Department of Veterans Affairs

Memorandum

Date: JAN - 5 2017

VAOPGCPREC 5-2014

From: Acting General Counsel (022)

Subj: Duty to Assist in Seeking Records Pertaining to an Individual Other than the Claimant

To: Executive in Charge, Board of Veterans' Appeals (01)
Principal Deputy Under Secretary for Benefits (20)

QUESTIONS PRESENTED: [1]

1. Is the Department of Veterans Affairs (VA) legally obligated under 38 U.S.C. § 5103A(a) to obtain the service and other related records (including investigation reports, service treatment records, service personnel records, Service Record Books, etc.) that belong or pertain to a Servicemember other than the Veteran who is seeking VA benefits, when such records may be potentially relevant to the Veteran's claim for benefits?

2. Do the special processing procedures set forth in 38 C.F.R. § 3.304(f)(5) for developing and deciding claims involving post-traumatic stress disorder (PTSD) asserted to be due to personal assault and/or military sexual trauma (MST) impose a requirement on VA to obtain records that belong or pertain to a Servicemember other than the Veteran claimant when such records may be useful for corroborating the Veteran's account of the stressor incident or to provide evidence of behavior changes following the incident?

   a. Would it be required, and/or would it be legally appropriate, to attempt to solicit a written statement from, or depose during a hearing, the asserted Servicemember assailant for purposes of obtaining information concerning a claim of personal assault or MST that has been raised by a Veteran claimant?

3. If VA is legally obligated to obtain the records of a Servicemember other than the Veteran:

   a. Does the Privacy Act, 5 U.S.C. § 552, prohibit VA from obtaining and associating with a Veteran claimant's claims file service and other related records that belong or pertain to another Servicemember? What legal factors are for consideration in making this determination?
   b. Assuming the Privacy Act does not prohibit VA from obtaining and associating a non-claimant Servicemember's records with a Veteran claimant's claims file, must VA obtain permission to request those records, and from whom must VA obtain such permission? Is the answer to this question the same or different if the Servicemember whose records are being sought is deceased? If

[1] This opinion replaces a prior version of VAOPGCPREC 5-2014 issued on August 12, 2014.

permission is denied, does VA have any additional duty to assist the claimant in obtaining the records?

c. If records related to the non-claimant Servicemember are obtained, how should they be handled? May copies of the records be associated with the Veteran claimant's claims file? If so, must the records first be redacted in order to remove all personally identifiable information?

   i. If VA is permitted to associate the nonclaimant Servicemember's redacted records in the Veteran claimant's claims file, is VA also required to conduct a full and complete search of the Veteran claimant's claims file for other named references to the Servicemember and redact them (such as in this case where the alleged assailant is named in both records located in the claims file and in the remand decision of the Court of Appeals for Veterans Claims)?

HELD:

1. In adjudicating a particular Veteran's claim for benefits, VA generally would be obligated under 38 U.S.C. § 5103A to make reasonable efforts to obtain records pertaining to another individual if: (a) those records were adequately identified, would be relevant to the Veteran's claim, and would aid in substantiating the claim; and (b) VA would be authorized to disclose the relevant portions of such records to the Veteran under the Privacy Act and 38 U.S.C. §§ 5701 and 7332. VA adjudicators generally may not consider documents that cannot be disclosed to the claimant.

2. Pursuant to the Privacy Act, 5 U.S.C. § 552a, and 38 U.S.C. § 5701, VA records pertaining to another individual generally may be disclosed to a claimant only: (1) pursuant to the written consent of the individual to whom the records pertain; (2) pursuant to a court order; or (3) where there is both an applicable routine use under the Privacy Act and a VA finding under 38 U.S.C. § 5701(e) that disclosure of records other than names and addresses would serve a useful purpose. Because there currently is no applicable routine use, disclosure of another individual's VA records to a VA claimant for purposes of the latter's benefits claim generally requires written consent or a court order. Further, if the records at issue contain information protected by 38 U.S.C. § 7332, any written consent or court order must comply with the specific requirements of that statute and VA's implementing regulations.

3. If a claimant identifies relevant records pertaining to another individual that are in the custody of the Department of Defense or another Federal agency, it would be consistent with VA's statutory duty to assist for VA to ask the custodian agency to furnish such records, but only if they may be disclosed to the VA claimant. The custodian agency would be responsible for determining whether its records may be disclosed to the VA claimant for the requested purpose. In making such requests, VA should clearly explain to the custodian agency the circumstances and conditional nature of the request.

Specifically, VA should explain that the records are requested on behalf of a VA claimant who is not the individual to whom the record pertains and that VA requests a determination by the custodian agency as to whether such records may be disclosed to the VA claimant under the Privacy Act and any routine uses applicable to the relevant system of records of the custodian agency.

