

VHA FREEDOM OF INFORMATION ACT PROGRAM

1. REASON FOR ISSUE: This Veterans Health Administration (VHA) directive establishes a VHA-wide program for the implementation of the Freedom of Information Act (FOIA) and establishes policy to comply with FOIA. This directive must be used to document and facilitate the appropriate disclosure of agency records maintained by VHA under FOIA.

2. SUMMARY OF CONTENT: This VHA directive establishes:

a. Policy for the VHA FOIA Program. This policy requires VHA-wide compliance with all applicable laws, regulations, Executive Orders and implementation policies, directives and handbooks pertaining to FOIA;

b. Responsibilities for implementing, managing, and monitoring the VHA FOIA Program;

c. Instructions on compliance with the Freedom of Information Act; and

d. References related to the VHA FOIA Program.

3. RELATED ISSUES: VA Handbook 6300.3, Procedures for Implementing the Freedom of Information Act.

4. RESPONSIBLE OFFICE: The VHA Office of Informatics and Information Governance, Health Information Governance Office, Information Access and Privacy (10A7B) is responsible for the content of this directive. Questions should be referred to the Director, VHA FOIA Office at 704-245-2492.

5. RESCISSIONS: None.

6. RECERTIFICATION: This VHA directive is scheduled for recertification on or before the last day of February 2023. This VHA directive will continue to serve as national VHA policy until it is recertified or rescinded.

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Executive in Charge

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VHA FREEDOM OF INFORMATION ACT PROGRAM

1. PURPOSE

This Veterans Health Administration (VHA) directive establishes policy and assigns responsibilities for managing and conducting the VHA Freedom of Information Act (FOIA) Program in accordance with FOIA, Executive Branch guidance and policy, and Department of Veterans Affairs (VA) policy. This VHA directive promotes uniformity in the VHA FOIA program and takes precedence over all VHA component publications that supplement and implement the VHA FOIA program. **AUTHORITY:** Title 5 United States Code (U.S.C.) 552; Title 38 Code of Federal Regulations (CFR), Sections 1.550-1.562.

2. BACKGROUND

a. FOIA, 5 U.S.C. 552, implemented in VA by 38 CFR 1.550-1.562 provides that any person has the right to obtain access to federal agency records, except to the extent that such records or portions of them are protected from public disclosure by one of the nine FOIA exemptions or by one of three special law enforcement record exclusions.

b. FOIA compels disclosure of reasonably described VHA records or a reasonably segregated portion of the records to any person upon written request, unless one or more of nine exemptions apply to the records. A FOIA request may be made by any person (including foreign citizens), partnerships, corporations, associations, and foreign, State, or local governments. VHA records are made available to the greatest extent possible in keeping with the spirit and intent of FOIA. All FOIA requests must be processed in accordance with the FOIA statute, applicable regulations, and this directive.

c. The VHA FOIA Program applies to records that are: Created, collected, used, maintained, or transmitted by or for VHA; under VHA authority and control; that document the organization, functions, policies, decisions, procedures, operations or activities of VHA; or contain information appropriate for retention or preservation by VHA because of the value of the information.

3. DEFINITIONS

a. **Adverse Determination.** An adverse determination is a decision by a FOIA Officer to withhold all or part of a requested record pursuant to an exemption, deny a fee category claim by a requester, deny a request for waiver or reduction of fees, deny a request to review an initial fee estimate, deny a request for expedited processing, confirm that no records were located during the initial search, a determination that a record is not readily reproducible in the form or format sought by the requester, a determination that what has been sought is not a record subject to FOIA or make any determination that a requester may believe is adverse in nature.

b. **Agency.** An agency is any executive department, military department, government corporation, government-controlled corporation, or other establishment in the executive branch of the Federal government, or independent regulatory entity.

c. **Agency Records.** Agency records include all documents or records created or obtained by an agency of the government that are in an agency's possession and control at the time a FOIA request is received. Four factors determine an agency's control: The intent of the creator of the document to retain control over the record; the ability of the agency to use and dispose of the record as it sees fit; the extent to which agency personnel have read or relied upon the document; and the degree to which the document was integrated into the agency's record systems or files. Information maintained by an entity pursuant to a Government contract for a VHA component for the purposes of records management is considered in the VHA component's possession. Records created by an agency employee in the course of employment, including Emails, may be either agency records or personal files.

