitive but unclassified information, for example, Air Force personnel should find out each entity's requirements for posting information on their web sites and proactively discuss restrictions on the posting of Air Force information. In addition to addressing the dissemination of Air Force information via the internet, the following actions should be taken: (1) the documents should be appropriately marked;[51] (2) any relevant agreements with the entity (such as Memoranda of Agreement or Cooperative Agreements) should require the entity to protect the information from further release; (3) such agreements should also include provisions that require the documents to be safeguarded, with access limited to appropriate individuals; and (4) the transmittal (cover) letter should specifically highlight all restrictions on further distribution of the document.[52] It must be clear that the release to the state or local entity is not a FOIA release and, instead, the document belongs to the Air Force and is being provided to the entity for a limited purpose. The prohibition on further distribution of the document as well as disposition instructions (such as returning or destroying the document) should be stated clearly. Also, Air Force personnel before releasing documents should verify that the entity has appropriate physical safeguards to limit access by unauthorized individuals. Finally, instructions for handling a request for a copy of an Air Force document should be included in the agreement (*e.g.*, deny the request and refer the requestor to the Air Force).

As an alternative to releasing sensitive information, the Air Force may be able to provide different information to the state or local entity that serves the same purpose. For example, the Air Force could identify the type of protective gear that would be needed to respond to a fire in a particular building without divulging the names and quantities of specific hazardous substances that are stored in the building.

## Part V: Miscellaneous Issues Affecting Protection of Information

There are two scenarios that are common in the Air Force and may affect the degree of protection that is afforded a document. One scenario involves contractor-generated documents, and the other concerns comments from a legal office submitted as a part of the JA coordination on a document. Generally, documents created for the Air Force by a contractor who is working under an Air Force contract are Air Force documents.[53] Consequently, the contractor should be instructed to mark the documents appropriately and properly safeguard information that requires protection.

Many Air Force organizations currently consolidate all comments submitted on a draft document into a spreadsheet. When a headquarters office consolidates comments from all functional groups, major commands, and other organizations, the spreadsheet is then disseminated throughout the Air Force to all organizations that have a need to see the collective comments. Legal comments, however, are not highlighted with any markings about attorney-client privilege. The use of this process raises questions about the adequate protection of legal comments. There is sufficient legal support for the position that legal comments continue to have the Exemption 5 protection (attorney work product or attorney-client privilege) since the comments are submitted on behalf of the Air Force client and are not submitted outside of official channels. The effect of this process, however, requires further review.

Whether release of environmental information to the EPA, a state entity or another entity is voluntary or mandatory, Air Force personnel must assess the sensitivity of the information and whether or not it is exempt from release under FOIA. Such an assessment should be done even for documents that must be released to the public in order to prevent inadvertent release of sensitive but unclassified information. Consequently, a FOIA analysis should be accomplished long before a FOIA request has been received, and all documents should be properly marked at creation.

[1]5 U.S.C. § 552.
[2]The DoD and Air Force FOIA programs are set forth in DoDD 5400.7, *DoD Freedom of Information Act Program*, and DoD R5400.7/AF Supp, DoD *Freedom of Information Act Program*, 24 June 2002, respectively.
[3]*See* Freedom of Information Act Guide & Privacy Act Overview, pp. 5-21 (U.S. Dep't of Justice May 2004) [hereinafter FOIA Guide]. For general information on FOIA, see JAA's Information Law webpage, https://aflsa.jag.af.mil/AF/lynx/tolls/content.php?qrylvl=3&lvl2id=90&lvl2folder=yes. For law review articles that provide a more expansive discussion of environmental law FOIA issues, *see* Joseph D. Jacobson, Safeguarding National Security Through Public Release of Environmental Information: Moving the Debate to the Next Level, 9 Envtl Law. 327, 377-84 (February 2003); and Stephen Gidiere & Jason Forrester, Balancing Homeland Security and Freedom of Information, 16 Nat. Resources & Env't 139 (2000).
[4]Information in the table is summarized from the FOIA Guide, *supra* note 3, and "A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974. The exemptions are set forth at 5 U.S.C. § 552(b)(1)-(9).
[5]FOIA Guide, *supra* note 3, at text accompanying footnote 12, and "Discretionary Disclosure and Waiver" section. Discretionary disclosure is not necessarily applicable to exemptions 1, 3, 4, 6, 7(C) and 7(F).
[6]Attorney General Ashcroft's FOIA Memorandum (Oct. 12, 2001), available at http://www.usdoj.gov/04foia/011012.htm, reprinted in *FOIA Post* (posted 10/15/01, at http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm).
[7]*Id.* Attorney General Ashcroft directs that "[a]ny discretionary decision by [an] agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information." *Id.*
[8]*FOIA Post* (posted 10/15/01), at http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm.
[9]*See also* DoD R5400.7/AF Supp, C3.2.1.2 for other examples of records that may qualify for exemption 2 protection.
[10]FOIA Guide, Exemption 2 – "Homeland Security-Related Information" (footnotes omitted).
[11]A table of Exemption 3 statutes applicable to DoD is at http://www.foia.af.mil/b3.pdf. Critical infrastructure information that is voluntarily submitted to a covered Federal agency for use by that agency regarding the security of critical infrastructure is also protected from release under Exemption 3. Critical Infrastructure Information Act (in the Homeland Security Act of 2002), Pub. L. No. 107-296, §§ 211-215 (codified at 6 U.S.C. § 133).
[12]42 U.S.C. §§ 300f *et seq*.
[13]42 U.S.C. §§ 7401 *et seq*.
[14]Pub. L. No. 107-188.
[15]42 U.S.C. § 300j-6.
[16]42 U.S.C. § 300i-2(a).
[17]42 U.S.C. § 300i-2(b). In the Air Force draft guide for dealing with the requirements of the Bioterrorism Act, the Air Force uses "Water Contingency Response Plan" (WCRP) to refer to the ERP.
[18]John Paul Woodley, Jr., Assistant Deputy Under Secretary of Defense (Environment, Safety and Occupational Health), DoD Policy on Drinking Water Vulnerability Assessments and Emergency Response Plans, dated 3 Jul 03.
[19]Maj Gen Joseph E. Kelley, Assistant Surgeon General, Healthcare Operations, Air Force Policy on Potable Water Vulnerability Assessments and Emergency Response Plans, dated 6 Oct 03.
[20]For systems serving between 3,301 and 49,999 people, the Vulnerability Assessment was due by 30 Jun 04; for those serving between 50,000 and 99,999, it was due 31 Dec 03; and for those serving 100,000 or greater, it was due 31 March 03. 42 U.S.C. § 300j-2(a)(2).
[21]42 U.S.C. § 300i-2(a)(3).
[22]42 U.S.C. § 300i-2(a)(5). EPA's Protocol to Secure Vulnerability Assessments is posted at http://www.epa.gov/safewater/watersecurity/pubs/info_protect_11-30-02.pdf.
[23]Generally, however, the federal laws do not limit state FOIA laws, as the following excerpt explains:
"State FOIA laws are not generally superseded or limited by Federal law [although there are notable exceptions, such as in New York's Pub. Off. Law § 87(2)(a), which carves out exclusions for records exempt under Federal statute]. As a result, drinking water and wastewater utilities will likely not be able to rely on [the FOIA exemption in the Bioterrorism Act] for protecting access to informa-

