

CONFIDENTIALITY OF MEDICAL INFORMATION

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1. Scope of Article.

This article reviews the confidentiality of military (MTF) medical information.³ In addition, the article highlights specific instances that authorize disclosure of certain medical information.

2. Army Policy and JCAHO Standards Regarding Confidentiality.

a. Department of the Army policy protects medical information from disclosure. Personnel not involved in a patient's care or medical research are generally not entitled to access any medical information pertaining to the patient.⁴ Third party access to patient medical information is permitted, however, when required by law, regulation, or judicial proceedings or when authorized by written consent of the patient or the patient's designated representative.⁵

b. Joint Commission on Accreditation of Healthcare Organizations (JCAHO) standards require protection of patient privacy and confidentiality.⁶

3. Confidentiality Afforded to Medical Records under the Freedom of Information Act and the Privacy Act.⁷

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³Generally, MTF medical information includes "[a]ll information that pertains to evaluations, findings, diagnosis, or treatment of a patient. The terms also include any other information given to AMEDD health personnel in the course of treatment or evaluation. Medical information is confidential and private. Paramedical documents, such as immunization registers and dosimetry records, are not considered medical information even though they are kept in the same file with medical records." DEP'T OF Army, REG. 40-66, MEDICAL RECORD ADMINISTRATION, Section 1, Glossary (20 Jul. 1992) <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/GLOSSARY>, [hereinafter AR 40-66].

⁴AR 40-66, para. 2-2, < http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/2.2>.

⁵AR 40-66, para. 2-2b, < http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/2.2>

⁶Joint Commission, Comprehensive Accreditation Manual for Hospitals, The Official Handbook, Standards RI.1.3.1, RI.1.3.2, and IM.2.

⁷5 U.S.C. sec. 552 (1996) PUBLIC INFORMATION; AGENCY RULES, OPINIONS, ORDERS, RECORDS, AND PROCEEDINGS (commonly referred to as The Freedom of Information Act or FOIA) [hereinafter FOIA]; 5 U.S.C. 552a (1996) RECORDS MAINTAINED ON INDIVIDUALS (Commonly referred to as The Privacy Act) [hereinafter THE PRIVACY ACT]. See generally, OFFICE OF INFORMATION AND PRIVACY, U. S. DEP'T OF

a. The Freedom of Information Act (FOIA) - 5 U.S.C. 552.⁸

(1) The FOIA is a federal statute requiring the government to release requested agency records that are readily retrievable and reproducible, and in the possession and control of the government.⁹ Army medical treatment facility (MTF) medical records qualify as agency records subject to release under FOIA.¹⁰ However, the agency may elect to withhold certain records if they are subject to an applicable FOIA exemption.¹¹

JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW (updated annually) for an excellent reference to current FOIA and Privacy Act policy and case law interpretation and application. Both are available on the Internet. Freedom of Information Act Guide [hereinafter FOIA GUIDE] <<http://www.usdoj.gov/oip/foi-act.htm>>. OVERVIEW OF THE PRIVACY ACT OF 1974 [hereinafter PRIVACY ACT OVERVIEW] <http://www.usdoj.gov/04foia/04_7_1.html>. Citations to Internet sources are used over printed sources because of they are readily available, while printed references are only updated annually and not always easy to locate. Table of content headings are used with Internet addresses for those who use the printed reference.

⁸See generally, DEP'T OF ARMY, REG. 25-55 THE DEPARTMENT OF THE ARMY FREEDOM OF INFORMATION ACT (1 Nov. 1997) <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R25_55/CCONTENTS> [hereinafter AR 25-55].

