

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)

Request for Information

1 March 2023

Victim Access to Information

I. Purpose

In Section 549B of the National Defense Authorization Act for Fiscal Year 2023, Congress directed the DAC-IPAD to submit to the Committees on Armed Services of the Senate and the House of Representatives and each Secretary concerned a report on the feasibility and advisability of establishing a uniform policy for the sharing of information with a Special Victims' Counsel, Victims' Legal Counsel, or other counsel representing a victim of an offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).

The information requested will inform the DAC-IPAD's review and assessment of this topic.

II. Authority

1. The DAC-IPAD is a federal advisory committee established by the Secretary of Defense pursuant to section 546 of the National Defense Authorization Act for Fiscal Year 2015, as amended.
2. The DAC-IPAD's mission is to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
3. The DAC-IPAD requests the assistance of the Military Services to provide the requested information by the suspense date indicated below.

III. Suspense

Suspense	RFI	Proponent – Military Services
31 May 2023	Narrative Responses	Service TJAGs and SJA to the Commandant of the Marine Corps provide narrative responses to the questions in Section IV, Paragraph A, of this RFI.
Suspense	RFI	Proponent – Military Services
31 May 2023	Narrative Responses	Services—The identified group provide narrative responses to the identified questions in Section IV, Paragraphs B and C of this RFI.

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IV. Information Requested

A. Questions for the Offices of The Judge Advocates General and the SJA to the Commandant of the Marine Corps (Questions 1 – 5)

1. Please identify the release authority and the stages of the military justice process—pre-preferral; post-preferral; Article 32 preliminary hearing; or post-referral—at which the information described in (1) – (3) below should be provided to counsel representing the victim.

(1) Any recorded statements of the victim to investigators.

(2) The record of any forensic examination of the person or property of the victim, including the record of any sexual assault forensic exam of the victim that is in possession of investigators or the Government and any photographs taken by the examiner during the medical-forensic exam.

(3) Any medical record of the victim that is in the possession of investigators or the Government.

2. Please describe your Service's current practice for sharing the information described in (1) – (3) above with counsel representing a victim.

3. What are the potential effects—both positive and negative—of establishing a uniform policy for the sharing the information described in (1) – (3) above with counsel representing a victim on the privacy of individuals, the criminal investigative process, and the military justice system generally?

4. Please provide your Service's position on the feasibility and advisability of establishing a uniform policy across all the Military Services for the sharing of the following information with counsel representing a victim:

(1) Any recorded statements of the victim to investigators.

(2) The record of any forensic examination of the person or property of the victim, including the record of any sexual assault forensic exam of the victim that is in possession of investigators or the Government and any photographs taken by the examiner during the medical-forensic exam.

(3) Any medical record of the victim that is in the possession of investigators or the Government.

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5. Please identify:

a. Any applicable professional responsibility regulations that address the obligation of counsel representing a victim to share information with their client.

b. Circumstances under which the information in (1) – (3) above should not be shared with the victim or counsel representing the victim, and explain why the information should, or should not, be shared.

B. Questions for the Services' Special Victim's Counsel Program Managers **(Questions 1 – 4)**

1. How, in practice, do counsel representing a victim as defined in Article 6b, UCMJ, obtain the information described in (1) – (3) below and at what stage of the military justice process—pre-preferral; post-preferral; Article 32 preliminary hearing; or post-referral?

(1) Any recorded statements of the victim to investigators.

(2) The record of any forensic examination of the person or property of the victim, including the record of any sexual assault forensic exam of the victim that is in possession of investigators or the Government and any photographs taken by the examiner during the medical-forensic exam.

(3) Any medical record of the victim that is in the possession of investigators or the Government.

2. What are the potential effects—both positive and negative—of establishing a uniform policy for the sharing of information described in (1) – (3) above with a victim, or counsel representing a victim, on the privacy of individuals, the criminal investigative process, and the military justice system generally?

3. Does your organization support or oppose the adoption of a uniform policy for the sharing of the information identified above with counsel representing a victim? With a victim? Why or why not?

4. Please identify:

a. Any applicable professional responsibility regulations that address the obligation of counsel representing a victim to share information with their client.

b. Circumstances under which the information in (1) – (3) above should not be shared with the victim or counsel representing the victim, and explain why the information should, or should not, be shared.

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C. Questions for the Service Chiefs of the Trial Defense Services Organizations **(Questions 1 – 3)**

1. What are the potential effects—both positive and negative—of establishing a uniform policy for the sharing the information described in (1) – (3) below with counsel representing a victim as defined in Article 6b, on the representation of the accused in the investigative process and in military judicial proceedings?

(1) Any recorded statements of the victim to investigators.

(2) The record of any forensic examination of the person or property of the victim, including the record of any sexual assault forensic exam of the victim that is in possession of investigators or the Government and any photographs taken by the examiner during the medical-forensic exam.

(3) Any medical record of the victim that is in the possession of investigators or the Government.

2. Does your organization support or oppose the adoption of a uniform policy for the sharing of the information identified above with counsel representing a victim? Why or why not?

3. Please identify and explain any recurring issues in your discovery practice regarding the sharing of information not listed above with counsel representing a victim.

Sec. IV. A. Narrative Questions for the Offices of The Judge Advocates General and the SJA to the Commandant of the Marine Corps (Questions 1 – 5)

<p>1. Please identify the release authority and the stages of the military justice process—pre-preferral; post-preferral; Article 32 preliminary hearing; or post-referral—at which the information described in (1) – (3) below should be provided to counsel representing the victim.</p> <p>(1) Any recorded statements of the victim to investigators.</p> <p>(2) The record of any forensic examination of the person or property of the victim, including the record of any sexual assault forensic exam of the victim that is in possession of investigators or the Government and any photographs taken by the examiner during the medical-forensic exam.</p> <p>(3) Any medical record of the victim that is in the possession of investigators or the Government</p>	
USA	<p>(1) TJAG Policy 22-07 provides that the prosecution will provide the victim/Special Victims’ Counsel (SVC) a copy of all statements and documentary evidence produced or provided by the victim upon preferral. Upon receipt by the government, the prosecution will provide to the victim/SVC a summarized transcript of the victim’s testimony at the preliminary hearing.</p> <p>(2) DoDI 6495.02, Enclosure 7, para. a.(12)(b) states, “Upon completion of the SAFE, the sexual assault victim shall be provided with a hard copy of the completed DD Form 2911.” The DD Form 2911, is the SAFE report. If a FOIA request was received by CID for medical records included in the investigative file, the FOIA would be referred to the custodian of those records, Defense Health Agency. If a FOIA was received for forensic testing performed on the property of the victim, such as a phone, CID would be the custodian of the record and redact in compliance with FOIA and the Privacy Act.</p> <p>(3) Servicemember victims may always request a copy of their own medical records from the medical treatment facility. There is no policy addressing release of victim medical records in the possession of investigators. If a FOIA request was received by CID for medical records included in the investigative file, the FOIA would be referred to the custodian, the Defense Health Agency.</p>
USMC	<p>(1) Upon request by the victim or the victim’s counsel, counsel for the government shall provide to the victim or the victim’s counsel a copy of the victim’s statements, including the victim’s video statements. These may be requested and disclosed before preferral of charges, and the obligation to disclose continues throughout the court-martial proceeding.</p> <p>(2) Upon request by the victim or the victim’s counsel, counsel for the government shall provide a copy of any reports arising from a sexual assault evidence collection kit, including a deoxyribonucleic acid (DNA) profile match, toxicology report, or other information collected as part of a medical forensic examination, unless doing so would impede or compromise an ongoing investigation. These may be requested</p>

	<p>and disclosed before preferral of charges, and the obligation to disclose continues throughout the court-martial proceeding. Additionally, Department of Defense Instruction 6495.02 and Secretary of the Navy Instruction 1752.4C require that upon completion of a sexual assault forensic examination, the victim shall be provided with a hard copy of the completed Department of Defense Sexual Assault Forensic Examination Report.</p> <p>(3) Upon request by the victim or the victim’s counsel, counsel for the government shall provide documentary evidence derived directly from and pertaining directly to the victim that are in the possession of the government, including medical records of the victim. These may be requested and disclosed before preferral of charges, and the obligation to disclose continues throughout the court-martial proceeding.</p>
<p>USAF</p>	<p>DAFI 51-201, <i>Administration of Military Justice</i>, 14 April 2022, Chapter 8, Section 8B, governs the provision of information to victim’s counsel (VC). This chapter does not distinguish release procedures based on stages of the military justice process. Instead, regardless of the stage of the military justice process, a uniformed victim’s counsel may request statements of the victim to investigators, the record of any forensic examination of the person or property of the victim, or any medical record of the victim that is in the possession of investigators or the government by making an “official use” request under the Privacy Act and FOIA. <i>See</i> 5 U.S.C. §552a(b)(1); DoD 5400.11-R, <i>Department of Defense Privacy Program</i>, paragraph C4.2.1. Civilian victims’ counsel may request information pursuant to the “routine use” provision of the SORN “Military Justice and Civilian Criminal Case Records,” DOD 0006.</p> <p>Upon receiving such a request, the release authority depends on which agency is in possession of the requested records. Pursuant to DAFI 51-201, paragraph 8.5.1, the Staff Judge Advocate is the release authority for “information generated and maintained by the servicing legal office in accordance with law and policy.” Consequently, should the legal office maintain the above referenced items, the Staff Judge Advocate would be the release authority. This provision makes it likely that the release authority for such records post-preferral, Article 32 preliminary hearing, or post referral would be the Staff Judge Advocate as the legal office likely to be in possession of any recorded statements, record of forensic examinations, or any medical records of the victim at those stages of the military justice process. There may be situations where the VC makes the request for such items pre-preferral, prior to the legal office being in possession of these records. In those situations, the release authority will likely be the OPR for the investigative agency, whether it be Air Force Office of Special Investigations or Security Forces Office of Investigations. <i>See</i> DoDM 5400.7-R_AFMAN 33-302, <i>Freedom of Information Act Program</i>. The victim or their representative is also entitled to get copies of their own records maintained in their own DAF Privacy Act record at any time, such as copies of their own DAF medical records. <i>See</i> DoD 5400.11-R, <i>DoD Privacy Program</i>.</p>
<p>USN</p>	<p>For subsections (a) – (c) below, the release authority is government counsel after consultation with other agencies, as appropriate. The stage of release is determined</p>

