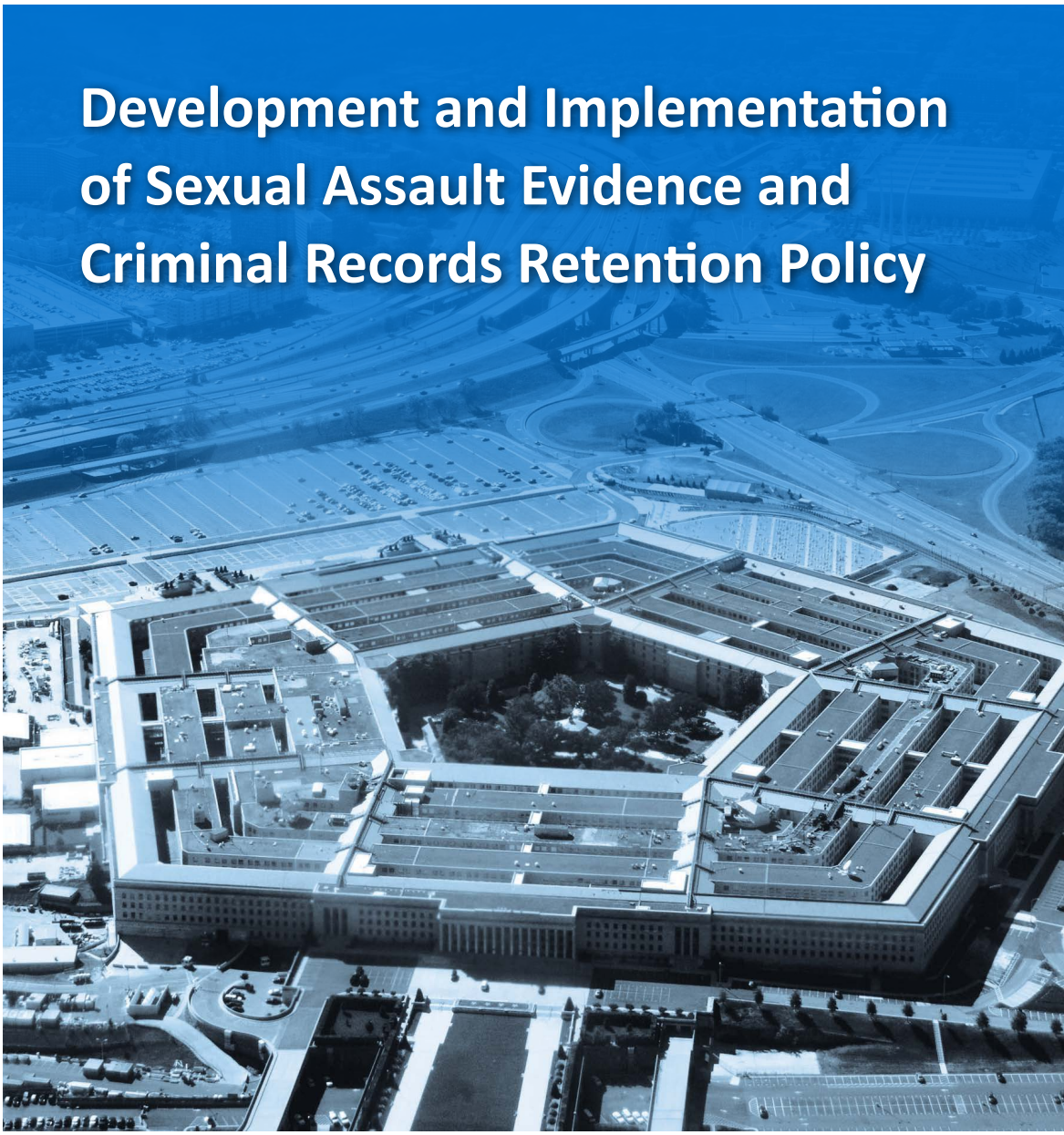
Report No. DODIG-2014-082

Inspector General

U.S. Department of Defense

JULY 11, 2014

Development and Implementation of Sexual Assault Evidence and Criminal Records Retention Policy



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Results in Brief

Development and Implementation of Sexual Assault Evidence and Criminal Records Retention Policy

July 11, 2014

Objective

We initiated this review as required by the "National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2014." Our objective was to review the Military Criminal Investigative Organizations'[1] (MCIO) progress in implementing DoD policy on the retention of and access to evidence and criminal records relating to sexual assault of service members as required by "The National Defense Authorization Act for Fiscal Year 2012," and Department of Defense Instruction (DODI) 5505.18, "Investigation of Adult Sexual Assault in the Department of Defense," January 25, 2013, Incorporating Change 1, May 1, 2013.