4. VA's duty under 38 U.S.C. § 5103A to make "reasonable efforts" to assist claimants in obtaining evidence may in some cases include the duty to request that a third party provide written consent for VA to disclose records pertaining to the third party to the claimant. The Veterans Benefits Administration may wish to consider issuing regulations or establishing uniform procedures to address the unique and sensitive issues that may arise where the records of an alleged assailant or other third party may be relevant to a claim. In the absence of regulations or procedures specifically addressing this issue, it generally must be resolved on a case-by-case basis. In determining whether "reasonable efforts" include such a request in a particular case, VA may consider factors including the third party's privacy interest in his or her records; the likelihood that the records exist; the likelihood that the request would result in consent to disclose the records to the claimant; and the potential for such requests to generate conflict or otherwise adversely affect the safety, health, or rights of either the claimant or the third party. A determination that "reasonable efforts" do not require seeking a third-party's consent to disclose his or her records to the claimant would be most strongly justified in a case where the interests of the third party are adverse to the claimant's interest, such as where the claimant alleges that the third party assaulted the claimant or engaged in other improper or unlawful behavior. In contrast, where the interests of the claimant and the third party are not adverse, there ordinarily would be a stronger basis for a finding that VA's "reasonable efforts" may include asking the third party to consent to disclosure of his or her records to the claimant.

5. If the individual to whom a record pertains is deceased, the Privacy Act would not apply, but other limitations would apply. First, under the Freedom of Information Act (FOIA), 5 U.S.C. §552(b)(6), VA may be required to balance the privacy interests of a decedent's surviving family members against the public interest in disclosure of information concerning the decedent in order to determine whether disclosure is warranted. Second, VA must ensure compliance with 38 U.S.C. §§ 5701 and 7332. Under section 5701(e), VA records other than names and addresses may be disclosed if VA finds that such disclosure would serve a "useful purpose." Alternatively, the next of kin of the person to whom the records pertain may provide written consent to disclose the records to a VA claimant. However, the next of kin cannot consent to disclosure of information protected by section 7332 for purposes of supporting a claim by a person other than a survivor or dependent of the person to whom the records pertain.

6. The provisions of 38 C.F.R. § 3.304(f)(5) do not impose on VA any duty to assist beyond that provided under 38 U.S.C. § 5103A. Section 3.304(f)(5) identifies the types of evidence that may be relevant to corroborate a Veteran's claim of an in-service

assault and seeks to ensure that the Veteran is aware of the types of evidence that may support his or her claim. The existence and extent of any duty on VA's part to obtain relevant records is governed by section 5103A and VA's regulations implementing that statute.

7. VA is not required to solicit a written statement from, or to depose during a hearing, the individual who allegedly assaulted a claimant who is seeking VA benefits for disability due to the alleged assault. Further, to prevent disparate treatment of similarly situated claimants and disparate commitment of VA adjudication resources, 38 C.F.R. § 3.159(g) reserves to the Secretary of Veterans Affairs the authority to authorize assistance beyond that currently specified in statute and regulation. Accordingly, VA generally may not, in an individual case, solicit statements or testimony from an alleged assailant, as doing so would give rise to the disparities section 3.159(g) was designed to prevent.

8. If records pertaining to an individual other than the claimant are obtained and considered in relation to the claim, VA must include them in the claims file. However, VA should exercise care in ensuring that the protected information included in the claims file is limited to the information that VA is authorized to disclose under the applicable written consent, routine use, useful purpose determination, court order, or other authority. Accordingly, it may be necessary to redact the records to remove identifying information that is not relevant to the claim or not otherwise within the scope of the relevant authorization, such as the individual's address, telephone number, and Social Security number. However, if the claimant provided VA with the Servicemember's name, VA would not need to redact that name from the documents placed in the file. If VA includes records pertaining to a third party in a VA claims file, it ordinarily would not need to search the entire file for other records containing protected information, unless it has reason to believe that the file may contain protected third-party information that was not provided by the claimant.

DISCUSSION:

Factors Affecting VA's Duty to Assist in Obtaining Records Concerning an Individual Other than the Claimant

1. Section 5103A(a)(1) of title 38, United States Code, provides that "[t]he Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary." Section 5103A(a)(2), however, provides that "[t]he Secretary is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim." In claims for VA disability compensation, 38 U.S.C. § 5103A(c)(1)(C) provides that VA's duty to assist shall include obtaining "[a]ny . . . relevant records held by any Federal department

or agency that the claimant adequately identifies and authorizes the Secretary to obtain." Section 5103A thus implicates at least three distinct considerations. First, the records identified to VA must be "relevant" to the claim. Second, there must be a reasonable possibility that the records would "aid in substantiating the claim." Third, if the identified records are relevant and may aid in substantiating the claim, VA must make "reasonable efforts" to assist the claimant in obtaining those records.

2. The service records of an individual other than the claimant may be relevant to the claim in certain circumstances. In *Durham v. Shinseki*, Vet. App. No. 08-3478 (May 28, 2010) (memorandum decision), the case referenced in the opinion request, the claimant sought compensation for PTSD due to an in-service assault and asserted that the service records of his alleged assailant would verify that he had assaulted several Servicemembers and that the Veteran had reported being abused by that individual. The U.S. Court of Appeals for Veterans Claims (Veterans Court) found that the identified records were potentially relevant to the Veteran's claim and that VA was required under section 5103A to seek to obtain those records. That decision is binding on VA as the law of the case for purposes of the Veteran's claim, although it may not be relied on as authority in any other case because the decision was not designated as a precedent. *See* U.S. Vet. App. R. 30(a). Whether the records of another individual may be relevant to a particular claim is inherently a case-specific factual determination. As the facts of the *Durham* case illustrate, however, it is certainly possible that another individual's records may be relevant to a Veteran's claim.