	<p>by the timing of the request or as provided by applicable instruction. These matters may be requested and disclosed before preferral of charges, and the obligation to disclose continues throughout the court-martial proceeding.</p> <p>(1) Commander Naval Legal Service Command Instruction 5810.1 calls for any statement of the victim, including a copy of any recording and transcript, be provided to victims, or Victim Legal Counsel (VLC) when applicable, upon request when in the physical possession of the government counsel. As the recorded statement of the victim to investigators can be a critical factor in a VLC’s advice to their client regarding a victim’s decision to participate in a prospective court-martial and testify at any preliminary hearing, these statements are provided to the VLC upon request.</p> <p>(2) Commander Naval Legal Service Command Instruction 5810.1 calls for any images or videos of the victim collected in the course of the investigation, including photographs taken during a sexual assault forensic examination, be provided to the victim, or VLC when applicable, upon request. Other portions of a forensic examination are provided to the victim or VLC upon their request unless doing so would impede or compromise an ongoing investigation. The DD Form 2911 (sexual assault forensic examination report) is provided to sexual assault victims upon completion of the sexual assault forensic examination in accordance with Department of Defense Instruction 6495.02, Enclosure 7, para. a.(12)(b).</p> <p>(3) Commander Naval Legal Service Command Instruction 5810.1 is silent on providing medical records to crime victims, as generally trial counsel obtain the victim’s medical records with the assistance of the victim. In those rare cases where the victim or their counsel make a request for the victim’s medical records within the control of the government, it is appropriate for trial counsel to share those records upon request of the victim or VLC. Of note, service member victims may always request a copy of their own medical records from the medical treatment facility.</p>
<p>USCG</p>	<p>(1) Upon preferral of charges, a crime victim is entitled to a copy of any recordings of interviews of the victim that are in the possession of trial counsel or the staff judge advocate. The release authority can be the trial counsel or Coast Guard Investigative Service (CGIS) special agent.</p> <p>(2) It should be noted at the outset that these records are sensitive and subject to safeguards to ensure the privacy of the victim and the integrity of the investigation. Release of such information is safeguarded under the Privacy Act, the Health Insurance Portability Accountability Act (HIPAA), and other laws such as the Violence Against Women Act. The answer is divided into two parts – forensic medical exams and forensic exams conducted on a victim’s property.</p> <p><i>Forensic medical exams</i></p> <p>For forensic medical exams, Coast Guard clinics typically do not conduct these examinations themselves. Instead, they usually collaborate with a state facility where a forensic examiner is often contracted with a state law enforcement agency for Coast Guard members and eligible dependents.</p>

Procedures for generating and releasing information vary among jurisdictions, but the following is a summary of how it is normally done. The exam generates two parts: forensic evidence collection to be used in the investigation of a criminal case and medical care for the evaluation and treatment of injuries. The complete forensic report is maintained separately from the patient's medical record to limit the disclosure of unrelated information and preserve confidentiality. There are separate release protocols for the medical evaluation and the forensic evidence collection aspects of the report. While the victim is generally entitled to view his or her medical records (which will be discussed later), the forensic evidence and its reports are subject to strict safeguards to preserve chain of custody and security. The forensic exam report itself is typically entered in the CGIS Report of Investigation. CGIS Headquarters acts as the release authority. However, its release would be subject to the Privacy Act including any conditions that the originator placed upon its release.

In some cases, it may be more efficient for the victim to obtain the record, or portions of it, directly from the facility itself. For example, facilities often have protocols in place that authorize more ready access to toxicology results as opposed to other portions of the examination. The facility responsible for conducting the exam should have already provided information to the victim regarding the procedures to access the records.

Forensic exams on a victim's property

Regarding forensic exams performed on a victim's property, the resulting documents are generally considered law enforcement records. CGIS maintains the system of records notice for these documents and acts as the release authority.

(3) Coast Guard members are entitled to examine their own health record. Coast Guard members may access their health records at a Coast Guard clinic or, for units without a clinic, from their Executive Officer. The recent transition to MHS Genesis, an electronic record system, should also serve to increase access to electronic medical records and health providers.

2. Please describe your Service’s current practice for sharing the information described in (1) – (3) above with counsel representing a victim.	
USA	TJAG Policy 22-07 directs the prosecution to provide, without request, the victim/SVC a copy of all statements and documentary evidence produced or provided by the victim upon preferral. After preferral, upon receipt by the government, the prosecution will provide to the victim/SVC a summarized transcript of the victim’s testimony at the preliminary hearing. Additional requests are addressed through FOIA.
USMC	The Marine Corps’ practice for sharing this information is reflected in the provisions described above from Marine Corps Order 5800.16, Legal Support and Administration Manual, Volume 16, Chapter 4.
USAF	<p>The Air Force’s current practice for sharing the information described above is to comply with the requirements set forth in DAFI 51-201, DoD 5400.11-R, paragraph C4.2.1, and Department of Defense Instruction 1030.02, <i>Victim and Witness Assistance</i>. For those records in possession of the Staff Judge Advocate, the Staff Judge Advocate may release records that are minimally required to accomplish the counsel’s intended use as articulated in the request. <i>See</i> DoD 5400.11-R, paragraph C4.2.1. DAFI 51-201, paragraph 8.5.3 provides examples of such records, to include, “[c]opies of the VC’s client’s statements and documents provided by the client” and “[c]opies of any evidence directly relating to or derived from the VC’s client. For example, photos, medical records, or communications by the VC’s client.”</p> <p>Before releasing information to the counsel of the victim, Government counsel should redact Privacy Act information regarding individuals other than the attorney’s client. <i>See</i> DAFI 51-201, paragraph 8.5.4. In cases where the victim’s counsel is a civilian, the Staff Judge Advocate must obtain a signed statement from the civilian counsel stating counsel agrees not to release any protected information to others not involved with representing the victim. <i>See</i> DAFI 51-201, paragraph 8.5.4. In turn, the victim’s counsel has a duty to discuss relevant information contained in released documents with his or her client to help the client understand the outcome of the trial or other proceeding, make case-related decisions, or otherwise assist the counsel in performing their duties as they relate to their client. <i>See</i> DAFI 51-207, <i>Victim and Witness Rights and Procedures</i>, paragraph 3.17.</p>
USN	<p>(1) As previously stated, Commander Naval Legal Service Command Instruction 5810.1 calls for any statement of the victim, including a copy of any recording and transcripts be provided to the victim, or VLC, as applicable, upon request.</p> <p>(2) As detailed above, Commander Naval Legal Service Command Instruction 5810.1 calls for any images or videos of the victim collected in the course of the investigation including photographs taken during a Sexual Assault Forensic Examinations, be provided to the victim, or VLC when applicable, upon request. Other portions of a forensic examination are provided to the VLC or victim upon their request unless doing so would impede or compromise an ongoing investigation. The DD Form 2911 (sexual assault forensic examination report) is</p>

	<p>provided to sexual assault victims upon completion of the sexual assault forensic examination in accordance with Department of Defense Instruction 6495.02.</p> <p>(3) Commander Naval Legal Service Command Instruction 5810.1 is silent on providing medical records to crime victims, as victims are generally involved in any attempt by the government to access those medical records. Should the victim or their counsel make a request for the victim's medical records within the control of the government, trial counsel will provide those records.</p>
USCG	<p>Regarding paragraph 1(a), the trial counsel will normally provide information to the victim counsel if they possess such information. Otherwise, the trial counsel will put the victim counsel in contact with the CGIS official who can provide a link for download.</p> <p>Regarding paragraph 1(b), if the victim's counsel wishes to view a forensic medical exam report or a report of a forensic exam on the victim's property, a CGIS special agent or trial counsel can arrange for them to view the report in a secure environment, such as the CGIS office itself. However, if the victim counsel requests a copy of the report, the release authority would be CGIS Headquarters pursuant to the protocols referenced in the answer to paragraph 1(b).</p> <p>Regarding paragraph 1(c), the victim counsel can access the victim's medical records through their client or if the client authorizes the release in writing.</p>

3. What are the potential effects—both positive and negative—of establishing a uniform policy for the sharing the information described in (1) – (3) above with counsel representing a victim on the privacy of individuals, the criminal investigative process, and the military justice system generally?