d. **Appeal.** An appeal is a requester's written disagreement with an adverse determination under FOIA.

e. **Beneficiary.** A beneficiary is a Veteran or other individual who has received benefits (including medical benefits) or has applied for benefits, pursuant to 38 U.S.C.

f. **Business Day.** A business day is the time during which typical Federal government offices are open for normal business. It does not include Saturdays, Sundays, or Federal legal public holidays. The term "day" means a business day unless otherwise specified.

g. **Business Information.** Business information is confidential or privileged commercial or financial information obtained by VA from a submitter that may be protected from disclosure under Exemption 4 of FOIA.

h. **Calendar Day.** A calendar day is any day of the week, month or year, including Saturdays, Sundays or Federal legal public holidays.

i. **Complaint.** Complaint is a term that may arise under two circumstances. First, a complaint is a gap between service expectations and actual experience. A complaint may be expressed verbally, or in writing, to any employee, as well as to officials outside of the facility, such as congressional officers or Veterans Service Officers. Second, a complaint may arise in the context of litigation or legal proceedings. In such circumstances, a complaint is any formal legal document that sets out the facts and legal reasons that the filing party or parties believes are sufficient to support a legal claim against VA.

j. **Component.** Components are each distinct VA entity, including administrations, staff offices, services, or facilities.

k. **Deliberative Information.** Deliberative information is internal advice, recommendations, or subjective evaluations that are reflected in records relied upon in the decision-making process of an agency, whether within or among agencies.

l. **Direct Costs.** Direct costs are those expenditures a VHA component actually incurs in searching for, reviewing, and duplicating documents to respond to a FOIA request. For example, direct costs may include the salary of the employee performing the work (the basic rate of pay plus 16 percent of that rate to cover benefits) and the costs of operating duplicating machinery. Not included in direct costs are overhead expenses such as the cost of space, heating, or lighting the facility in which the records are stored.

m. **Electronic Records.** Electronic records are records (including Email) created, stored, and retrievable by electronic means.

n. **Expedited Processing.** Expedited processing means giving a FOIA request priority for processing ahead of other pending requests because VA has determined that the requester has shown an exceptional need or urgency for the records as provided in this directive.

o. **Freedom of Information Act (FOIA).** FOIA was enacted in 1966, and taking effect on July 5, 1967, the Freedom of Information Act provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions or by one of the three special law enforcement record exclusions. FOIA thus established a statutory right of public access to Executive Branch information in the federal government.

p. **FOIA Officer.** A FOIA Officer is the individual within a VA component whose responsibilities include addressing and granting or denying requests for records under FOIA.

q. **FOIA Request.** A FOIA request is a written demand for records under FOIA. A FOIA request must be made in writing and in accordance with VA's implementing regulations. The term request includes any action emanating from the initial demand for records, including an appeal to the initial demand.

r. **Glomar Response.** A Glomar response is a response to a FOIA request that neither admits nor denies the existence of any responsive records on a specifically identified individual other than the requester; the disclosure of which would constitute an invasion of personal privacy.

s. **Health Care Facility.** For the purpose of this directive, the term health care facility encompasses all offices and facilities, including but not limited to: VISNs, VA medical facilities, VA Health Care Systems, Community Based Outpatient Clinics (CBOCs) under the jurisdiction of VHA.

t. **Individually-Identifiable Information.** Individually-identifiable information is any information, including health information maintained by VHA, pertaining to an individual that also identifies the individual and, except for individually-identifiable health information, is retrieved by the individual's name or other unique identifier. Individually-identifiable health information is covered regardless of whether or not the information is retrieved by name.

u. **Initial Agency Decision Letter.** An initial agency decision letter is the formal, written determination made by a VHA component FOIA Officer on the merits of a FOIA request.

v. **Metadata.** Metadata is data describing the structure, data elements, interrelationships, and other characteristics of electronic data and records.

w. **Misdirected FOIA Request.** A misdirected FOIA request is a FOIA request that is initially sent to a FOIA office that does not have responsibility for the requested information.

x. **Official FOIA Mailbox.** An official FOIA mailbox is an Email mailbox created solely for the receipt of FOIA requests.

y. **Perfected FOIA Request.** A perfected FOIA request is a written FOIA request that meets the requirements set forth in 38 CFR 1.554 and for which there are no remaining issues about the payment of applicable fees or any other matter that requires resolution prior to processing.