3. Even though another individual's records may be relevant to a claimant's claim, section 5103A would not require VA to obtain such records if VA would be prohibited from disclosing those records to the claimant and associating those records with the claimant's VA claims file. Federal records pertaining to individuals are subject to protection against unauthorized disclosure to other persons under the Privacy Act (5 U.S.C. § 552) and VA claims records are further protected against such disclosure under 38 U.S.C. §§ 5701 and 7332. Those protections impose limits on VA's ability to disclose another individual's records to a claimant or to place those records in the claimant's VA claims file. The limitations imposed by those statutes may affect the scope of VA's duty to assist. In adjudicating claims for benefits, VA may not consider and rely upon evidence that cannot be disclosed to the claimant. As the Veterans Court has explained:

> [A]s a general matter, VA should not consider in its decisions any evidence not made available to the claimant. Several provisions of title 38 of the U.S. Code require VA to disclose to a claimant and/or to summarize the contents of the evidence relevant to his own case. 38 U.S.C. §§ 5104(b) ("[i]n any case where the Secretary denies a benefit sought, [he shall provide] . . . a summary of the evidence considered by the Secretary"); 5701 (requiring release to claimant of VA records contained in claimant's own claims file); 7105(d)(1)(A) (requiring [a VA regional office]

> to include in [its statement of the case] "[a] summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed"); *see also Anderson (Hersey) v. West*, 12 Vet. App. 491, 493-95 (1999) (discussing Secretary's obligation to provide claimants copies of documents in custody of VA); *Sutton v. Brown*, 9 Vet. App. 553, 564 (1996) ("before the [Board of Veterans' Appeals (Board)] relies on any evidence developed or obtained by it subsequent to the issuance of the most recent Statement of the Case (SOC) or Supplemental SOC . . . , the [Board] must provide the claimant with reasonable notice of such evidence and of the reliance that the Board proposes to place on it and to provide a reasonable opportunity for the claimant to respond to it").

Faust v. West, 13 Vet. App. 342, 357-58 (2000). It follows that, where VA is prohibited by statute from disclosing records to a claimant, VA generally cannot consider those records in adjudicating the claimant's claim.

4. The duty-to-assist provisions of 38 U.S.C. § 5013A do not provide an exception to the prohibitions on disclosure imposed by 38 U.S.C. §§ 5701 and 7332 or 5 U.S.C. § 552a. Section 5701(a) provides that "[a]ll 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, <u>and no disclosure thereof shall be made except as provided in this section</u>." (Emphasis added.) Section 552a(b) of title 5 provides that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be" within one of the exceptions specified in that paragraph. *See also* 38 U.S.C. § 7332(a)(1) (stating that records maintained in connection with any program or activity relating to drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia "may be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b)" of section 7332). Those statutes make clear that they provide the exclusive circumstances under which covered records may be disclosed. "[A] specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *see also Zimick v. West*, 11 Vet. App. 45, 51 (1998). Section 5103A creates a general duty to make reasonable efforts to obtain relevant evidence of any type, but does not address the specific circumstance where such evidence consists of protected information pertaining to another individual. Sections 5701 and 7332 of title 38, United States Code, and 5 U.S.C. § 552a establish specific prohibitions on releasing information regarding an individual or an individual's VA claim. Accordingly, 38 U.S.C. §§ 5701 and 7332 and 5 U.S.C. § 552a are more specific than 5 U.S.C. § 5103A as to the confidential nature of information and are not abrogated by the provisions of the latter statute.

5. If VA is precluded from disclosing another individual's records to the claimant, then it would be precluded from considering those records in deciding the claim. Accordingly, efforts to obtain those records ordinarily would not be within the scope of the "reasonable efforts" required by the statute and would create no reasonable possibility that the assistance would aid in substantiating the claim.

Disclosure of Information Concerning Another Individual

6. Information concerning a Servicemember or Veteran other than the claimant potentially may come from either the VA claims file of such other individual or the records of another Federal agency, such as the Department of Defense (DoD), pertaining to such individual. Different standards apply to requests for information from those sources, for two primary reasons. First, although the same general requirements of the Privacy Act, 5 U.S.C. § 552a, apply to both VA and other Federal records, VA records are subject to additional protections under 38 U.S.C. §§ 5701 and 7332, which do not apply to other Federal records. Second, with respect to records maintained by an agency other than VA, that agency would be responsible for determining whether, and under what circumstances, such records may be disclosed to VA for the purpose of adjudication of the claim of another individual. Pursuant to 38 U.S.C. § 5106, other Federal agencies generally must "provide such information to the Secretary [of Veterans Affairs] as the Secretary may request for purposes of determining eligibility for or amount of benefits, or verifying other information with respect thereto." While this statute requires agencies to comply with VA's requests for relevant records in their custody, it does not authorize either VA or the custodian agency to disclose such information to third parties.