Findings

DoD has developed policy for retaining and accessing evidence and criminal records for sexual assault victims as required by NDAA FY 2012.

The MCIOs have issued Service-specific policies and procedures to implement Federal law and DoD guidance.

[1] The MCIOs are the Army Criminal Investigation Command, Naval Criminal Investigative Service, and Air Force Office of Special Investigations.

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Recommendations

None.

Management Comments

No written response to this report was required.

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
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July 11, 2014

MEMORANDUM FOR ASSISTANT SECRETARY OF THE AIR FORCE (FINANCIAL MANAGEMENT AND COMPTROLLER)
NAVAL INSPECTOR GENERAL
AUDITOR GENERAL, DEPARTMENT OF THE ARMY

SUBJECT: Development and Implementation of Sexual Assault Evidence and Criminal Records Retention Policy (Report No. DODIG-2014-082)

We are providing this report for information and use. Public Law 112-81, "National Defense Authorization Act for Fiscal Year 2012," Section 586, required the Secretary of Defense (Secretary) to develop a comprehensive DoD policy that incorporated 11 elements outlined in the Law on the retention of and access to evidence and records for sexual assaults involving service members.

Section 1734 of the National Defense Authorization Act for Fiscal Year 2014 directed the Secretary to review the progress made in developing and implementing sexual assault evidence and records retention and access policy required by NDAA FY 2012. A report to the Armed Services Committees in the Senate and House was due on June 24, 2014.

We reviewed DoD's progress in developing sexual assault evidence and criminal records retention and access policy, and the Military Criminal Investigative Organizations' progress in implementing that policy.

We found that DoD has developed policy for retaining and accessing evidence and criminal records for sexual assault victims as required, and the MCIOs have issued Service-specific policies and procedures to implement Federal law and DoD guidance.

For additional information on this report, please contact Mr. Jeff Bennett, Acting Director of Oversight, at (703) 699-5667.

Randolph R. Stone
Deputy Inspector General
Policy and Oversight

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Introduction

Objective

We initiated this review as required by the National Defense Authorization Act (NDAA) FY 2014, Section 1734, of the progress made in developing and implementing policy of retention and access to evidence and criminal records related to sexual assaults of service members.

The overall objective was to assess DoD's compliance with sexual assault evidence and criminal records retention and access requirements in Section 586, NDAA FY 12.

Specifically, we sought to determine whether the MCIOs are implementing sexual assault evidence and criminal records retention and access requirements in Department of Defense Instruction DoDI 5505.18, "Investigation of Adult Sexual Assault in the Department of Defense," January 25, 2013, Incorporating Change 1, May 1, 2013.

Background

Federal Law

On December 31, 2011, Public Law 112-81, "National Defense Authorization Act for Fiscal Year 2012," was enacted. Section 586 of the law, "Department of Defense Policy and Procedures on Retention and Access to Evidence and Records Relating to Sexual Assaults Involving Members of the Armed Forces," required the Secretary of Defense (Secretary) to develop a comprehensive DoD policy on the retention of and access to evidence and records for sexual assaults involving service members.

Section 586 specifically required that the policy address:

1. Identification of records, including non-Department of Defense records, relating to an incident of sexual assault that must be retained.
2. Criteria for collection and retention of records.
3. Identification of physical evidence and non documentary forms of evidence relating to sexual assaults that must be retained.

4. Length of time records, including Department of Defense Forms 2910 and 2911, and evidence must be retained, except that—

    a. the length of time physical evidence and forensic evidence must be retained, shall be not less than 5 years; and

    b. the length of time documentary evidence relating to sexual assaults must be retained shall be not less than the length of time investigative records relating to reports of sexual assaults of that type (restricted or unrestricted reports) must be retained.

5. Locations where records must be stored.

6. Media which may be used to preserve records and assure access, including an electronic systems of records.

7. Protection of privacy of individuals named in records and status of records under section 552 of title 5, United States Code (commonly referred to as the ''Freedom of Information Act'' (FOIA)), section 552a of title 5, United States Code (commonly referred to as the ''Privacy Act''), restricted reporting cases, and laws related to privilege.

8. Access to records by victims of sexual assault, the Department of Veterans Affairs, and others, including alleged assailants and law enforcement authorities.