tion at state levels."
Association of Metropolitan Water Agencies, State FOIA Laws: A Guide to Protecting Sensitive Water Security Information, at 2, posted at http://www.amwa.net/isac/StateFOIA.pdf (footnotes omitted).
[24]Part IV, below, covers state FOIA laws in greater detail and describes precautions that should be taken whenever submitting a document to a non-federal entity to protect against unwanted disclosure.
[25]Pub. L. No. 107-188, § 1433(a)(4); 42 U.S.C. § 300i-2(a)(4) (emphasis added).
[26]42 U.S.C. §§ 7412(r)(1) and (r)(3).
[27]42 U.S.C. § 7418.
[28]Pub. L. No. 106-40, 113 Stat. 207 (1999). Aside from addressing OCA, the statute also exempted flammable substances from 112(r). section 2(4), codified at 42 U.S.C. § 7412(r)(4)(B).
[29]42 U.S.C. § 7412(r)(7)(H)(iii).
[30]Accidental Release Prevention Requirements; RMP Under the CAA § 112(r)(7); Distribution of OCA Information, 65 Fed. Reg. 48,108, 48,126 (Aug. 4, 2000), codified at 40 C.F.R. ch. IV.
[31]42 U.S.C. § 7412(r)(7)(H)(iii)(II).
[32]RMP*Review, http://yosemite.epa.gov/oswer/ceppoweb.nsf/content/rmp_review.htm.
[33]42 U.S.C. §§ 7412(r)(7)(H)(i)(I)(aa)-(gg). The inclusion of state and local employees, officers and contractors under "covered persons" does not mean that these officials must be given this information. In most situation, sensitive information should not be provided to state or local agencies, employees or contractors unless specifically required. As will be discussed below in Part V, once documents are released to these persons or entities, the Air Force may lose control over how they are subsequently handled.
[34]FOIA Guide, Exemption 5 discussion.
[35]FOIA Guide, Deliberative Process Privilege discussion under Exemption 5.
[36]FOIA Guide, discussion of attorney work-product privilege.
[37]*Id.*
[38]FOIA Guide, discussion of attorney-client privilege.
[39]*See* footnotes 4-5 and accompanying text.
[40]*See* 5 U.S.C. § 552(b)(6).
[41]A request from an individual for their own records (first party request) must be analyzed under the Freedom of Information Act and under the Privacy Act. The government may only withhold information protected from disclosure under both acts. *See* DoD R5400.7/AF Supp, C1.5.13.
[42]*Environmental Compliance Assessment and Management Program (ECAMP),* AFI 32-7045 (July 1, 1998).
[43]Col Francis H. Esposito, Chief, Environmental Law & Litigation Division, Memo, Advice on Disclosing Noncompliance Detected by ECAMP (10 Oct 96), available at https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/ENVLAW/MISC/auditesp.htm. The advice provided in this memo is still accurate, but JACE is currently working on a memo to supercede it that will provide broader and more detailed guidance on information law and environmental documents.
[44]*Id.* at para. 3.4.
[45]*Id.*
[46]*See* 5 U.S.C. § 552(b)(5).
[47]AFI 32-7045, at para 3.4. This paragraph references AFI 37-131, which is now DoD R5400.7/AF Supp.
[48]*Id.*
[49]33 U.S.C. 1321(j)(5); and 40 C.F.R. 112.20.
[50]Documents transmitted outside the Air Force (e.g. to the EPA), should be marked as For Official Use Only, IAW DoD R5400.7/AF Supp, C4.2.1. See attachment 2 for a sample marking.
[51]Attachment 2 contains suggested For Official Use Only (FOUO) markings.
[52]Attachment 3 contains suggested transmittal letter language.
[53]Ultimately the issue comes down to whether the document is an "agency record." The Supreme Court provided a two part test for "agency records" in United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989). Under this test, a document is an agency record so long as it is (1) created or obtained by an agency, and (2) under agency control at the time of the FOIA request. In Hercules, Inc. v. Marsh, 839 F.2d 1027, 1029 (4th Cir. 1988), the court held that an army ammunition plant telephone directory prepared by a contractor at government expense was an agency record. *See also*, Burka v. Dep't of Health and Human Services, 318 U.S. App. D.C. 274, 87 F.3d 508, at 515 (data tapes created and possessed by contractor were agency records because of extensive supervision by agency, which evidenced "constructive control"); and Los Alamos Study Group v. Dep't of Energy, No. 97-1412, slip op. at 4 (D.N.M. July 22, 1988) (records created by contractor are agency records because contract established agency intent to retain control over records).

## Attachment 1 – Checklist for Protecting Environmental Information

1. What statute, regulation, DoD or AF regulation, or policy requires the creation of the document? Does the statute, regulation, or policy contain instructions on releasability? If yes, follow the instructions.

2. Does the document contain information that would be exempt from release under FOIA?
   a. Does the document contain information which, if released, would enable someone to circumvent Air Force legal responsibilities (*e.g.*, requirement to provide safe drinking water or safely transport hazardous substances)? If yes, the information or document is exempt from release under Exemption 2, "High 2."
   b. Does the document contain information that is exempt from release under other laws (e.g., vulnerability assessments under the SDWA Amendments, or OCA under the CAA, section 112(r))? If yes, exemption 3 protects it from release.
   c. Does the document contain information that normally would be privileged in the civil discovery context? Is it pre-decisional and a direct part of the deliberative process, or does it fall under the attorney work product or attorney-client privilege? If yes, exemption 5 likely applies.
   d. Does the document contain information that, if released, would be an unwarranted invasion of a person's privacy (*e.g.*, environmental tort claims might have this type of information)? If yes, the information or document is exempt under exemption 6.
   e. Does any other FOIA exemption apply?

3. If an exemption does apply or the document is For Official Use Only, is the document properly marked to address releasability?

4. Is the document required to be released to a state or local entity such as a state regulatory agency or a local fire department? If yes, the release is not a release under FOIA, but the following steps should be taken to ensure the documents are not further released.
   a. Is there a Memorandum of Agreement or any other agreement between the base and the state or local entity? If yes, evaluate whether it contains, or should contain, a provision addressing the protection of sensitive Air Force documents.
   b. Does the document contain a header or footer as suggested in Attachment 2?
   c. Does the cover or transmittal letter contain the language suggested in Attachment 3?
   d. Check the state law regarding release of information to the public. If the state law would require the release of Air Force documents that should be protected, consult with AFLSA/JACE (Air Force Environmental Law and Litigation Division) and AF/JAA.

5. Will the document or portions of the document be posted on a web site? If the document contains any FOIA exempted or Privacy Act-protected information, it should at least be redacted to remove such information. Even if there is no FOIA exempted information in the document, does it contain sensitive information that could be used by a terrorist to target military bases or personnel? If yes and there is no legal requirement to post the information, then do not post it.

## Attachment 2 – Suggested FOUO Markings

This document contains information that is EXEMPT FROM MANDATORY DISCLOSURE under the Freedom of Information Act, 5 U.S.C. § 552. Exemption(s) ___ apply/applies. Further distribution is prohibited without the prior approval of (organization, office symbol, phone).

- In the blank insert the applicable exemption(s).
  -- For draft documents, exemption 5 applies.
  -- Where there is statutory protection consider application of exemption 3.
  -- If release of the information would permit the circumvention of a statute, regulation, an agency rule, or other legal requirement, consider application of exemption 2 ("High 2")

## Attachment 3 – Suggested Transmittal Letter Language

This document is being provided to your organization for official use only and remains the property of the United States Air Force. It is not a release under the Freedom of Information Act (5 U.S.C. 552), and due to the sensitivity of the information, this document must be appropriately safeguarded. For example, you may not make the information publicly available, and you must limit disclosure to those who need the information to carry out their duties. Because this document is being provided for limited purposes, it must be returned to the appropriate Air Force organization or destroyed when it is no longer needed. Should you receive a request for this document or information contained in this document (whether under the Freedom of Information Act, a state version of that act, or any other type of request), you must: 1) refer the request to us at (AF organization contact information), and 2) notify the requestor of the referral.

## Attachment 4 - Nine Exemptions Under the FOIA

| | | |
|---|---|---|
| Exemption 1 | Classified Documents | Protects national security information concerning the national defense or foreign policy, provided that it has been currently and properly classified under an Executive Order. |
| Exemption 2<br>(Two categories) | Internal Personnel Rules and Practices | Protects "Low 2" information (internal matters of a relatively trivial nature); and<br>"High 2" information (more substantial internal matters, where disclosure would risk circumvention of a legal requirement). |
| Exemption 3 | Information Exempt Under Other Laws | Protects information prohibited from disclosure by another statute. |
| Exemption 4 | Trade Secrets and Commercial Information | Protects (1) trade secrets and (2) commercial or financial information that is obtained from a person and is privileged or confidential. |
| Exemption 5 | Inter or Intra agency memos not available to a party in civil litigation | Protects inter-agency or intra-agency memorandums or letters that would not be available by law to a party in litigation with the agency. The three most common Exemption 5 privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. |
| Exemption 6 | Information in which there are personal privacy interests | Protects information about individuals in personnel and medical files and similar files when disclosure would constitute a clearly unwarranted invasion of personal privacy. |
| Exemption 7 | Law enforcement records | Protects information compiled for law enforcement purposes, but only to the extent that the production of such information satisfies one of six possible outcomes (*e.g.*, could reasonably be expected to interfere with enforcement proceedings). |
| Exemption 8 | Financial Institutions | Protects information that is contained in or related to examination, operating, or condition reports prepared by or for a bank supervisory agency. |
| Exemption 9 | Geological Information | Protects geological and geophysical information, data and maps about wells. |

# PRACTICUM

## RACIAL ALLUSIONS DURING ARGUMENT

A recent Court of Appeals of the Armed Forces case, *U.S. v. Rodriguez*, 60 M.J. 87 (2004), highlights the need for trial counsel to always choose his/her words with care and to avoid racially-based comments. This should go without saying but unfortunately, *Rodriguez* is just the latest in a series of cases on this topic.

The United States Supreme Court said, in discussing the role of the prosecutor, "he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935).

This oft-quoted statement is at the heart of why officers of the court should use extreme caution before using racially-specific allusions in their arguments. If the fact finder bases the conviction on a racial stereotype, not on the facts of the case, the justice system has failed. "Our system of military justice must remain not only *actually* fair to all judged by it, but it must *appear* fair to all who observe it." *U.S. v. Lawrence*, 47 M.J. 572, 575 (N.M.Ct.Crim.App. 1997).