⁹See FOIA, 5 U.S.C. 552(f); See also FOIA GUIDE, Procedural Requirements, <<http://www.usdoj.gov/oip/procereq.htm>>; AR 25-55. Chapter I, para. 1-402 <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R25_55/I.402> and para. 1-506 <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R25_55/I.506>. Any person can make a FOIA request. Under FOIA, a "person" is defined as any individual (including foreign citizens), partnerships, corporations, associations, and foreign or domestic governments. FOIA GUIDE, Procedural Requirements, <<http://www.usdoj.gov/oip/procereq.htm>>; AR 25-55, Chapter I, para. 1-401 <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R25_55/I.401>. The identity or purpose of the FOIA requester is not relevant to the agency's decision on whether to release the requested documents. AR 25-55, Chapter III, para. 3-200 <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R25_55/III.200>. See also, FOIA GUIDE, Procedural Requirements, <<http://www.usdoj.gov/oip/procereq.htm>> and Exemption 6, Initial Considerations, <<http://www.usdoj.gov/oip/exemption6.htm#exemption>>.

¹⁰See FOIA GUIDE, Introduction, <<http://www.usdoj.gov/oip/introduc.htm>> and Procedural Requirements, <<http://www.usdoj.gov/oip/procereq.htm>>. See also, FOIA, 5 U.S.C. 552(f).

¹¹FOIA is a release statute, not a withholding statute. See FOIA, 5 U.S.C. 552(d). See, FOIA GUIDE, Introduction, <<http://www.usdoj.gov/oip/introduc.htm>>, and Discretionary Disclosure and Waiver, Discretionary Disclosure, <<http://www.usdoj.gov/oip/discretionary.htm#disclosure>>. The FOIA contains nine exemptions that allow, but do not require, withholding of certain types of records (Exemption 1: Classified Records; Exemption 2: Internal Personnel Rules and Policies; Exemption 3: Records Subject to a Specific Federal Withholding Statute; Exemption: Business Records; Exemption 5: Agency Memorandums; Exemption 6: Personnel, Medical, or Similar Files; Exemption 7: Law Enforcement Records; Exemption 8: Financial Institution Records; and Exemption 9: Geological Data. See FOIA, 5 U.S.C. 552(b) ; FOIA GUIDE, Introduction, <<http://www.usdoj.gov/oip/introduc.htm>>. See also AR 25-55, paras. 1-504 and 3-200.

(2) Although Army MTF medical records are agency records subject to FOIA, they generally qualify for protection against release to third parties under FOIA exemption 6, Personnel, Medical, or Similar Files.¹² Furthermore, release of a patient's medical records pursuant to a third party FOIA request, absent written consent from the patient or a Privacy Act exception, violates the Privacy Act.¹³

(3) FOIA exemption 6 does not guarantee the confidentiality of military MTF medical records. All FOIA exemptions are permissive.¹⁴ Nevertheless, if the requested records satisfy the necessary criteria for FOIA exemption 6, current DOD/DOJ policy recognizes a presumption of "foreseeable harm to the government" if that information is released.¹⁵ Under this "foreseeable harm" analysis, the agency must not release an

¹²FOIA, 5 U.S.C. 552(b)(6); AR 25-55, para. 3-200, Number 6. See generally FOIA GUIDE, Exemption 6, <<http://www.usdoj.gov/oip/exemption6.htm#exemption>>.

¹³Third party FOIA requests for medical records are subject to denial pursuant to FOIA exemption 6. Medical records qualify as FOIA exemption 6 Medical, Personnel, or Similar Files. Absent the patient's written consent, release would result in a clearly unwarranted invasion of personal privacy. In addition, since military medical records are maintained in a system of records retrievable by the patient's name or personal identifier, release to requesting third parties will violate the Privacy Act, *supra* note 17. See also FOIA GUIDE, Discretionary Disclosure and Waiver, Discretionary Disclosure, <<http://www.usdoj.gov/oip/discretionary.htm#disclosure>>.

¹⁴FOIA, 5 U.S.C. 552(d) See also, FOIA GUIDE, Introduction, <<http://www.usdoj.gov/oip/introduc.htm>>, and Discretionary Disclosure and Waiver, Discretionary Disclosure, <<http://www.usdoj.gov/oip/discretionary.htm#disclosure>>.

