

**STATEMENT OF LINDA A. HALLIDAY  
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BEFORE THE  
COMMITTEE ON HOMELAND SECURITY  
AND GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE  
HEARING ON  
IMPROVING VA ACCOUNTABILITY:  
EXAMINING FIRST-HAND ACCOUNTS OF  
DEPARTMENT OF VETERANS AFFAIRS WHISTLEBLOWERS  
SEPTEMBER 22, 2015**

Mr. Chairman and Members of the Committee, thank you for the opportunity to discuss how the VA Office of Inspector General (OIG) works to protect and encourage Federal employees to come forward with allegations of waste, fraud, abuse, and mismanagement. I am accompanied by Mr. Quentin G. Aucoin, Assistant Inspector General for Investigations.

**BACKGROUND**

Under Public Law (P.L.) 101-12, the *Whistleblower Protection Act of 1989*, as amended, it is unlawful for agencies to take or threaten to take a personnel action against an employee who makes a protected disclosure—information he or she reasonably believes evidences a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health and safety—so long as the disclosure is not specifically prohibited by law. Personnel actions can include a poor performance review, demotion, suspension, or termination. In addition, the law prohibits retaliation for filing an appeal, complaint, or grievance; helping someone else file or testifying on their behalf; or cooperating with or disclosing information to the OIG.

The OIG does not make a determination as to whether an individual who makes a complaint or provides information to the OIG has made a protected disclosure as defined under the *Whistleblower Protection Act of 1989*, as amended, and applicable case law is considered to be a “whistleblower.” This is a legal determination made by the U.S. Office of Special Counsel (OSC), the U.S. Merit Systems Protection Board (MSPB), or the U.S. Court of Appeals for the Federal Circuit.

**ONGOING EFFORTS TO EDUCATE AND PROTECT WHISTLEBLOWERS**

As we have stated on many occasions, complainants, including whistleblowers, are the lifeline of OIG organizations, and the OIG is committed to protecting their identities, understanding their concerns, objectively seeking the truth, and ensuring VA pursues accountability and corrective action for wrongdoing. Individuals who at times risk their reputations and careers to report suspected wrongdoing should be afforded all of the protections available by law. Over the years, whistleblowers have played a vital role in

revealing serious problems in need of corrective action at VA. For example, we recently acknowledged the instrumental efforts of a whistleblower who exposed extensive, persistent data integrity issues at the Veterans Health Administration's Health Eligibility Center.<sup>1</sup>

#### Promoting Awareness about Whistleblower Protections and Retaliation Prohibitions

As authorized by P.L. 112-199, the *Whistleblower Protection Enhancement Act of 2012*, the OIG Whistleblower Protection Ombudsman program provides education about protections for current or former employees of VA, VA contractors, or VA grantees who make protected disclosures. The OIG Ombudsman cannot act as a legal representative, agent, or advocate of the employee or former employee; however, the Ombudsman coordinates with VA administrations and staff offices to increase awareness of prohibitions on whistleblower retaliation. In addition, the program disseminates information on rights and remedies against retaliation for making protected disclosures. Specifically, the Ombudsman provides complainants with information on how to contact organizations that address reprisal allegations.

#### Protecting the Identities of Complainants Who Contact the OIG Hotline

The OIG takes seriously the provisions of Section 7(b) of P.L. 113-126, the *Inspector General Act of 1978* (IG Act), as amended, that prohibits the disclosure of the identity of an employee who has made a complaint or provided information to the OIG unless the employee consents to the disclosure or, in very rare occasions, the VA Inspector General personally determines such disclosure is unavoidable during the course of an investigation; however, such determinations are extremely rare.

The OIG Hotline serves as the central point of contact for employees, veterans and their family members, other Federal agencies, and the general public to report allegations. When individuals contact our Hotline, they are advised of their right to submit their complaint anonymously, to identify themselves but remain confidential, or to waive the right to confidentiality, and of the potential consequences of their decision. Confidential status enables further communication between the OIG and the complainant after the original complaint is received. Confidential status is more advantageous to both the OIG and the complainant than anonymous status because it allows further contact with complainants to clarify issues and better focus of efforts.