<p>USA</p>	<p>The potential positive effects of a uniform policy include: 1) consistency; 2) increased trust; 3) improved ability of SVC/STC to establish expectations on case outcomes with victims; and 4) transparency for victims.</p> <p>The potential negative effects of a uniform policy include: 1) use of the disclosures by defense counsel to cross-examine the victim and suggest that the victim has tailored their testimony based on early access to information; 2) delay in court-martial processing if the policy established a substantive right that required disclosure prior to preferral, referral, or arraignment; and 3) records may contain FOIA/Privacy Act or MRE 513 protected information.</p> <p>OTJAG recommends that the Joint Service Committee be tasked with development of a uniform policy that alleviates possible negative effects. As there is no Department of Justice or model state rule or policy regarding mandatory discovery for victims of sexual assault, development of a uniform policy should be deliberate and coordinated with all stakeholders.</p>
<p>USMC</p>	<p>Uniformity is favorable in many aspects of military justice in order to ensure that similarly situated accused and victims across the services are treated similarly. The Joint Service Committee on Military Justice should be tasked to recommend a modification to the Rules for Courts-Martial that implements a uniform standard for the sharing of this information with counsel representing a victim that accounts for and mitigates potential negative effects.</p>
<p>USAF</p>	<p>Predictability, consistency, and reliability are the main benefits of establishing a uniform policy for sharing information described in 1(a)-(c), as victims’ counsel, defense counsel, and investigators will know what, how, and when such information will be provided, regardless of the Military Service involved.</p> <p>While a uniform policy alone does not threaten the accused or third parties’ privacy rights, the content of such policy, if written too broadly, may fail to adequately balance their privacy rights against the victim’s interests in disclosure.</p> <p>Additionally, a uniform policy would not allow Military Services to tailor their approach to address their unique circumstances. I would highlight the importance of ensuring that your committee review feedback from all parties who are engaged in the system; to include prosecutors, representatives of the Office of Special Trial Counsel, defense counsel, and victim’s counsel, as well as expert military policy advisors from each Service. They all have equities based on their client base and an understanding of additional effects of continuing to evolve military justice in the midst of what are already historic changes that have yet to fully take place or be assessed.</p>
<p>USN</p>	<p>A uniform policy would provide certainty for all military justice professionals and eliminate situations where similarly situated individual victims are treated differently because of their Service’s policy or the command handling their case.</p>

	<p>While disclosure of these records to the victim may raise additional areas of cross-examination, such a uniform policy, when limited to the matters raised here, is in the best interests of victims and the military justice system as a whole.</p> <p>The Joint Service Committee on Military Justice should be tasked to recommend a modification to the Rules for Courts-Martial that implements a uniform policy that considers both the positive implications and mitigates potential negative effects associated with mandating disclosures prior to various stages of the court-martial.</p>
<p>USCG</p>	<p><i>Positives.</i> (1) A uniform policy would ensure that victims and their lawyers are treated consistently across all branches, eliminating disparities. (2) A uniform policy would promote efficiency by standardizing procedures, reducing the administrative burden of each branch in developing and maintaining different protocols. (3) A uniform policy would facilitate better collaboration and coordination among military services, allowing for the sharing of information in cases involving multiple services. (4) A uniform policy would enable lawyers to access information more readily, regardless of the branch they are working with, leading to improved legal advocacy and outcomes. (5) A uniform policy would promote efficiency in sharing information in cases where a victim is treated in a medical facility operated by a military service other than the military service responsible for the investigation and prosecution.</p> <p><i>Negatives.</i> The development of a uniform policy brings forth certain risks that warrant consideration. (1) A uniform policy must carefully account for the applicable system of records maintained by each military service, as well as other laws protecting sensitive information to avoid unintended, adverse consequences. (2) It may not fully account for the distinct structure and resource limitations of individual services, potentially leading to the adopting of practices employed by branches with greater resources and capability to manage complex procedures. (3) It runs the risk of unduly constraining the discretion of government counsel and investigators to determine what information to share, when, and with whom, a critical aspect in navigating the uncertain landscape of litigation and trial. (4) Any additional burden, though seemingly small or resource-neutral from a headquarters standpoint, could unduly strain limited field resources in unanticipated ways, ultimately degrading the pursuit of justice. (5) The information described in 1(a)-(c) is sensitive, particularly forensic medical examinations, and therefore should only be shared with individuals that have a clear need to know in order to perform an official function.</p>

4. Please provide your Service's position on the feasibility and advisability of establishing a uniform policy across all the Military Services for the sharing of the following information with counsel representing a victim:

(1) Any recorded statements of the victim to investigators.

(2) The record of any forensic examination of the person or property of the victim, including the record of any sexual assault forensic exam of the victim that is in possession of investigators or the Government and any photographs taken by the examiner during the medical-forensic exam.

(3) Any medical record of the victim that is in the possession of investigators or the Government.

USA

(1) Army OTJAG is not opposed to a uniform policy that the prosecution provide the victim a copy of all statements and documentary evidence produced or provided by the victim upon preferal.

(2) OTJAG is not opposed to a uniform policy that the prosecution will provide the victim/Special Victims' Counsel (SVC) the record of any forensic examination of the person or property of the victim, including the record of any sexual assault forensic exam of the victim that is in possession of investigators or the Government and any photographs taken by the examiner during the medical-forensic exam upon referral, subject to the following caveats:

1) the appropriate custodian of the records, such as DHA, must approve the release; 2) release must not occur until all investigative leads have been exhausted; 3) records released must be appropriately redacted or withheld in accordance with FOIA and the Privacy Act interests of any party other than the victim (i.e. accused's health information in SAFE exam or DNA analysis); 4) policy should not create a substantive right for the victim that delays the processing of the court-martial; 5) policy should provide exceptions for non-cooperative victims or victims who elect not to receive the information; 6) policy should address appropriate procedures for minor or incompetent victims; and, 7) policy should allow for an exception if the records, in the opinion of the prosecutor, contain information that is likely to influence the testimony of the victim (i.e. medical opinions or perceptions).

(3) A policy allowing a victim to obtain copies of their own medical records may not be necessary, as military victims can obtain copies of their own records from any medical treatment facility. Nevertheless, OTJAG is not opposed to a uniform policy that the appropriate custodian of a victim's medical records included in investigatory files provide those records to the victim upon referral with the following caveats: 1) records redacted or withheld in accordance with FOIA and the Privacy Act interests of any party other than the victim; 2) policy should provide exceptions for non-cooperative victims or victims who elect not to receive the information; 3) policy should address appropriate procedures for minor or incompetent victims; 4) policy should allow for an exception if the records, in the opinion of the prosecutor, contain information that is likely to influence the

	testimony of the victim (i.e. medical opinions or perceptions); and 5) policy should take into consideration the discussion in United States v. Mellette distinguishing medical records from behavioral health records in regard to Military Rule of Evidence 513.
USMC	Some victim rights are uniformly applicable pursuant to statute and regulation. It follows that establishing a uniform policy for the sharing of this information with counsel representing a victim is feasible. It is advisable only to the extent that the uniform policy allows for an appropriate level of discretion to withhold information in certain limited circumstances. This uniform policy is most appropriate within the Rules for Courts-Martial.
USAF	The Air Force currently has the tools it needs to share appropriate information with counsel. As provided in DAFI 51-201, paragraph 8.5.4, Air Force Staff Judge Advocates can release recorded statements made by the victim, any records of forensic examinations or the person or property of the victim, and any medical examinations of the victim pursuant to an “official use” request made by the counsel of a victim. Staff Judge Advocates have this ability at any stage of the military justice process, so long as such items are maintained by the legal office.
USN	Any changes in this area designed to establish a uniform policy across all Military Services are best handled through amendment and modification of the Rules for Courts-Martial. While this process can be lengthy, it is the most appropriate way to ensure uniformity across all Services for this matter.
USCG	<p>A uniform policy for sharing information with lawyers who represent victims can be beneficial to ensure fair and effective representation and streamline processes reducing administrative complexities for lawyers who might have to represent victims from different services. Implementing a uniform policy has the potential to enhance clarity for investigators and trial counsel, streamlining their workflow and making more efficient use of their time. That said, it is critical that the uniform policy remain focused on the categories outlined in 1(a) – (c) to mitigate significant issues when expanding the scope of sharing information as a matter of course, which necessitates thorough study and research of relevant legal principles and best practices.</p> <p>Furthermore, certain safeguards should be in place to address potential concerns to ensure information sharing is efficient, safe, secure, and beneficial to participants in the military justice system, as listed below.</p> <ul style="list-style-type: none"> • The default sharing/access provision in any uniform policy should be narrowly limited with broader sharing only occurring during litigation and trial preparations. • The policy should comply with the Privacy Act, HIPAA, and other applicable laws. The policy should include provisions outlining the potential consequences of misuse or unauthorized access to information. Clear articulation can promote responsible handling of information. • The policy should provide clarity of when a victim is officially considered as such and at what stage they are entitled to specific information. Relatedly, the Office of Legal Counsel has opined that victims’ rights are generally guaranteed from the

time that criminal proceedings are initiated and cease to be available if all charges are dismissed or if the government declines to bring formal charges.

- The policy should allow for individual service flexibility and should strive to make the system more efficient rather than adding additional administrative burdens that could hinder investigations and litigation preparations.
- It is critical to maintain adaptable procedures to ensure the integrity of the system. It is inherently challenging to account for all the different permutations in which sharing information might lead to negative consequences, particularly when dealing with potentially wrongful actors. For example, preventing gamesmanship or addressing situations where victims might be co-conspirators or involved in wrongful actions themselves requires careful consideration of information sharing at specific stages.

Ultimately, the system must strike the right balance between transparency and protection to continue a justice system that is fair to all parties while upholding the legitimate needs of crime victims and addressing the nature of litigation preparations and the operational requirements of law enforcement and medical personnel.

5. Please identify:

(1) Any applicable professional responsibility regulations that address the obligation of counsel representing a victim to share information with their client.

(2) Circumstances under which the information in (1) – (3) above should not be shared with the victim or counsel representing the victim, and explain why the information should, or should not, be shared.

USA

(1) Rule 1.2(a) and Rule 1.4 of the Army Rules of Professional Conduct for Lawyers could be interpreted to require an SVC to provide to their client information provided to the SVC from the prosecution, or any other party, regarding the investigation. Any uniform policy should clarify the SVC's obligation.

(2) As discussed above, policy should address non-cooperative victims, minor or incompetent victims, records that contain Privacy Act/HIPPA protected information of another party, and an exception if the records, in the opinion of the prosecution, contain information that is likely to influence the testimony of the victim (i.e., medical opinions or perceptions).

