

THE DUTY TO ASSIST & LOCATING RECORDS

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AGENDA



- **Duty to Assist (DTA)**
 - Non-Federal Records
 - Federal Records
 - Compensation claims
- **When VA Need Not or Cannot Obtain Records**
- **NPRC and Location of Records**
- **VA MRRC**
- **Courts-Martial Transcripts, Other Resources**

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DUTY TO ASSIST



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38 U.S.C. § 5103A

- **VA has a statutory duty to assist claimants**
 - VA must make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate a claim
 - VA NOT required to assist if no reasonable possibility exists that such assistance would aid in substantiating the claim.
 - VA may defer assistance pending the submission by the claimant of essential info missing from claimant's application


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DUTY TO ASSIST IN OBTAINING RECORDS

- **VA's duty to assist in obtaining records is set forth in statute and regulation:**
 - Private (non-Federal) records
 - 38 U.S.C. § 5103A(b)
 - 38 C.F.R. § 3.159(c)(1)
 - Records in the custody of Federal dep't or agency
 - 38 C.F.R. § 3.159(c)(2)
 - Obtaining records for compensation claims
 - 38 U.S.C. § 5103A(c)
 - 38 C.F.R. § 3.159(c)(3)

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WHEN DTA APPLIES

- **Legacy Claims:**
 - From when VA received a complete or substantially complete application, throughout pendency of claim (including at BVA)
- **AMA Claims:**
 - From when VA receives a substantially complete initial or supplemental claim, until RO issues notice of decision on claim
 - When claim is returned by HLR or BVA for correction of DTA error, until RO issues notice of decision on returned claim
 - Does NOT apply to claims before HLR or BVA
- **Fully Developed Claims (AMA or Legacy):**
 - VA must obtain VA medical records, STRs/SPRs, provide VA exam
 - VA will NOT obtain private records

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OBTAINING PRIVATE RECORDS

- Private records include records of:
 - State and local governments
 - Private medical care providers
 - Current and former employers
 - Other non-Federal gov't sources


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OBTAINING PRIVATE RECORDS


- If claimant wants VA to attempt to obtain private records, claimant must provide enough info to identify and locate the records, including:
 - The person, company, agency, or other custodian holding the records
 - Approximate time frame covered by the records
 - For medical treatment records, the condition for which treatment was provided
 - If necessary, authorization for the release of records in a form acceptable to the custodian holding the records
 - 38 C.F.R. § 3.159(c)(1)(i), (ii)
- In many cases, it's better for Vet to get records on own and submit to VA

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SURVEY #1

- After initial request, how many follow-up requests must VA usually make for non-Federal records?
 - A. Zero
 - B. At least one
 - C. Two
 - D. Unlimited



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ANSWER

B

- Reasonable efforts to obtain private records generally consist of an initial request for the records and at least one follow-up request
- If after requesting records, VA receives info showing that requests to another custodian could result in obtaining the records, VA must make an initial request to the new source and, if VA does not receive the records, at least one follow-up request to the new source or an additional request to the original source
- Exception:
 - If response to initial request indicates that the records do not exist or that a follow-up request for the records would be futile
- 38 U.S.C. § 5103A(b)(2)(B); 38 C.F.R. § 3.159(c)(1)

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OBTAINING FEDERAL RECORDS

- Records in the custody of a Federal dep't or agency:
 - Military records, including SMRs / STRs
 - Medical and other records from VA medical facilities
 - Records from non-VA facilities providing exam or treatment at VA expense
 - Records from other Federal agencies, such as SSA

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OBTAINING FEDERAL RECORDS

- If claimant wants VA to attempt to obtain Federal records, claimant must provide enough info to identify and locate the records including, if requested:
 - The custodian or agency holding the records
 - Approximate time frame covered by the records
 - For medical treatment records, the condition for which treatment was provided
 - For records to corroborate a claimed in-service stressor, info sufficient for the custodian to search corroborative records
 - Authorization for the release of records in a form acceptable to the custodian holding the records
 - 38 C.F.R. § 3.159(c)(2)(i), (ii)

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SURVEY #2

• How many requests must VA make for Federal records?

