

**STATEMENT OF MAUREEN T. REGAN
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BEFORE
THE COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
HEARING ON
"THE POWER OF LEGISLATIVE INQUIRY –
IMPROVING THE VA BY IMPROVING TRANSPARENCY"
MARCH 16, 2015**

Mr. Chairman and Members of the Committee, thank you for the opportunity to provide information on the laws and requirements that the Office of Inspector General (OIG) must follow when releasing information to Congress and the public.

The primary responsibility of the OIG for the Department of Veterans Affairs (VA) under the Inspector General Act of 1978, (IG Act) as amended, is to conduct oversight of VA's programs and operations. In addition to planned audits, inspections, and evaluations, we conduct investigations, reviews, audits, and inspections in response to complaints received through the OIG Hotline as well as from Members of Congress. In the last 6 years we opened 690 cases based on requests from Members of Congress.

Our purpose today is to discuss the OIG's responses to congressional requests and discuss our commitment to transparency. As discussed in detail below, the OIG is transparent in reporting the findings and conclusions of our work as permitted under existing laws and regulations. Furthermore, the OIG has complied with applicable legal requirements for reporting to Congress and responding to congressional requests.

TRANSPARENCY

With respect to the issue of transparency, in the past 6 years, the OIG has issued more than 1,700 reports; made 3,000 arrests; provided testimony at 67 congressional hearings; conducted 400 briefings to Members of Congress and staff for various congressional committees; and responded to written requests for information from various Members and committees. In addition to the 400 briefings, on a daily basis we respond to telephone calls and emails from committee and Members' personal staffs and the media seeking additional information regarding our reports. During this 6-year time period, we also processed 1,860 requests for information under the Freedom of Information Act.

As required under the IG Act, all report titles are posted on our website within 3 days of being issued to VA. If the information in the report is not protected under the Privacy Act or another confidentiality statute, the website includes a link to the report. If the report contains protected information, the title and a brief summary are posted. However, once we release a report in either redacted or unredacted form under the Freedom of Information Act (FOIA), the report itself can be accessed on the website. Our official distribution list include our congressional oversight committees. We also

include other Members of Congress when the report is about a facility in their district or state or if that Member of Congress requested the review. All receive email notification when reports are posted on the OIG's website.

In an effort to release our findings and conclusions publicly, all reports are reviewed by our Information Release Office, which is a component of the Office of the Counselor to the Inspector General, for a determination whether the report can be published on our website in its entirety or in redacted format when issued. The Office of the Counselor works closely with the various OIG Directorates to write reports that the findings and conclusions are clear and supported and in such a way that the reports can be made public without redactions. As one example, on December 8, 2014, we issued a report, *Review of Allegations Regarding the Technical Acquisition Center's Award of Sole-Source Contracts to Tridac for the Virtual Office of Acquisition*, Report No. 12-02387-59. The report was referenced on our website the same day it was issued but was not accessible because it was protected from disclosure under the Privacy Act. We subsequently received FOIA requests for the report and it became accessible in its entirety on the website on December 15, 2014, within days of receiving the FOIA requests.

The OIG has procedures in place to authorize us to review certain allegations and provide information to individual Members of Congress who have requested that we review or investigate a complaint from a constituent. For example, as discussed below, the IG Act prohibits us from disclosing the identity of complainants. Due to the nature of many complaints, it is often not possible to review allegations without disclosing directly or indirectly the identity of the complainant. To this end, we developed a waiver of confidentiality form for the complainant's signature that we provide the Member. When we complete our work we provide follow-up information to the Member for the constituent. Similarly, when we close a Hotline case, those complainants whose identity is known are notified of the closure and advised of their right to make a request under FOIA.

RESPONDING TO REQUESTS FROM CONGRESS

In responding to congressional oversight committees, the OIG has fully complied with applicable laws. We have reviewed applicable Federal statutory and case law and consulted with the Department of Justice. We have made every effort to be responsive and provide requested information without violating the law or waiving any applicable privilege based upon requests in any form from a committee Member or staff. Our responses have ranged from providing briefings, answering questions, and providing records.

However, we have a responsibility to comply with laws and regulations regarding the release of information and a right to request justification when responding to requests for non-public information maintained by the Executive Branch. Some of the laws that impact decisions to release non-public information to congressional oversight committees include:

The Inspector General Act:

Section 2 of the IG Act states that the intent of the Act was “to create independent and objective units” to “conduct and supervise audits and investigations relating to the programs and operations” of the agency and to “provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action.”

Section 4 (a)(5) of the IG Act provides: “[T]o keep the head of such establishment and the Congress fully and currently informed, by means of the reports required by section 5 and otherwise, concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such establishment, to recommend corrective action concerning such problems, abuses, and deficiencies, and to report on the progress made in implementing such corrective action.”

The only specific means identified or mandated in Section 5, or for that matter anywhere else in the IG Act, for meeting this requirement are the Semiannual Reports to Congress and the “seven day” letter described in Section 5(d). This section requires the IG to report immediately to the head of the establishment involved whenever the IG becomes aware of “particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such establishment.” The head of the establishment, not the IG, is required to transmit any such report to the appropriate committees or subcommittees of Congress within seven calendar days, together with a report by the head of the establishment containing any comments such head deems appropriate.

In addition to our semiannual reports, to ensure that Congress is currently informed, the OIG routinely provides copies of reports, sometimes in redacted form, to our oversight Committees usually before the report is posted on our website. When requested or when we believe there are significant findings we offer to brief the Committees on the findings and conclusions and answer questions. As noted above, our oversight Committees receive an email notification when reports are posted on our website.