z. **Personnel.** For the purpose of this directive, the term VA personnel includes those officers and employees of VA; consultants and attendings; without compensation (WOC) employees; contractors; others employed on a fee basis; medical students and other trainees; and uncompensated services rendered by volunteer workers, excluding patient volunteers, providing a service at the direction of VA staff.

aa. **Pre-Decisional Information.** Pre-decisional information is information created before the decision maker reached a final decision.

bb. **Privacy Act Request.** A privacy act request is a signed, written request for records that are maintained in a Privacy Act Systems of Records.

cc. **Privacy Act System of Records.** The Privacy Act System of Records is any group of records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual. A record in a system of records must contain two elements: A personal identifier and at least one item of personal information.

dd. **Program Office.** Program office refers to an entity organizationally aligned under VHA Central Office that provides specific services or national program oversight across VHA.

ee. **Reading Room.** A reading room is a space made available, as needed, in VA components where records are available for review pursuant to 5 U.S.C. 552(a)(2). Ordinarily the VA component providing public reading room space will be the component that maintains the record.

ff. **Record.** A record is a document, a portion of a document and information contained within a document, and can include information derived from a document or a database. Such documents may be maintained in paper, electronic, and other forms, but do not include objects such as tissue slides, blood samples, or computer hardware.

gg. **Requester.** A requester is, generally, any individual, partnership, corporation, association or foreign, state or local government, which has made a demand to access an agency record.

hh. **Review Costs.** Review costs include time spent by a VHA component FOIA Officer examining a record, to include audiovisual, Email, databases, documents and the like, in response to a commercial use request, to determine whether any portion of the record is exempt from disclosure under one or more FOIA exemptions. Review costs include time spent by the VHA component FOIA Officer contacting a submitter and considering or responding to any objections to disclosure made by a submitter, but does not include time spent resolving general legal or policy issues regarding the application of exemptions. Review costs are recoverable from commercial use requesters even if, after a review, a record is not disclosed.

ii. **Search.** A search includes all time spent looking, both manually and electronically, for records that are responsive to a FOIA request. Electronic searches include searching for responsive Email or electronic documents whether they are located on personal computers, network servers or easily accessible storage media. The time taken by a programmer to create a program to run a requested report from a database is search time. The term search also includes a page-by-page or line-by-line identification (if necessary) of material in the record to determine if it, or portions of it, are responsive to the request. Time spent reviewing documents to determine whether to apply one or more of the statutory exemptions is not search time; it is review time. The most efficient and least expensive manner to search for documents will be used to minimize costs to VA and the requester.

jj. **Submitter.** A submitter is any person or entity, including corporations, state, local and tribal governments and foreign governments, from whom VA obtains trade secrets or confidential commercial or financial information either directly or indirectly.

kk. **Substantial Interest FOIA Request.** A substantial interest FOIA request is a request for information in which there has been or is likely to generate substantial public interest. This includes, but is not limited to, the following types of requests, regardless of the requester: (1) those related to a threat to the public health; (2) high profile local or national incidents or situations involving VA beneficiaries, employees or officials; and (3) incidents involving an alleged breach of the public trust (e.g., waste, fraud or abuse).

ll. **Toll.** For the purposes of this directive, a toll is to delay, suspend, or hold off the timing effects of a statute.

mm. **VA Central Office (VACO).** VACO is the headquarters of the Department of Veterans Affairs.

nn. **VHA Component.** A VHA component is any component of VHA to include, but not limited to, Program Offices, VISNs, Medical facilities and Vet Centers.

oo. **Written or In Writing.** Written or in writing means communication such as letters, photocopies of letters, electronic mail, and facsimiles and does not include any form of oral communication.

4. POLICY

It is VHA policy to promote Government transparency and accountability by adopting a presumption in favor of disclosure in all decisions involving FOIA while also considering Veteran privacy and responding promptly to requests in a spirit of cooperation by implementing a VHA-wide FOIA Program through the VHA FOIA Program Office in the Office of the Assistant Deputy Under Secretary for Health for Informatics and Information Governance, Health Information Governance, Information Access and Privacy Office.

5. RESPONSIBILITIES

a. **Assistant Deputy Under Secretary for Health for Informatics and Information Governance.** The Assistant Deputy Under Secretary for Health for Informatics and Information Governance is responsible for:

(1) Ensuring all VHA program offices with designated FOIA Officers and all Veterans Integrated Service Networks (VISNs) and VA medical centers or VA Health Care Systems publish a facility or office policy consistent with FOIA procedures and policies contained in this directive. This publication must be distributed to all employees within each respective VHA component.

