

Claims Report

United States Army Claims Service

Personnel Claims Note

Personnel Claims Files Releasable Under the Privacy Act

The U.S. Army Claims Service (USARCS) recently determined that individuals who file a claim under the Military Personnel and Civilian Employees' Claims Act (PCA)¹ are entitled under the Privacy Act² to obtain access to documents contained in their personnel claim file.³ The USARCS disseminated this information to inform field claims offices of the potential for disclosure of personnel claims documents and to provide guidance on the preparation of personnel claims files. This note provides the legal basis for the disclosure requirement and sets forth rules for developing a personnel claim file without exposing the Army to avoidable litigation or adversely affecting its image.

Legal Basis for Disclosure

The Army Privacy Program permits an individual to request and to obtain access to a record which is maintained in a system of records and which pertains to that individual, unless it is exempt from disclosure.⁴ The request may be oral or written and must be presented by an individual or his agent or legal guardian.⁵ The individual is not required to provide a reason for the request⁶ or to identify correctly the statute which requires

release of the requested documents.⁷ The individual, however, may only obtain documents which qualify as a "record maintained within a system of records."⁸

Before a requested document can be released, the custodian of the document must first determine whether the document is a record maintained within a system of records. A "record" is "any item, collection, or grouping of information about an individual that is kept by the Government . . . [and] contains an individual's name, identifying number, . . . or other individual identifier" A "system of records" is "a group of records under the control of [the Department of the Army] from which information is retrieved by the individual's name or by some identifying number, symbol, or other identifying particular assigned to the individual. System notices for all systems of records must be published in the Federal Register" ¹⁰ Once the custodian of the requested document determines that the document qualifies as a record maintained in a system of records, the custodian must provide the individual with access to the record unless it is exempt from disclosure under both the Privacy Act and the Freedom of Information Act.¹¹ Only the Secretary of the Army or an "access and amendment refusal authority" may deny a request for a record which pertains to the individual who made the request.¹²

A personnel claim file constitutes a record under the Privacy Act. It is created by field claims offices and is maintained by the government during the adjudication and settlement process and into retirement. Claims offices use the claimant's name and

1. 31 U.S.C.A. § 3721 (West 1997).

2. 5 U.S.C.A. § 552a (West 1997).

3. The Office of the Judge Advocate General of the Army recently approved this determination. Determination on Release of Personnel Claims Documents, Op. Admin. L. Div., OTJAG, Army, DAJA-AL/1338 (29 July 1997). The Office of the Judge Advocate General of the Air Force also has determined that personnel claims "memoranda, adjudication notes, or recommendations" must be released under the Privacy Act to claimants upon request. Disclosure of Information from Household Goods Claims Files, Op. JAG, Air Force, No. 7 (10 Feb. 1988).

4. U.S. DEP'T OF ARMY, REG. 340-21, ARMY PRIVACY PROGRAM, para. 2-1 (5 July 1985) [hereinafter AR 340-21].

5. *Id.*

6. *Id.*

7. *Id.* para. 2-4.

8. *Id.* para. 2-1.

9. *Id.* glossary.

10. *Id.*

11. 5 U.S.C.A. § 552 (West 1997); AR 340-21, *supra* note 4, para. 2-3.

12. AR 340-21, *supra* note 4, para. 2-9.

an assigned claim number to identify a personnel claim file. The file contains numerous documents with information about the claimant, including: Department of Defense (DD) Form 1842, Claim for Loss of or Damage to Personal Property Incident to Service; DD Form 1844, List of Property and Claims Analysis Chart; a chronology sheet for actions taken by the field claims office in adjudicating the claim; and a seven-paragraph memorandum of opinion which transmits the claim to the final settlement authority.¹³

Personnel claims files are maintained within a system of records. Each file may be located by entering the claimant's name into a computerized personnel claims corporate database. The database contains the claimant's name and social security number, the amount of the claim, the amount paid to the claimant, a chronological list of transactions, the claims processing time, and pertinent insurance information. The personnel claims corporate database is maintained and controlled by the USARCS, a component of the Department of the Army. The database is part of the USARCS Management Information System, which is published in the Federal Register as an Army system of records subject to the Privacy Act.¹⁴

There are no exemptions under the Privacy Act which permit the Army to deny a claimant access to documents contained within his personnel claim file.¹⁵ A record within a system of records is exempt from disclosure only if it qualifies under

either a general or specific exemption, as determined by the Secretary of the Army, or if it was "compiled in reasonable anticipation of a civil action or proceeding."¹⁶ General exemptions apply only to records which are compiled by "Army activities actually engaged in the enforcement of criminal laws as their primary function."¹⁷ Specific exemptions apply to a gamut of particular records and permit the Army to deny a claimant access to them.¹⁸ Personnel claims files do not fall within either of these categories. Personnel claims files also are not "compiled in reasonable anticipation of a civil action or proceeding." Although this language is not clearly defined in the Privacy Act's legislative history, the plain language of the exemption and related case law indicate that courts would likely find that documents contained in a personnel claims file are not exempt from disclosure.