9. Responsibilities for record retention by the military departments.

10. Education and training on record retention requirements.

11. Uniform collection of data on the incidence of sexual assaults and on disciplinary actions taken in substantiated cases of sexual assault.

On December 26, 2013, Public Law 113-66, "National Defense Authorization Act for Fiscal Year 2014," was enacted. Section 1734 directed the Secretary to review the progress made in developing and implementing sexual assault evidence and records retention and access policy required by NDAA FY 2012. A report to the Armed Services Committees in the Senate and House was due on June 24, 2014.

DoD Policy

In December 2011, DoD issued Directive Type Memorandum (DTM) 11-062, "Document Retention in Cases of Restricted and Unrestricted Reports of Sexual Assault." The

DTM 11-062 established DoD policy on the retention of sexual assault records pertaining to service members who report being sexual assault victims. The DTM incorporated Public Law 112-81, Section 586 requirements. It mandated retention schedules for records of service members who reported they are sexual assault victims based on whether they filed a Restricted or Unrestricted Report as defined in DoD Directive (DoDD) 6495.01, "Sexual Assault Prevention and Response (SAPR) Program," January 23, 2012 Incorporating Change 1, April 30, 2013. The DTM was effective immediately, served as interim guidance, and was ultimately incorporated into DoDD 6495.01 and DoDI 5505.18.

In January 2013, DoD issued DoDI 5505.18, which implemented Federal law, incorporated DTM 11-062's interim guidance for unrestricted reports, and established requirements, responsibilities, and procedures for conducting adult sexual assault criminal investigations within DoD.

The Instruction establishes policy and procedures for the MCIOs on retaining sexual assault criminal investigative reports, forensic examination forms and reports, disposition data, and physical and forensic evidence related to Unrestricted Reporting[2] of sexual assault. It also provides that access to criminal investigative records and files will be in accordance with DoD privacy policies in DoDD 5400.11, "DoD Privacy Program," May 8, 2007 and DoDD 5400.11-R, "Department of Defense Privacy Program," May 14, 2007, which implement the FOIA and the Privacy Act.

Scope and Methodology

Our review assessed the MCIOs' compliance with DoDI 5505.18 since its promulgation in January 2013. We focused on whether the Service MCIOs have developed and/or implemented policies and procedures and how these policies comply with requirements in the NDAA FY 2012, Section 586, and DoDI 5505.18.

We reviewed MCIO criminal investigative and evidence policies and procedures and met with MCIO representatives to discuss how they are implementing DoDI 5505.18 evidence and criminal records retention and access requirements.

[2] Per DoDD 6495.01, Unrestricted Reporting allows an individual to report the details of his/her sexual assault and receive medical treatment, counseling, and advocacy services, and the report triggers the official investigative process.

Results

1. **DoD has developed policy for retaining and accessing evidence and criminal records for sexual assault victims as required by NDAA FY 12.**
2. **The MCIOs have issued Service-specific policies and procedures to implement the federal law and DoD guidance.**

Discussion

1. *DoD has complied with NDAA FY 2012 requirements in developing and implementing a sexual assault evidence and criminal records retention and access policy.*

The NDAA FY 2012, Section 586, required DoD to develop a comprehensive sexual assault policy on evidence and records retention, and access, and include, at a minimum, 11 elements outlined in the law.

DTM 11-062 was the interim directive and the DoDI 5505.18 is the implementing guidance for DoD's comprehensive policy for evidence and criminal records retention and access, and incorporates the 11 elements in the NDAA. We identified the applicable sections of the Instruction that address promulgation and implementation of those 11 elements below.

A. *FY 2012 NDAA Element 1:*

Identification of records, including non-Department of Defense records, relating to an incident of sexual assault that must be retained.

DoDI 5505.18, Enclosure 2, paragraphs 8 and 9, require MCIOs to retain DD Form 2911, "DoD Sexual Assault Forensic Examination (SAFE) Report," or reports from civilian sexual assault forensic exams conducted at civilian healthcare facilities. MCIOs must also retain all final sexual assault disposition data and investigative reports.

B. FY 2012 NDAA Element 2:

Criteria for collection and retention of records.

DoDI 5505.18, Enclosure 2, paragraphs 8 and 9, require MCIOs to retain DD Form 2911, or reports from civilian sexual assault forensic exams conducted at civilian healthcare facilities, all final sexual assault disposition data, and investigative reports for 50 years. If the investigation was referred to another agency, the MCIO must obtain disposition and final investigative reports from the lead investigative agency and retain them for 50 years.