(2) Ensuring that VA-wide FOIA policies and procedures are implemented through the VHA FOIA program;

(3) Ensuring the VHA FOIA program mission and vision are accomplished by supporting resources, funding, and staffing;

(4) Seeking technical guidance on all issues related to FOIA from the VHA FOIA Office; and

(5) Promoting VHA-wide collaboration with the VHA FOIA Office on record requests that are processed under FOIA.

b. **Director, Health Information Governance.** The Director, Health Information Governance is responsible for:

(1) Ensuring that VA-wide FOIA policies and procedures are implemented through the VHA FOIA program;

(2) Ensuring the VHA FOIA program mission and vision are accomplished by supporting resources, funding and staffing;

(3) Seeking technical guidance on all issues related to FOIA from the VHA FOIA Office; and

(4) Promoting VHA-wide collaboration with the VHA FOIA Office on record requests that are processed under FOIA.

c. **VHA Director, Information Access and Privacy.** The VHA Director, Information Access and Privacy (IAP), is responsible for:

(1) Coordinating the VHA FOIA and Privacy Programs;

(2) Ensuring that VA-wide FOIA policies and procedures are implemented through the VHA FOIA program;

(3) Ensuring that the VHA FOIA Program complies with Federal laws, regulations and policies, VA regulations and policies, and VHA policies relating to FOIA;

(4) Seeking technical guidance on all issues related to FOIA from the VHA FOIA Office;

(5) Promoting VHA-wide collaboration with the VHA FOIA Office on record requests that are processed under FOIA;

(6) Ensuring the monitoring of VHA FOIA Program compliance;

(7) Ensuring the VHA FOIA program mission and vision are accomplished by supporting resources, funding and staffing; and

(8) Approving and allocating budget and funding to support the VHA FOIA Program.

d. **Director, VHA FOIA Office.** The Director, VHA FOIA Office, is responsible for:

(1) Performing all FOIA duties and responsibilities as designated by the VA FOIA Service and the VHA Director, IAP;

(2) Complying with Federal laws, regulations and guidance, VA regulations, policies and guidance, and VHA policies relating to FOIA;

(3) Developing and implementing a VHA FOIA Program;

- (4) Developing, issuing, reviewing, and coordinating FOIA policy and procedures for VHA in conjunction with policy efforts by VA;
- (5) Coordinating requirements and monitoring compliance with FOIA and policy guidance issued by VA and VHA;
- (6) Issuing direction to all VHA component FOIA Officers regarding all aspects of implementing the VHA FOIA Program;
- (7) Consulting with the VA Office of General Counsel as needed concerning interpretation of federal laws and regulations as they relate to FOIA;
- (8) Establishing requirements for the responsibilities of all VHA component FOIA Officers and providing implementation guidance, as needed;
- (9) Providing VHA-specific FOIA training to VHA component FOIA Officers;
- (10) Providing VHA-specific tools to assist VHA component FOIA Officers in developing a FOIA Program;
- (11) Examining new or proposed legislation and VHA policy to assess the actual or potential impact on VHA FOIA policy and/or practices;
- (12) Serves as VHA's senior advisor in providing guidance to VHA leadership, program offices and component FOIA Officers regarding FOIA and other applicable Federal laws, regulations, and policies related to FOIA;
- (13) Providing expert guidance to VHA component FOIA Officers regarding implementation of the VHA FOIA Program or handling of specific FOIA requests for VHA records;
- (14) Ensuring the VHA submission for the annual FOIA report is accurate;
- (15) Developing and approving acquisitions, budgeting and funding for the VHA FOIA Program;
- (16) Ensuring that records that are submitted for posting in the VA FOIA Reading Room are timely provided to the VA FOIA Service;
- (17) Processing assigned FOIA requests; and
- (18) Resolving complaints and concerns on service delivery of FOIA requests as the VHA FOIA Public Liaison, including coordinating with National Archives and Records Administration (NARA), Office of Government Information Services (OGIS) on complaint resolution.
- (19) Learning about the challenges about data de-identification as technology advances and more data generally becomes widely available about individuals.

e. **VHA Central Office FOIA Officers.** The VHA Central Office FOIA Officers, which are part of the VHA FOIA Office, are responsible for:

(1) Performing the duties and responsibilities associated with operation of the VHA-wide FOIA Program as designated by the Director, VHA FOIA Office;

(2) Complying with Federal laws, regulations and guidance, VA regulations, policies and guidance, and VHA policies relating to FOIA;

(3) Consulting with the VA Office of General Counsel as needed concerning interpretation of federal laws and regulations as they relate to FOIA;

(4) Providing training, guidance and assistance to program offices, facility and VISN-level FOIA Officers regarding implementation of the VHA FOIA Program or handling of specific FOIA requests for VHA records;

(5) Processing assigned FOIA requests;

(6) Drafting and issuing correspondence, on official VA letterhead, related to FOIA requests;

(7) Supporting the implementation of the VHA FOIA Program by advising the Director, VHA FOIA Office of identified issues and recommending corrective action;

(8) Resolving complaints and concerns on service delivery of FOIA requests as the VHA FOIA Public Liaison.

(9) Developing tools for use by field VISN and facility FOIA Officers; and

(10) Monitoring VHA FOIA program compliance.

f. **VISN Directors and Chief Program Officers.** With regard to their respective components, VISN Directors and Chief Program Officers are responsible for:

(1) Implementing the requirements of the VHA FOIA Program to include ensuring component policies and procedures are consistent with VHA FOIA program guidance and policies and are distributed to all component employees;

(2) Ensuring all employees are instructed annually on the requirements of FOIA, VA regulations and policies pertaining to FOIA, and VHA policy. Defined processes and procedures must be provided to all employees at the start of employment and within 6 months of any significant change in Federal law, regulation, this VHA directive, and/or facility or office procedures, and as otherwise directed in paragraph 6 of this directive;

(3) Ensuring compliance within their respective programs with Federal laws, regulations, and policies, VA regulations and policies, and VHA policies relating to FOIA;

(4) Ensuring a thorough and timely response to action items assigned by the VHA FOIA Office;

(5) Designating through a formal, written designation, a named individual to serve as the component's FOIA Officer. Such designation must indicate whether a FOIA Officer has signature authority for FOIA requests;

(6) Designating through a formal, written designation, a named individual to serve as the component's alternate FOIA Officer. Such designation must indicate whether a FOIA Officer has signature authority for FOIA requests;

NOTE: *The position of FOIA Officer or Alternate FOIA Officer can be served as a collateral duty. For example, an employee can encumber the position as both a Privacy Officer and a FOIA Officer.*

(7) Providing appropriate resources, including human and financial resources, to implement the requirements of the VHA FOIA program;

(8) Ensuring that all FOIA requests received by the component are appropriately logged into the FOIA electronic tracking system and are appropriately counted for the annual FOIA report;

(9) Notifying the VHA FOIA Office of any changes in the component's FOIA Officer and/or alternate FOIA Officer; and

(10) Ensuring all staff members comply with their responsibilities related to the VHA FOIA Program.

g. VISN FOIA Officers and VHA Program Offices with designated FOIA Officers. The VISN and program office FOIA Officers are responsible for:

(1) Developing VISN and program office FOIA policies consistent with the VHA FOIA Program;

(2) Processing FOIA requests addressed to, received by, or assigned to their respective entity to include processing of any requests that are seeking the same records from three or more facilities within the respective VISN;

(3) Drafting and issuing correspondence, on official VA letterhead, related to FOIA requests;

(4) Ensuring that the VISN or program office electronic mailbox for receiving FOIA requests is functional and monitored on a daily basis;

(5) Completing all training requirements associated with the performance of their FOIA duties, to include, at a minimum, mandatory training in the VA's Talent Management System and completion of all portions of the VHA FOIA Office training program available in MyVeHU Campus or equivalent training system. All training

requirements must be completed within 90 days of designation as a VHA component FOIA Officer or alternate VHA component FOIA Officer.

(6) Coordinating action items as directed by the VHA FOIA Office within their respective entity;

(7) Notifying the VHA FOIA Office when the VISN receives three or more FOIA requests for substantially the same records and when the VISN FOIA Officer determines that records have become or are likely to become the subject of subsequent FOIA requests.