Civil Action

Subsection (k) of the PCA states: "Settlement of a claim under this section is final and conclusive."¹⁹ Several courts have held that this provision precludes judicial review of personnel claims.²⁰ There appears to be only one unreported case in which a federal court reviewed a service's final settlement of a personnel claim.²¹ In that case, the court did not review the USARCS's denial of a personnel claim, but rather remanded the claim to the USARCS for consideration under the Military

13. See U.S. DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 11-19 (1 Aug. 1995). A personnel claim file may also contain several other documents with individual information. If the claim arose from loss or damage to a government-sponsored personal property shipment, the claim file will also include a Government Bill of Lading; DD Form 1840, Joint Statement of Loss or Damage at Delivery; and DD Form 1840R, Notice of Loss or Damage. It may also include DD Form 1841, Government Inspection Report. If the field claims office assessed liability against the carrier for the lost or damaged property, the file also will include DD Form 1843, Demand on Carrier/Contractor. In addition, the file will include documents presented by the claimant to substantiate the loss and the value of the loss (such as the Household Goods Descriptive Inventory and necessary purchase receipts, estimates of repair, etc.) and any applicable insurance information.

Some courts adopt a narrow construction of the term "record," which would exclude several of the documents listed above which do not provide information concerning a "quality or characteristic" of the claimant. See, e.g., *Wolde-Giorgis v. United States*, No. 94-254 (D. Ariz. Dec. 9, 1994) (holding that a Postal Service claim form and information concerning estimated value of an item sent through the mail is "not a 'record' within the meaning of the [Privacy Act]" because it "disclosed no information about the plaintiff" and did not reflect any "'quality or characteristic' concerning the plaintiff"). Even though access to claims files might cause claims personnel to hesitate in recording issues concerning a claimant's credibility or potential fraud, the USARCS did not implement a policy which grants access only to those documents which describe a quality or characteristic of the claimant. There is no discernible policy reason why access to non-descriptive documents should be denied, and the USARCS announced that claimants should be granted access to all documents contained within their personnel claim file.

14. U.S. DEP'T OF ARMY, PAM. 25-51, OFFICE MANAGEMENT: THE ARMY PRIVACY PROGRAM-SYSTEM NOTICES AND EXEMPTION RULES, para. 5-6 (21 Sept. 1988).

15. Because personnel claims files are not exempt from disclosure under the Privacy Act, it is unnecessary to determine if they are exempt from disclosure under the Freedom of Information Act. Unless requested records are exempt under both statutes, they must be disclosed to the individual upon request. U.S. DEPARTMENT OF JUSTICE OFFICE OF INFORMATION AND PRIVACY, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 635 (1997).

16. AR 340-21, *supra* note 4, para. 2-1. See 5 U.S.C.A. § 552a(d)(5) (West 1997).

17. *Id.* para. 5-2.

18. *Id.* para. 5-3. The Secretary of the Army has exempted certain types of records from provisions of the Privacy Act, including properly classified information; investigatory data for law enforcement (other than that claimed under the general exemption); records related to Secret Service activities; purely statistical data required by statute; data compiled relative to suitability for federal service or contracts; and testing materials used to determine federal service (including military service) eligibility and promotion potential.

19. 31 U.S.C.A. § 3721(k) (West 1997).

20. See, e.g., *Meade v. F.A.A.*, 855 F. Supp. 619 (E.D.N.Y. 1994); *Macomber v. United States*, 335 F. Supp. 197 (D.R.I. 1971); *Shull v. United States*, 228 Ct. Cl. 750 (1981). See also *Preferred Ins. Co. v. United States*, 222 F.2d 942, 947 (9th Cir.), *cert. denied*, 350 U.S. 837 (1955) (concluding that the finality provision of the PCA's predecessor statute barred judicial review of "administrative action on claims").

