

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

CARMEN J. CARDONA,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 11-3083
)	
ERIC K. SHINSEKI,)	
Secretary of Veterans Affairs,)	
)	
Appellee,)	
)	
)	
BIPARTISAN LEGAL ADVISORY)	
GROUP OF THE U.S. HOUSE OF)	
REPRESENTATIVES,)	
)	
Intervenor.)	

**SECRETARY’S RESPONSE TO MOTION OF INTERVENOR BIPARTISAN
LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES
FOR ACCESS TO THE RECORD BEFORE THE AGENCY**

Appellee, Eric K. Shinseki, Secretary of Veterans Affairs (Secretary), hereby respectfully responds to the June 26, 2012 motion of Intervenor-Appellee Bipartisan Legal Advisory Group of the U.S. House of Representatives (BLAG) for access to (to compel production of) the Record Before the Agency (RBA). In response, the Secretary states that the RBA is a complete copy of all material contained in a veteran’s claims file as of the date of the decision of the Board of Veterans’ Appeals (Board) on appeal, and includes all documents and correspondence submitted to, or obtained by, the Secretary with respect to that

veteran regardless of the relevance of that document to the issue or issues on appeal. U.S. Vet. App. R. 10(a)(1). These records are statutorily protected under both the Privacy Act of 1974, 5 U.S.C. § 522a (the Privacy Act), and 38 U.S.C. § 5701 which prohibit disclosure of such records without prior written consent of Appellant or pursuant to specific statutory exceptions. In the absence of an exception to both statutes, the Secretary is prohibited from disclosing a veteran's claims file, to include in the form of the RBA. In this case, for reasons that follow, insofar as Appellant has indicated that she does not consent to the release of the RBA, it is the Secretary's position that, in accordance with both the Privacy Act and section 5701, disclosure of the RBA to BLAG is permitted only upon direct order of the Court.

A. Disclosure under the Privacy Act of 1974, 5 U.S.C. § 522a

The Privacy Act prohibits "agency" disclosure of "any record which is contained in a system of records . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains" unless otherwise provided. 5 U.S.C. § 552a(b). Potentially applicable exceptions under the Privacy Act include where disclosure is made "to either House of Congress" or "pursuant to the order of a court of competent jurisdiction." 5 U.S.C. § 552a(b)(9), (11).

With respect to the former, on June 20, 2012, counsel for the U.S. House of Representatives (the House) made an oral request for the RBA, after which, on June 21, 2012, the Secretary requested that the House provide some form of

documentation that BLAG, the Intervenor-Appellee, was authorized to request such records on behalf of the House. As of this date, the Secretary has not received any documentation indicating that BLAG is authorized to request records on behalf of the House and, as such, is not persuaded that the disclosure restrictions of the Privacy Act are excepted on the basis of disclosure being made “to either House of Congress.” Accordingly, it is the Secretary’s position that disclosure of the RBA to BLAG in this case would be authorized under the Privacy Act only pursuant to an order of this Court directing such disclosure.

BLAG also asserts that disclosure of the RBA is required under the “routine use” exception. See 5 U.S.C. § 552(b)(3). Routine use of a record “means . . . the use of such record for a purpose which is compatible with the purpose for which it was collected.” 5 U.S.C. § 552(a)(7). The routine use exception applies only if the routine use relied on for the purpose of disclosure is published by the agency in the federal register. 5 U.S.C. § 552a(e)(4). No routine use has been promulgated permitting disclosure to Congress under these circumstances. See VA System of Records, 58VA21/22, Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records – VA, published at 74 Fed. Reg. 29275, 29276 (June 19, 2009). Indeed, the only routine use pertaining to Congress permits disclosures for the purpose of constituent service,¹ which is not the situation in the case at bar. Accordingly, the

¹ The routine use reads as follows: “The record of an individual who is covered by this system or [sic] records may be disclosed to a Member of Congress, or

routine use exception does not authorize or otherwise require the disclosure of the RBA to BLAG.