¹⁵On October 4, 1993, Attorney General Janet Reno announced the "foreseeable harm" standard for invoking FOIA exemptions. Under this policy, agencies should release records requested under FOIA unless release will result in "foreseeable harm" to the government. Under this policy, the Department of Justice will only defend the assertion of a FOIA exemption in those cases where the agency reasonably foresees that disclosure will harm an interest protected by that particular exemption. This applies even where the requested information falls within the criteria of a FOIA exemption. Under the policy, government records that meet the withholding criteria in FOIA exemptions 1, 3, 4, 6, and 7 (C) carry a presumption of foreseeable harm to the government if they are released. See generally, FOIA GUIDE, Introduction, <<http://www.usdoj.gov/oip/introduc.htm>>; Exemption 5, Applying the "Foreseeable Harm" Standard, <<http://www.usdoj.gov/oip/exemption5.htm#applying>>, and Discretionary Disclosure and Waiver, Discretionary Disclosure, <<http://www.usdoj.gov/oip/discretionary.htm#disclosure>>. See also, Attorney General Janet Reno's FOIA Memorandum, reprinted in FOIA Update, Summer/Fall 1993, 3-5, <http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.txt>. The Army recognizes a similar discretionary release policy provided there is "no jeopardy to government interest." See, AR 25-55 Chapter III, para. 3-101 <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R25_55/III.101>.

individual's medical record to a third party FOIA requester because release will result in a violation of the Privacy Act.¹⁶

b. The Privacy Act - 5 U.S.C. 552a.¹⁷

(1) The Privacy Act of 1974 is a federal statute designed to protect "the privacy of individuals from unwarranted intrusion."¹⁸ Unlike FOIA, the Privacy Act only applies to U.S. citizens and permanent resident aliens.¹⁹

(2) Rights afforded to individuals under the Privacy Act belong to the subject of the record.²⁰ Nevertheless, the parent

¹⁶See generally THE PRIVACY ACT, 5 U.S.C. 552a(b) ; FOIA GUIDE, Discretionary Disclosure and Waiver, Discretionary Disclosure, <<http://www.usdoj.gov/oip/discretionary.htm#disclosure>>; AR 25-55, para. 1-504A, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R25_55/I.504>.

¹⁷See generally, DEPT OF ARMY REG. 340-21 THE ARMY PRIVACY PROGRAM (5 Jul. 1985) <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R340_21/CCONTENTS>, [hereinafter AR 340-21]. NOTE: AR 340-21 is currently under revision.

¹⁸The Privacy Act is a multi-faceted statute. It contains three major parts aimed at protecting information on individuals that the government has elected to maintain in a system of records retrievable by the subject's name or personal identifier:

- a. The Act places controls and restrictions on how the government collects, maintains, and uses information on individuals.
- b. The Act allows the subject of the record the right to access the agency record and amend it if it is incorrect, unless there is an applicable Privacy Act exemption. The Privacy Act contains ten exemptions that will preclude subject access and amendment.
- c. The Act prevents the release of information from agency records maintained in a system of records to third party requesters unless the subject of the record has provided written consent or there is an applicable Privacy Act exception. The Privacy Act contains 12 exceptions

that will allow release of information to third parties. See AR 340-21,

para. 1-5, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R340_21/1.5>.

See also, PRIVACY ACT OVERVIEW, Policy Objectives, <<http://www.usdoj.gov/04foia/1974polobj.htm>>.

¹⁹THE PRIVACY ACT, 5 U.S.C. 552a(a)(2); AR 340-21, Section II, Glossary <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R340_21/GLOSSARY>; PRIVACY ACT OVERVIEW, Definitions, Individual, <<http://www.usdoj.gov/04foia/1974def-b.htm>>.