C. FY 2012 NDAA Element 3:

Identification of physical evidence and non-documentary forms of evidence relating to sexual assaults that must be retained.

DoDI 5505.18, Enclosure 2, paragraph 6e, requires that primary MCIO investigators assigned to conduct sexual assault investigations be properly trained in conducting such investigations.

D. FY 2012 NDAA Element 4:

Length of time records, including Department of Defense Form 2911, and evidence must be retained except that:

DoDI 5505.18, Enclosure 2, paragraphs 8 and 9, require MCIOs to retain DD Form 2911, or reports from civilian sexual assault forensic exams conducted at civilian healthcare facilities, all final sexual assault disposition data, and investigative reports for a period of 50 years. If the investigation was referred to another agency, the MCIO must obtain disposition and final investigative reports from the lead investigative agency and retain them for 50 years.

a. FY 2012 NDAA Element 4a:

The length of time physical evidence and forensic evidence must be retained shall be not less than 5 years; and

DoDI 5508.18, Enclosure 2, paragraph 10, requires all physical and forensic evidence relating to sexual assaults involving service members be retained for a period of at least 5 years from the date the evidence is acquired. However, in certain circumstances

evidence may be returned to the owner prior to the 5-year period after authorization from the court-martial convening authority when:

a. It is determined that the allegation is unfounded, i.e., the crime did not occur and/or it was a false allegation;

b. The subject is acquitted or the appeal process has been exhausted; or

c. The evidence is taken from a suspect who is later deemed to be the wrong person, i.e., mistaken identity.

b. FY 2012 NDAA Element 4b:

The length of time documentary evidence relating to sexual assaults must be retained shall be not less than the length of time investigative records relating to reports of sexual assaults of that type (restricted or unrestricted reports) must be retained.

DoDI 5505.18, Enclosure 2, paragraphs 8 and 9, require MCIOs to retain documentary evidence related to sexual assault for a period of 50 years.

E. FY 2012 NDAA Element 5:

Location where records must be stored.

DoDI 5505.18, paragraph 3a, requires criminal investigative records be maintained in accordance with DoD privacy policies.

F. FY 2012 NDAA Element 6:

Media which may be used to preserve records and assure access, including an electronic system of records.

DoDI 5505.18, Enclosure 2, paragraphs 8 and 9, require MCIOs to retain DD Form 2911, or reports from civilian sexual assault forensic exams conducted at civilian healthcare facilities, all final sexual assault disposition data, and investigative reports for a period of 50 years. If the investigation was referred to another agency, the MCIO must obtain disposition and final investigative reports from the lead investigative agency and retain them for 50 years. If creating digital records, the DD Form 2911 is uploaded as part of the archived file.

G. FY 2012 NDAA Element 7:

Protection of privacy of individuals named in records and status of records under section 552 of title 5, United States Code (commonly referred to as the "Freedom of Information Act"), restricted reporting cases, and laws related to privilege.

DoDI 5505.18, paragraph 3a, requires MCIOs to protect individuals' privacy in accordance with DoDD 5400.11, "DoD Privacy Program," May 8, 2007, Incorporating Change 1, September 1, 2011, which directs that "the legal rights of individuals shall be protected when collecting, maintaining, using or disseminating personal information about individuals."

H. FY 2012 NDAA Element 8:

Access to records by victims of sexual assault, the Department of Veterans Affairs, and others, including alleged assailants and law enforcement authorities.

DoDI 5505.18, paragraph 3a, requires MCIOs to comply with Freedom of Information Act requests, while assuring the individual's privacy in accordance with the Privacy Act, legal privileges, and DoD privacy program directives.

I. FY 2012 NDAA Element 9:

Responsibilities for records retention by the military departments.

DoDI 5505.18, paragraph 1, established policy, assigned responsibilities and provided procedures for sexual assault criminal investigative records and physical evidence retention for the Service MCIOs. Paragraph 2 states it applies to the military departments.

J. FY 2012 NDAA Element 10:

Education and training on record retention requirements.

DoDI 5505.18, paragraph 4b(1) assigns responsibility for education and training on records retention requirement. The Instruction states that component heads will ensure compliance with the Instruction and prescribe additional procedures as necessary to implement its policy. The MCIOs have also instituted various procedures to ensure continued education and training through basic and supplemental training at special agent training academies, computer-based training, and Inspector General inspections and site visits.

K. FY 2012 NDAA Element 11:

Uniform collection of data on the incidence of sexual assaults and on disciplinary actions taken in substantiated cases of sexual assault.