The IG Act does not mandate that reports or other information protected from disclosure under a provision of law be provided to oversight committees or otherwise made public. Section 5(e) of the IG Act states that “nothing in this section shall be construed to authorize the public disclosure of information which is “(A) specifically prohibited from disclosure by any other provision of law” ... and “(C) a part of an ongoing criminal investigation.” In other words, there is no requirement under the IG Act to provide any congressional committee or subcommittee with an unredacted copy of a report containing information that is protected under the Privacy Act or other confidentiality statute.

Section 7(b) of the IG Act prohibits the OIG from disclosing the identity of employees who submit complaints or provide information to the OIG. Similarly, Section 8(m) of the IG Act protects the identity of all other complainants. The failure by the OIG to maintain confidentiality by releasing the identity of complainants without their authorization would have a chilling effect on individuals or entities who want to report fraud or other criminal behavior, violations of laws, rules, or regulations, public health or safety issues, gross mismanagement, etc.

The Privacy Act

Information contained in reports issued by the OIG and the information contained in the supporting documents are maintained in a Privacy Act system of records. The Privacy Act prohibits the disclosure of information that is maintained, or should be maintained, in a Privacy Act system of records without the consent of the individual to whom the record pertains. The term “disclosure” includes any means of communication including oral disclosures. The Privacy Act provides for civil and criminal penalties for the unauthorized disclosure of records or information contained in those records.

There are 12 exceptions to the “no disclosure without consent rule.” These exceptions include responding to requests for information received under FOIA, Section 552a (b)(3). When information protected by the Privacy Act is requested under FOIA, and is not prohibited from disclosure under any other FOIA exemption, the agency is required to conduct a balancing test in which the individual’s right to privacy is weighed against the public’s right to know [FOIA Exemptions (b)(6) and (b)(7)(C)]. When the public’s interest outweighs the individual’s privacy interests, the information can be released without the consent of the individual. The decision to release information in OIG systems of records resides with the Inspector General or designee.

Section 552a(b)(9) *authorizes* (but does not mandate) a disclosure “to either House of Congress, or, to the extent of a matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee.” OMB Guidelines specifically state that this exception does not authorize the disclosure of information protected under the Privacy Act to an individual Member of Congress acting on his or her behalf or on behalf of a constituent. OMB Guidelines, 40 Fed.Reg. 28,948 -28,955 (July 9, 1975). The decision by the agency to disclose Privacy Act protected information to an oversight body is at the discretion of the agency and requires a written request. Neither the Privacy Act nor any other statute mandates that an agency release Privacy Act protected information to either House of Congress when requested.

In our discussions with staff from the House Veterans’ Affairs Committee and another committee, they have told us that the Privacy Act does not apply to Congress. As we pointed out in both discussions, while the Privacy Act does not apply to records in the possession of congressional committees, it does apply to the agency that maintains the record when making a decision whether the record can be released.

Title 38 U.S.C. Confidentiality Statutes

In addition to the Privacy Act, certain VA records are also protected from disclosure under various VA confidentiality statutes, Title 38 U.S.C. Sections 5701, 5705, and 7332. The plain language of these sections shows that the decision whether to release the information resides with the Secretary. Each statute identifies the circumstances under which the Secretary is required to disclose or the discretion to disclose the protected information without the consent of the individual. None of the statutes authorize the OIG to disclose protected information. As with the Privacy Act, each of these the statutes include civil and/or criminal penalties for unauthorized disclosures.

- 38 U.S.C. Section 5701 – Prohibits the disclosure of VA claims records, including the names and addresses of veterans and other beneficiaries. With the exception of deceased veterans, these records are also protected under the Privacy Act. Unlike the Privacy Act, Section 5701 is still applicable after the death of the individual.
- 38 U.S.C. Section 5705 – Prohibits the disclosure of medical quality assurance records. Regulatory requirements implementing this statute are set forth in 38 C.F.R. 17.500 et. seq.
- 38 U.S.C. Section 7332 – Prohibits the disclosure of records of the identity, diagnosis, prognosis, or treatment of any patient or subject that are maintained in connection with the performance of any program or activity relating to drug abuse, alcoholism or alcohol abuse, infection with HIV, or sickle cell anemia.

In responding to requests for information, including requests from our oversight committees we take seriously our responsibilities to protect the identity of individuals, especially employees and veterans, who could be harmed if the information became public. Statute dictates that veterans have both a right and expectation that their private medical and other claims information not be disclosed without their consent unless otherwise authorized by statute. As such, we have both a right and an obligation to ask questions and obtain clarification from an oversight committee or subcommittee seeking information protected from disclosure.

THE ACCOMODATION PROCESS

A memorandum issued on June 19, 1989, by the Department of Justice, Office of Legal Counsel (OLC), summarized the principles and practices governing congressional requests for confidential executive branch information. 13 Op. O.L.C. 153 (1989). The memorandum addressed “the duty of Congress to justify its requests.” *Id.*, 159. As noted in the OLC memorandum, “the process of accommodation requires that each branch explain to the other why it believes its needs are legitimate.” *Id.* Justifications for not providing the information requested may include whether the entity responding has the legal authority to release the information and whether the records are privileged. The OIG is and has always been prepared to accommodate legitimate oversight requests but we need to do so in a manner consistent with veterans’ expectations to privacy, statutes, and appropriate guidance of the Executive Branch.

CONCLUSION

The OIG is committed to carrying out vigorous oversight of VA programs and operations and keeping the VA Secretary, Congress, and the American public informed of our oversight results. Our prolific public reporting on the OIG website (<http://www.va.gov/oig/>) and information sharing with Congress thru briefings, hearing testimony, and regular staff contacts are among the highest in the Inspector General community. In doing so, we will continue to carefully balance the public's right to know against the privacy of individual veterans, and to work with Congress in accommodating legitimate oversight requests to further our mutual goal of helping VA improve delivery of services to America's veterans.