²⁰The Privacy Act provides the subject of a record with a presumption of access and amendment of any record maintained by the agency in a system of records retrievable by the subject's name or personal identifier. Subject access and amendment is precluded only if the agency has properly asserted a Privacy Act exemption. The Privacy Act contains two general exemptions, seven specific exemptions, and one special exemption. To properly assert a general or specific exemption, the head of the agency must first publish notice of the exemption in the Federal Register. The special exemption does not carry a notice requirement. See generally PRIVACY ACT OVERVIEW, Ten Exemptions, Two General Exemptions, <<http://www.usdoj.gov/04foia/1974tenex-b.htm>>; Seven Specific Exemptions, <<http://www.usdoj.gov/04foia/1974tenex-c.htm>>; One Special Exemption, <<http://www.usdoj.gov/04foia/1974tenex-a.htm>>.

of a minor subject, or the legal guardian of an incompetent subject, may act on behalf of the particular individual.²¹ The Army recognizes that State law will govern disclosure of certain types of medical information pertaining to minors.²² Special rules apply for a minor's medical records maintained at overseas installations.²³

(3) Privacy Act protections only apply to agency records maintained in a system of records.²⁴ Army MTF medical records qualify as records maintained in a system of records.²⁵

²¹THE PRIVACY ACT, 5 U.S.C. 552a(h) ; See also PRIVACY ACT OVERVIEW, Definitions, Individual, <<http://www.usdoj.gov/04foia/1974def-b.htm>>; AR 340-21, Section II, Glossary <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R340_21/GLOSSARY>. NOTE: Office of Management and Budget (OMB) Guidelines consider 552a(h) "discretionary and that individuals who are minors are authorized to exercise the rights given to them by the Privacy Act or, in the alternative, their parents or those acting in loco parentis may exercise them in their behalf." See PRIVACY ACT OVERVIEW, Definitions, Individual, <<http://www.usdoj.gov/04foia/1974def-b.htm>>, citing OMB GUIDELINES, 40 Fed. Reg. at 28,970, and OMB GUIDELINES, 40 Fed. Reg. 56,741 and 56,742 (1975) ("no absolute right of a parent to have access to a record about a child absent a court order or consent").

²²The law of the state in which the minor's medical record is located governs the disclosure of information pertaining to drug and alcohol abuse, venereal disease control, birth control, and abortion statutory or regulatory programs. AR 40-66, para. 2-5 <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/2.5.a>. The law of the state where the minor resides determines minority status.

²³For the purpose of parental access to medical records and determinations of a minor, the age of majority is 18 years except where-

- (a) The minor at the time he or she sought or consented to the treatment was between 15 and 17 years of age;
- (b) The treatment was sought in a program that promised to keep treatment records confidential;
- (c) The minor specifically requested or indicated that he or she wished the treatment record to be kept confidential and not released to a parent or guardian; and
- (d) The parent or guardian seeking access does not have the written authorization of the minor or a valid court order for access."

If all four conditions are met, the parent or guardian will not have access to the medical records of the minor. Nothing in this opinion would in any way deny the minor the access to his, her own records which he, or she has under the Privacy Act or other statutes." See AR 40-66, para. 2-5 <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/2.5.a>, citing Opinion from the DOD PRIVACY BOARD LEGAL COMMITTEE, 24 November 1980.

²⁴The term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. See THE PRIVACY ACT, 5 U.S.C. 552a(a)(5). Privacy Act coverage is dependent upon the method of retrieval (i.e. from a system of records) of a record rather than its substantive content. See PRIVACY ACT OVERVIEW, Definitions, System of Records, <<http://www.usdoj.gov/04foia/1974def-e.htm>>.

²⁵DEP'T OF ARMY, PAMPHLET, 25-51, THE ARMY PRIVACY PROGRAM - SYSTEM NOTICES AND EXEMPTION rules, para. 10-11 (1 October 1988) <<http://books.army.mil/cgi->

(4) Notwithstanding the Privacy Act protections against disclosure, the statute allows release of information to third parties if the subject of the record provides written consent,²⁶ or a Privacy Act exception applies.²⁷ Privacy Act exceptions frequently cited as authority to release Army medical records to third parties include:

(a) Release based on a need to know within the agency.²⁸

(b) Release is required by FOIA.²⁹

(c) Release is made pursuant to a routine use.³⁰

(d) Release pursuant to a written request from a law enforcement agency.³¹

bin/bookmgr/BOOKS/P25_51/10.11> [hereinafter DA Pam 25-51] . See also AR 40-66, para. 4-1, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/4.1>.