USMC

(1) JAG Instruction 5803.1E, Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General, apply to Marine Corps Victims' Legal Counsel. Rule of Professional Conduct 1.4 requires covered attorneys to "reasonably consult with the client about the means by which the client's objectives are to be accomplished," "promptly comply with reasonable requests for information," and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The comment to the Rule says, "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued . . ." It further explains, "In some circumstances, a covered attorney may be required to withhold information from a client. For example, classified information may not be disclosed without proper authority."

(2) Counsel for the government may withhold required information from the victim or counsel representing the victim only after consulting supervisory counsel and in situations involving exceptional circumstances where disclosing the information to the victim would lead to the destruction of evidence, would compromise the investigation, or would otherwise be inconsistent with the pursuit of justice.

USAF

(1) The American Bar Association (ABA) Model Rules of Professional Conduct and the Air Force Rules of Professional Conduct address an attorney's professional responsibility to communicate with their clients. Specifically, ABA Model Rule 1.4(a) provides that a lawyer shall: (1) promptly inform the client of any decision or circumstances with respect to which the client's informed consent, as defined by Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with

	<p>reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law. This obligation to communicate, however, only extends to information actually provided to counsel.</p> <p>Similarly, Rule 1.4 of the Air Force Rules of Professional Conduct directly mirrors ABA Model 1.4. <i>See</i> AFI 51-110, <i>Professional Responsibility Program</i>, Attachment 2 – Air Force Rules of Professional Conduct, 11 December 2018. As such, counsel representing a victim has the professional responsibility to communicate with their client in compliance with these provisions – which may include discussing the content of the records when necessary to fulfil these obligations.</p> <p>(2) The victim’s interest in obtaining his/her recorded statements, records of forensic examinations, and medical records is high. These records relate directly to the victim and DAFI 51-201 expressly provides that any information related to other individuals, consistent with the Privacy Act, must be redacted before providing such records. Such protection minimizes any potential risks associated with providing these records to the victim or counsel representing the victim. Nonetheless, there may be situations where the information should, or should not, be shared. One such circumstance may be that releasing such information could implicate third parties. Another circumstance may be that releasing such information discloses government secrets or investigative techniques, that if shared, may jeopardize national security and/or future investigations. Lastly, release may not be appropriate if there is no official purpose or use for the victim to have such information. Should a victim or counsel for the victim desire such information to embarrass the accused or some other reason not directly related to the counsel’s representation, release would not be appropriate.</p>
<p>USN</p>	<p>(1) The Navy Rules of Professional Conduct of Attorneys, JAG Instruction 5803.1E, provides that a lawyer has a duty to provide their client with candid advice (Rule 2.1) and to explain matters to the extent necessary to permit the client to make informed decisions regarding the representation (Rule 1.4). Rule 1.4 requires covered attorneys to “reasonably consult with a client about the means by which the client’s objectives are to be accomplished,” “promptly comply with reasonable requests for information,” and “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation.” This information sharing may be limited in certain circumstances. The comment to Rule 1.4 explains, “In some circumstances, a covered attorney may be required to withhold information from a client. For example, classified information may not be disclosed without proper authority.”</p> <p>(2) Such information should be shared with the victim in all cases, unless, in the judgment of the government, such disclosure would lead to destruction of evidence or would impede or compromise an ongoing investigation.</p>
<p>USCG</p>	<p>(1) Pursuant to Rule 1.2 of the Coast Guard Legal Responsibility Program, COMDTINST M5800.1, a lawyer, including a special victims counsel, is</p>

required to adhere to a client's decisions regarding the objectives of the representation and must consult with that client as to the means by which the objectives are to be pursued. Accordingly, Rule 1.4, among other matters, requires that a lawyer keep the client reasonably informed about the matter at hand, promptly comply with reasonable requests for information, and explain matters to the extent necessary for the client to make informed decisions. Rule 1.2 and Rule 1.4 are based upon the ABA Model Rules of Professional Conduct and are consistent with state rules which also govern the conduct of Coast Guard attorneys. These standards ensure that the client's decisions are respected, clients receive relevant information, and can actively participate in the legal process. It is worth noting that the cited ethics rules primarily pertain to the general act of sharing information relating to the representation, not the process of obtaining government documents and providing them to individuals who are not acting as government officials.

(2) In general, the information in paragraphs 1(a)-(c) collected about a crime victim should be sharable, especially after preferral of charges. There, however, may be limited circumstances where information sharing should be restricted to protect the integrity of an ongoing investigation to ensure the safety of other victims or witnesses.

For example, a victim's status as a co-conspirator could pose a foreseeable risk, as their access to statements made by investigators during an interview could be used to potentially intimidate other conspirators or alert them to forthcoming questions, potentially leading to a defense strategy based upon perjury. This concern might be particularly pronounced in cases where the stakes and potential risks are high, such as those involving drug distribution or organized crime. While this fact pattern would be admittedly rare, it is provided as a reminder for the need for the flexibility in information sharing practices to ensure the effectiveness and security of the investigatory process.

Sec. IV. B. Narrative Questions for the Services' Special Victim's Counsel/Victims' Legal Counsel Program Managers (Questions 1 – 4)

<p>1. How, in practice, do counsel representing a victim as defined in Article 6b, UCMJ, obtain the information described in (1) – (3) below and at what stage of the military justice process—pre-preferral; post-preferral; Article 32 preliminary hearing; or post-referral?</p> <p>(a) Any recorded statements of the victim to investigators.</p> <p>(b) The record of any forensic examination of the person or property of the victim, including the record of any sexual assault forensic exam of the victim that is in possession of investigators or the Government and any photographs taken by the examiner during the medical-forensic exam.</p> <p>(c) Any medical record of the victim that is in the possession of investigators or the Government.</p>	
USA	<p>Victims, and when applicable their SVCs, are entitled to access certain material at different stages of the investigative and judicial processes.</p> <p>a. Government counsel has an obligation to provide victims all statements and documentary evidence produced or provided by that victim upon preferral of charges. (IAW TJAG Policy 22-07, dated 1 MAR 22) This access includes any of the victim's recorded statements. Often this access is provided earlier in the investigative process, but the right to access vests at the time of preferral. This right does not depend upon whether the victim is eligible for SVC representation, elects SVC representation, or the type of crime at issue – this applies to all victims.</p> <p>b. This disclosure described above includes statements or evidence provided by the victim during any forensic medical exam. However, there is no requirement to provide the victim with parts of forensic examinations of the victim's person or property beyond the victim's statements. For example, when the victim provides clothing or bedding to be forensically examined, the victim does not have a right to access the results of that examination.</p> <p>c. Victims have a right, outside of the military justice process, to their own medical records. If the Government collects medical records that include statements by the victim, those statements must be provided at the time of preferral.</p>
USMC	<p>(a) Upon request by the victim or victim's counsel, the counsel for the government, normally the trial counsel, provides a copy of the victim's statements, including recorded oral or video statements, to the victim or victim's counsel, if represented. The victim or victim's counsel can request and obtain recorded statements of the victim prior to preferral of charges, or anytime later.</p> <p>[USMC Legal Support and Administrative Manual (LSAM) MCO 5800.16, Chapter 7, para. 040401]</p>

Marine Corps VLC in the field report they typically receive their clients' recorded statements from trial counsel in response to VLC requests, although less frequently they receive statements from NCIS investigators prior to referral. Most VLC choose to request trial counsel provide victims' statements. There does not appear to be any reported issues with trial counsel ignoring requests or refusing to produce victims' recorded statements.

(b) Upon request by the victim or victim's counsel, the counsel for the government, normally the trial counsel, will provide any documentary evidence in their possession or in the possession of the SJA that is derived directly from and pertaining directly to the victim. This would include any record of any sexual assault forensic exam (SAFE) of the victim. The victim or victim's counsel can request and obtain recorded statements of the victim prior to preferral of charges, or anytime later.

[USMC Legal Support and Administrative Manual (LSAM) MCO 5800.16, Chapter 7, para. 040401]

Victims' counsel may receive SAFE reports from NCIS agents prior to preferral of charges, but typically trial counsel provide these in response to VLC requests. Trial counsel are often reluctant to provide more than just the narrative portion of the SAFE report, which serves to document the victim's description of the assault. VLC report that they obtain complete SAFE reports (to include photographs) when they push back against trial counsel objections. However, government disclosure practices regarding timing and content vary across the Marine Corps military justice enterprise.

It is important also in this connection to note the significant differences between SAFE results and the results of other forensic examinations, including digital examinations of a victim's cell phone or other media devices.

(c) Upon request by the victim or victim's counsel, the counsel for the government, normally the trial counsel, will provide any documentary evidence in their possession or in the possession of the SJA that is derived directly from and pertaining directly to the victim' counsel or victim (if not represented). This would include any medical record of the victim. The victim or victim's counsel can request and obtain recorded statements of the victim prior to preferral of charges, or anytime later.