Claims Act (MCA).²² In reviewing the MCA's finality provision (which is the same as the PCA's finality provision),²³ most courts have held that final MCA determinations are not subject to judicial review.²⁴ There is only one reported case to the contrary.²⁵ These cases indicate that judicial review of personnel claims is very unlikely.

Proceeding

According to guidance from the Office of Management and Budget (OMB), "[t]he term civil proceeding was intended to cover those quasi-judicial and preliminary judicial steps which are the counterpart in the civil sphere of criminal proceedings as opposed to criminal litigation."²⁶ In *Martin v. Office of Special Counsel, MSPB*,²⁷ the Court of Appeals for the District of Columbia held that "civil proceedings" include quasi-judicial administrative hearings of the sort conducted by the Merit System Protection Board (MSPB).²⁸ The court stated that MSPB hearings resemble the formal civil actions that Congress intended to protect²⁹ and noted that such hearings are adversarial, include discovery proceedings, and are subject to the rules of evidence.³⁰ It further noted that, similar to federal district court decisions, MSPB decisions are subject to review by appellate courts.³¹ The court also warned against interpreting the term "civil proceeding" too expansively:

[E]xempting documents prepared in anticipation of quasi-judicial proceedings will not gut the Privacy Act. Quasi-judicial hearings are relatively rare, and the vast majority of agency records will not be associated with them We need not fear overmuch an ever-widening set of hearings embraced by the term and protected by exemption (d)(5).³²

Though the *Martin* holding is limited to records compiled in reasonable anticipation of an MSPB hearing, it is helpful in determining whether an agency's administrative settlement procedures can be classified as "civil proceedings." The personnel claims settlement process has none of the characteristics of formal civil proceedings. The process neither resembles formal civil actions nor involves any type of administrative hearing. After a claimant submits his claim and supporting documentation, the claims office renders a settlement determination which does not involve negotiation, discovery, or rules of evidence. Though the decision may be appealed to the USARCS or one of its command claims services, it is not subject to judicial review.

In 1992, the Office of the Judge Advocate General of the Army issued an opinion which stated that a memorandum of opinion and several related documents prepared pursuant to the settlement of a claim under the MCA were exempt from disclosure under the Privacy Act.³³ The opinion was based on the fact

21. *Brown v. Secretary of the Army*, No. 79-1129 (D.C. Cir. Mar. 14, 1980).

22. 10 U.S.C.A. § 2733 (West 1997).

23. The finality provisions of the MCA and the PCA contained identical language until the 1982 revision to the PCA "omitted as unnecessary" the words "[n]otwithstanding any other provision of law." 31 U.S.C. § 3721, Historical and Revision Notes: 1982 Act (1983).

24. See *Collins v. United States*, 67 F.3d 284, 288 (Fed. Cir. 1995); *Schneider v. United States*, 27 F.3d 1327, 1332 (8th Cir. 1994), *cert. denied* 513 U.S. 1077 (1995); *Hata v. United States*, 23 F.3d 230, 233 (9th Cir. 1994); *Rodriguez v. United States*, 968 F.2d 1430, 1434 (1st Cir. 1992); *Poindexter v. United States*, 777 F.2d 231, 233 (5th Cir. 1985); *Labash v. Department of the Army*, 668 F.2d 1153, 1156 (10th Cir. 1982), *cert. denied* 456 U.S. 1008 (1982). Except for the court in *Collins*, these courts will review cognizable constitutional claims. None, however, have held that a military service violated a claimant's constitutional rights in the settlement of a claim. The Court of Appeals for the D.C. Circuit also has held that the MCA precludes judicial review, but the court recognizes several exceptions to this rule. *Broadnax v. U.S. Army*, 710 F.2d 865, 867 (D.C. Cir. 1983) (judicial review not implicated under circumstances of this case but appropriate "where there has been a substantial departure from important procedural rights, a misconstruction of governing legislation, or some like error going to the heart of the administrative determination"). Numerous district courts in other circuits have held that the MCA precludes judicial review. See, e.g., *Duncan v. West*, 965 F. Supp. 796 (E.D. Va. 1997); *Niebalda v. United States*, 37 Fed. Cl. 43, 50 (1996); *Hass v. U.S. Air Force*, 848 F. Supp. 926, 933 (D. Kan. 1994); *MacCaskill v. United States*, 834 F. Supp. 14, 17 (D.D.C. 1993), *aff'd*, 24 F.3d 1464 (D.C. Cir. 1994); *Vogelaar v. United States*, 665 F. Supp. 1295, 1298 (E.D. Mich. 1987); *Bryson v. United States*, 463 F. Supp. 908, 910 (E.D. Pa. 1978); *Towry v. United States*, 459 F. Supp. 101, 107-08 (E.D. La. 1978), *aff'd*, 620 F.2d 568 (5th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981).