- A. One
- B. Two
- C. Three
- D. As many as necessary

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ANSWER

D

- VA will make as many requests as are necessary to obtain relevant records from a Federal dep't or agency
- VA may end its efforts only if it concludes that the records do not exist or that further efforts to obtain those records would be futile
- Includes when the dep't or agency advises VA that the records do not exist or the custodian does not have them
 - 38 U.S.C. § 5103A(c)(2); 38 C.F.R. § 3.159(c)(2)

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OBTAINING RECORDS FOR COMPENSATION CLAIMS

- In claims for disability compensation, VA must make efforts to obtain the Vet's:
 - SMRs, if relevant to the claim
 - Other relevant records pertaining to the claimant's active service that are held or maintained by a gov't entity
 - VAMRs or records of exam or treatment at non-VA facilities authorized by VA
 - Any other relevant records held by any Federal dep't or agency
 - 38 C.F.R. § 3.159(c)(3); see 38 U.S.C. § 5103A(c)(1)

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SURVEY #3

• In claims for compensation, when is VA NOT required to attempt to obtain VA medical records?

- A. When they are not relevant to the claim
- B. When there is no reasonable possibility obtaining them would substantiate the claim
- C. Both A and B
- D. VA must always attempt to obtain them

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ANSWER

B

- VA has a duty to obtain VA medical records, regardless of their relevance to the claim
- BUT, VA need not obtain them if there is “no reasonable possibility that such assistance would substantiate the claim”
 - Standard NOT met by mere belief that the likelihood of finding a record substantiating a Vet’s claim is low or extremely low
 - Vet NOT required to show that a particular record exists or that such a record would independently prove the claim
- *Sullivan v. McDonald*, 815 F.3d 786 (Fed. Cir. 2016); *Jones v. Wilkie*, 918 F.3d 922 (Fed. Cir. 2019)

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OBTAINING RECORDS FOR COMPENSATION CLAIMS

- If Vet wants VA to attempt to obtain these records, Vet must provide enough info to identify and locate the existing records, including:
 - The custodian or agency holding the records
 - The approximate time frame covered by the records
 - In the case of medical treatment records, the condition for which treatment was provided
- 38 C.F.R. § 3.159(c)(3)

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OBTAINING RECORDS FOR COMPENSATION CLAIMS



- Because the records (SMRs, VAMRs, etc.) are Federal records, VA must make as many requests as are necessary to obtain them
- VA may end its efforts only if it concludes that the records do not exist or that further efforts to obtain those records would be futile
 - 38 U.S.C. § 5103A(c)(2); 38 C.F.R. § 3.159(c)(2)

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WHEN VA NEED NOT OR CANNOT OBTAIN RECORDS






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ASSISTANCE NOT REQUIRED



- VA need not provide assistance in obtaining evidence if the application for benefits indicates that there is **no reasonable possibility that any assistance VA would provide would substantiate the claim**
- VA will stop providing assistance in obtaining evidence if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim
- Examples:
 - Claimant ineligible for benefit because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility
 - Claim inherently not credible or clearly lacks merit
 - Claimant is not entitled to benefit as a matter of law
 - 38 C.F.R. § 3.159(d)

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REQUESTED RECORDS NOT OBTAINED



- If VA is unable to obtain requested records, it must provide oral or written notice including:
 - Identity of the records VA was unable to obtain
 - Explanation of the efforts VA made to obtain the records
 - Description of any further action VA will take regarding the claim, including that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain
 - Claimant is ultimately responsible for obtaining the evidence
- 38 C.F.R. § 3.159(e)(1)

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WHEN VA LEARNS OF RELEVANT RECORDS



- If VA becomes aware of the existence of relevant records before deciding a claim, VA will notify the claimant of the existence of the records and ask that the claimant provide a release for them
- If the claimant does not provide any necessary release, VA will ask the claimant to obtain the records and provide them to VA
- 38 C.F.R. § 3.159(e)(2)

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DUTY TO ASSIST VIOLATIONS




- VA must obtain VA outpatient records, Vet Center records, and retired VA medical/clinical records that are referenced in other documents of record, even though Vet does not ask VA to get them
- VA errs if it cites lack of relevance as reason for failing to obtain VA medical records


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DUTY TO ASSIST VIOLATIONS




- Where there is notice to VA that Vet is receiving SSA disability benefits, VA must acquire a copy of the SSA decision granting disability benefits and the supporting medical documentation relied upon
- Exception: SSA records not pertinent (potentially relevant) to the claim




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DUTY TO ASSIST VIOLATIONS



- Service Personnel Records (SPRs or “201” file) contain important info about Vet’s combat history, medals, awards, etc.
- Helpful for PTSD claim or for application of 38 U.S.C. § 1154(b) for combat-related disabilities
- Performance Evals – helpful in PTSD cases, especially personal assault cases
- TDY records – helpful to prove Vietnam service
- DTA error if SPRs may be relevant to claim and VA fails to attempt to obtain them