[USMC Legal Support and Administrative Manual (LSAM) MCO 5800.16, Chapter 7, para. 040401]

Marine Corps VLC report that they may receive their client's medical records in possession of the government from NCIS investigators prior to preferral, but more typically receive them from trial counsel when VLC request them before or after preferral. Trial counsel do not appear reluctant to provide victims' medical records to them. However, there are often cases in which a victim's medical records

	inadvertently include disclosure of mental health records protected under Military Rule of Evidence (MRE) 513.
USAF	<p>(a) Per Department of the Air Force Instruction (DAFI) 51-201, <i>Administration of Military Justice</i>, Section 8B, DAF VCs and SVC/VLCs from other services may request records pertaining to a court-martial proceeding involving their client as “official use” requests under the Privacy Act and Freedom of Information Act. See 5 U.S.C. § 552a(b)(1); DoD 5400.11-R, <i>Department of Defense Privacy Program</i>, paragraph C4.2.1. The Staff Judge Advocate is the release authority for records in the legal office’s possession. An SJA’s decision to release information pursuant to an official use or routine use request is discretionary, unless the SJA is otherwise required by law or policy to provide that information to the victim or Victim’s Counsel. Requests must be in writing, provide a detailed description of the requested information, and explain the official need for that information. In practice, these requests are usually submitted during the pre-preferral process.</p> <p>(b) The record of any forensic examination of the person or property of the victim, including the record of any sexual assault forensic exam of the victim that is in possession of investigators or the Government and any photographs taken by the examiner during the medical-forensic exam.</p> <p>Answer: See B.1.(a) above.</p> <p>(c) Any medical record of the victim that is in the possession of investigators or the government.</p> <p>Answer: See B.1.(a) above.</p>
USN	<p>(a) Upon request, at any stage of the military justice process.</p> <p>[CNLSC INSTRUCTION 5810.1, Disclosure of Information to Crime Victims, 6.a.(1)]</p> <p>(b) Upon request, at any stage of the military justice process when the images or videos from either the Sexual Assault Forensic Examinations (SAFE) or the investigation are subject of a charge for violation of Articles 117a and 120c, UCMJ, with the exception of contraband constituting child pornography.</p> <p>[CNLSC INSTRUCTION 5810.1, Disclosure of Information to Crime Victims, 6.a.(4)]</p> <p>(c) Not specifically addressed in the Disclosure of Information to Crime Victims instruction for Navy and Marine judge advocates or in policy. However, in practice, medical records outside of the SAFE and in possession of government counsel are generally not turned over to Navy VLC.</p>
USCG	<p>(a) During investigation stage and prior to the preferral of charges, a victim is entitled to a copy of all statements and documentary evidence adopted, produced, or provided by the victim that are in possession of TC or an SJA. (COMDTINST M5810.1H Ch. 16-3). Upon preferral of charges, a victim is entitled to a copy of all statements and documentary evidence adopted, produced, or provided by the victim</p>

	and any recordings of interview of the victim that are in the possession of TC or SJA or local servicing attorney.
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	(b) The Coast Guard has no specific policy on forensic exams.
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	(c) The Coast Guard has no specific policy on medical records in possession of investigators or the government.
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<p>2. What are the potential effects—both positive and negative—of establishing a uniform policy for the sharing of information described in (1) – (3) above with a victim, or counsel representing a victim, on the privacy of individuals, the criminal investigative process, and the military justice system generally?</p>	
<p>USA</p>	<p>Establishing clear rules for types of information that must be disclosed to victims to ensure all victims are treated equally and military justice practitioners know their obligations would be beneficial. SVCs represent victims who are Soldiers, are Family members, are Civilian employees, and, by exception, are unaffiliated civilians. Thus, we recommend any rules apply to all victims regardless of status. To avoid negative impacts, allow for exceptions where disclosure would negatively impact the prosecution of an offender.</p>
<p>USMC</p>	<p>Uniform policy would yield more timely, efficient and predictable VLC access to information essential to effective legal advice and informed client decision making. Standardizing policy would also mitigate the disparate treatment of victims based on established regional practices and minimize or eliminate objections from investigators and trial counsel to providing this information. The information provided should include what is described in question 1(a)–(c), in addition to the complete law enforcement Report of Investigation (ROI) in possession of the government. Disclosures should be an affirmative obligation of the government and should not require a request by the VLC detailed to the case.</p> <p>The positive effects of providing VLC with timely and complete access to victim statements, SAFE and other forensic reports, medical records, and ROIs would include enabling counsel to provide thorough and competent legal advice and representation based on a more complete and nuanced understanding of the facts of each individual case. More detailed advice would also enhance victims in intelligently exercising their rights, and likely increase victim willingness to participate in criminal proceedings.</p> <p>The potential negative effects largely relate to argument and advocacy concerns related to credibility issues flowing from access to case information, notably a concern that victims would shape trial testimony based on their knowledge of case information gleaned through advice from counsel. These concerns are counterbalanced by advocacy training and rules of evidence related to rehabilitating witness credibility on the stand. In addition, it is far from certain that the shaping of testimony flows only from case file access—victims (and other witnesses) are often cross-examined on bias and other motive to fabricate flowing from information obtained by other sources, to include social media, gossip, and other discussion of a case. Trial skills related to these challenges are the subject of frequent training, and any negative impact would be minimal and vastly outweighed by the benefit of better-informed advice and clients.</p>
<p>USAF</p>	<p>Should the DoD adopt the DAF policy outlined in B.1.(a) above or a policy that mandates release of information described in 1(a)–(c), we see no negative impacts. These are the statements and medical records of the victim; therefore, the victim should presumably already know the information contained therein. If a more restrictive policy is adopted, it may be more difficult for VCs to advise their clients,</p>

	<p>and thus more difficult for victims of crime to make well-informed decisions regarding participation in the military justice process.</p>
<p>USN</p>	<p>The Navy VLCP supports a uniform information sharing policy between government counsel and victims' legal counsel. In addition to 1(a)-(c), victims should have access to Reports of Investigation (ROIs) in possession of government counsel in the form of an in-person review, conducted by victims' legal counsel, during the investigation and throughout the military justice process. When possible, the in-person review would ideally occur in government counsel's office. When in-person review is not possible, the ROI can be reviewed by the victims' legal counsel via a shared drive folder with read-only access (not available for download or printing) or the ROI can be sent to the nearest government counsel's office for the victims' legal counsel to view in-person. Government counsel's discretion to withhold materials should be solely limited to when sharing case material would jeopardize an ongoing investigation. The information withheld should be narrowly tailored to only the portion of information that would impede or compromise an ongoing investigation.</p> <p>The Navy VLCP notes access to case information by unrepresented victims requires further study and review.</p> <p><u>Victim and victims' legal counsel.</u> After reviewing the ROI, victims' legal counsel can comprehensively and competently advise their client. Consequently, the client can then make well-informed decisions. With the benefit of an ROI review, a victims' legal counsel can issue spot areas affecting the victim's rights and take appropriate action. Additionally, access to the ROI allows the victim to identify any potential deficiencies in the investigation. The victim holds a unique and vital viewpoint critical to this crucial check on the thoroughness of the investigation. For example, a victim could confer with government counsel regarding a witness not interviewed or a piece of evidence not collected. A victim's timely access to the ROI aids in ensuring the comprehensiveness of the investigation and ultimately supports a just outcome for all parties. Decisions made by the victim occur well before preferral, and outside of the courtmartial process, highlighting the imperative need for victims' legal counsel to have access to timely case information. Victims' vested interests exist in a variety of matters, including input to the Initial Disposition Authority, pre-trial investigations, confinement and restraint determinations, military and civilian protective orders, administrative hearings, and nonjudicial proceedings. For example, victims' legal counsel may submit matters to the convening authority's staff judge advocate (SJA) for consideration as part of the SJA's pre-trial advice to the convening authority.</p> <p><u>Privacy of individuals.</u> In-person review by victims' legal counsel defeats any concerns regarding unauthorized copies of materials and/or improper release of documents. The review is conducted in a controlled setting with government counsel retaining possession of the ROIs. The establishment of a uniform policy allows individuals with privacy concerns contained within case materials to know precisely how the information will be shared and with whom information will be shared.</p>

	<p><u>Criminal investigative process.</u> All ROIs, interim and final, should be available for a victims’ legal counsel in-person review, unless government counsel determines a review of a document would impede or compromise the ongoing investigation. Government counsel should later permit review when the concern to the ongoing investigation is removed.</p> <p><u>Military justice system.</u> Greater access to information will increase victims’ trust in the military justice system and likely result in greater engagement by victims. Victims with greater access to information make well-informed decisions and are able to fully exercise their rights as victims. Likewise, greater access to information affords victims’ legal counsel the ability to provide comprehensive and competent advice as required by the Navy’s rules of professional conduct for judge advocates. Additionally, well-informed victims’ legal counsel can better argue M.R.E. 303, 412, 513, 514, and 615 matters, improving the overall integrity and veracity of the entire court-martial process. When a victim is exposed to case information outside of their own statement or evidence they have provided, there is a concern for potentially altered or tainted testimony. However, this concern exists for every witness who testifies and is eliminated by a thorough cross-examination and when appropriate, impeachment of the witness.</p> <p>Any potential negative effect of a uniform policy for greater access to information is outweighed by the overall positive effect of a well-informed and well-advised victim fully and meaningfully exercising their rights.</p>
<p>USCG</p>	<p>The Coast Guard SVC Program does not see any detrimental effect in establishing a uniform policy sharing this information with a victim or their counsel. While the victim’s credibility may be called into question on cross examination because of their access to this information, any potential detriment is vastly outweighed by the benefit of better-informed attorneys and clients. Uniformity promotes fairness and trust in the system and avoids potential disparate access to information within the USCG and between services.</p>

3. Does your organization support or oppose the adoption of a uniform policy for the sharing of the information identified above with counsel representing a victim? With a victim? Why or why not?