BLAG not only ignores this critical (and dispositive) requirement of publication but, insofar as it argues the “production of a Record Before the Agency to the parties to pertinent litigation is indisputably an act compatible with the purpose for which that record was created,” BLAG Mo. at 9, it misconstrues the RBA as a single record or single type of record collected for the purpose of litigation rather than what it is, which is a collective of every record contained in a veteran’s claims file. A typical RBA can contain documents that run the gamut from claims forms, procedural documents, copies of administrative decisions and correspondence, to sensitive personal, medical and financial information. Because a veteran’s claims folder is veteran-specific rather than claim-specific, the RBA generally includes many documents and records that are irrelevant to the particular claim(s) or issue(s) on appeal. See U.S. Vet. App. R. 10(c) (“The record before the agency may include many documents not relevant to the issues on appeal. It will not be filed with the Court unless the Court so orders.”). Indeed, because the documents and records of which the RBA is comprised may be submitted for any number of reasons and with respect to any one or more claims pursued by a veteran/claimant, a disclosure under the routine use

staff person acting for the member when, the member or staff person requests the record on behalf of and *at the written request of that individual.* See VA System of Records, 58VA21/22 (emphasis added).

exception would still not permit the disclosure of every document and record contained in the RBA.

B. Disclosure under 38 U.S.C. 5701

In addition to the Privacy Act of 1974, section 5701 of title 38 protects the confidential nature of records associated with veterans' claims:

All files, records, reports, and other papers and documents pertaining to any claim under any of the laws administered by the Secretary and the names and addresses of present or former members of the Armed Forces, and their dependents, in the possession of the Department shall be confidential and privileged, and no disclosure thereof shall be made except as provided in this section.

38 U.S.C. § 5701(a). Exceptions to nondisclosure under section 5701 include when either disclosure is required by a United States court to be produced in court proceedings or the Secretary deems disclosure "necessary and proper." 38 U.S.C. § 5701(b)(2), (5).

With respect to the former, the Court's rules expressly provide that a copy of the RBA shall be served on "the appellant," i.e., the individual to who the records pertain. U.S. Vet. App. R. 10(a)(4). This is consistent with the first party access right under the Privacy Act (5 U.S.C. § 552a(d)(1) and section 5701(b)(1)). The Court's rules do not require (or even appear to contemplate) service of the RBA upon a third party such as the Intervenor-Appellee. Moreover, the RBA is not filed with the Court. U.S. Vet. App. R. 10(c). Therefore, while the Secretary is not unsympathetic to BLAG's request, it is his position that disclosure of the RBA to BLAG is not authorized on the basis that

such disclosure is required by a process of the Court. *Cf.* U.S. Vet. App. R. 28.1 (regarding service and filing of the Record of Proceedings); *In re a Motion for a Standing Order*, 1 Vet.App. 555, 560 (1990). Even if this Court were to find that its process requires disclosure of the records contained in Appellant's RBA to BLAG, disclosure would be limited to only those records relevant to the particular claim on appeal. See Fed. R. Civ. P. 26(b)(1) (providing that scope of discovery in civil proceeding is limited to "nonprivileged matter that is relevant to any party's claim or defense"); *cf.* U.S. Vet. App. R. 10(c) (recognizing that the RBA "may include many documents not relevant to the issues on appeal"). Thus, even under this exception, absent further direct order of the Court, the Secretary would be prohibited from disclosing Appellant's entire RBA to BLAG.

With respect to the latter exception, in light of the fact that a veteran's claims folder is veteran-specific rather than claim-specific and thus typically includes material unrelated to the particular claim on appeal to the Court, to include unrelated documents and reports that are sensitive and personal in nature, the Secretary determined that disclosure of the entire RBA to BLAG in the instant case was not necessary and proper. While the Secretary recognizes that BLAG has an interest in seeing first-hand the documents relied on by the parties to establish certain facts, for example, Appellant's standing to challenge the constitutionality of the statutes at issue in this case, it is the Secretary's position that the Record of Proceedings (ROP) should suffice to permit BLAG to draft its brief and fully advocate its position.

Indeed, on June 21, 2012, Counsel for the Secretary notified the Office of the General Counsel of the House that the Secretary would not oppose a motion to produce the ROP at this stage of the proceedings. In contrast with the RBA, the ROP, is claim-specific and contains those documents in the RBA that are relevant to or relied on by the parties in their respective briefs. See U.S. Vet. App. R. 28.1 (The record of proceedings shall contain . . . any document from the record before the agency cited in a brief . . . and, any other documents before the Secretary and the Board that are relevant to the issues before the Board that are on appeal to the Court or relevant to the issues otherwise raised in the appeal”).

Accordingly, for the reasons stated herein, it is the Secretary’s position that disclosure of the RBA to BLAG would not be authorized by either the Privacy Act or section 5701 in the absence of an order of this Court directing such disclosure.

WHEREFORE, Appellee, Eric K. Shinseki, Secretary of Veterans Affairs, respectfully responds to Intervenor BLAG’s motion for access to the RBA.

Respectfully submitted,

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