DoDI 5505.18, Enclosure 2, paragraph 12, requires all MCIOs to provide unrestricted sexual assault data elements for incorporation into the Defense Sexual Assault Incident Database. Additionally, paragraph 4 requires that commanders provide the MCIOs all disposition data, to include any administrative, non-judicial punishment or judicial action taken.

2. The MCIOs are implementing DoDI 5505.18 requirements for evidence and records retention and access.

The MCIOs have issued Service-specific guidance on conducting criminal investigations that include DoD requirements for sexual assault evidence and criminal records retention and access.

The Army's Criminal Investigation Command (CID) implements DoD sexual assault investigation guidance in CID Regulation 195-1, "Criminal Investigation Operational Procedures," March 4, 2014. The Regulation established policies on criminal investigation activities, "including the utilization and control, and investigative responsibilities of all personnel assigned to the U.S Army Criminal Investigation Command elements."

The Navy's Naval Criminal Investigative Service (NCIS) has issued NCIS Policy Document 13-06, "Investigation of Adult Sexual Assaults," October 7, 2013, that outlined NCIS policy on sexual assault investigations.

The Air Force's Office of Special Investigations (AFOSI) sexual assault investigation guidance is outlined in its "Office of Special Investigations Manual 71-118 Volume 4, General Investigative Methods," April 5, 2012, Incorporating Change 4, March 1, 2013. The Manual provides policy, guidance, and procedures necessary to standardize investigative operations, and ensure investigative sufficiency for general investigative methods common to AFOSI.

Conclusion

We concluded that DoD has implemented NDAA FY 2012 requirements as they pertain to evidence and records associated with criminal investigations through DTM 11-062, and then DoDI 5505.18, and the MCIOs are implementing the requirements by establishing specific policies and procedures.

Appendix

References

Federal Law

10 U.S.C. § 1561, "Comprehensive Policy on Retention and Access to Records." Provides the Military Departments a comprehensive policy on the retention of and access to evidence and records relating to sexual assaults involving members of the Armed Forces.

Public Law 112-81, Section 586, "National Defense Authorization Act for Fiscal Year 2012," December 31, 2011. Requires the Military Departments to establish policy to ensure the preservation of records and evidence for periods of time that ensure members of the Armed Forces and veterans of military service who were victims of sexual assault during the military service are able to substantiate claims.

Public Law 113-66, Section 1734, "National Defense Authorization Act for Fiscal Year 2014," December 26, 2013. Directed the Secretary to review the progress made in developing and implementing sexual assault evidence and records retention and access policy required by NDAA FY 2012.

DoD Issuances

DoD Directive 5400.7, "DoD Freedom of Information Act Program," January 2, 2008. Makes available DoD records requested by a member of the public who explicitly or implicitly cites the FOIA.

DoD Directive 5400.11, "DoD Privacy Program," May 8, 2007, Incorporating Change 1, September 1, 2011. Ensures the legal rights of individuals shall be protected when collecting, maintaining, using or disseminating personal information about individuals.

DoD Directive 6495.01, "Sexual Assault Prevention and Response (SAPR) Program," January 23, 2012 Incorporating Change 1, April 30, 2013. Implements DoD policy and assigns responsibilities for the SAPR Program on prevention, response, and oversight to sexual assault.

DoD Instruction 5505.18, "Investigation of Adult Sexual Assault in the Department of Defense," January 25, 2013 (Incorporating Change 1, May 1, 2013). Establishes policy, assigns responsibilities, and provides procedures for the investigation of adult sexual assault within the DoD in accordance with the authority in Appendix 3 of Title 5,

United States Code (U.S.C.) and DoD Directive (DoDD) 5106.01, " Inspector General of the Department of Defense (IG DoD)," April 20, 2012.

Directive Type Memorandum (DTM) 11-062, "Document Retention in Cases of Restricted and Unrestricted Reports of Sexual Assault," December 16, 2011, Incorporating Change 2, December 7, 2012. The DTM established DoD policy on the retention of sexual assault records pertaining to service members who report being sexual assault victims. The DTM mandated retention schedules for records of service members who reported they are sexual assault victims based on whether they filed a Restricted or Unrestricted Report as defined in DoD Directive (DoDD) 6495.01, "Sexual Assault Prevention and Response (SAPR) Program," January 23, 2012 Incorporating Change 1, April 30, 2013.

Service Issuances

U.S. Army Regulation 195-5, "Evidence Procedures," February 22, 2013. Establishes policies and procedures on criminal and counterintelligence investigation evidence procedures, including the collection, accounting, preservation, and disposition of evidence.