²⁶Written consent is not specifically defined in the Privacy Act, but implied consent is not sufficient to allow for release of the record to third parties.

THE PRIVACY ACT, 5 U.S. C. 552a(b); AR 340-21, para. 3-1

<http://books.army.mil/cgi-bin/bookmgr/BOOKS/R340_21/3.1>. See also PRIVACY ACT OVERVIEW, Conditions of Disclosure to Third Parties, The "No Disclosure Without Consent" Rule, <<http://www.usdoj.gov/04foia/1974condis-a.htm>>. The Army requires an authorization for release of information in third party requests for medical records. AR 40-66, para. 2-3c(1), <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/2.3.c>.

²⁷THE PRIVACY ACT, 5 U. S. C. 552a(b)(1)-(12). See generally PRIVACY ACT OVERVIEW, Twelve Exceptions to the "No Disclosure Without Consent" Rule, <<http://www.usdoj.gov/04foia/1974condis-b.htm>>. Unlike Privacy Act access and amendment exemptions, third party exceptions under the Privacy Act do not require prior notice by the head of the agency.

²⁸THE PRIVACY ACT, 5 U.S.C. 552a(b)(1); AR 340-21, para. 3-1a,

<http://books.army.mil/cgi-bin/bookmgr/BOOKS/R340_21/3.1>; AR 40-66, para. 2-3a, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/2.3.a>. See generally PRIVACY ACT OVERVIEW , Conditions of Disclosure to Third Parties, Twelve Exceptions, "Need to know" within agency, <<http://www.usdoj.gov/04foia/1974condis-1.htm>>.

²⁹THE PRIVACY ACT, 5 U.S.C. 552a(b)(2); AR 340-21, para. 3-1b, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R340_21/3.1>. See generally, PRIVACY ACT OVERVIEW , Conditions of Disclosure to Third Parties, Twelve Exceptions, Required FOIA disclosure, <<http://www.usdoj.gov/04foia/1974condis-2.htm>>.

³⁰THE PRIVACY ACT, 5 U.S.C. 552a(a)7, (b)(3), and (e)(D)(4) AR 340-21, para. 3-1c, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R340_21/3.1> and para. 3-2, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R340_21/3.2>. See generally PRIVACY ACT OVERVIEW, Conditions of Disclosure to Third Parties, Twelve Exceptions, Routine uses, <<http://www.usdoj.gov/04foia/1974condis-3.htm>>. In general, agency record system notices contain a list of the specific and general routine uses. The Army publishes their system notices in DA Pam 25-51. For example, the routine uses applied to an individual's military medical treatment file are published in Record System Notice A0917.01DASG, Health Care and Medical Treatment Record. DA Pam 25-51, para. 10-11f, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/P25_51/10.11.f>.

(e) Release pursuant to a court order.³²

(5) Privacy Act violations may result in criminal penalties against an individual (knowing/willful violation amounts to a misdemeanor and up to \$5000 fine) and civil remedies against the agency (successful civil action will result in a monetary damage award).³³

4. Specific Applications of Confidentiality to Military Medical Information.

a. General Access to Medical Information by Department of the Army Personnel.

(1) Army personnel seeking medical records must put their request in writing.³⁴

(2) Army personnel are provided access to medical information to the extent necessary to satisfy their expressed official needs.³⁵ Personnel using the information for official purposes are charged with ensuring the information remains private and confidential.³⁶ Releasing a soldier's entire medical record, pursuant to an official request, is generally not recommended.³⁷

³¹THE PRIVACY ACT, 5 U.S.C. 552a(b)(7); AR 340-21, para. 3-1g, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R340_21/3.1>. See generally PRIVACY ACT OVERVIEW, Conditions of Disclosure to Third Parties, Twelve Exceptions, Law enforcement request, <<http://www.usdoj.gov/04foia/1974condis-7.htm>>.