USA	The Army SVC Program supports a uniform policy for the disclosure of victim statements but opposes further mandatory disclosures.
USMC	<p>The Marine Corps VLCO supports the adoption of a uniform policy for the sharing of victims’ personal statements, forensic exams, and medical records, in addition to investigative ROIs, among VLC and government counsel.</p> <p>When polled, Marine Corps VLC in the field overwhelmingly supported the adoption of uniform policy for the sharing of this information based on the positive impact this policy would have on their ability to advise their clients and the benefit to victims in making informed decisions.</p>
USAF	The DAF Victims’ Counsel Division would support a uniform policy similar to the DAF policy outlined in B.1.(a) above or a policy that mandates release of information described in 1(a)–(c). Access to information is critical for VCs to fulfill their duties of competent representation. Without it, VCs will struggle to keep clients reasonably informed about the status and prospects of the case, making it more difficult for victims of crime to make informed decisions about participation in the military justice process. Additionally, these are the statements and medical records of the victim; therefore, the victim should presumably already know the information contained therein.
USN	<p>The Navy VLCP supports the adoption of a uniform policy for sharing information with represented victims to include items 1(a)-(c) and full access to ROIs on an ongoing basis. As noted above, information provided directly to victims without representation requires further study and analysis.</p> <p>When analyzing disclosure of case information to victims, the National Crime Victim Law Institute noted victims’ due process rights and the right to be treated with fairness are affected when case information relevant to the exercise of their victims’ rights is denied. An absence of case information negatively impacts a victim’s ability to competently confer with government counsel and be heard. Additionally, providing access to investigative materials ensures victims are treated with fairness.</p>
USCG	The Coast Guard SVC Program supports a uniform policy for sharing this information with the victim and counsel. Bar rules contain general provisions about competence and typically require the attorney to have the legal knowledge, skill, access to evidence, thoroughness, and expeditious preparation reasonably necessary for representation. Allowing victim’s counsel to have access to specific evidence about their client, the victim, should be allowed so counsel can be better informed about the evidence that support the allegations. Additionally, victims should have access so that they can make well-informed decisions about the direction of the representation. Providing victims and attorneys access to this limited information will enable both to make better informed decisions.

4. Please identify:

(a) Any applicable professional responsibility regulations that address the obligation of counsel representing a victim to share information with their client.

(b) Circumstances under which the information in (1) – (3) above should not be shared with the victim or counsel representing the victim, and explain why the information should, or should not, be shared.

USA

a. SVCs have ethical responsibilities regarding disclosure of information to their clients that require they share information with their clients and then handle that information as directed by their clients. SVCs cannot act as agents of the Government withholding information as directed or preferred by Government counsel. The governing regulation is Army Regulation 27-26, Rules for Professional Conduct of Lawyers.

b. The Government's disclosure of a victim's statements, forensic reports, medical records, or other investigative materials to an SVC does require that SVC notify the victim of the disclosure and to then provide that information to the victim upon request. Rule 1.2.(a) requires the SVC "abide by their client's well-informed and lawful decisions..." To be well informed, clients would need to know, at a minimum, what information is in their SVC's possession. Once they know what the SVC has, the client can then decide what information they want to review – that is one well-informed decision the client, not the Government counsel or SVC, gets to make.

Army SVC clients direct our representation – not the other way around. If the client expresses their desire to review materials we have, we share the materials with the client. There is a small class of information an attorney can withhold from their client. Rule 1.4.(b) provides examples of types of information that can be withheld from one's client such as material classified above the client's security clearance level or a "psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person..." Thus, once the SVC has the materials, the client decides whether to review them.

There are times when the victim reviewing investigative materials will negatively impact the successful prosecution of the offender. Defense counsel must be informed that the materials have been disclosed, whether to the victim directly or through an SVC, and can then use that knowledge of that disclosure in any way that might benefit their client. Thus, if investigative materials have been disclosed to a victim, the defense counsel can cross examine the victim about the impact of those materials. Thus, affecting the victim's testimony at trial.

- i. The victim may respond, "my attorney had the files and didn't show them to me." This statement may implicate confidential communications between the victim and their counsel. The defense counsel may call the SVC as a witness to either confirm or dispute that victim's testimony. Through misunderstanding, misremembering, or lying, this testimony may

	<p>not be consistent with the SVC’s potential testimony. Thus, it would put the contents of their confidential communications at issue and possibly result in termination of the attorney-client relationship due to conflict and Rule 3.7.</p> <p>ii. The victim may respond, “I reviewed the materials, but they didn’t impact my testimony.” This may have no impact on the victim’s credibility. However, a factfinder may decide that the investigative materials at issue would have impacted the victim’s testimony and that the victim is being disingenuous and is thus less credible as a result.</p> <p>Disclosure of investigative materials, especially those beyond forensic reports, could include statements by other witnesses that are neither admissible nor reliable. Thus, these statements would not be presented at a board or trial – unless the victim’s access to that statement becomes a basis for admissibility. When some inflammatory information/opinion is provided in the case file to a victim before the proceedings it could impact the victim in many ways- to include triggering a change to testimony or an allegation that the victim changed their testimony. If that inadmissible statement is a motive to fabricate, a change in the victim’s testimony from prior statements could now be a vehicle to present the inflammatory statement regarding a motive to fabricate. For example: CID agent includes in case notes that they do not believe the victim and why. That statement has been disclosed to victim and/or SVC. Victim’s testimony has some changes from the initial statement to that CID agent. Defense counsel successfully argues that victim may have changed their story to address the reasons the CID did not believe the allegation. Now, the fact that the experienced investigator doesn’t believe the allegations is relevant and admissible - and potentially persuasive.</p> <p>As traumatized people, victims’ ability to digest and explain their assault over time changes. Currently, we rely on experts to explain the impact of trauma on memory to a panel. When impact of trauma is the best explanation for new or changed details, the prosecution might be able to overcome that change persuasively with the support of the expert testimony. The expert testimony is much less persuasive after the defense points out that the changes followed access to all the investigative materials. Thus, the ability of the prosecution to gain conviction may be greatly reduced.</p> <p>Victims are critical witnesses- not just our SVC clients. SVCs allow their clients to be better prepared to participate in the military justice process because the SVC protects their interests, presents motions on their behalf, and explains the process throughout. The argument that unlike all other witnesses, victims should be given access to all the evidence presumes their counsel can, in theory, better represent clients after having full access. The counter is two- fold: (1) SVCs are expertly representing clients now and (2) expanded access to investigative materials may negatively impact victim credibility and decrease the ability to achieve a conviction. Thus, providing victims with more than their own prior statements does not benefit victims or their pursuit of justice.</p>
<p>USMC</p>	<p>(a) The professional responsibility regulations governing Marine Corps VLC fall into two categories: the Rules of Professional Conduct for Navy and Marine judge</p>

advocates (JAGINST 5803.1E, Rules of Professional Conduct), and the rule of professional conduct imposed by the respective VLC's state bar. Marine Corps VLCO analysis of this question revealed significant portions of JAGINST 5803.1E indicating access to relevant information is necessary to provide competent and complete advice and representation to their victim-clients.

Rule 1.1 (Competence) of the JAG Instruction governing Navy and Marine judge advocates provides that "[c]ompetent representation requires the legal knowledge, skill, **access to evidence**, thoroughness, and expeditious preparation reasonably necessary for representation." (Emphasis added). Rule 1.2 (Establishment & Scope of Attorney-Client Relationship) also speaks to this issue, noting that a "covered attorney shall follow the client's **well-informed** and lawful decisions concerning case objectives, choice of counsel, forum, pleas, whether to testify, and settlements." (Emphasis added). Taken together, these provisions suggest that an attorney cannot be competent—and clients are less able to make sound decisions about how best to exercise their rights—in the absence of adequate information on which to base reasoned legal analysis and advice. At a minimum, the language of these rules indicates a strong preference for informed counsel and clients.

Enabling competence and advice through timely disclosure of relevant information does not require wholesale disclosure of case files to victims themselves. Under JAGINST Rule 1.4 (Communication), covered attorneys must "promptly comply with reasonable requests for information[.]"... "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation[.]" and "consult with the client about any relevant limitation on the covered attorney's conduct when the covered attorney knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."

While VLCO did not conduct a comprehensive review of every state bar rule regarding counsel access to information and obligation to share that information with their clients, Marine Corps VLC did report some illustrative requirements of their state bar rules. A review of these state bar generally identified a common theme of requirements for counsel to provide their clients with information sufficient to keep clients reasonably informed to allow them intelligently to participate in making decisions about case objectives. None of the state bar rules identified contradicted the professional responsibility requirements of JAGINST 5803.1E. Some states (Illinois and Florida, for example) have provisions noting that rules or court orders may restrict the release to a client of information provided to counsel.

Where there is conflict between state and military rules of professional responsibility, JAGINST 5803.1E provides that the military rules prevail. Marine Corps VLCO is not currently aware of any case in which a conflict between bar rules was a significant source of friction in a case. However, the JAGINST was last revised in 2015 and is therefore likely ripe for revision in light of rapidly-evolving VLC practice.

(b) Rules limiting VLC access to case information should be narrowly tailored and construed as contrary both to the professional obligations of counsel and to the

	<p>truth-finding functions of the military justice process. Information should not be shared with victims and/or VLC when contrary to statutory provisions, privileged, when restricted by court order, or during an ongoing investigation when government counsel determines that VLC in-person review of specific information would jeopardize the ongoing investigation. Withholding information pursuant to this exception should be strictly limited to only that portion of the information which would jeopardize the ongoing investigation, and this exception should not apply to discretionary government determinations about its case preparation.</p> <p>Further, VLC should not disclose information to a client when it would be detrimental to their client’s safety or well-being, where disclosure would present an identifiable harm to the client, or where the client would be likely to act unlawfully in response to information received through disclosures to counsel or client. This language pertaining to non-disclosure appears in various forms in state bar language.</p>
<p>USAF</p>	<p>(a) Rule 1.4 of the Air Force Rules of Professional Conduct (AFI 51-110, Attachment 2) requires a lawyer to “keep the client reasonably informed about the status of the matter,” “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation,” and “consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.”</p> <p>The official use request is a limitation set by the government and not the VC. In practice, VCs are responsible for explaining the limitations of their representation and the client decides whether they would like their VC to request documents pursuant to an official use request, knowing the limitations on release of information.</p> <p>(b) The DAF Victims’ Counsel Division finds no reason the victims’ own statements and medical records should not be shared with them.</p>
<p>USN</p>	<p>(a) Within the Rules of Professional Conduct for Navy and Marine judge advocates, several rules are applicable to information sharing with a client. Specifically, Rule 1.1 Competence, necessitates “legal knowledge, skill, access to evidence, thoroughness, and expeditious preparation” for competent representation. Access to evidence (evidence such as 1(a)-(c) documents and the ROI) is specifically listed as a requirement for competent representation. Additionally, Rule 1.2. Establishment and Scope of Representation, requires judge advocates to “follow the client’s well-informed and lawful decisions” regarding the case. Greater access to information supports the need for clients to make well-informed decisions. Finally, Rule 1.4 Communication, requires judge advocates to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” A synthesis of the above-mentioned rules supports greater access to case information to ensure victims’ legal counsel are acting in accordance with their professional responsibility requirements and in a position to educate the client so the client can make a well-informed decision.</p>