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DUTY TO ASSIST VIOLATIONS



- VA fails to make sufficient requests for verification of exposure or stressor events to the VA Military Records Research Center (RRC)
- Although RRC requires 120-day research window, VA must make multiple requests covering different 120-day periods if Vet identifies longer date range of possible exposure or stressor incident
- Gagne v. McDonald*, 27 Vet. App. 397 (2015)


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THE NATIONAL PERSONNEL RECORDS CENTER (NPRC)

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NPRC

- NPRC is part of the National Archives and Records Administration (NARA)
- Located in St. Louis, MO
- NPRC houses SPRs, some SMRs, and some clinical records, and responds to requests for record searches
- Most NPRC records are in paper form and have to be manually searched
- Holds 80 million records



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RECORDS AT NPRC

- Personnel records kept at NPRC for Vets discharged, deceased, or retired:
 - Army: prior to 10/1/2002 (STRs prior to 10/16/1992)
 - Navy: through the present (STRs prior to 1/31/1994)
 - Air Force: prior to 10/1/2004 (STRs prior to 5/1/1994)
 - Marine Corps: prior to 1/1/1999 (STRs prior to 5/1/1994)
 - Coast Guard: through the present (STRs prior to 5/1/1998)
- Records may be obtained by filing SF 180

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RECORDS NOT AT NPRC



- Personnel Records** of Vets who have been separated from AD but retained some form of Reserve status, whether active or inactive, are not at NPRC
 - Should be requested through the Reserve Headquarters of service dep't
- Military and medical records** for Reserves and National Guard are not at NPRC
 - Reserve records located at Reserve Headquarters of service dep't
 - National Guard records located at state's Adjutant General's Office

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RECORDS NOT AT NPRC



- STRs** have been scanned and uploaded to the Vet's VA electronic claims folder or DoD's Healthcare Artifacts and Images Management Solution (HAIMS), if the Vet's service ended:
 - Army: On or after 10/16/1992
 - Navy: On or after 1/31/1994
 - Air Force: On or after 5/1/1994
 - Marine Corps: On or after 5/1/1994
 - Coast Guard: On or after 5/1/1998
- VSO** may view the STRs in VBMS or obtain them by filing VA Form 20-10206 or VA Form 3288

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RECORDS NOT AT NPRC



- Fire in 1973** destroyed 16-18 million military personnel files:
 - Army – personnel discharged 11/1/1912-1/1/1960
 - ~80% destroyed
 - Air Force – personnel discharged 9/25/1947-1/1/1964 (with names alphabetically after Hubbard, James E.)
 - ~75% destroyed
- VA** has a heightened duty to assist when STRs are lost, which may include requests for unit records, such as morning reports, and advising Vet to submit "buddy statements" or other alternative sources of evidence to corroborate claimed in-service injury

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LOCATION OF RECENT RECORDS



- **Personnel records for Vets recently discharged, deceased, or retired:**
 - Air Force: Air Force Personnel Center (after 10/1/2004)
 - Army: U.S. Army Human Resources Command (after 9/30/2002) (but requests serviced by NPRC)
 - Marine Corps: U.S. Marine Corps, Manpower Management Records & Performance Branch (after 12/31/1998)
 - Navy: NPRC
 - Coast Guard: NPRC


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SURVEY #4




Where are most in-patient hospitalization records from military hospitals stored?

- A. At NPRC with Vet's STRs
- B. At NPRC by name of hospital
- C. Somewhere other than NPRC



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ANSWER



B

- Clinical (in-patient hospital) records are created when an active duty service member is hospitalized
- Stored at NPRC under the name of the hospital or other military treatment facility that provided the in-patient treatment
- **Exception:**
 - Prior to 1960, Army and Air Force clinical records were filed with Vet's military personnel file

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CLINICAL RECORDS

- **To retrieve Vet's "clinical," file w/ NPRC an SF 180 with:**
 - Name of the hospital / medical facility
 - Month and year of treatment
 - Vet's name
 - Vet's SSN or service number
- **Even if Vet previously filed a VA claim and VA indicates it has Vet's clinicals...**
 - Find out dates and locations of hospitalization from Vet and then review c-file to ensure records are included
 - If necessary, request records (or ask VA to)

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CLINICAL RECORDS

- **In-patient treatment records not found at NPRC should be requested from the original treating facility**
 - Likely to occur if Vet was recently discharged or was in transit and not officially stationed at the military installation where hospitalized
 - Most in-patient records remain at Army and Air Force facilities for 1 year, and at Navy hospitals for 2 years
 - For military medical facilities with major research and education programs, in-patient records may be retained up to 5 years before retirement to NPRC
 - Sometimes the records are kept at the hospital simply through oversight or error