³²THE PRIVACY ACT,, 5 U.S.C. 552a(b)(11) ; AR 340-21, para. 3-1k, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R340_21/3.1>. See generally PRIVACY ACT OVERVIEW, Conditions of Disclosure to Third Parties, Twelve Exceptions, Court order, <<http://www.usdoj.gov/04foia/1974condis-11.htm>>.

³³THE PRIVACY ACT, 5 U.S.C. 552a(g) and (i); AR 340-21, para. 4-9, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R340_21/4.9>. See generally PRIVACY ACT OVERVIEW, Civil Remedies, <<http://www.usdoj.gov/04foia/1974civrem.htm>>.

³⁴AR 40-66, para. 2-3a. DA Form 4254-R will be used for requests. AR 40-66, para 2-3a(1) <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/2.3.a>.

³⁵THE PRIVACY ACT, 5 U.S.C. 552a(b)(1); AR 40-66, paras. 1-4b, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/1.4.b>; 2-2c, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/2.2>; and 2-3a, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/2.3.a>; AR 340-21, chapter 3, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R340_21/3.0>. See also, AR 40-66, para 1-4i, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/1.4.i> (hospital chaplains allowed access to medical records subject to standards contained in the American Hospital Association Guidelines).

³⁶AR 40-66, para. 1-4j, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/1.4.j>.

³⁷AR 40-66, para. 2-2c, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/2.2>.

(3) The MTF Chief, Patient Administration Division (PAD), acts for the MTF commander in matters Pertaining to medical records management and information.³⁸ Before releasing medical information, the Chief of PAD, with the assistance of the local staff judge advocate or medical claims judge advocate when necessary, determines the legitimacy of the request.³⁹ Even when the request for information is legitimate, personnel failing to maintain the confidentiality of the medical information are subject to administrative or disciplinary action.⁴⁰

b. Disclosing Medical Information in Military Judicial and Administrative Proceedings.

(1) The Military Rules of Evidence (MREs) do not recognize a physician-patient privilege.⁴¹ As such, medical information is generally subject to full disclosure in military judicial and administrative proceedings.⁴² Even if a soldier consults with a civilian physician in a jurisdiction recognizing a physician patient privilege, that privilege is not effective if the physician is called to testify as a witness in a court-martial or other military proceeding or investigation.⁴³ State law will determine whether a physician-patient privilege is enforceable in a civilian court action against a soldier or non-military patient.⁴⁴

(2) Previously, the MREs did not recognize a psychotherapist-patient privilege.⁴⁵ However, based on the

³⁸AR 40-66, para. 1-4f, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/1.4.f>.

³⁹AR 40-66, para. 2-3a(2), <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/2.3.a>.

⁴⁰AR 40-66, para. 2-2b(2), <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/2.2>.

⁴¹MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 501(d) (1998 ed.), <<http://books.army.mil/cgi-bin/bookmgr/BOOKS/MCM98/3.5.1>> [hereinafter MCM].

⁴²See, *United States v. Brown*, 38 M.J. 696 (C.M.A. 1993) (no physician-patient privilege in military law; power to create a physician-patient privilege is outside the authority of the Court of Military Review; Congress entrusted the President with the power to adopt rules of evidence, including privilege.) See also *United States v. Mansfield*, 38 M.J. 415 (C.M.A. 1993) (no physician-patient or psychotherapist-patient privilege in federal law, including the military).

⁴³See, *United States v. Mansfield*, 38 M.J. 415 (C.M.A. 1993) (any expert who offers a testimonial opinion is subject, at the request of a party opponent, to disclose the underlying facts or data on cross-examination).

⁴⁴AR 608-18, Appendix E-1b, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R608_18/E.0>.