We receive far more allegations than we have the resource capacity to review, thus the OIG must be highly selective in the cases we accept. VA is the second largest Federal employer with a fiscal year (FY) 2015 operating budget of \$163.5 billion and over 351,000 employees spread throughout VA's massive, decentralized network of 144 hospitals, over 1,200 outpatient clinics, 300 vet centers, 56 regional benefit offices, and over 130 national cemeteries spread throughout every state, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Republic of the Philippines, and the U.S. Virgin Islands that serve an estimated 22 million living veterans.

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<sup>1</sup> <http://t.co/PFHJojWKzh>. Accessed September 17, 2015.

The OIG receives approximately 40,000 complaints annually from employees, veterans, their families, and the general public, making our Hotline one of the largest and most active in the OIG community. We must use our professional judgment to accept only the allegations that we believe represent the most serious risks to veterans, beneficiaries, and taxpayers. This includes indicators of significant fraud, compliance failures, systemic problems in program management and financial stewardship, and improprieties by senior officials.

For allegations that are not accepted by the OIG but that appear to warrant further review, the OIG makes external referrals to VA in accordance with VA Directive 0701, *Office of Inspector General Hotline Complaint Referrals* (January 15, 2009).<sup>2</sup> I have directed my staff to initiate a review of VA Directive 0701 to determine ways we can enhance the existing referral process and provide better service to individuals who report allegations. Further, I have a team assessing the feasibility of repositioning our resources to enable the OIG to perform more reviews of the complaints that under current procedures would be externally referred to VA, and to provide better control of the quality of the reviews performed. Because thorough investigations and reviews take time, we are specifically considering enhancing communications with complainants at interim points throughout the process.

We also apply strong controls to protect the identities of those who report allegations. For example, the OIG does not identify the complainant to VA when making these referrals without the complainant's prior written consent. In certain circumstances, such as veteran-specific complaints regarding specific episodes of VA medical care, it may be unavoidable to disclose a complainant's identity to VA in order for the allegation to be reviewed. In cases where it is not possible for VA to review the complaint without the OIG disclosing the identity of the complainant, we advise the complainant and, before taking any further action on the complaint, request that they provide their written consent for the OIG to disclose their identity. Without the proper consent, we do not proceed with an external referral.

#### Protecting the Identities of Complainants for Matters Outside OIG's Jurisdiction

The OIG does not evaluate complaints regarding matters that are unrelated to the programs and operations of VA or that can be addressed in other legal or administrative forums. When possible, the OIG advises the individual of the appropriate VA program office or Federal agency that can provide further assistance on the matter. For example, individuals with complaints regarding claim adjudications for VA disability and pension benefits are advised to contact the Veterans Benefits Administration (VBA); individuals with complaints regarding discrimination are advised to contact VA's Office of Resolution Management (ORM); and individuals with allegations of prohibited personnel practices, including reprisal for whistleblowing, are advised to contact OSC. As a precautionary measure to avoid an accidental unauthorized disclosure of an individual's identity, we do not provide the incoming complaint directly to the outside agency but rather provide the agency's contact information to the individual to pursue if

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<sup>2</sup> [http://www1.va.gov/vapubs/viewPublication.asp?Pub\\_ID=436&FTy](http://www1.va.gov/vapubs/viewPublication.asp?Pub_ID=436&FTy). Accessed September 17, 2015.

he or she wishes. I have also directed my staff to assess the quality of our communications with complainants.

### Providing Guidance on Responsibly Reporting Sensitive Information

Multiple Federal laws, as outlined below, protect the disclosure of certain personal information maintained in VA systems of records to a third party without the prior written consent of the individual to whom the record pertains. It is the responsibility of every VA employee, including whistleblowers, to safeguard and protect the personally identifiable information (PII) and protected health information (PHI) of veterans and fellow employees who could be harmed if the personal information became public.