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CLINICAL RECORDS

- **1973 fire and clinical records:**
 - Because pre-1960 Army and Air Force clinical records were stored with Vet's personnel file, many were destroyed
 - But hospitals with clinical record libraries typically maintained records longer than other hospitals
 - Patients treated at such hospitals (as early as 1951 for Air Force hospitals and 1957 for Army hospitals) may have clinical records that were not filed in the personnel file
 - List of facilities with such libraries on NPRC website
 - There are other small, scattered collections of records from earlier years and some alternate medical records sources for the fire-related period

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CLINICAL RECORDS

- **DOD has established an Inpatient Treatment Records Database of Gulf War hospital in-patient treatment records**
- Database contains records for admissions to both U.S. military hospitals in the Kuwait Theater of Operations and for evacuee admissions to U.S. military hospitals in Germany
- Advocates seeking to obtain in-patient records from the first Gulf War may call 1-800-497-6261 to request a database search

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SENSITIVE MEDICAL RECORDS

- **Drug and alcohol abuse treatment records are considered sensitive and require special handling by NPRC**
- **Access is granted to the individual Vet in most circumstances**
- **Access by a third party typically requires Vet's express authorization on NA Form 13036, *Authorization for Release of Military Medical Patient Records***


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SENSITIVE MEDICAL RECORDS

- **NPRC will not release copies of medical records to a Vet if it appears the records "may adversely affect the individual identified therein"**
- **Examples include records relating to:**
 - A mental, psychoneurotic, or personality disorder
 - A diagnosis or implications of sexual deviation
 - Any illness that carries a uniformly unfavorable prognosis
- **Policy can be circumvented if Vet's physician or advocate requests that these records, with Vet's consent, be sent directly to Vet's personal physician**


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OTHER RECORDS

- **Military units/organizations maintained other helpful records, such as daily journals, morning reports, personnel rosters, files of field commands, records of activities, deck logs, and unit diaries**
 - If records exist, they can be obtained using FOIA request
 - Most of these types of records are stored at locations other than NPRC
 - A records research request should be made, even if VA is not willing to do so, if such records would be helpful to the development of a claim

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OTHER RECORDS

- **These unit/organizational records may be stored at:**
 - All branches: National Archives (NARA), 8601 Adelphi Road, College Park, MD 20740-6001; (301) 837-2000
 - U.S. Marine Corps History Division, 2044 Broadway Street, Quantico, VA 22134; (703) 432-4877
 - Air Force Historical Research Agency, 600 Chennault Circle, Maxwell AFB, AL 36112-6424; (334) 953-5697
 - Naval History and Heritage Command, Archives Branch, (202) 433-3224
 - For records not yet processed into NARA: National Technical Information Service, 5301 Shawnee Road, Alexandria, VA 22312

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HOW TO REQUEST RECORDS FROM NPRC

- **Records can be requested from NPRC by:**
 1. Mailing or faxing Standard Form (SF) 180, *Request Pertaining to Military Records*
 - www.archives.gov/veterans/military-service-records/standard-form-180
 - or
 2. Using eVetRecs, an online records request application
 - <https://vetrecs.archives.gov/VeteranRequest/home.html>

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HOW TO REQUEST RECORDS FROM NPRC



- **NPRC recommends requesting records online using eVetRecs in order to receive the quickest response**
- Fewer errors made if the info is transmitted electronically, rather than having NPRC personnel transcribe and respond to info on written forms
- Follow-ups to a request also can be submitted electronically
- If a DD Form 214 is all that is requested electronically, the request should be fulfilled within 10 days
- If not Vet or NOK, proper written authorization will need to be uploaded to complete an online request
- **But, VSO should have a claimant complete and sign a few copies of SF 180 as a back up**

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HOW TO REQUEST RECORDS FROM NPRC



- **Because NPRC receives thousands of records requests daily, they may not send complete set of military personnel and medical records on first request**
- **From the online request or SF 180, they try to determine what specific records the requestor needs**
- Clinical records should be specifically requested, including name of facility, disease or injury treated, and date of hospitalization
- If hospitalization was provided while Vet was in transit between permanent assignments, on leave, or in combat, provide as much description as possible


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EXPEDITED REQUESTS



- **NPRC offers expedited service for emergency requests, including requests for terminally ill Vets and homeless Vets who need expedited treatment of their request for a copy of their DD Form 214**
- **Advocates can make such requests online through eVetRecs or by faxing SF 180 to (314) 801-9195 or (314) 801-0764 and clearly indicating the reason the request should be expedited**
- **This service should be used only for urgent requests related to matters such as homelessness, a funeral, or an upcoming medical procedure**