⁴⁵DEP'T OF ARMY, REG. AR 608-18 THE ARMY FAMILY ADVOCACY PROGRAM Appendix E-3 (1 Sep. 1995), <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R608_18/E.0> [hereinafter AR 608-18].

proposed 1999 Amendments to the Manual for Courts-Martial, the MREs may shortly recognize such a privilege.⁴⁶

c. Release of Medical Quality Assurance Records.⁴⁷

Medical quality assurance records are the "proceedings, records, minutes, and reports that emanate from quality assurance program activities."⁴⁸ Releasing medical quality assurance records, pursuant to a FOIA request, is prohibited as release results in foreseeable harm to the government.⁴⁹

d. Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) Information.

ADAPCP records are military medical records that document a soldier's abuse of alcohol or drugs.⁵⁰ The Privacy Act and implementing Army regulations govern release of these records.⁵¹ Generally, ADAPCP information is available only to those within

⁴⁶The general rule, if executed, is expected to read as follows:

"Rule 513. Psychotherapist-patient privilege (a) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."

⁴⁷This article does not provide an in depth discussion on the confidentiality of medical quality assurance records. 10 U.S.C. 1102 (1996) CONFIDENTIALITY OF MEDICAL QUALITY ASSURANCE RECORDS: QUALIFIED IMMUNITY FOR PARTICIPANTS [hereinafter CONFIDENTIALITY OF MEDICAL QUALITY ASSURANCE RECORDS]. For general background information on protection of medical quality assurance records, refer to "The Confidentiality of Medical Quality Assurance Records," The Army Lawyer, May 1987. For regulatory guidance, see DEP'T OF Army, REG. AR 40-68, QUALITY ASSURANCE ADMINISTRATION (19 Jan. 1990) (IO3, 30 Jun 95) <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_68/CCONTENTS>, **NOTE:** The Internet addition does not contain the changes contained in Interim Change No. IO3, which is still in effect. Direct specific questions on protection of medical quality assurance records to the U.S. Army Litigation Division, ATTN: Torts Branch (JALS-LTT), 901 North Stuart Street, Ballston Room 400, Arlington, VA 22203-1837; Telephone: (703) 696-1620.

⁴⁸CONFIDENTIALITY OF MEDICAL QUALITY ASSURANCE RECORDS, 10 U.S.C. 1102(j)(2).

⁴⁹Release of medical quality assurance records, as defined by 10 U.S.C. 1102 (j)(2), does not violate FOIA, but does violate the prohibition against release set forth in 1102(b) Moreover, medical quality assurance records are specifically exempt from provisions of the FOIA under 1102(f) . Unauthorized disclosures of medical quality assurance records carry an initial fine of up to \$3,000 and not more than \$20,000 for subsequent offenses. Although no reported case interprets 1102(f), it appears that this provision qualifies the statute for FOIA exemption 3 status.

⁵⁰DEP'T OF ARMY, REG. 600-85, ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM, para. 6-2 (1 Oct 1995), <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R600_85/6.2> [hereinafter AR 600-85].

⁵¹AR 600-85, para. 6-2, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R600_85/6.2> ; AR 40-66, para. 2-7, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/2.7>.

the agency with an official need to know.⁵² Commanders are not afforded unlimited access to a soldier's medical record.⁵³

e. Medical Information on Human Immunodeficiency Virus (HIV) Positive Personnel.⁵⁴

The Department of the Army treats HIV information in a sensitive manner.⁵⁵ HIV information about specific individuals is subject to FOIA and the Privacy Act.⁵⁶ Generally, information pertaining to the HIV status of an individual is withheld from release pursuant to FOIA exemption 6, unless the requester is the subject of the record.⁵⁷ To safeguard against accidental disclosures, HIV statistics are only released to major installations or major commands.⁵⁸

f. Army Family Advocacy Program (AFAP) Information.

The AFAP evaluates allegations of child and spouse abuse, gathers investigative facts and evidence, and conducts psychosocial and family assessments necessary to protect the victim of abuse and provide necessary support services.⁵⁹ To accomplish these objectives, law enforcement, medical, and social

⁵²AR 600-85, paras. 6-2b(3) and (5), <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R600_85/6.2>.