In *Lawrence*, the accused and three others chased down and assaulted a man they believed had carjacked Corporal Lawrence's car (loaned to a friend) the previous day. The appellant and two of his friends were Jamaican (but not otherwise related). In rebuttal argument, the trial counsel attacked the accused's credibility by saying "the only inconsistencies in this case are from three Jamaican brothers and the lying PFC Barron." *Lawrence*, 47 M.J. at 574. The court could find "no logical and legally permissible nexus" between the race of anyone in the case and "a valid consideration for the members." *Lawrence*, 47 M.J. at 574-575. Instead, the court stated the reference was "unmistakably pejorative. It draws an illogical and unnecessary reference to a term most often colloquially associated, both positively and negatively, with Americans of color." *Lawrence*, 47 M.J. at 574. To make the message even clearer, the court said, "[t]rial counsel must avoid invocation of race in argument (and elsewhere in a proceeding) absent a logical basis for the introduction of race as an issue, and strong evidentiary support for its introduction." Because the error was "materially prejudicial to the substantial rights of the appellant," the court set aside the findings of guilty and the sentence. *Lawrence*, 47 M.J. at 573, 575-76.

In *U.S. v. Diffoot*, 54 M.J. 149, 150 (2000), three Marines conspired to steal an automobile. The two Marines other than the accused had Hispanic surnames. Trial counsel didn't pull his punches describing those co-conspirators. They were "lousy Marines," "criminal Marines," and "a Platoon Commander's worst nightmare." Those comments were all hard blows but not over the line. Then trial counsel went too far. He asked, "But who is their amigo, gentlemen? Who is their compadre?" He also argued there was "guilt by association" since the accused kept company with those lousy Marines. *Diffoot*, 54 M.J. at 150. The Court of Appeals for the Armed Forces found "these comments by trial counsel, viewed together and in the context of the entire record of trial, did materially prejudice appellant's substantial rights." *Diffoot*, 54 M.J. at 151. Acting to "remedy such a serious injustice and preserve the integrity of the military justice system," the court set aside the findings of guilty and the sentence. *Diffoot*, 54 M.J. at 153.

In *U.S. v. Rodriguez*, 60 M.J. 87 (2004), the accused, 21-years old with a young child, pled guilty to several charges including specifications of larceny. In sentencing before a judge, trial counsel argued, "[t]hese are not the actions of somebody who is trying to steal to give bread so his child doesn't starve, sir, some sort of a [L]atin movie here." *Rodriguez*, 60 M.J. at 88. Although ultimately affirming the findings and sentence, the Court of Appeals for the Armed Forces went out of its way to condemn the use of racial or ethnic remarks. The court noted "race is different [from other improper arguments and therefore it] is the rare case indeed, involving the most tangential allusion, where the unwarranted reference to race or ethnicity will not be obvious error." *Rodriguez*, 60 M.J. at 90. Nevertheless, the court found the Appellant had not suffered a "material prejudice to a substantial right," based in large part on the argument being made before a judge alone. The holding could well have been different in a trial before members.

You may now be thinking that this article doesn't apply to you. After all, you're not a racist and would never make the sort of comments you've read above.

Consider the case of the hapless trial counsel in *U.S. v. Hyde*, ACM 34536, (A.F.Ct.Crim.App. 9 April 2002,). The accused was convicted of indecent assault and housebreaking. In sentencing, trial counsel used the phrase "call a spade a spade" when arguing the accused's conduct was dishonorable and therefore a dishonorable discharge was appropriate. There is no dispute that trial counsel meant only that the Air Force should "tell it like is" and was not deliberately insult-

ing the African-American accused. In fact, the court accepted that the trial counsel was unaware of a negative racial connotation to the phrase "calling a spade a spade." The Air Force Court of Criminal Appeals started with the premise that "[t]he military judicial system will not tolerate improper comments or references to an appellant's race." After a lengthy analysis of trial counsel's use of the phrase and consideration of the facts that it has a non-racial meaning and counsel did not point to the accused, the Air Force Court of Criminal Appeals found the argument was not a reference to the appellant's race. Nevertheless, the court noted "in hindsight, trial counsel might have chosen different words to make this point."

Words have power; words have multiple meanings. When you use a word, any word, you run the risk of your listener ascribing a certain meaning to it – whether you personally intended that meaning or not. Your innocent motivation may save you from accusations of deliberate misconduct but it will not unring the bell of a loaded phrase and it will not save the case if what you said was a "foul" blow.

# CAVEAT

### YOU BETTER WATCH OUT . . . I'M TELLING YOU WHY

If you're an accused who is sentenced to confinement by court-martial after 1 January 2005, you may be serving more of your sentence behind bars--*lots more*. That is because a change to DOD policy on good conduct abatement has gone into effect. See https://aflsa.jag.af.mil/AF/JAJR/LYNX/dod_policy_on_abatement_of_sentences.doc

Prior to the New Year, the amount of good conduct abatement an inmate could earn depended on the length of the sentence to confinement. If your sentence was for a period less than a year, you could count on five days a month or 50 days on a ten-month sentence. If your sentence was ten years or more, you could count on ten days per month good conduct abatement or four years off a twelve-year sentence. Sentences between a year and ten years had six, seven or eight days a month abatement depending on the sentence length.

All that has changed. An inmate now sentenced to confinement can expect no more than five days per month good conduct abatement, *regardless of sentence length*. While the inmate can earn additional abatement under the policy for participating in rehabilitation programs, educational activities, good work performance at assigned duties, and for special acts, e.g., outstanding actions for the community, the new policy will likely lead to those with lengthy sentences serving more of their sentence to confinement, unless paroled, than was the case for sentences given in previous years.

Trial defense counsel need to understand the changes to abatement policy in order to explain to their clients what sentences really mean. Chiefs of military justice and trial counsel also must understand what has happened. In discussing pretrial agreements, not only do accused want to know when they may expect to get out of confinement, frequently that is a question convening authorities also want to know the answer to before they cut the deal.

Litigation surely will follow the change to DOD's abatement policy. One may expect, for example, a claim that the DOD has violated the Ex Post Facto clause by determining a minimum release date on the basis of an abatement policy promulgated after the crime for which an accused is incarcerated. See *Fletcher v. District of Columbia, et al*., __ F.3d __ (D.C.Cir. 2004); see also *Garner v. Jones*, 529 U.S. 244 (2000). A mistake made to a convening authority may mean someone's got some "splainin' to do." A mistake to an accused could be so significant as to call the PTA into question.

# ADMINISTRATIVE LAW

### PRAYER AT STAFF MEETINGS

The issue of prayer at mandatory formations surfaces periodically. A recent court case has raised the issue of prayer at mandatory formations, to include staff meetings. There are several significant factual differences in the case as it applies to the military. While the courts have given great deference to the military and its special needs, we need to continue to be alert for extreme factual situations that might put in jeopardy a commander's ability to call for prayer.

Our current approach to prayer at mandatory formations is to leave the decision to commanders. Our judge advocates have been instructed to advise commanders of the relevant factors found in the Supreme Court case of *Lemon v. Kurtzman*, but to leave the decision to have a prayer up to commanders. Under *Lemon*, a government statute or program "respecting" religion is constitutional if it has a secular legislative purpose, its principal effect neither advances nor inhibits religion, and it does not foster excessive governmental entanglement with religion. A commander's decision to hold prayer should be based on the particular facts of each situation.

However, excusing people from a staff meeting

while the prayer is held is not an answer to the Constitutional issues involved. In *Warnock v. Archer*, the United States Court of Appeals for the Eighth Circuit ruled that prayers conducted during mandatory teachers staff meetings in a public school system violated the establishment clause of the Constitution. In that case, the school supervisor who called the mandatory meetings (not a chaplain) also led the prayer. The District Court (lower court) held that this practice violated the establishment clause and enjoined the school system from engaging in prayer while the complainant was present. On appeal, the higher court concurred that the practice violated the establishment clause but went farther and concluded that the establishment clause was violated whether or not the complainant was present. It remanded the case back to the lower court for modification of the order consistent with its ruling. The test the court employed was whether or not the circumstances would cause a reasonable observer to conclude that the government was affirmatively endorsing religion. While this practice was found in violation of the establishment clause, the opinion does not stand for the proposition that prayer is forbidden at all government events or staff meetings.

We are aware that chaplains rather than commanders are providing the prayer at many mandatory meetings, a significant factual distinction, and many of the prayers given are nondenominational in nature. It appears there are an increasing number of chaplains who are very adept at providing moralistic, uplifting and obviously spiritually guided short stories or observations, rather than traditional prayers. These "observations on life" fulfill many of the purposes that a prayer would provide, but avoid entirely the Constitutional issue. While this is not a requirement, it certainly eliminates any opportunity for complaints while meeting the spiritual needs of the military.