7. Turning first to disclosures from VA's own records, VA's ability to disclose records from another individual's VA claims file is limited by both the Privacy Act and 38 U.S.C. § 5701. Those two statutes impose similar protections against disclosure of personal information in VA claims files, but differ somewhat in setting forth circumstances in which disclosure may be made. VA is required to comply with both the Privacy Act and section 5701. *See* 38 U.S.C. § 5701(j) ("any disclosure made pursuant to this section shall be made in accordance with the provisions of section 552a of title 5"); *Doe v. DiGenova*, 779 F.2d 74, 79 (D.C. Cir. 1985). Accordingly, a disclosure of information from records pertaining to VA claims must be authorized by both statutes before VA may disclose the information. *See* VAOPGCADV 71-90; VAOPGCADV 22-90.

8. As noted above, the Privacy Act provides generally that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person," except as authorized by that statute. 5 U.S.C. § 552a(b). VA regulations implementing the Privacy Act state that, except as otherwise provided by statute or regulation, VA will "[p]ermit an individual to prevent records pertaining to him or her, obtained by the Department of Veterans Affairs for a particular purpose, from being

used or made available for another purpose without his or her consent." 38 U.S.C. § 1.576(a)(2). Three of the statutory exceptions to the general prohibition on disclosure of records are potentially relevant to the issues at hand. First, disclosure is permitted "pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." *Id.* Second, records may be disclosed "pursuant to the order of a court of competent jurisdiction." 5 U.S.C. § 552a(b)(11); *see* 38 C.F.R. § 1.511. An order of the Veterans Court or other Federal court directing VA to disclose a Veteran's records to a different Veteran for purposes of the latter Veteran's claim would satisfy that requirement. *See* 38 C.F.R. § 1.511(b)(1) ("[u]pon receipt of a Federal court order directing disclosure of claimant records, such records will be disclosed"). Third, the Privacy Act permits disclosure pursuant to a "routine use" published in the Federal Register that is compatible with the purpose for which the information was collected. 5 U.S.C. § 552a(b)(3). With respect to the system of records that includes VA claims files, the routine uses established by VA do not include disclosing one Veteran's records to another Veteran for the purpose of supporting the latter Veteran's claim for benefits. *See* 74 Fed. Reg. 29,275, 29,277-81 (2009) (listing routine uses).[2]

9. Another exception to the Privacy Act, in 5 U.S.C. § 552a(b)(2), permits disclosure of a protected record when such disclosure is required by the Freedom of Information Act (FOIA), 5 U.S.C. § 552. FOIA states that Federal agencies must disclose records requested unless they may be withheld in accordance with one or more of nine statutory exemptions. 5 U.S.C.§ 552(b) Exemption 6 of FOIA protects records the release of which would lead to a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6). It is unquestionable that Veterans and their family members have a privacy interest in the information maintained in their VA claims files. Once a personal privacy interest has been identified, FOIA requires a balancing of the privacy interest that would be compromised by a disclosure against the public interest in the requested information. *See Jurewicz v. U.S. Dept. of Agriculture*, 741 F.3d 1326, 1332 (D.C. Cir. 2014). In a case where Veteran B seeks to obtain information from Veteran A's claims file in order to pursue a claim for VA benefits, we believe the privacy interest of Veteran A would outweigh any public interest in disclosure of the information. Because disclosure would not be required under FOIA, the Privacy Act exception in 5 U.S.C. § 552a(b)(2) would not apply to permit disclosure. For the foregoing reasons, VA has no authority under the Privacy Act to disclose to a claimant records maintained by VA regarding another individual, except upon the written consent of the person to whom the records pertain or upon receipt of a court order directing the disclosure.

10. Again as noted above, section 5701(a) provides that "[a]ll files, records, reports, and other papers and documents pertaining to any claim under any of the laws

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[2] We note that 5 U.S.C. § 552(b)(7) permits an agency to disclose a record "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." Under this provision, a VA adjudicator deciding Veteran A's claim potentially may consider records in Veteran B's VA claims file without violating the Privacy Act. However, this provision does not in itself authorize further disclosure of such records to Veteran A.

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." Four recognized exceptions to this general prohibition are potentially applicable to the issues addressed in this opinion. First, section 5701(b)(2) permits disclosure "[w]hen required by process of a United States court to be produced in any suit or proceeding therein pending." Second, section 5701(b)(5) permits disclosure "[i]n any suit or other judicial proceeding when in the judgment of the Secretary such disclosure is deemed necessary and proper." Subsections (b)(2) and (b)(5) both require actual or imminent litigation in a court and thus generally do not authorize VA to disclose information from one Veteran's file to another Veteran in the context of an administrative claim before VA. *See* 38 C.F.R. § 1.511(a) and (b) (prescribing procedures for disclosure where a "suit (or legal proceeding) has been threatened or instituted against the Government" or in response to court orders). Third, although section 5701 does not expressly authorize release of VA claims file records to a third party upon consent of the person to whom they relate, VA has concluded that it ordinarily may disclose information from claim records with the written authorization of the person to whom those records relate. *See* VAOPGCADV 22-90. Because VA may disclose to a VA claimant information concerning the claimant alone, 38 U.S.C. § 5701(b)(1), there is no apparent reason VA could not honor a claimant's request to disclose such information to another party.