⁵³AR 600-85, para. 6-2b(3), <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R600_85/6.2>.

⁵⁴See DEP'T OF ARMY, REG. 600-110 IDENTIFICATION AND SURVEILLANCE, AND ADMINISTRATION OF PERSONNEL INFECTED WITH HUMAN IMMUNODEFICIENCY VIRUS (HIV) (22 April 1994), <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R600_110/CCONTENTS> [hereinafter AR 600-110] for guidance on confidentiality of medical records and information on personnel with HIV and Acquired Immunodeficiency Syndrome (AIDS).

⁵⁵AR 600-110, para. 2-11a, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R600_110/2.11>.

⁵⁶AR 600-110, paras. 1-14n and o, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R600_110/1.14>. See generally AR 25-55, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R25_55/CCONTENTS> and AR 340-21, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R340_21/CCONTENTS>.

⁵⁷The Privacy Act authorizes the release of information to the subject of the record that is maintained and retrieved from a system of records. AR 600-110, para. 1-14o(3), <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R600_110/1.14>. See generally AR 340-21, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R340_21/CCONTENTS> and PRIVACY ACT OVERVIEW, Definitions, System of Records, <<http://www.usdoj.gov/04foia/1974def-e.htm>>; Definitions, System of Records, Disclosure: Subsection (b), <<http://www.usdoj.gov/04foia/1974disclos.htm>>; Definitions, System of Records, Access and Amendment: Subsections (d)(1) and (d)(2), <<http://www.usdoj.gov/04foia/1974acc-amn.htm>>; and Definitions, System of Records, Other Aspects, <<http://www.usdoj.gov/04foia/1974oth-asp.htm>>.

⁵⁸AR 600-110, para. 1-14o(3), <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R600_110/1.14>.

⁵⁹AR 608-18, para. 3-11, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R608_18/3.11>.

work personnel cooperate and share information and records as permitted by law and regulation.⁶⁰

g. Access to Medical Information for Research and Study.

Qualified persons are authorized access to medical records and biostatistical information.⁶¹ The U.S. Army Surgeon General or the MTF or dental treatment facility (DTF) commander approves research requests.⁶² Access to military MTF medical records requires an approval letter from the Surgeon General.⁶³

5. Editor's Comments.

a. Analysis of an issue concerning confidentiality of medical information should not be attempted without first reading AR 40-66, Chapter 2. Care must be taken to ensure that no more information is disclosed than authorized by the patient's representative or the applicable exception to consent.

b. JCAHO confidentiality standards cannot be over emphasized. JCAHO surveyors have stated that records should not be left unsecured (even in locked rooms where housekeepers have keys) and discussions of patient treatment plans must not be carried on in public areas (such as elevators) when individuals without a need to know are present. In addition, patient sign-in sheets that are left on clinic check-in counters violate patient confidentiality. When releasing copies of records, a written request for records should always be used and should be kept on file by PAD.

c. The MTF legal counsel should facilitate training for health care providers and other hospital staff in medical information confidentiality. During this training, staff should be encouraged to always inquire about a requestor's authority to obtain records and refer questions about medical information

⁶⁰AR 608-18, para. 3-13, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R608_18/3.13>. Access to AFAP information by the subject of the record and third party releases are governed by the disclosure provisions of the Privacy Act. Routine uses of AFAP records are detailed in the Army's published systems notice. See generally AR 608-18, chapter 6 <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R608_18/6.0>, and DA Pam 25-51, para. 10-13f <http://books.army.mil/cgi-bin/bookmgr/BOOKS/P25_51/10.13.f>.

⁶¹AR 40-66, para. 2-6, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/2.6>.

⁶²AR 40-66, para. 2-6a, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/2.6.a>.

⁶³AR 40-66, para. 2-6c, <http://books.army.mil/cgi-bin/bookmgr/BOOKS/R40_66/2.6.c>.

confidentiality to their supervisor, PAD, or the MTF legal counsel.