We continue to believe that prayer is an option that should not be denied commanders. At times it may be the only motivation that appeals to our members to provide them the inner courage and resolve to press on. At the same time, we must be sensitive to the limits of the Establishment Clause and make certain we don't press the issue in the wrong setting or at the wrong time. All of the factors that a commander considers in determining that prayer is appropriate (time, place, frequency, nature of the formation or setting, content of the message, and even who leads the prayer) must be evaluated to make certain the practice is legally defensible. For these reasons, attorneys should not hesitate to seek advice from their MAJCOMs and AF/JAA on establishment clause issues, as needed.

# TORT CLAIMS AND HEALTH LAW

Military medicine has been undergoing major changes over the past decade. We have seen the implementation of TRICARE, the downsizing of our facilities, and new operational mission challenges. To meet many of these changes, the services have tried to use existing law and regulation to maintain clinical standards and currency for our providers. More innovative approaches will need to be made in the next few years, including closer cooperation with other federal agencies and civilian institutions. Sharing arrangements with the Department of Veterans Affairs, and External Resource Sharing Agreements with civilian hospitals are two tools being expanded to accommodate mission needs. This evolution brings new challenges in contracting, liability, research and fiscal law, and the role played by JAG is a critical part of these developments.

## RES GESTAE

The 2005 Medical Law Consultant (MLC) Course is being held in April 2005 at Malcolm Grow USAF Medical Center, Andrews AFB, Maryland. This four week course trains newly appointed Medical Law Consultants who will be assigned to medical centers world wide. The course will end with the graduates of the course attending the Medical Law Consultant's Conference in Rosslyn, Virginia, where incumbent MLCs meet with JACT and SG staff to discuss topical issues.

## VERBA SAPIENTI

Too often, Ethics Committees are underutilized in hospitals. These committees are excellent tools to discuss cases where life and death issues are at stake. MTF Ethics Committees should have legal counsel to offer advice, but not use the law as a box to contain the free flow of discussion and options. Ultimately, medical care decisions are made by health providers in conjunction with the patient and patient's family. Knowing the perimeters set by law and precedent cases may well help those decision makers better establish their options and care plans. Even when there is no critical case to come before the committee, it is crucial for the committee to keep current by having scheduled meetings to discuss hypothetical cases, learn of new legal cases and laws dealing with bioethics, and have experts present briefings. In this way, committee members will be better prepared to deal with actual cases that may come to their attention.

### ARBITRIA ET IUDICIA

Cases in pediatrics can be especially problematic due to the inability of the patient to articulate locations or extent of pains or symptoms. A settlement occurred in a case of an infant with a broken leg who was fitted with a cast. Unfortunately, the cast was too tight around the child's thigh, but the child was too young to warn his parents or the physician of the tightness. The crying was mistakenly interpreted to be a result of the fracture itself. The edge of the cast ended up causing a ring of scarring and "burns" around the patient's thigh that were deemed by experts to be permanent. When the patient is not able to speak for him/herself, providers must be extra vigilant to prevent such problems from happening.

# EDITOR'S NOTE

## Air University Foundation Legal Writing Award Winner Selected

After reviewing all articles published in the 2003 editions of *The Reporter*, the Air University Foundation Legal Writing Award Committee along with the Commandant of the Air Force Judge Advocate General School found the lead article in Volume 30, Number 1, written by Major Kate Oler, entitled, "Catch Me If You Can: Identify Theft Litigation in the Air Force," to be deserving of an award for outstanding legal writing. Maj Oler's article provided invaluable insight and tips on litigating identity theft cases, drawing on her personal experience in litigating this unique crime. Congratulations to Major Oler, who received a cash award for her efforts! Special thanks to the Air University Foundation for its continuing efforts to recognize and reward deserving authors whose works appear in our Air Force JAG Corps publications.

## Correction

The September 2004 issue of *The Reporter*, Volume 31, Number 3, was mislabeled on the inside pages of the issue as "Vol. 31, No. 2." While the cover of the issue correctly identified it as "Number 3," the inside pages should have read "Vol. 31, No. 3." The Editor regrets this error.

## Submissions Requested for *The Reporter*

Have you worked an interesting issue in a recent court-martial? Have you found a great technique or approach that could help other base level attorneys or paralegals? Write a short article about it and submit it to *The Reporter*!

Contributions from all readers are invited. Items are welcome on any area of the law, legal practice, or procedure that would be of interest to members of The Air Force Judge Advocate General's Corps. Send your submissions to *The Reporter*, CPD/JA, 150 Chennault Circle, Building 694, Maxwell AFB, AL 36112, or e-mail Capt Christopher Schumann at chris.schumann@maxwell.af.mil.

Previous editions of *The Reporter* as well as submission information can be found on the JAG School website at https://aflsa.jag.af.mil/AF/JAGSCHOOL/reporter/index.htm

# Courts-Martial and Classified Information

## Major Michael W. Taylor

Classified information must be protected from unauthorized disclosure.[1] This can be difficult to do in a court-martial. Those of us involved in prosecuting the two F-16 pilots responsible for the bombing of Canadian Forces soldiers at Tarnak Farms, Afghanistan[2] learned some valuable lessons about handling classified information in a court-martial. This article provides practical advice to trial counsel on how to handle classified information before and during a court-martial, including how to obtain permission to use classified evidence and how to protect classified information from unauthorized disclosure.

### Obtaining Permission to Use Classified Evidence

In a court-martial involving classified information, the burden is on the government to establish that the information in question is actually classified.[3] An early task for any prosecutor, therefore, is to start the process to obtain the necessary proof that the information is properly classified.[4] Obtaining permission to use classified evidence is a lengthy process that can be divided into four discrete steps.

The first step is to determine what United States government agency owns the information and who is the original classification authority (OCA).[5] The best source for this data is the actual document itself. However, in many cases, the document will be a derivative classification of something else and may simply refer to "multiple sources."[6] If this is the case, use the originator of the document and your security manager to help you through the maze. You may also find it helpful to consult the security classification guides for the subjects involved.[7] Whenever multiple OCAs and/or government agencies are identified as the owners of the information, each must be consulted.

The second step is to explain to the OCA what classified information you need and why you need it.[8] Provide the OCA an outline of your case and fully justify your documentary and witness requirements and ask the OCA[9] to provide an affidavit[10] that: (1) describes the classified information reviewed by the OCA; (2) verifies the current classification level and duration; (3) verifies the classification level during the charged time frame; (4) describes the impact on operations and national security if the classified information were to be disclosed to unauthorized persons; and (5) states whether the OCA believes the M.R.E. 505 privilege should be asserted.[11] You should also find out from the OCA whether any other government agency or OCA needs to review the information. If the OCA refuses to authorize release of the classified information to the defense, you may not be able to proceed to court-martial on one or more charges.[12]

The third step is to obtain the Secretary of the Air Force's (SAF) decision whether or not to invoke the classified information privilege. Only SAF has this authority.[13] If the OCA refuses to authorize disclosure and recommends the privilege be invoked, forward the necessary documents to SAF through AFLSA/JAJM. In this situation, SAF will typically issue a memorandum authorizing the trial counsel to invoke the privilege on the Secretary's behalf.

The fourth and final step is an evidentiary ruling by the military judge. To use classified information in a court-martial, the military judge must make written findings that the information is relevant and necessary to an element of an offense or to a legally cognizable defense and is otherwise admissible in evidence.[14] Thus, whenever the prosecution intends to use classified information at trial,[15] or whenever the defense has put the government on notice that it intends to use classified information at trial, the prosecution should move for an *in camera* proceeding.[16] During the *in camera* proceeding, the prosecution submits the classified information and an affidavit to the military judge, *ex parte*.[17] The judge then decides whether the evidence can be used at trial.

The purpose of this process is to allow the prosecution to meet its "heavy burden [to] demonstrate the classified nature" of the information.[18] The military judge does not conduct a *de novo* review of whether the information is actually classified. The only question is whether the material was properly classified by the appropriate authorities in accordance with the regulations concerning classified information.[19] With a properly prepared affidavit, SAF's decision to invoke the M.R.E. 505 privilege, and the military judge's rulings, the prosecution is prepared to introduce classified information at trial while preventing unauthorized disclosures.