11. Fourth, section 5701(e) provides that, "[e]xcept as otherwise specifically provided in this section with respect to certain information, the Secretary may release information, statistics, or reports to individuals or organizations when in the Secretary's judgment such release would serve a useful purpose." VA has consistently interpreted this provision to vest VA with discretion to disclose information relating to claims, other than names or addresses, if VA determines that such disclosure would serve a useful purpose. VAOPGCADV 53-90; VAOPGCADV 22-90. In contrast to the "routine use" exception to the Privacy Act, the "useful purpose" exception does not require any specific procedure, such as publication in the Federal Register, to invoke the exception. Rather, VA has determined that adjudicative personnel in VA regional offices generally may by delegation exercise the authority in individual cases to determine whether such disclosure would serve a useful purpose in the particular case. VAOPGCADV 65-90. As noted above, the "useful purpose" exception of section 5701(e) does not permit disclosure of names and addresses. However, if a claimant provided VA the name of his or her alleged assailant, VA's provision of information concerning the alleged assailant would not constitute a disclosure of that individual's name.

12. Section 7332 of title 38, United States Code, generally bars disclosure of records pertaining to treatment for drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia, absent specific written consent as provided in 38 C.F.R. § 1.475 or a court order finding good cause for such disclosure. 38 U.S.C. § 7332(b)(1) and (2)(D). Accordingly, if the information sought to be

disclosed is protected by section 7332, VA must ensure that any consent or court order meets the heightened requirements applicable under that statute and VA's implementing regulations.

13. In summary, where section 7332 is not implicated, the disclosure under the Privacy Act and section 5701 of one individual's VA records to another individual may be made pursuant to a court order, pursuant to the written consent of the individual to whom the records pertain, or where there is both an applicable routine use and a VA finding that the disclosure would serve a useful purpose (subject to the limitation that VA may not disclose names and addresses pursuant to a "useful purpose" determination). Because there currently is no applicable routine use, disclosure of one individual's VA records to another individual for purposes of supporting the latter individual's benefits claim generally would require a court order or the written consent of the individual to whom the records pertain. (See below concerning deceased individuals.)

14. Turning next to records maintained by agencies other than VA, the Privacy Act would apply to prohibit the disclosure of records concerning one individual to another individual absent the written consent of the person to whom the records pertain, a court order directing the disclosure, or a routine use permitting disclosure for the specified purpose. Because Federal agencies generally maintain numerous systems of records, each subject to its own prescribed routine uses, it is impossible to state a general conclusion as to whether any other agencies' records on an individual may be disclosed to another individual for purposes related to the latter individual's claim for VA benefits. If a claimant identifies records held by another agency concerning another individual that may be relevant to the claimant's VA claim, we believe it would be consistent with VA's duty to assist for VA to request that the other agency provide those records, but only if such records may be disclosed to the VA claimant. For purposes of making such requests, we suggest that VA clearly explain to the custodian agency the circumstances and conditional nature of the request. For example, VA may develop standard language to explain that the records are requested on behalf of a VA claimant who is not the individual to whom the record pertains, for purpose of substantiating facts related to the claimant's claim for VA benefits, and further explaining that VA requests a determination by the custodian agency as to whether such records may be disclosed to the VA claimant for that purpose under the Privacy Act and any routine uses applicable to the system of records at issue.

<u>Duty to Assist in Obtaining Consent or Authority to Disclose Information Concerning Another Individual</u>

15. In a case where VA does not currently have a written consent or court order authorizing disclosure, the question may arise as to whether VA's duty to assist under section 5103A(a) would require VA to assist the claimant by seeking the written consent of the individual to whom the relevant records pertain or seeking a court order authorizing the disclosure. Section 5103A provides no clear answer to that question,

but merely provides that VA must make "reasonable efforts" to assist claimants in developing evidence to support their claims. VA regulations at 38 C.F.R. § 3.159 also do not address this issue. Section 3.159(c)(1)(ii) provides that, if necessary, the claimant seeking VA's assistance must authorize the release of his or her records to VA, but does not address circumstances in which a third party's records may be relevant to the claim. In determining how an ambiguous general term, such as "reasonable efforts," applies to a particular case, an agency necessarily exercises a degree of discretionary judgment. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) ("Congress, when it left an ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows"). In exercising that discretion, the agency may consider competing policies and practical considerations. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984). In determining whether "reasonable efforts" include asking a third party to consent to disclosure of their records to a claimant, we believe VA may consider factors including the third party's privacy interest in his or her records; the likelihood that the request would result in consent to disclose the records to the claimant; and the potential for such a request to generate conflict or otherwise adversely affect the safety, health, or rights of either the claimant or the third party. VA also may consider whether there is a basis for believing that records of the type referenced by the claimant exist, as distinguished from mere speculation that such records may exist. *See* 38 U.S.C. § 5103A(c)(1)(C) (requiring VA to assist in obtaining "records" that the claimant "adequately identifies"); *Gobber v. Derwinski*, 2 Vet. App. 470, 472 (1992) (duty to assist "is limited to specifically identified documents that by their description *would be* facially relevant and material to the claim" (emphasis in original)). Of course, VA also may consider other factors relevant to any particular case.