PII is any information about an individual that can be used to distinguish or trace an individual's identity alone or when combined with other information that can be linked to an individual. Examples of such personal information include but are not limited to an individual's name, social security number, date and place of birth, photograph, financial transactions, and criminal or employment history. PHI includes any information that concerns the health status, provision of health care, or payment for health care that can be linked to an individual.

The improper disclosure of veterans' PII or PHI, particularly sensitive medical and mental health information, can have serious consequences for the veterans to whom the information pertains. Individuals whose information is improperly disclosed can suffer social, economic, or physical harm even including potential loss of life. Federal laws dictate 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.

In recognition of this, many VA employees are uncertain about whether they are permitted by law to disclose PII and PHI to the OIG. P.L. 104-191, the *Health Insurance Portability and Accountability Act of 1996* (HIPAA), specifically authorizes the disclosure of HIPAA-protected information by individuals reporting to a health oversight agency such as the OIG; however, such disclosures must be made in a responsible manner without compromising veterans' personal information or right to privacy. For several years, the OIG's public website has included a "Frequently Asked Questions" section that specifically addresses this concern.<sup>3</sup> Our website instructs VA employees about how they can keep information secure when the information is protected from disclosure by law.

The OIG takes very seriously the responsibility of every VA employee to protect veterans' sensitive information, and we have a track record of investigating data losses and breaches within VA. While we strongly encourage any employee with information of wrongdoing to report it to the OIG, we equally encourage those employees to ensure they are doing so in a manner that does not compromise sensitive veteran information. An employee who blows the whistle is not immune from or an exception to enforcement

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<sup>3</sup> <http://www.va.gov/oig/hotline/faq.asp#disclose>. Accessed September 17, 2015.

of these laws when making a disclosure about suspected wrongdoing if they put sensitive veteran information at risk during the course of the disclosure.

- HIPAA and the Privacy Rule (45 CFR Part 160 and Part 164, Subparts A and E) prohibit covered entities, with limited exceptions, from disclosing PHI to a third party without the prior written consent of the individual to whom the record pertains.
- P.L. 93-579, the *Privacy Act of 1974* (Privacy Act), governs the collection, storage, access to, use of, and disclosure of PII about veterans and VA employees. The Privacy Act prohibits, with limited exceptions, 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.
- Title 38 U.S.C. Sections 5701, 5705, and 7332 protect certain VA records from disclosure. As with the Privacy Act, each of these statutes include civil and/or criminal penalties for unauthorized disclosures.
  - Title 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.
  - Title 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.
  - Title 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.

VA records can and frequently include highly confidential information which, if publicly disclosed, could cause harm not only to important processes that ensure continuous quality review and improvement, but most importantly, to veterans and their families who may have significant interests in protecting their private information.

## **CHALLENGES TO PROTECTING WHISTLEBLOWER IDENTITIES**

### Swift Response by OIG Management to Confidentiality Breaches

Fulfilling the OIG’s mission requires a people-driven process and on occasion human errors occur during the course of our work. On rare occasions, we receive complaints

that OIG staff breached the confidentiality of a complainant. When this occurs, we investigate the allegations and take administrative action with our own staff when the complaint is substantiated. I am aware of only two such incidents both of which were unintentional mistakes, and actions were taken to hold staff accountable. I am not aware that there has ever been an intentional breach of a complainant's confidentiality.

#### Employees Who Report Their Complaint to Multiple Outlets

There are occasional instances where individuals who have requested confidentiality with the OIG have also made the same complaints to VA management, coworkers, or media outlets, or they have made statements that they have gone to the OIG or threatened to go to the OIG. Even though the OIG does not disclose the identity of the complainant, either overtly or by refusing to confirm that the individual submitted a complaint, VA officials know or, at a minimum suspect, that the individual filed the complaint. Furthermore, under certain circumstances, the very nature of the allegations brought forth by the complainant may render the complainant's identity obvious or possible to deduce by others outside the OIG.