*Major Taylor (B.A., Berry College; J.D., University of Georgia School of Law) is currently the Chief of Military Justice for Headquarters Eighth Air Force, Barksdale Air Force Base, Louisiana. He is a member of the State Bar of Georgia*

## Protective Orders

The government has at least four methods available to protect classified information from unauthorized disclosure during a court-martial. These can be used separately or in conjunction with one another. First, the government can ask the military judge (or the convening authority prior to referral) for a protective order to prevent the unauthorized disclosure of the information to the accused and defense counsel.[20] Protective orders are useful when the M.R.E. 505 privilege is not being invoked and the defense already has or will be given access to the classified information. Under those circumstances, the government may still want to impose some time, place, and manner restrictions on defense access. Prior to referral, the convening authority can provide the classified information subject to conditions guarding against compromise.[21] After referral, upon a request by the government, the military judge "shall enter" a protective order to guard against compromise.[22]

## Closed Sessions

Second, the government should request that the military judge close to the public any portion of the court-martial[23] that involves classified information. The accused and the public have a well-established right to an open court-martial.[24] A court-martial may be closed over the accused's objection only by the military judge and only when expressly authorized by the Manual for Courts-Martial.[25] The appellate courts have established a set of basic guidelines or procedures on how to close a court-martial to prevent disclosure of classified information.[26] Prosecutors can use the following checklist to help ensure that all requirements are being met at trial and that the case will withstand appellate scrutiny:

-- Request an *in camera* review of the classified information to get the judge's ruling on whether it can be admitted into evidence.[27]

-- Establish that the information is properly classified by submitting affidavits.[28]

-- Ensure the judge thoroughly justifies the closed sessions through judicial findings.[29]

-- Establish procedures to prevent classified information from inadvertently being disclosed during open sessions.[30] This may include asking the convening authority to detail security personnel to observe the proceedings to identify when a question or answer is moving into "soft ground"[31] so the court can be closed. Of course, counsel for both sides and all witnesses should, at a minimum, be instructed to refrain from disclosing classified information in open proceedings and notify the court if they are about to go into classified discussion.[32]

-- Ensure the military judge provides tailored instructions appropriate to the circumstances. *United States v. Grunden* requires at least two special instructions. First, in all cases, *Grunden* requires "an instruction that information presented or testimony heard in closed sessions be given no more weight by virtue of the closed form in which the evidence is presented than the other evidence."[33] Second, in cases where the fact that the information is classified is an element of the offense, an instruction must be given that informs the members that markings on a document and the presentation of testimony in closed session are not proof of that element.[34]

-- Ensure the court is closed only the minimum amount necessary to prevent disclosure of classified information to the public.[35] When testimony concerns both classified and unclassified areas, use bifurcated sessions, separating the classified evidence from the unclassified.[36]

The actual procedures for conducting bifurcated proceedings can be complicated and should be submitted for approval to the judge well in advance of trial. Several factors need to be considered: the amount of classified versus unclassified information, the number of times bifurcated proceedings are expected, the sensitivity of the classified information, the anticipated number of spectators and media representatives, and the facilities and resources available. The goal is to balance the accused's right to a public trial with the government's obligation to prevent disclosure of classified information. Here are four possible bifurcation solutions:

1. Hold the entire trial in a traditional courtroom setting. Prior to discussing classified information, clear the public from the courtroom.[37] The public can return when unclassified testimony resumes. This method would be most appropriate when the anticipated number of bifurcated sessions is small and the classified information is not particularly sensitive or when the available resources are insufficient to implement any of the other options. Pros: inexpensive and easy to implement as no additional facilities are required. Cons: security personnel must sweep the spectator areas before discussing classified to look for hidden recording or broadcast devices; very disruptive to an orderly flow of witness examination; time consuming to switch between unclassified and classified sessions.

2. Hold the entire trial[38] in a Secure Compartment Information Facility (SCIF).[39] When discussing unclassified information, the public can be invited into the SCIF.[40] This method would be most appropriate when the classified information is very sensitive in nature and the majority of the trial will be

conducted in classified session. This option may not be available at many bases because of the size of the SCIF necessary to hold a trial with members. Furthermore, using a SCIF for a trial makes it unavailable for operational uses. Pros: best way to protect sensitive classified information. Cons: difficult to arrange access for personnel who do not have a top secret clearance; security sweeps of spectator areas after unclassified sessions are required; disruptive to an orderly flow of witness examination; time consuming to switch between classified and unclassified sessions.

3. Hybrid mixture of regular courtroom and SCIF. When discussing unclassified information, use the base courtroom and when classified testimony is necessary, move the participants in the trial to a SCIF. This method would be most appropriate when the classified information is very sensitive but classified testimony will comprise a small part of the overall court-martial. Pros: potentially larger facility with easier access for unclassified sessions than the second method; ability to protect sensitive classified information; no security sweeps of spectator areas required. Cons: most disruptive method since all the participants must move locations; time consuming to relocate; counsel and witnesses have to be especially careful to organize testimony to limit the number of bifurcated proceedings since switching locations is so burdensome.

4. Closed-circuit television (CCTV) remote viewing.[41] Only the participants to the trial are present in the courtroom. Everyone else observes the trial from a remote location via CCTV.[42] When classified information is discussed, the CCTV signal is terminated. With a signal delay capability, it is even possible to censor out inadvertently disclosed classified information. CCTV would be appropriate in any situation, assuming the resources are available. Pros: provides the smoothest transition between unclassified and classified sessions; security sweeps are not required after each session as there is no spectator access to the room; less time consuming than other methods; easy for anyone to view the trial; capability exists to segregate media and the accused's supporters from victims and the general public. Cons: very expensive; specialized technical expertise required to set-up and monitor equipment; lack of precedent.

## M.R.E. 505 Privilege

A third way for the government to guard against unauthorized disclosure is to invoke the M.R.E. 505 privilege and refuse to disclose some or all of the classified information to the accused and defense counsel. The privilege can also be invoked to prevent the accused from disclosing at trial classified information already known by the accused.[43] Prior to referral, if the accused seeks classified information and the privilege is invoked, the convening authority can withhold some or all of the classified information.[44] After referral, the convening authority must either obtain the information for an *in camera* review by the judge or dismiss the charges.[45] Once the information is provided, the judge must decide whether the information must be fully disclosed or whether a portion or a summary of the information may be substituted.[46] If the judge determines that full disclosure is required and the government continues to invoke the privilege, the judge must enter an order to protect the accused's rights, such as precluding testimony of a witness, declaring a mistrial, or dismissing the charges.[47]

## Civilian Defense Counsel Access

In cases involving civilian defense counsel without a security clearance, the government has a fourth method since non-cleared personnel must request access to classified information on a document-by-document basis.[48] In this way, the government can control what classified information the defense counsel receives without actually ever invoking the M.R.E. 505 privilege. Furthermore, civilian defense counsel cannot get around the document-by-document access procedures by demanding a security clearance as the government can, but is not required to, award a security clearance to a civilian defense counsel.[49]

## Conclusion

Military justice practitioners must thoroughly comprehend M.R.E. 505 and the related caselaw before working on a case involving classified information. This brief overview provides some practical advice and citation to authority, but is no substitute for a complete understanding of the law. Many real life questions remain unanswered by the Manual for Courts-Martial and the cases. Be prepared to ask for assistance; no one should try to handle a classified information court-martial alone.

[1] *See*, Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (1995), "Classified National Security Information"; DoD 5200.1-R, *Information Security Program* (January 1997).

[2] On 17 April 2002, an Illinois Air National Guard F-16 pilot, with the assistance of his flight lead, dropped a bomb on a training range at Tarnak Farms, killing four Canadian Forces soldiers and wounding eight others. The pilots claimed they were acting in self-defense. Charges of dereliction of duty and manslaughter were preferred against both pilots. After a lengthy Article 32 investigation, several Article 39(a) sessions, and appeals, the charges were ultimately resolved through nonjudicial and administrative action.

[3] *United States v. Grunden*, 2 M.J. 116, 122 (C.M.A. 1977). In some cases, like espionage, the fact that certain information was classified may be an element of the offense and the government would have to

prove that beyond a reasonable doubt. In other cases, the government simply wants to close the court to the public or invoke the M.R.E. 505 privilege and R.C.M. 905(c)(1) sets the burden of proof as a preponderance of the evidence.

[4]Pursuant to Exec. Order No. 12,958, para. 3.6, any person can ask that information be declassified and released to the public. This procedure is implemented by DoD 5200.1-R, *Information Security Program*, C4.4 (January 1997) and AFI 31-401, *Information Security Program Management*, para. 3.3 (1 November 2001). The purpose of the declassification review is to answer the question "Should the information remain classified" whereas the purpose of the verification is to answer the question "Was the information properly classified?"

[5]AFI 31-401, Attachment 10, contains a list of OCAs in the Air Force.

[6]Derivative classification incorporates, restates, or generates in new form, information that is already classified. DoD 5200.1-H, *DoD Guide to Marking Classified Documents*, ch. 2 (April 1997).

[7]Security classification guides identify specific items or categories of information that are classified, the reason for the classification, and assign an OCA for the guide. DoD 5200.1-R, C2.5.2. Most security classification guides are themselves unclassified.

[8]If the OCA is from a non-DoD agency, you should go through that agency's Office of the General Counsel.

[9]An employee subordinate to the OCA can prepare this detailed affidavit. The OCA can in a separate, shorter affidavit, adopt the conclusions of the subordinate.

[10]The affidavit, if at all possible, should be unclassified. A classified affidavit exponentially complicates the situation.

[11]The Judge Advocate's Handbook for Litigating National Security Cases, Department of the Navy, Office of the Judge Advocate General, National Security and Intelligence Law Division (Code 17), available at http://sja.hqmc.usmc.mil/jam/MilitaryLawResources/MilitaryLawResources.htm.