16. A determination that "reasonable efforts" do not require seeking a third-party's consent to disclose his or her records to the claimant would be most strongly justified in a case where the interests of the third party are adverse to the claimant's interest, such as where the claimant alleges that the third party assaulted the claimant or engaged in other improper or unlawful behavior. In such cases, the third-party's interest in maintaining the confidentiality of his or her records would be high, and the likelihood that the third party would consent to disclosure of his or her records would be quite low. Further, asking the third party to allow disclosure to the claimant may create some risk of conflict or other adverse effects. In order to obtain a third party's informed consent to disclose his or her records to the claimant, VA potentially would have to disclose to the third party the claimant's identity and the nature of the claim (which it could do only with the claimant's written consent, a court order, or an applicable routine use and "useful purpose" determination under the Privacy Act and section 5701(e)). VA reasonably may consider that such disclosures and inquiries related to controversial and emotionally-charged matters may give rise to conflicts and could have adverse effects on both the third party and the claimant (particularly if either or both suffer from

psychiatric conditions). Accordingly, VA may be justified in concluding that "reasonable efforts" to assist a claimant ordinarily would not include notifying a third party that the claimant has accused the third party of assault or other wrongdoing and asking the third party to consent to disclosure of his or her records to the claimant.

17. In contrast, where the information alleged to exist in a third party's records does not entail any matters of a controversial nature or as to which the interests of the third party and the claimant are adverse, there may be a stronger basis for finding that "reasonable efforts" include asking the third party to consent to disclosure of his or her records to the claimant. Even in such cases, VA may find that such actions are beyond the scope of "reasonable efforts" for other reasons, such as where there is no reason, other than mere speculation, to believe that such records exist or where the burden of obtaining the third-party's consent would be unreasonable (e.g., the third party cannot be located absent significant effort and expense). Further, if VA finds that a request for the third party's consent is reasonable, it must first obtain the claimant's informed written consent to disclose his or her information to the third party as needed in order to facilitate the third party's informed consent to the disclosure of his or her records to the claimant. In view of the unique and complex issues involved in determining how VA's duty to assist applies in the context of obtaining third-party records, the Veterans Benefits Administration may wish to consider issuing regulations or establishing uniform procedures for handling such matters in order to ensure that the relevant factors are duly considered and addressed consistently.

18. We believe VA's duty to assist generally would not require VA to institute court proceedings to secure authority for such disclosure. It is not clear that VA would have standing to initiate such judicial proceedings on a claimant's behalf. Moreover, instituting a judicial proceeding collateral to a pending benefits claim would likely be beyond the scope of the "reasonable efforts" contemplated by section 5103A(a).

Consent to Release of Information Regarding a Deceased Individual

19. An individual's rights under the Privacy Act do not survive the individual's death. *See Crumpton v. United States*, 843 F.Supp. 751, 756 (D.D.C. 1994); VAOPGCADV 53-90. However, although the Privacy Act does not bar release of a decedent's records to a third party, it also confers no right on the third party to receive those records. *See Warren v. Colvin*, 744 F.3d 841, 844 (2nd Cir. 2014). Rather, under exemption 6 of FOIA, discussed above, close family members of the decedent may, for example, possess a privacy interest in avoiding release of information concerning the decedent the release, of which could subject them to harassment or grief. *See Mobley v. Central Intelligence Agency*, 924 F. Supp. 2d 24, 70-71 (D.D.C. 2013). Where such a privacy interest exists for a decedent's close relatives, an agency generally must balance the public interest in release of the records against the privacy interest of the relatives in order to determine whether release of the records is warranted under FOIA. *See Jurewicz*, 741 F.3d at 1332. Further, the prohibitions on release of VA records under 38

U.S.C. §§ 5701 and 7332 do survive an individual's death. *See* VAOPGCADV 12-99. If the individual to whom the record pertains is deceased, VA could disclose information from that individual's VA file to a claimant pursuant to 38 U.S.C. § 5701(e) if it finds the disclosure would serve a "useful purpose" (subject to the limitation that VA may not disclose names and addresses pursuant to a "useful purpose" determination), and no consent would be required in that situation. Alternatively, VA may release information protected by section 5701 and exemption 6 of FOIA with the consent of the deceased individual's next of kin. *See* VAOPGCADV 12-99. However, the next-of-kin or other representative of the decedent generally cannot authorize disclosure of information protected by 38 U.S.C. § 7332, as section 7332(b)(3) provides that the next-of-kin or personal representative of the decedent may authorize the disclosure of information protected by that statute only if such disclosure is necessary for a survivor of the decedent to obtain VA survivor benefits.