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ADVOCACY ADVICE

- **Best way to obtain needed records as quickly as possible is to be as specific as possible in request**
 - Provide as much info as possible about what is needed and why it is needed in section II of SF 180 or appropriate comment box in eVetRecs
- A general request such as “send the complete military personnel and medical records,” may result in a more routine response and a less thorough search
- VSOs who want to review the complete records to determine whether Vet is potentially entitled to other benefits may have to submit more than one request

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ADVOCACY ADVICE

- If using SF 180, keep a copy of the completed form, any addendum, and any cover letter for your records
- If using SF 180 and records are not received within 6 weeks, another copy of the SF 180 should be sent with a cover letter labeled “SECOND REQUEST”
- If the response from NPRC is incomplete or not responsive to the request, or you are otherwise dissatisfied with the response, follow up with a letter describing the problem and attaching a copy of the original request


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ADVOCACY ADVICE

- **Mailing the SF 180:**
 - Send to proper address noted on the back of the form
 - May be sent via regular mail, but best to send by certified mail, return receipt requested
- **Status check:**
 - Call (314) 801-0800
 - Check online at www.archives.gov/personnel-records-center/forms

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NPRC & FEES

- NPRC generally does not charge a fee for a copy of basic military personnel and medical record info
- There may be a fee for personnel records of Vets discharged from the military more than 62 years ago
- To be safe, request a waiver of fees whenever records are requested
 - If using SF 180, in section II.2, which asks for purpose of request, write: "To confirm accuracy and completeness of records under the Privacy Act; to further the veteran's claim for benefits; request fee waiver under 32 C.F.R. § 310.20(d)"

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VA MILITARY RECORDS RESEARCH CENTER

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JOINT SERVICES RECORDS RESEARCH CENTER (JSRRC)

- JSRRC was a DoD entity for matters pertaining to PTSD and Agent Orange VA claims
 - Conducted research of official military unit records for info that could verify an incident described by Vet in a claim for disability compensation
- JSRRC researched available Army, Navy, Air Force, and Coast Guard historical records, unit reports, and, on a limited basis, personnel records, in order to document a Vet's exposure to a stressful event during service or exposure to herbicides
 - Archives Branch of USMC History Division conducted research of Marine Corps records
- In 2020, JSRRC ceased operations

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VA MILITARY RECORDS RESEARCH CENTER (MRRC)



- VA started using its own personnel for research requests it previously sent to JSRRC, creating the VA Military Records Research Center (MRRC)
- Conducts research for Vets of ALL branches of service
- VA adjudicators submit a research request through VBMS with info including:
 - The unit designation (lowest possible level)
 - Approximate date of the incident
- MRRC does not conduct research requests submitted by Vets or non-VA personnel

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MRRC




- Vet must provide VA with the specific “who, what, where, and when,” if possible, for each stressful incident, alleged actual herbicide exposure, or visitation to area of presumptive herbicide exposure
- MRRC will then request or conduct a search for records that might confirm the event

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MRRC



- Vet should provide to VA:
 - Approximate date of the incident, within 120 days (but preferably the month and year of incident)
 - Specific location of the incident
 - Type of incident
 - When possible:
 - Complete unit designation
 - Tour/assignment dates
 - Major base camp location



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MRRC

- **Vet should provide to VA (cont.):**
 - VA Form 21-0781, *Statement in Support of Claimed Mental Health Disorder(s) Due to An In-Service Traumatic Event(s)*, for research of stressors
 - Copies of documents from the personnel file that contain unit info, if not already in c-file

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COURTS-MARTIAL TRANSCRIPTS & OTHER RESOURCES

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COURTS-MARTIAL TRANSCRIPTS

- Courts-martial transcripts may be helpful in cases involving discharge upgrades, COD determinations, or psych disability claims
- Court documents listing court-martial offenses and final orders with the court-martial results are usually included in Vet's personnel file, but a copy of the transcript of the court-martial is not usually maintained in that file
- Transcripts are retained for varying lengths of time by different offices depending on the type of court-martial, but general and special court-martial records should be preserved for at least 15 yrs
- Courts-martial transcripts should be sought from the relevant military service department under the FOIA, either online or by certified mail, return receipt requested

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OTHER RESOURCES

NVLSP

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- Advocates can request records directly from:
 - NARA
 - Air Force Historical Research Agency
 - Naval History and Heritage Command
 - U.S. Marine Corps History Division
- Many Vietnam War unit records, operational reports, etc. can be found online at The Vietnam Center & Sam Johnson Vietnam Archive at www.vietnam.ttu.edu
- Gives the advocate an opportunity to review evidence before submitting it to VA
 - Be careful to not provide any harmful evidence that VA could use to deny a claim


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ANY
QUESTIONS?



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