	<p>(b) Information should not be shared with victims and/or victims' legal counsel when contrary to statutory provisions, pursuant to a court order, or during an ongoing investigation when government counsel determines a victims' legal counsel's in-person review of specific information would jeopardize the ongoing investigation. The withheld information should be narrowly tailored to only the portion of information that would jeopardize the ongoing investigation, not case preparation.</p>
USCG	<p>(a) The Coast Guard Legal Responsibility Program, COMDTINST M5800.1 does not have a specific provision that addresses this. Rule 1.4 (b) does state that a lawyer shall communicate "reasonably with the client about the means by which the client's objectives are to be accomplished; keep the client reasonably informed about the status of the matter; and promptly comply with reasonable requests for information." Since generally attorneys must fulfill a client's reasonable expectation that information will be shared consistent with an attorney's duty to act in the client's best interests, it would be difficult to justify withholding information from a client without clear authority to do so, such as a court order.</p> <p>(b) The only circumstances where information should not immediately be shared with the victim is when investigators recover information related to an unrelated offense or when information deleted from the victims' phone is recovered and it impacts the credibility of the report. In these situations, the government should have a method of withholding the information so it does not compromise the investigation.</p>

Sec. IV. C. Narrative Questions for the Services' Chiefs of the Trial Defense Services Organizations (Questions 1 – 3)

1. What are the potential effects—both positive and negative—of establishing a uniform policy for the sharing of the information described in (a)–(c) below with counsel representing a victim as defined in Article 6b, on the representation of the accused in the investigative process and in military judicial proceedings?

(a) Any recorded statements of the victim to investigators.

(b) The record of any forensic examination of the person or property of the victim, including the record of any sexual assault forensic exam of the victim that is in possession of investigators or the Government and any photographs taken by the examiner during the medical-forensic exam.

(c) Any medical record of the victim that is in the possession of investigators or the government.

USA

Any policy on this topic should absolutely be uniform across all Services, should specifically identify the circumstances under which information is provided to a Special Victim Counsel (SVC) or directly to a complaining witness (CW), and should not be the subject of prosecutorial discretion. Current practice suggests information is already being shared to some extent through SVC disclosures, and a CW is always able to obtain their own personal medical records. Further, limited information sharing through the assigned SVC may improve expectation management for disposition process outcomes and improve the ability of an assigned SVC to adequately advise on topics that include level of CW participation and consideration of the full range of disposition alternatives.

That said, the obvious concern with providing information to a particular type of witness outside of already existing process, relates to the potential for unfairly influencing/minimizing what may otherwise present as inconsistent statements at trial. Any information provided to a CW has the potential to impact memory of the event. Providing information to any witness in advance of trial clearly elevates the risk, as unintentional as it may be, that witness testimony may be altered.

Highlighting potential inconsistencies in advance of trial may tempt a CW to alter testimony or cause unintentional / subconscious revisions to effect what is perceived as a more compelling narrative that side-steps concerns established by other evidence. Simply put, sharing information in advance of trial this way could at least appear calculated to enhance the government's ability to secure a conviction, even in the face of how evidence would otherwise be presented at trial.

Another negative aspect of such an expanded sharing policy is the potential for unintentional impact on medical personnel or law enforcement officials who may modify how they draft written reports, to include being less comprehensive in recording observations and opinions because of concern related to how a CW may react.

	<p>Also, just as important as what may be released to a CW, is the question of release timing. If there is going to be a policy or rule that expands the way information is provided to witnesses, the government should be required to provide the same information to the accused at least simultaneously so that the defense can better assess if there is an alteration or other testimonial change based on the provided information. To maximize at least the appearance of fairness, special CW releases should not occur before service on the accused and certainly not before arraignment, when major changes to the charge sheet require the accused’s consent.</p> <p>Limited medical record sharing is not likely objectionable, given the CW either provided those records or a court compelled their disclosure, as is the case in the majority of instances. However, it isn’t clear if carving out an exception to FOIA b(7) (records related to law enforcement) might undermine justification for the entire exemption. If so, one might risk opening more law enforcement files as subject to disclosure pursuant to FOIA. This risk may be greater the earlier any information is shared with the alleged victim. For instance, if information is shared pre-preferral—before the accused may even have counsel—it would seem odd that the alleged victim could have in depth knowledge of a pending investigation but the subject of that investigation would have no right to any information.</p>
<p>USMC</p>	<p>A uniform policy would be welcome by the USMC Defense Services Organization (DSO) insofar as such a policy outlines exactly what information victim’s counsel will receive and when, and such decisions will not be at the discretion of the prosecutor.</p> <p>That said, there are major concerns related to what information is provided to victim’s counsel. The DSO operates under the belief that, ultimately, all information provided to victim’s counsel will be provided to their client. The DSO’s chief concern is that the above proposal potentially distorts the memory of the complainant and impacts his/her trial testimony. It is well grounded in psychology that increasing inputs of information related to a particular event can alter how a witness remembers the event. As such, in order to maintain fair, accurate, and minimally biased testimony at trial, our system of justice should seek to minimize unnecessary pre-trial informational inputs for victims. All witnesses should testify to the best of their own belief and memory.</p> <p>Treating CWs who choose to have or “rate” VLC differently than those who don’t would be fundamentally unfair to CWs. The below list outlines our concerns:</p> <ol style="list-style-type: none"> 1. Providing law enforcement summaries. Any policy requiring summaries produced by law enforcement be provided to victims is problematic. Summaries often include the investigator’s interpretation of the events, gleaned from other aspects of the investigation, and not necessarily what the victim stated. Providing such information contaminates witness memory. Additionally, LE may begin to tailor summaries to be read more favorably to complaining witnesses (CW) in order to maintain their participation. There is no good reason to provide the information to the CW that would be different than providing it to any other witness in a case, which we do not do in order to maintain some integrity in the process. Similarly, no other jurisdiction provides this information to CWs. Notably, there is a law

	<p>enforcement exception to FOIA for just this purpose—to maintain the integrity of the investigative and court process.</p> <p>2. Providing SAFE reports. Similar to item 2, a SAFE report often includes information not relayed by the victim, such as the examiner’s opinion or conclusions. Providing this type of information contaminates the victim’s memory and impacts trial testimony.</p> <p>3. Providing forensic examinations of the victim’s property. The above negative impacts on the investigative and judicial proceedings apply to this investigative measure. Additionally, providing victim’s “[t]he record of any forensic examination of the [...] property of the victim” creates potential for overbroad access to information, likely not intended by the proposal. For example, the CW may be entitled to the digital forensic reports for all electronics in the home where the CW has a joint claim of ownership. This would be overbroad and creates any number of issues including impacts to the CW’s knowledge and memory of events.</p> <p>4. Impact on investigators. If law enforcement agents are aware that victims will receive copies of interviews or summaries/notes, it may affect law enforcement’s willingness to ask hard questions when they know the interview may be released, and may end up in the news, on social media, or strain the relationship with the CW who may be less likely to continue to cooperate or, on the other hand, take measures him/herself to try to “investigate” the case, rally witnesses, search for evidence etc. that negatively impacts LE’s ability to investigate.</p>
USAF	<p>The overall of effect on the administration of courts-martial within the Department of the Air Force should be minimal with the release of the above-listed materials. Medical records are already accessible by the alleged victim by virtue of being the patient. Moreover, the Department of the Air Force has a policy for providing items (a)-(c) listed above, and more, to the Victims’ Counsel (VC).</p> <p>Department of the Air Force Instruction (DAFI) 51-201, <i>Administration of Military Justice</i>, dated 14 April 2022, paragraph 8.5.3 gives Staff Judge Advocates discretion to release information in response to an official use request submitted by a VC. In Air Force practice, VC often request and receive relevant recorded statements made by their clients and SAFE reports in cases in which their clients are the named victim of a charged offense.</p> <p>The positive effects of disclosing this evidence is that alleged victims are able to prepare for trial and, particularly when there is a VC, to engage in well informed discussions related to the exercise of their rights under Article 6b and any inputs they may wish to provide related to case disposition.</p> <p>The potential negative effects are that witnesses may substitute their prior statements for their current recollection of events. However, that potential adverse impact is mitigated through discovery, pretrial interviews with the alleged victim, and cross-examination.</p>
USN	<p>The system would benefit from a uniform policy for sharing information with counsel representing an alleged victim. However, the court-martial's truth-seeking function must remain paramount when determining the appropriate policy.</p>

Therefore, neither the alleged victim nor their counsel should have access to investigative material which could distort, taint, or color the recollection of a percipient witness. Since most cases in which counsel represents an alleged victim are “special victims' cases,” this is of particular concern as the credibility of the alleged victim will always be a critical determination for the finder of fact.

In responding to these RFIs, the Navy Defense Service Offices (DSOs) assume that a victim’s legal counsel is ethically required to provide any information to their client that was provided to them in the course of their representation. Further, it would be incongruous for a victim’s counsel to exercise rights under Article 6b that the alleged victim themselves would not be able to exercise if they were unrepresented. Ultimately, the alleged victim is presumed to receive anything provided to the alleged victim's counsel.

An appropriate uniform policy would provide alleged victims access to their own statements or anything they created (e.g. diary entries, text messages, notes, letters). However, any such policy would not provide access to information related to their case that contains the impressions, observations, or conclusions of others, including the attorneys or investigators on the case.