U.S. Army Criminal Investigative CID Regulation 195–1, "Criminal Investigation Operational Procedures," March 4, 2014. Establishes procedures pertaining to criminal investigative activities, reporting of criminal incidents, support functions, and other CID operations.

U.S. Army Criminal Investigative CID Regulation 195–2, "Criminal Investigation Activities," May 15, 2009, Rapid Revision Issue: September 6, 2011. Prescribes Department of the Army (DA) policy on criminal investigation activities, including the utilization, control, investigative authority, and responsibilities of all personnel assigned to elements of the U.S. Army Criminal Investigation Command (USACIDC).

ALCID Memorandum 013-13, "Guidance on Retention of Sexual Assault Evidence," May 8, 2013. Implements DoD IG guidance regarding the retention of sexual assault evidence. The DoDIG has recognized the need to modify the retention standards.

ALCID Memorandum 024-13, "Guidance on Retention of Sexual Assault Evidence," November 15, 2013. Modify guidance regarding the retention of sexual assault evidence.

SECNAV M-5210.1, "Department of the Navy Records Management Program," January 2012, Revision 1 Incorporated May 2012. Establishes policies and procedures

for life cycle management (creation, maintenance, use, and disposition) of DON records. Also provides guidelines and procedures for the proper administration of a records management program and contains all DON records disposition schedules approved by the National Archives and Records Administration (NARA).

NCIS-1, Chapter 5, "Inspector General Matters," December 2006. Describes NCIS IG responsibility for providing oversight to the efficiency, effectiveness, and integrity of NCIS operations and personnel.

NCIS-1, Chapter 19, "File Retention and Disposal of Closed Case Law Enforcement Case," September 2008. Provides for systematic retention and retrieval of all NCIS investigative, counterintelligence, counterterrorism, and Security Clearance Adjudication closed case files.

NCIS-1, Chapter 20, "Freedom of Information Act Policy," December 2006. Sets forth-basic policy and procedures for making NCIS records available to the public.

NCIS-1, Chapter 21, "Personal Privacy and Rights of Individuals (Privacy Act)," December 2006. Sets forth-basic policy and procedures concerning the rights of individuals to records concerning them as well as restrictions imposed on the collection and disclosure of personal information from records systems.

NCIS-3, Chapter 13, "Evidence Custody System," December 2006. Establishes policies and procedures on criminal investigation evidence procedures, including the collection, accounting, preservation, and disposal of evidence.

NCIS-3, Chapter 34, "Sex Offenses", September 2007. Provides policy and procedures for criminal investigations conducted by NCIS into sex-related offenses.

General Administration 11C-0028, NCIS Policy Document 13-06, "Investigation of Adult Sexual Assaults," October 7, 2013. Updates NCIS policy governing the investigation of adult sexual assaults and requirements established by DoDI 5505.18 regarding investigation of reported adult sexual assaults; requirements related to suspected threats against sexual assault victims; and reporting, notification, and training responsibilities for investigators.

Air Force Office of Special Investigations Manual 71-118V4, "General Investigative Methods," Incorporating All Changes Through Change 4 (IC-4, March 1, 2013). Provides

policy, guidance, and procedures necessary to comply with laws and higher directives, ensure health and safety, standardize investigative operations, and ensure investigative sufficiency for general investigative methods.

Air Force Office of Special Investigations Guidance Memorandum Air Force Office of Special Investigations Manual 71-121 GM-06, "Adult Sexual Assault Case Guidance," March 1, 2013. Consolidates and implements various Department of Defense, Air Force, and AFOSI policies on initiating, conducting, and documenting sexual assault investigations.

Air Force Office of Special Investigations Manual 71-121, "Processing and Reporting Investigative Matters," January 13, 2009, Incorporating All Changes Through Change 5 (IC-5, October 12, 2012). Provides guidance in receiving, documenting, reviewing, and reporting investigative matters utilizing AFOSI's Investigative Information Management Systems (I2MS). This manual also prescribes guidance for closing, screening, archiving, mailing, and storing AFOSI files and provides information, guidance, and procedures for processing, documenting, and reporting investigative matters.

Air Force Office of Special Investigations Manual 71-122V1, "Criminal Investigations," September 28, 2012, Incorporating All Changes Through Change 2 (IC-2, August 14, 2013). Provides guidance on certain drug investigations and sexual assault investigations due to changes in law and Department of Defense policy regarding these types of investigations.

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