Effect of 38 C.F.R. § 3.304(f)(5)

20. Section 3.304(f)(5) of title 38, Code of Federal Regulations, does not require VA to obtain the records of an individual who allegedly assaulted a claimant. Section 3.304(f)(5) identifies the types of evidence that may be useful in substantiating a claim that an in-service assault occurred. Section 3.304(f)(5) provides that, in claims for service connection for PTSD due to personal assault, "evidence from sources other than the veteran's service records may corroborate the veteran's account of the stressor incident," and, further, identifies nonexclusive examples of such corroborating evidence. The regulation does provide that VA will not deny a PTSD claim based on personal assault without first advising the claimant that such evidence may be useful and providing the claimant the opportunity to submit such evidence or advise VA of potential sources of such evidence. In proposing section 3.304(f)(5), VA explained that the purpose of the regulation was to make claimants "aware of the types of evidence which might support their claims," to "give them an opportunity to obtain and submit such evidence," and to "ensure that VA will not deny claims simply because the claimants did not realize that certain types of evidence may be relevant and therefore failed to submit such evidence to VA." 65 Fed. Reg. 61,132 (Oct. 16, 2000). Section 3.304(f)(5) does not itself impose a duty upon VA to seek to obtain particular evidence. Rather, 38 U.S.C. § 5103A and VA's implementing regulations at 38 C.F.R. § 3.159 set forth VA's duty to assist claimants in obtaining relevant records. The examples of potentially corroborating evidence listed in section 3.304(f)(5) may assist VA in determining what types of evidence may be "relevant," for purposes of section 5103A, to a claim based on PTSD due to a personal assault. However, section 3.304(f)(5) does not itself impose any duty to assist independent of section 5103A.

Obtaining a Statement or Testimony from an Alleged Assailant

21. VA is not required to solicit a written statement from, or to depose during a hearing, the individual who allegedly assaulted a claimant who is seeking VA benefits for

disability due to the alleged assault. Section 5103A requires VA to provide reasonable assistance in "obtaining evidence" and specifies that such assistance may include "obtaining records" and "providing a medical examination or obtaining a medical opinion." Apart from the requirement to provide a medical examination or obtain a medical opinion, section 5103A does not expressly require VA to seek the creation of new evidence, including through such means as questioning or deposing third parties. The Veterans Court has held that the duty to assist may require VA to notify a claimant that statements from others, such as fellow service members, may help to substantiate a claim. *See Sizemore v. Principi*, 18 Vet. App. 264, 273-74 (2004); *Garlejo v. Derwinski*, 2 Vet. App. 619, 620-21 (1992). However, the court has not held that the duty to assist requires VA to solicit third-party statements in support of a claim. Consistent with section 5103A, VA regulations at 38 C.F.R. § 3.159(c)(1)-(4) provide that VA will assist a claimant by "[o]btaining records" and "[p]roviding medical examinations or obtaining medical opinions," but do not provide that VA will solicit new statements (other than medical opinions) or testimony from third parties.

22. In listing the type of evidence that may corroborate a claimed assault, including "statements from family members, fellow service members, or clergy," 38 C.F.R. § 3.304(f)(5),states that VA will not deny a claim without giving the claimant the opportunity to furnish this type of evidence "or advise VA of potential sources of such evidence." That language could be read to suggest that VA may assist a claimant by soliciting statements from third parties whom the claimant has identified. As explained above, however, section 3.304(f)(5) does not purport to define VA's duty to assist claimants in obtaining evidence, but, rather, is intended to ensure that claimants are notified of the types of evidence that may support their claims. Apart from the referenced third-party statements, the list of types of evidence in section 3.304(f)(5) refers exclusively to existing records that potentially would fall within the scope of the duty to assist described in section 3.159(c). Accordingly, insofar as section 3.304(f)(5) suggests that claimants may notify VA of sources of potential evidence, that language is most logically construed to refer to documents within the scope of VA's duty to assist under section 3.159(c) rather than as imposing an additional duty to assist in soliciting third-party statements. This interpretation is consistent with the instructions provided on VA Form 21-0781a, the form used to solicit information regarding a claimed stressor involving a personal assault. The form states:

> OTHER SOURCES OF INFORMATION: Identify any other sources (military or non-military) that may provide information concerning the incident. If you reported the incident to military or civilian authorities or sought help from a rape crisis center, counseling facility, or health clinic, etc., please provide the names and addresses and we will assist you in getting the information. If the source provided treatment and you would like us to obtain the treatment records, complete VA Form 21-4142, Authorization and Consent to Release Information to the Department of Veterans Affairs (VA), for each provider. If you confided in roommates,

> family members, chaplains, clergy, or fellow service persons, you may want to ask them for a statement concerning their knowledge of the incident. These statements will help us in deciding your claim. Other sources of information also include personal diaries or journals.

Those instructions indicate that VA will attempt to obtain existing records identified by the claimant, but that the claimant generally is responsible for soliciting third-party statements in support of the claim. We thus conclude that the language of section 3.304(f)(5) does not require VA to solicit third-party statements and that VA has not construed its regulation to impose such a requirement.