(a) The Defense Services Offices assume the alleged victims and their counsel are provided a copy of recorded statements they made to investigators in any case handled by attorneys from a Region Legal Service Office based on a policy promulgated by the Assistant for Prosecution Services (APS). From the defense perspective, this policy has yet to have an appreciable impact on the fairness of courts-martial. The alleged victim is not gaining access to information beyond what he or she has already told investigators. A prior recorded statement, or the transcript of that statement, is the same information that trial counsel would likely use to refresh the alleged victim's memory. Therefore, providing the alleged victim with a copy of the recorded statement does not trigger concerns about how it could modify their independent memory of events or enable them to alter their memory to fit conflicting evidence.

(b) The alleged victim receiving records related to forensic examinations of their person or property, including photographs, will harm the fundamental fairness of the court-martial process. This risk of harm is particularly egregious when the alleged victim receives them through privileged communications from their counsel.

While alleged victims and their counsel sometimes gain insights about forensic evidence from pre-trial litigation, providing access to forensic examinations should not be the uniform policy. The purpose of forensic examinations is to preserve and develop reliable evidence. They can include third parties' observations, opinions, and conclusions, including nursing, pathology, or toxicology experts. These observations, opinions, and conclusions should not be made available to alleged victims. If an alleged victim is to provide reliable evidence, then the court-martial process should seek to insulate them from material that could intentionally or unintentionally contaminate their testimony. Observations by those seeking to preserve and collect evidence, including photographs, could distort, taint, or color

	<p>the witness's recollection. If investigators or trial counsel provide alleged victims with the results of forensic examinations, there is a real danger of unfair prejudice to Service Members facing trial. Because the conversations between counsel for an alleged victim and the alleged victim are privileged, and, therefore, shielded from discovery and off-limits during cross-examination, filtering information through that counsel only exacerbates the danger of prejudice to defense clients. This lack of transparency starkly contrasts with occasions when a trial counsel or investigator chooses to share or confront an alleged victim with information while subject to discovery obligations under R.C.M. 701(a)(6) and R.C.M. 914.</p> <p>There are no apparent positive effects from a change that would permit alleged victims, or their counsel, to obtain forensic examinations of their person or property, including photographs. Moreover, no other witness would be given access to investigative material because of the danger to the integrity of the investigation or trial.</p> <p>(c) An alleged victim, especially one with counsel, can obtain their own medical records. There should not be an additional uniform policy created to control a mechanism that already exists. Suppose the investigators or the government sought and obtained them as part of the investigation. Presumably, the records in this hypothetical have independent value to the investigation or prosecution of the case. Should the government or investigators seek clarification on that information with the complaining witness, it should be done as part of the investigation rather than funneling the information through privileged communication via counsel.</p>
USCG	See Navy's Response

2. Does your organization support or oppose the adoption of a uniform policy for the sharing of the information described in 1(a)-(c) above with counsel representing a victim? Why or why not?	
USA	The United States Army Trial Defense Service only supports an information sharing process expanded beyond currently existing mechanisms to the extent it clearly defines all circumstances under which information is provided directly to a CW or through a SVC, includes at least concurrent sharing with the accused, and is limited to non-forensic information originating with the CW, and is not subject to prosecutorial discretion. Information contemplated for CW release should not include forensic or investigatory comment, agent summaries, opinion, conclusion, or assessment as such editorializations are beyond the scope of what is relevant for someone who is merely a witness and not part of the prosecution team.
USMC	<p>The USMC DSO supports a policy if it clearly defines what can be provided to victim’s counsel to include limitations and requires notification to defense counsel of exactly what was provided to the victim’s counsel.</p> <p>Specifically, USMC DSO supports the adoption of 1(a) and 1(c) as long as it is only the recorded statement and non-forensic medical records of the victim, and not any supplemental material generated by investigating agencies as part of a report, such are summaries. In its current form, 1(b) is too broad to support.</p> <p>If this policy establishes a minimum of what must be provided to victim’s counsel but allows the prosecutor on a case-by-case basis to provide additional information (especially without notifying the Defense), USMC DSO does not support it.</p>
USAF	<p>The Air Force Trial Defense Division supports the adoption of a uniform policy for the sharing of the information described in 1(a)-(c) above, contingent on that policy embedding procedural safeguards to protect the rights of the accused and to ensure defense counsel is made aware of any disclosures made under the policy.</p> <p>(a) Any uniform policy should be accompanied by a requirement for VC to protect the matters listed in 1(a)-(c) from improper release to third parties.</p> <p>(b) Trial Counsel should be required, likely via amendment to the Rules for Courts-Martial, to maintain a log of any evidence that is provided to the VC and to disclose that log to the accused upon request. This will foster open discovery and ensure defense counsel are able to fully exercise their clients’ right to confront accusers at court-martial.</p> <p>(c) The policy should make clear that the defense has no obligation to disclose or to provide evidence to the alleged victim.</p>
USN	The Navy DSO does not oppose the adoption of a uniform policy which ensures a consistent practice for disclosures to the alleged victim and his or her counsel – with the caveats discussed in the earlier questions. However, the DSOs oppose any policy which seeks to elevate the rights of the alleged victim to be informed of matters beyond their own statements, as such a policy which could impede the truth seeking function of a court-martial. Specifically, we oppose providing the alleged

	victim, or their counsel, forensic examinations which could include observations and opinions of third parties.
USCG	Refer to Navy's Response.

3. Please identify and explain any recurring issues in your discovery practice regarding the sharing of information not listed above with counsel representing a victim.

USA

TJAG Policy 22-07, DoDI 6495.02, and general patient medical record access already contemplate CW information sharing. These also provide a commonly understood basis for standardized discovery practices. Issues potentially arise when a prosecution team goes beyond what is specifically authorized if additional information is shared with a CW and not the defense, which can lead to inefficiencies and/or substantive issues that require subsequent motions practice to remedy.

USMC

The Defense is not notified what information the trial counsel and NCIS provide to the VLC, and what is provided varies by case. The lack of standardization is difficult for all parties: the prosecutors seem to have difficulty deciding what should be disclosed, the VLC seek broader access than is necessary, and the defense is left in the dark about the information provided rightly necessary to their case preparation.

If any witness is testifying not based on his/her memory, but rather on something he/she read after the fact, that must be demonstrated to the trier of fact in order to maintain fairness to the process and to the accused. As such, it is critical that the Defense understand what information a victim is provided in pre-trial preparation.

Because the proposed rules would provide documents to the VLC to work with their clients and such work being protected communications, the ability for defense counsel to effectively cross examine a CW regarding their case preparation is unfairly limited. When a CW's credibility is critical to the outcome of the case—as it always is, how they prepared for trial is similarly a critical part of cross examination.

Two additional points raised by VLCs during former testimony: VLC want access to all case-related information and notice of all motions. The stated reason for the former was to “explain” to the CW why a case is not going forward. If the case is not going forward, there is no discovery process and FOIA rules apply for the CW to access investigations. As to the latter, CWs are not a party to the litigation and have a voice in only a narrow areas: 412, 413, 513, and quashing subpoenas as it applies to all witnesses. Motions regarding unlawful command influence, multiplicity, discovery etc., all routine motions brought in the course of litigation, are disagreements between the trial counsel/government and the accused/defense counsel. There is generally, with very rare exception, no amicus brief filing at the trial court. It is the trial and defense counsel's responsibility to make the strategic and tactical decisions about how to present their case at trial. To permit amicus briefs would turn the criminal court from “United States vs accused” to Plaintiff vs defendant.” As such, providing all motions to VLC and/or CWs necessarily means that all the exhibits and attachments that are rightfully withheld from disclosure would then be disclosed. Both of these “asks” are ways for the CW to circumvent

	<p>the truth seeking function and fundamental fairness necessary for a criminal justice system founded on integrity, fairness, and the Constitution.</p> <p>Bottom line: fundamental fairness in the court martial process weighs in favor of withholding all information from the VLC or CWs that is not solely the creation of the CW, for example their own statement or text messages.</p>
USAF	<p>The Air Force Trial Defense Division has identified the following recurring issues in our discovery practice regarding the sharing of information with the VC.</p> <p>Since 2020, the Air Force Trial Judiciary has utilized an electronic filing system where parties to the proceeding file their motions, pleadings, and various other documents. While hugely convenient for the prosecution, the defense, and the military judge, the electronic filing system effectively functions as an unintended tool for disclosure of substantial case evidence to the VC that would otherwise not be authorized. Because the Air Force Trial Judiciary establishes only one filing website for each case, VC are on the same website as the parties and, in light of the requirement to include supporting evidence as attachments to motions, thereby essentially become the recipients of large amounts of discovery to which they otherwise have no right under law or regulation, to include evidence that far exceeds the materials originating from the named victim described in 1(a)-(c).</p>
USN	<p>Judicial circuits have been inconsistent regarding which filings must be provided to counsel representing an alleged victim. As a result, in some circuits, counsel representing an alleged victim may receive all motions filed in the case, even if their client does not have standing to respond. This results in an alleged victim having constructive possession of voluminous documents from discovery. For example, suppose the defense counsel files a motion to suppress a statement or illegally obtained evidence. In that case, the enclosures may include the statements of the accused or the evidence obtained from the unlawful search. Counsel representing an alleged victim has no standing to respond to this type of motion, but they would then possess material they could share with their client. Filings like these often result in the most substantive portions of discovery, including summaries of the statements of other witnesses, being shared with the counsel for the alleged victim.</p> <p>The DSO's maintain that the alleged victim and her counsel should have limited standing based on Article 6b for issues like prior sexual behavior and the production of mental health records. Any discovery provided to the alleged victim that expands beyond those limited areas before a guilty finding poses a real danger to the system's fairness.</p>
USCG	<p>Refer to Navy's Response.</p>