#### **RECENT INITIATIVES**

I assumed the position of Deputy Inspector General (IG) on July 6, 2015. On July 10, 2015, I announced that one of my first acts as Deputy IG would be to ensure that all OIG employees are fully trained on protections and remedies guaranteed to Federal employees by the *Whistleblower Protection Act of 1989*, the *Whistleblower Protection Enhancement Act of 2012*, and related laws. To this end, the OIG has registered with OSC to participate in the OSC's 2302(c) Certification Program and expects to complete all required actions for certification by December 2015. OSC presented the first training session on September 16, 2015, to approximately 25 percent of OIG staff. Undertaking the certification process will help strengthen our past training efforts so that all OIG employees—from our Hotline analysts who are a complainant's first point of contact with the OIG to our auditors, investigators, and healthcare inspectors who interact with complainants in the course of their daily work activities—can assist complainants in making protected disclosures and by educating them on their right to be free from retaliation for whistleblowing and other prohibited personnel practices.

I have also taken several actions to further strengthen the OIG's Whistleblower Protection Ombudsman program.

#### Improved Hotline Submission Process

In order to better serve complainants and address complainant concerns of potential retaliation in an informed manner, we have created additional forms on our website designed to ensure anonymity, confidentiality, or allow for full identity disclosure. Providing these different classifications allows complainants a greater degree of confidence that their personal information is appropriately protected. We also rewrote in plain English the notice Hotline sends to individuals who contact us so that there is a clear understanding of what to expect when making a complaint.

### Reinvigorated the OIG Rewards Program

To promote greater utilization of the OIG's cash reward program to individuals who disclose information leading to felony charges, monetary recovery, or significant improvements to VA operations or programs, each OIG Directorate and the OIG Whistleblower Ombudsman will proactively conduct a semiannual review of disclosures made to the OIG to identify potential recipients for cash rewards. Rewards will be based on such factors as the significance of the information, risks to the individual making the disclosure, time spent and expenses incurred by the individual making the disclosure, and cost savings to VA.

Later this year, we will recognize a vocal advocate of better Government who was instrumental in supporting OIG's efforts to pursue allegations of criminal activity, fraud, waste, abuse, and mismanagement of operations at a VA Regional Office (VARO) at a public presentation. In addition to personally providing valuable information pointing to gross mismanagement, the individual encouraged other colleagues to do the same in a review completed in 2015. With the assistance of this individual and the evidence provided, OIG substantiated serious issues at the VARO.

### Enhanced Crime Awareness Education Briefings

These briefings, provided by our criminal investigators as part of cyclical inspection reviews of VHA and VBA facilities, will be expanded to better define how VA employees can make disclosures of protected health information, the roles and responsibilities of the Whistleblower Protection Ombudsman, and the avenues of relief available to VA employees. For the period FY 2014 to present, more than 300 briefings were attended by approximately 20,000 VA employees nationwide. Implementation of this training in VA's work environment can potentially reduce reprisal actions that whistleblowers have previously experienced.

## **CONCLUSION**

The OIG recognizes the critical role complainants and whistleblowers play in exposing serious problems and deficiencies in VA programs and operations, and I will continue to review and evaluate ways in which the OIG can enhance its interactions with complainants. We are committed to protecting the identity of any person who comes forward to the OIG to report serious allegations of criminal activity, fraud, waste, abuse, and mismanagement; getting to the bottom of those allegations; and monitoring VA to ensure they pursue accountability and corrective action when wrongdoing is found. OSC has found that VA whistleblowers have experienced reprisal actions, and that those actions are inappropriate. Whistleblowers have raised valid and important concerns to our organization. Their concerns regarding reprisals cannot be taken lightly. As we move forward it is my hope that OSC will continue to actively investigate complaints of such reprisal actions to the fullest extent possible and that VA will hold accountable any VA official who engages in retaliatory actions.

Mr. Chairman, this concludes my statement and I would be happy to answer any questions that you or Members of Committee may have.