23. We next address whether VA may solicit a statement from an alleged assailant even though it is not required to do so. Under 38 U.S.C. § 5103A(g), VA has discretion to provide assistance that it is not specifically required to provide. However, in 38 C.F.R. § 3.159(g), VA has specified that "[t]he authority recognized in subsection (g) of 38 U.S.C. 5103A is reserved to the sole discretion of the Secretary and will be implemented, when deemed appropriate by the Secretary, through the promulgation of regulations." In issuing that regulation, VA explained that "[t]he main purpose of this new provision is to avoid the potential disparate treatment of similarly situated claimants that could arise from inconsistent use in various parts of the agency of open-ended authority to provide 'extra' development assistance." 73 Fed. Reg. 23,353, 23,355 (Apr. 30, 2008). VA further explained that this approach implements the Secretary's determination "of the appropriate level of assistance to be provided individuals based on VA's finite resources and the need to process claims in an efficient manner for the benefit of all veterans." *Id.* In light of section 3.159(g), it generally would be inappropriate for VA to solicit statements or testimony from an alleged third-party assailant. To undertake such an effort in any claim, VA would need to address sensitive issues regarding the disclosure of protected information between the claimant and the third party and the appropriateness, in the particular case, of seeking assistance from a third party who allegedly assaulted the claimant. Absent regulatory standards governing those determinations, there is a substantial possibility that case-by-case determinations would result in disparate treatment of similarly situated claimants and disparate use of VA's adjudication resources, the very problems section 3.159(g) was designed to prevent. Accordingly, we believe a decision regarding whether to solicit statements from alleged assailants is the type of decision that, under section 3.159(g), must be made by the Secretary in the context of rulemaking.

24. Under 38 U.S.C. § 5711(a), VA has authority to "issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles from the place of hearing" and to take affidavits and examine witnesses for purposes of claims for VA benefits. The Secretary has delegated this authority to several VA officials, including the Chairman of the Board of Veterans' Appeals and the heads of VA regional offices. 38 C.F.R. § 2.2(a) and (b). Section 5711(a) is permissive in nature and grants VA discretion in determining whether to grant or deny requests for a subpoena. The Board has issued

regulations setting forth the requirements for a motion for a subpoena and procedures for deciding such motions. 38 C.F.R. § 20.711. Among other things, the motion must explain why the claimant cannot obtain the attendance of the witness and/or the production of evidence without a subpoena. 38 C.F.R. § 20.711(b). We are not aware of any regulations or directives governing such motions before VA regional offices. If the Board or a regional office receives a motion for subpoena to obtain the testimony of an alleged assailant, that office may decide the motion in the same manner as it would decide any other motion for subpoena. Because the authority to issue subpoenas is established by statute and, in the Board's case, regulations independent of the duty to assist, the grant of a motion for subpoena would not directly contravene 38 C.F.R. § 3.159(g). We note, however, that decisions as to whether to grant a subpoena to compel the testimony of an alleged assailant may implicate some of the sensitive issues discussed above regarding information disclosure, the potentially adversarial posture of proceedings involving such witnesses, and the potential for disparate treatment of claimants. Accordingly, VA may wish to develop guidelines regarding how it will exercise its discretionary authority with respect to requests for subpoenas in this type of case.

Handling the Disclosure of Information Concerning Another Individual

25. In circumstances where VA may disclose to a Veteran claimant the records of another Veteran, VA should exercise care in ensuring that the disclosure is limited to the information that VA is authorized to disclose. The terms of a written consent, routine use, useful purpose determination, or court order may specify the types of information that may be disclosed. If such authorities refer in general terms to disclosure of information relevant to a particular claim for benefits, personal information concerning a third party that is unnecessary to the adjudication of the claim should be excluded or redacted, as appropriate. This generally would include addresses, social security numbers, and similar identifiers. As noted above, if the claimant provided VA the name of the third party, there would be no need to redact that name in any documents included in the claims file. If the third party is deceased, VA still must guard against the unnecessary disclosure of any information maintained in VA records because the protections of 38 U.S.C. §§ 5701 and 7332 survive the death of an individual. However, non-VA records pertaining to a deceased individual would not need to be redacted unless they are protected from disclosure by a law other than the Privacy Act.

26. If the claimant asserts that another individual assaulted him or her in service, but a search of the other individual's records reveals no information supporting that claim, VA could not include the other individual's complete service records in the claimant's claim file simply to establish the absence of relevant evidence. However, if the VA adjudicator had reviewed the other individual's records in order to determine whether they contained relevant records, then concerns may arise regarding the adjudicator's reliance on records that cannot be disclosed to the claimant. In order to avoid this

situation, the VA adjudicator could ask a custodian of the records – i.e., an employee of the office having custody of the records pertaining to the other individual – to review the record for documents concerning the alleged assault, investigation, disciplinary proceedings, or such other occurrence as may be pertinent to the particular claim and to either furnish the VA adjudicator with the relevant records or provide a written response documenting the search and stating that no such records were found. We believe that such a process appropriately may balance the goals of obtaining relevant records with the need to prevent unwarranted disclosures of protected records.

27. Although VA may be required to redact certain personal information when it adds a third-party's records to the VA claims file, VA ordinarily would not be required to review all records previously placed in the claims file to determine whether they contained similar information requiring redaction. As noted above, if the claimant identifies the third party's name to VA, there would be no need to redact that name from documents in the claims file. In general, it appears unlikely that the claims file would contain personal information concerning a third party that was not provided by the claimant. However, if in a particular case there is reason to suspect that the file may contain such information – for example, if VA previously obtained third-party records from a source other than the claimant and placed them in the file – then it would be advisable to review those records and redact any information that would be protected from disclosure.

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