25. *Welch v. U.S.*, 446 F. Supp. 75 (D. Conn. 1978).

26. Office of Management and Budget, Privacy Act Guidelines, 40 FED. REG. 28,948, 28,960 (1975).

27. 819 F.2d 1181 (D.C. Cir. 1987).

28. *Id.*

29. *Id.* at 1188.

30. *Id.*

31. *Id.*

32. *Id.*

that “MCA claims have substantive impact similar to FTCA³⁴ claims (which are judicially reviewable)” and the absence of case law including or excluding administrative claims procedures from the phrase “civil action or proceeding.”³⁵ The “substantive impact” rationale was explained in an earlier memorandum from the USARCS.

Under the MCA, the potential for sizable awards and thus a substantive impact or result for both the claimant and the government is just as great as under the FTCA. The Army claims procedures for investigating, substantiating, and determining the validity of tort claims under the MCA mirror those of the FTCA. The same questions of substantive law and burdens obtain. Under both statutes, the liability of the United States is essentially unlimited, except by the damages suffered and provisions of applicable local law. Negotiations can be as complex and protracted under the MCA as the FTCA. The same sort of intricate high-value structured settlements can be reached under the MCA as the FTCA.³⁶

Claims under the PCA do not have a substantive impact similar to FTCA claims. The PCA limits settlements to \$40,000 (or \$100,000 in the case of emergency evacuations or extraordinary circumstances), and these settlements do not involve negotiations or structured settlements. Although PCA settlement procedures constitute “administrative settlement procedures” which neither statute nor case law have expressly excluded from the phrase “civil action or proceeding,” personnel claims do not have a substantive impact similar to FTCA claims or claims arising under other statutes which permit judicial review of final agency decisions. The PCA settlement procedures also do not meet the characteristics of a formal civil proceeding as set forth in *Martin*.

Reasonable Anticipation

The other facet of the “civil action or proceeding” exemption to the Privacy Act is that the document must have been pre-

pared in *reasonable anticipation of* the civil action or proceeding. The OMB states:

[I]n a suit in which government action or inaction is challenged, the provision generally would not be available until the initiation of litigation or until information began to be compiled in reasonable anticipation of litigation. Where the government is prosecuting or seeking enforcement of its laws or regulations, this provision may be applicable at the outset if information is being compiled in reasonable anticipation of a civil action or proceeding.³⁷

Because personnel claims files do not fall within the plain language of the litigation exemption, the interpretive case law, or the OPM guidelines, they must be released to claimants upon request.

General Rules for Developing Personnel Claims Files

Because claimants can obtain access to their personnel claims files, it is critical that claims personnel prepare documents in a manner which will not give rise to avoidable litigation and which will not adversely affect the image of the U.S. Army. Even if claimants could be denied access to their personnel claims files, the professional standards of the U.S. Army and the interests of justice require accurate and careful preparation of all claims documents. It is essential that claims personnel limit their entries to: (1) verifiable facts; (2) logically supported inferences from those facts; and (3) professionally stated opinions. Claims judge advocates, claims attorneys, and staff judge advocates must emphasize these standards (which also can be applied outside the claims arena) and review personnel claims files to ensure that these standards are met. This will provide the final settlement authority with an adequate basis to render a final decision and will enhance the likelihood of an equitable settlement. Captain Metrey.

33. Op. Admin. L. Div., OTJAG, Army, DAJA-AL/2292, para. 5b(6) (22 Sept. 1992) [hereinafter Op. 2292].

34. Federal Torts Claims Act, 28 U.S.C. §§ 2671-80 (1994).

35. Op. 2292, *supra* note 33, para. 5b(6).

36. Memorandum, Acting Commander, United States Army Claims Service, JACS-TC, to Assistant Judge Advocate General (Military Law and Operations), subject: FOIA/Privacy Act Request of [MCA Claimant], para. 3a (20 Aug. 1992).

37. Office of Management and Budget, Privacy Act Guidelines, 40 FED. REG. 28,948, 28,960 (1975).