[12]*United States v. Gagnon*, 44 C.M.R. 212, 217 (C.M.A. 1972). You should ask if the OCA is willing to consider limited disclosure alternatives such as deleting certain items, substituting a summary of the information, or substituting a statement that admits relevant facts that the classified information would tend to prove. See M.R.E. 505(d) and (g)(2).

[13]AFI 51-201, *Administration of Military Justice*, para. 8.10 (26 November 2003); *United States v. Flannigan*, 28 M.J. 988 (A.F.C.M.R. 1989), *rev'd on other grounds*, 31 M.J. 240 (C.M.A. 1990).

[14]M.R.E. 505(i)(4)(C).

[15]M.R.E. 505(h). The defense's obligations concerning classified information are detailed in M.R.E. 505(h). Essentially, the defense has the duty to notify the prosecution if it intends to use classified information at trial and not to disclose classified information unless the government acquiesces. When the defense provides notice of intent to use classified information, the prosecution should immediately takes steps to obtain an affidavit. The prosecution must be prepared to consent to defense disclosure of the information at trial, to invoke the privilege, or to forego prosecution.

[16]M.R.E. 505(i)(2).

[17]M.R.E. 505(i)(3).

[18]*Grunden*, 2 M.J. at 122.

[19]Id. at 122-3.

[20]M.R.E. 505(d)(4) and (g)(1).

[21]M.R.E. 505(d)(4).

[22]M.R.E. 505(g)(1).

[23]Article 32 pretrial investigations are ordinarily open to spectators, but can be closed at the discretion of the convening authority or investigating officer. R.C.M. 405(h)(3) (Discussion); *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F 1997); *San Antonio Express News v. Morrow*, 44 M.J. 706, 710 (A.F. Ct. Crim. App. 1996) (stating that Article 32 hearings should be "open to public scrutiny"); AFI 51-201, para. 4.1.2.

[24]R.C.M. 806; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

[25]R.C.M. 806(b). The only provisions in the manual authorizing such closure are M.R.E. 412(c), 505(i), 505(j), and 506(i). R.C.M. 806(b) (Discussion).

[26]*See United States v. Fleming*, 38 M.J. 126 (C.M.A. 1993); *Grunden*, 2 M.J. 116; *Lonetree*, 31 M.J. 849; *United States v. Gonzalez*, 12 M.J. 747 (A.F.C.M.R. 1981), *aff'd*, 16 M.J. 428 (C.M.A 1983).

[27]M.R.E. 505(i)(4)(C).

[28]M.R.E. 505(i)(3); *Grunden*, 2 M.J. at 122.

[29]*Lonetree*, 31 M.J. at 853. However, each classified session does not require separate findings. *Id.*

[30]*Fleming*, 38 M.J. at 130.

[31]*Id.*

[32]From a practical perspective, this can be very difficult. More often than not, in the courtroom environment (with dialogue between counsel and the witness), it is difficult to determine whether something is classified or not. Furthermore, while one particular data point may not be classified standing alone, when combined with other unclassified data points, it may become classified. Prosecutors must be especially vigilant in this regard.

[33]*Lonetree*, 31 M.J. at 855.

[34]*Id.* At 854-5.

[35]*Grunden*, 2 M.J. at 123.

[36]*Id.*

[37]R.C.M. 806(b).

[38]*Cf. Gonzalez*, 12 M.J. at 749-50.

[39]A SCIF is a special facility that meets certain stringent requirements to prevent unauthorized disclose of especially sensitive classified information. AFI 14-302, *Control, Protection, and Dissemination of Sensitive Compartmented Information* (18 January 1994).

[40]This can only be done with the permission of the SCIF owner and if the classified information normally maintained in the SCIF is properly secured.

[41]R.C.M. 806(c) authorizes CCTV when the courtroom is inadequate to accommodate a reasonable number of spectators. R.C.M. 806(b) authorizes methods of controlling spectator access to the courtroom. The Uniform Rules of Practice Before Air Force Courts-Martial, Rule 4.11 (15 January 2003) authorize CCTV for remote-live viewing of a child witness' testimony. Read together, these two provisions provide a sound legal argument for this bifurcated method. There is, however, no case law support for this proposition.

[42]The signal must be sent via closed-circuit television rather than broadcast over the air. R.C.M. 806(c); Uniform Rules of Practice Before Air Force Courts-Martial, Rule 4.11; *Estes v. Texas*, 381 U.S. 532 (1965).

[43]However, M.R.E. 505 does not limit the discussions that an accused can have with a properly cleared defense counsel. *Schmidt v. Boone*, 60 M.J. 1, 2-3 (2004). In other words, when an accused has knowledge of classified information based on his prior authorized access as part of his duties, he may discuss that information with a defense counsel with a security clearance without government oversight.

[44]M.R.E. 505(d).

[45]M.R.E. 505(f).

[46]M.R.E. 505(i)(4).

[47]M.R.E. 505(i)(4)(E).

[48]DoD 5200.2-R, *Personnel Security Program*, C3.4.4.6 (February 23, 1996).

[49]*Schmidt v. Boone*, 59 M.J. 841, 844-49 (A.F. Ct. Crim. App. 2004), *rev'd on other grounds*, 60 M.J. 1 (2004).

# Chiefs of Military Justice: Be Careful What You Ask For

## Captain Eric Merriam

Ask a group of ten current or former base-level Chiefs of Military Justice their biggest source of frustration with the job and you will hear some variation of the following answer at least 30 times: "court member selection." A confluence of multiple factors, including lack of control over the eventual trial date,[1] limited time,[2] limited interest by potential members and the commanders who nominate them, the desire to have a diverse panel, and the requirements of Article 25, Uniform Code of Military Justice (UCMJ),[3] itself often leaves those responsible for assembling a pool of potential court members feeling as though they are speeding inevitably toward lack of quorum, or worse, reversal of a conviction.

Perhaps somewhat lost in a month where the Court of Appeals for the Armed Forces ("CAAF") handed down a more renowned ruling on the constitutionality of Article 125, UCMJ's, prohibition of consensual sodomy[4] was a decision identifying yet another pitfall for those tasked with gathering names of potential court members. In *United States v Dowty*, 60 M.J. 163 (2004), the court addressed an idea for identifying potential court members that has probably floated across the minds of many: seeking volunteers.

In what the court characterized as a "novel panel selection process" an Assistant Staff Judge Advocate ("ASJA") had placed the following notice in a command-wide weekly newsletter:

> 3. LEGAL NOTE: MEMBERS NEEDED. Would you like to serve as a member in a general or special courts-martial [sic] in the greater Washington, DC area? Interested active-duty military personnel, both officers and enlisted, please contact [the ASJA] for further information.[5]

The ASJA's solicitation resulted in almost 50 officers and enlisted personnel submitting court member questionnaires containing the typical court member data.[6] After eliminating enlisted volunteers (the accused was a Navy Lieutenant), the ASJA further pared down the list to a group of 15 members available for the trial. After coordinating with the Staff Judge Advocate, the ASJA then forwarded the list of 15 members to the convening authority, specifically nominating 9 of the members by placing a check mark next to 9 names. In the package, the convening authority was also given a separate document listing the 15 names without check marks on which to make his own selections. The convening authority selected 9 members, with 8 of 9 in common with the ASJA's nominations.[7]

*Captain Eric Merriam (B.A., Asbury College; J.D., The University of Virginia School of Law) is currently an assistant staff judge advocate assigned to the 52d Fighter Wing, Spangdahlem Air Base, Germany. He is a member of the Bar in the state of Pennsylvania.*

### Volunteers (Not) Needed

What did CAAF find troublesome about the above selection process? The fact that the ASJA was "nominating" specific individuals of the pool as court members to the convening authority? No! The court condemned the practice of using an all volunteer panel as "impermissible and erroneous."[8]

The court arrived at its conclusion by relying on a Fifth Circuit case, *United States v. Kennedy*, 548 F.2d 608 (1977), decided under the Jury Selection and Service Act of 1968.[9] This Act requires random selection of jurors for federal trials. In *Kennedy*, the clerk had obtained volunteers for jury service from a list of persons who had completed jury service during the prior term. The court determined that this practice was contrary to the goal of the statute, which was random selection from a fair cross section of the community.[10]

Oddly, in *Dowty*, CAAF repeatedly and explicitly recognized that randomness is *not* a required goal of the military court member selection process.[11] Nevertheless, the court was "persuaded by the logic and authority of the federal rule as stated in Kennedy . . . ."[12] Citing *Kennedy*, the court's rationale in rejecting an all-volunteer panel was that the use of volunteers was injecting a significant variable in member selection not specifically contemplated in Article 25(d)(2), UCMJ. In other words, because voluntariness is not one of the criteria for court member selection established by Congress in Article 25(d)(2), UCMJ, using only volunteers

on a court panel is an impermissible method to screen potential members.[13]

Setting aside arguments as to the logic and policy wisdom of CAAF's ruling, the newly stated rule is clear: sending a pool of potential court members, each of whom is a *volunteer* for service, to the convening authority is not permissible. What is *unclear* from the court's ruling is whether solicitation of volunteers *by subordinate nominating commanders* is permissible. Though few, if any, Chiefs of Military Justice would consider circulating court member volunteer "want ads" themselves, many bases have some sort of system for the nomination of court members that relies on nominations by group and/or squadron commanders. If a squadron commander is tasked with providing X number of names and she asks for volunteers for court member duty from her squadron and sends forward the volunteers' names, has the rule enunciated in *Dowty* been violated?

Ostensibly a member could volunteer for court duty and the squadron commander could determine that the member did not meet the criteria of Article 25, UCMJ, and not nominate that individual. One could argue that by following this process, the members that *are* forwarded for convening authority consideration have been nominated based on permissible factors. However, that position was at least implicitly rejected when CAAF found the volunteer system to be impermissible despite the uncontroverted fact that the convening authority made his ultimate selection decisions based solely on the Article 25, UCMJ, criteria. One could further argue that if a squadron commander forwards the names of some individuals who are volunteers, and other individuals who are not, the court's concern about using volunteerism as a screening device should be allayed. However, it is at least possible, if not probable, that future courts will interpret the court's holding in *Dowty* as a complete bar on soliciting volunteers, regardless of whether that is accomplished by the legal office or a subordinate commander tasked with providing a certain number of names to the convening authority's staff for court-martial duty. The safe approach, and the guidance given to Air Force legal offices by JAJG, is to avoid the temptation to solicit volunteers altogether.[14] This approach requires ensuring that commanders who are nominating members and forwarding them to the legal office are not using this as their basis for nominations.

***"The safe approach, and the guidance given to Air Force legal offices by JAJG, is to avoid the temptation to solicit volunteers altogether."***

## Does this Help?

In the process of rendering its decision regarding soliciting volunteers, CAAF recited a host of its prior decisions regarding permissible and impermissible methods of screening by a convening authority's staff.[15] After reviewing the prior holdings, CAAF established a new 3-part test to use when determining whether a screening system for eventual consideration by the convening authority is permissible. First, no improper motive to "pack the pool" will be tolerated.[16] Second, "systemic exclusion of otherwise qualified potential court members based on an impermissible variable such as rank is improper."[17] Finally, "good faith attempts to be inclusive and to require representativeness so that court-martial service is open to all segments of the military community" will receive deference.[18] The court warned, however, that these factors were not an exhaustive checklist, but rather a "starting point" for evaluating a challenge alleging an impermissible members selection process. Indeed, the court immediately undercut the helpfulness of this new "test" by noting that though it was declaring the volunteer system at issue in the instant case impermissible, it violated none of the three factors identified.[19]

Unless and until a system of court member pool creation is mandated by Congress, courts, or command, each base legal office remains responsible for the difficult task developing, refining, and implementing a plan that is both effective and legal. In identifying "factors that are . . . helpful" for evaluating any plan of creating court member pools, CAAF provided *some* guidance in this regard, while leaving the door to yet-unannounced errors wide open. Judge advocates and paralegals assigned the responsibility of assembling court member pools will do best to ensure that they, and all the commanders involved in the court-member gathering process, use *only* the selection criteria identified in Article 25 in the course of selecting court members, keeping in mind the three "*Dowty* factors" enumerated above. With the myriad logistical difficulties in assembling a panel, this will remain easier said than done.

[1]A common frustration is systemic: members are selected for a trial long before the trial date is set, frequently rendering appointed members unavailable.
[2]Though the need for a court panel can be projected in most cases, occasional surprises occur, especially when the accused changes forum selection once or more shortly before trial.
[3]UCMJ Article. 25 (2002).
[4]In *United States v Marcum*, 60 M.J. 198 (2004), CAAF determined

that, as applied to the facts in the case, Article 125 of the UCMJ was not unconstitutional. Note that the importance of the *Dowty* case was *not* lost on the Air Force Legal Services Agency Appellate Government Branch ("JAJG"), which reported it in the August 2004 edition of its "AFLSA/JAJG Pocket Parts."

[5]*Dowty*, 60 M.J. at 166.

[6]As is common following *United States v. Credit*, 2 M.J. 631 (A.F.C.M.R. 1976), *rev'd on other grounds*, 4 M.J. 118 (C.M.A. 1977), the questionnaires included standard information such as the military experience of the member for the last 10 years, significant or unusual billets, experience in the military justice system, and educational background. *See Dowty*, 60 M.J. at 174.

[7]After subsequent relief and replacement of members due to ineligibility, schedule conflicts, and challenges during *voir dire*, only three of the seven member panel that heard the case were among the original "volunteers."

[8]*Dowty*, 60 M.J. at 171, 173. The issue as to whether the convening authority personally selected members as required was addressed in the decision and resolved by CAAF in the affirmative. In this discussion, the court noted that the defense proffer itself contained statements by the convening authority that he had made his selections relying "solely upon the 15 member questionnaires" and had not even reviewed the document containing the ASJA's suggested selections prior to making his own selections. *See id*. at 175.

[9]28 U.S.C. §§ 1861-1869.

[10]*See Kennedy*, 548 F.2d at 611-12.

[11]*See Dowty*, 60 M.J. at 169, 173.

[12]*Dowty*, 60 M.J. at 173.

[13]The court refused to "'speculate as to what sort of biases will be reflected in a jury chosen on the basis of its members' willingness to depart from their daily business and serve as jurors.'" *Dowty*, 60 M.J. at 173, citing *Kennedy*, 548 F.2d at 612. This is an interesting issue, as there are persuasive arguments for and against volunteer jurors as a policy matter. In the military, where "additional duties" are often begrudgingly performed, would not volunteers, genuinely interested in the military justice process, likely pay particular attention to judge's instructions and fully take the time necessary to accomplish their tasks rather than hurrying back to jobs as non-volunteers might? On the other hand, there is a legitimate concern that accepting volunteers might encourage participation by people with particular axes to grind or, as the court in *Kennedy* pejoratively implied, might encourage participation by people with nothing better to do.

[14]AFLSA/JAJG Pocket Parts, August 2004

[15]The *Dowty* decision includes a helpful compilation of permissible and impermissible practices in identifying and screening potential court members for selection by a convening authority. Mentioned permissible practices include random selection from master personnel file, creating a panel list that excluded members junior in grade to the accused, group commanders nominating their "best and brightest" officers, which resulted in a significant number of commanders being nominated, exclusion of soldiers in pay grades E-1 and E-2 as presumptively unqualified, and deliberate inclusion of minorities to insure fair representation. Impermissible methods of generating pools include obtaining nominees from subordinate commanders solely on the basis of their rank and without consideration of Article 25(d)(2) criteria, excluding potentially qualified members below the grade of E-7, deliberate stacking of the pool with supporters of a command policy of hard discipline, and rejecting systematic exclusion of junior officers and enlisted members E-6 and below to avoid light sentences. *See Dowty*, 60 M.J. at 170-71.

[16]*See id.* at 171.

[17]*Id.*

[18]*See id*.

[19]*See id.* Again the court's meaning is unclear, as it seems that the rationale underlying the holding is that volunteer status is an impermissible variable for exclusion, which seems to be a violation of the second factor.

# Overseas Aircraft Accident Response

## Captain Kirk H. Samson

Responding to aircraft accidents is always difficult for a Judge Advocate; they are high-stakes legal situations, and oftentimes emotionally charged scenes. However, responding to an aircraft accident outside of U.S. jurisdiction is even more difficult for a Judge Advocate, because the safety net of detailed domestic legislation and Air Force instructions disappears.

This article is an attempt to provide a primer for legal offices on the types of issues which may arise when a U.S. military aircraft accident occurs overseas. It cannot answer all of the questions that one might come across in dealing with an international accident, but it can be helpful in pointing out practical considerations to consider before the call comes. After a brief discussion of the legal problems one can expect to face in responding to an aircraft accident, there is a short list of practicalities to consider when preparing Disaster Control Group (DCG) or international law continuity materials.

The first priority for the Judge Advocate is to educate the response team. U.S. regulations are binding on U.S. agencies regardless of where we may be operating, but are not particularly persuasive to civil authorities in other countries.[1] This may seem clear to a lawyer, but it is nevertheless something that on-scene commanders may not immediately appreciate. For example, they may have been trained to set up a National Defense Area, which is not possible outside of U.S. jurisdiction. As the legal advisor in a situation like this you need to become, in very short order, an expert on the conflicting responsibilities that drive Air Force responses and the local or international law that may conflict with those requirements.

This is a sticky situation to find oneself in. Imagine, for example, that the aircraft has assets that require protection. Not only may it be impossible to bring in weapons for security forces members to rely on for defense, it is entirely possible that the scene will be closed to the response team and their Security Forces when they arrive. In most cases, it will be difficult for U.S. security to establish a presence or protect assets from photography or potential theft, which is why the diplomatic connection can be of invaluable assistance, as the local authorities/military will be responsible for setting up security arrangements. The Judge Advocate can assist by conferring en route with the commander as to what his limitations are and by liaising with the local authorities upon arrival to explain what the U.S. requirements are for an accident response.

***"Not only may it be impossible to bring in weapons for security forces members to rely on for defense, it is entirely possible that the scene will be closed to the response team and their Security Forces when they arrive."***

The second priority is to establish U.S. presence for the investigation. It may take hours to reach an accident site, by which time it may very well be compromised from an investigative perspective. Very few countries have the demanding investigative requirements that we do, and they may be more concerned about immediate clean up than a concern for the cause of the accident. You may discover that the local accident scene response team is not handling the site in a manner consistent with U.S. investigations. For example, military or civilian authorities of the host nation may begin to gather aircraft wreckage or human remains immediately, without marking or photographing their locations. One of the most important initial steps in a response is to try to prevent the scene from being compromised. An effective manner of encouraging locals to leave the scene undisturbed is to warn them of EOD threats, such as the potentially dangerous ejector seat explosive bolts or ammunition.

It becomes the responsibility of the Judge Advocate to assist the commander in legally and diplomatically finding a way to establish maximum control over the accident site and to cajole local authorities to assist in the investigation process. You may find that local authorities are unwilling to have U.S. involvement in the accident response, but there are several sources of law that can be of assistance.

There are Memorandums of Understanding (MOUs)

*Capt Kirk H. Samson (B.A,, University of Wisconsin; J.D., University of Wisconsin) is an IMA Legal Staff Officer attached to the HQ USAF International and Operations Law Division at the Pentagon. His civilian employment is as a Foreign Service Officer with the U.S Department of State.*

and bilateral agreements that may be of great assistance to you, so one of your first actions should be to track down any agreements that may be in existence with the country where the accident site is located. Ask for assistance from the experts at your NAF or MAJCOM if you are having problems locating these materials, as you will need to be in touch with them for Serious Incident Reports (SIR) and updates in any event.

There are certain existent legal regimes that address accidents. For example, the NATO countries have established a NATO Standardization Agreement (STANAG) that is very much on point. STANAG 3531 only applies to accidents solely involving military aircraft and missile accidents. It states in part that "[t]he nation of occurrence shall be responsible for guarding the scene of the accident…throughout the investigation."[2] Additionally, it notes that "…the responsibility for conducting the safety investigation shall normally be delegated to the military authorities of the operating nation." This language can be particularly convincing during the initial meeting of the response team commander and the local site authorities in proving that the "operating nation(s)" (i.e. the nations that had aircraft involved) should be allowed to play a significant role in any investigative procedure. Beyond the STANAG, look to SOFAs and any supplementary agreements to see if there is any helpful language, be it an authority to set up "protective zones", or even transportation regulations. Although these may not seem to be on-point at first blush, a good lawyer can use them in convincing fashion to get a foot in the door and improve U.S. involvement.

For combined civil and military aircraft accidents, Annex III of the ICAO Chicago convention controls the investigative process.[3] This means that civil authorities will be involved. In the absence of a STANAG or MOU, the Chicago convention is also a good argument for involvement in the investigation, failing other legal arguments. It represents customary international practice, and in the absence of better arrangements, can provide a template that will at least ensure U.S. participation. Law will only get you so far, and as noted below, the diplomatic efforts of the Air Attaché will probably be more helpful in combating local intransigence than a discussion of legal niceties. Your role as Judge Advocate may be to constantly remind the Air Attaché of this if they feel unsure of their role.

## PRACTICALITIES

The list below is not intended to be exhaustive, but it should be helpful in preparing for, and responding to, an aircraft accident outside of U.S. jurisdiction.

Bring a translator: If you are going to a crash site in a non-English speaking country, the responding team will need several translators. If there is only one, you will be severely hampered in your ability to help as others drag the translator off to take care of the never-ending problems of accommodation issues, supplying the site, and sorting out misunderstandings at the accident scene. Your best bet for immediate help is the MPF. Have them pull up the list of members receiving Foreign Language Proficiency Pay (FLPP) on base and see if they have some people with fluency in the necessary language. If they don't have any experts on base, they need to expand the search to include nearby bases. Keep in mind that 24 hour operations at the scene means you need at least two translators for the DCG, and hopefully several additional ones to help with contracting and legal issues. If you are lucky enough to have a choice, pick the translators who have the greatest familiarity with military or legal language. Many people are "fluent" according to their test results, but will flounder in a pressure situation using unfamiliar vocabulary. This is a good reason to encourage your office staff to hone their language skills.

Prepare to be a diplomat: Regardless of what international law sources you may have at your fingertips, the truth of the matter is that very little will come of this knowledge unless the local authorities are willing to work with you. It can be difficult as a lawyer and a trained litigator to avoid the temptation to win an argument over what law controls, but if winning a minor legal point loses you access to the scene or causes delays in getting the remains back to the family, you've failed your job. Being persistently polite and empathetic is oftentimes the most effective method of gaining control of a accident site.

Stay in touch with the U.S. Defense/Air Attaché: These individuals should be told the minute the accident occurs so they can begin to coordinate with the host nation military authorities at the ministry of defense levels. They may be closer to the scene than the response team and can "hold the fort" until you arrive. It may even be helpful to have the Air Attaché get on a phone directly with the local national commander to solve any problems, as they are specially trained to work within the culture and political system of the country.

Bring a cell phone: Cell phones are invaluable.

However, half of them will fail to get a signal, and your mobile command post may be hours behind you, assuming it can make the trip. That means that everyone ends up sharing the phones that do work. Bring a charger that will work at that location: the majority of your initial legal work will be coordination and the phone will be dead in record time. In the heat of the moment, a lot of first responders neglect to bring their charger. You need to ensure that you have a plug that will operate in the country where the accident occurred.

Consider claim and environmental issues: Local authorities can identify potential claimants and local particularities that you need to be aware of. They should be able to provide you with a plat map or other handy materials for identifying who has property in the area. They can also tell you what the local industries are that may be endangered by the accident; for example, trees raised for resale may have been damaged by fire or livestock may have been endangered by toxic spills into local water sources. It is best to try to establish a base line for damages immediately. Finally, don't forget your camera. Alert Photo may have the opportunity to help you, but don't count on it.

Anticipate local law: Put all of those years of answering odd on-call JAG queries by thinking ahead to where you may have new local or national law concerns. Consider the following issues, for example:

- what regulations will hamper the transportation of the remains? If you have problems, call the MAJCOM Mortuary Affairs Office (SVS) for their expertise.
- introduce yourself to the local authorities. It is an unfortunate reality, but there is always the possibility that one of the U.S. team members will violate local law. If you have established a professional relationship with the local authorities, things may go easier.
- what are the local rules or procedures for taking witness testimony? Will the local authorities assist in locating and interviewing potential witnesses or claimants?
- what weapons, if any, will you be allowed to take in country?

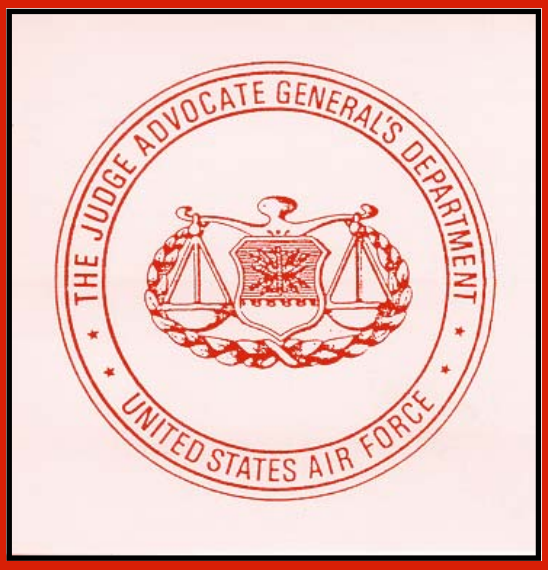
Be aware that every step along the way, from your arrival to final recovery and transport, may be subject to unfamiliar local laws. Ask questions.

The purpose of this article is to raise awareness of the difficulties of responding to an aircraft accident outside of U.S. jurisdiction. The bottom line is to remain flexible. Every situation will be different and most likely subject to different laws. If you are well prepared and stay in touch with the experts up the JA chain, it is possible to tackle any situation successfully. The best thing to do is to consider what you need in your emergency response kit now, rather than in a moment of panic following the call to respond to the DCG.

[1]Some of these would include DoD Instruction 6055.7 and AFI 51-503, in addition to the myriad of applicable Safety instructions and the procedures for AIBs and SIBs.

[2]Para. 27

[3]Convention on International Civil Aviation, signed at Chicago, on 7 Dec 1994 (Chicago Convention). See also Art. 26.


THE JUDGE ADVOCATE GENERAL'S DEPARTMENT
UNITED STATES AIR FORCE