(8) Assisting the VHA FOIA Office as requested in obtaining records maintained within the VISN, program office, or VISN facilities;

(9) VISN FOIA Officers are responsible for providing oversight and guidance to facility FOIA Officers within that VISN;

(10) Consulting with the VHA FOIA Office and Regional Counsel as needed concerning FOIA legal requirements and handling of specific FOIA requests;

(11) Advising VISN and/or program office officials and the VHA FOIA Office of receipt of a substantial interest FOIA request;

(12) Following the VHA FOIA Office policy on receipt of a substantial interest FOIA request, including the review of facility level substantial interest FOIA requests;

(13) Notifying the VHA FOIA Office of any changes in the primary or alternate FOIA Officer at any VISN facility;

(14) Providing annual training to staff on FOIA with respect to their responsibilities as they relate to FOIA;

(15) Ensuring that all FOIA requests received by the component are appropriately logged into the FOIA electronic tracking system and appropriately counted for the annual FOIA report;

(16) Advising component officials as needed or requested about FOIA requirements, including release of specific documents and the VHA FOIA Program;

(17) Ensuring a thorough and timely response to action items assigned by the VHA FOIA Office;

(18) Ensuring new facility FOIA Officers and alternate FOIA Officers within their respective VISN receive new employee orientation as it relates to FOIA and the VHA FOIA Program; and

(19) VISN FOIA Officers are responsible for auditing, annually, the facilities within the VISN FOIA Program for compliance with FOIA.

h. **VA Medical Facility Directors.** VA medical facility Directors are responsible for:

(1) Implementing the requirements of the VHA FOIA Program, to include ensuring facility policies and procedures are consistent with VHA FOIA program guidance and policies and distributed to all facility employees;

(2) Ensuring compliance within their respective programs with Federal laws, regulations, and policies, VA regulations and policies, and VHA policies relating to FOIA;

(3) Ensuring that all FOIA requests received by the facility are appropriately logged into the FOIA electronic tracking system and appropriately counted for the annual FOIA report;

(4) Ensuring a thorough and timely response to action items assigned by the VHA FOIA Office;

(5) Ensuring policies and procedures consistent with policies contained in this directive are established within their respective facilities and programs and distributed to all personnel;

(6) Designating through a formal, written designation, a named facility FOIA Officer and alternate facility FOIA Officer, who will report directly to the VA medical facility Director or Associate Director for responsibilities and for activities of the facility FOIA program. Such designation must indicate whether a FOIA Officer has signature authority for FOIA requests;

(7) Notifying the VISN FOIA Officer of any changes in the facility's FOIA Officer and/or alternate FOIA Officer;

(8) Ensuring that the facility complies with Federal laws, regulations, and policies, VA regulations and policies, and VHA policies relating to FOIA;

(9) Ensuring all staff receive annual training on FOIA and any additional training on FOIA as it relates to their VHA job duties;

(10) Providing the appropriate resources, including human and financial resources, to implement the requirements of the VHA FOIA Program; and

(11) Ensuring all staff comply with their responsibilities related to the VHA FOIA Program.

i. **VA Medical Facility FOIA Officers.** VA medical facility FOIA Officers are responsible for:

(1) Processing FOIA requests addressed to, received by or assigned to the facility in accordance with this directive;

(2) Drafting and issuing correspondence, on official VA letterhead, related to FOIA requests;

(3) Reporting directly to the VA medical facility Director or Associate Director for responsibilities and for activities of the facility FOIA program;

(4) Completing all training requirements associated with the performance of their FOIA duties, to include, at a minimum, mandatory training in the VA's Talent Management System and completion of all portions of the VHA FOIA Office training program available in MyVeHU Campus or equivalent training system. All training requirements must be completed within 90 calendar days of designation as a VHA component FOIA Officer or alternate FOIA Officer;

(5) Consulting with Regional Counsel, VISN, and the VHA FOIA Office as needed concerning FOIA legal requirements and handling of specific FOIA requests;

(6) Assisting the VHA FOIA Office as requested in obtaining records maintained within the facility;

(7) Ensuring that all FOIA requests received by the facility are timely and appropriately logged into the FOIA electronic tracking system and appropriately counted for the annual FOIA report;

(8) Ensuring that the facility electronic mailbox for receiving FOIA requests is functional and monitored on a daily basis;

(9) Advising the appropriate facility, VISN officials, and VHA FOIA Office of receipt of a substantial interest FOIA request;

(10) Developing facility FOIA policies consistent with the VHA FOIA Program;

(11) Ensuring a thorough and timely response to action items assigned by the VHA FOIA Office;

(12) Advising facility officials as needed or requested about FOIA requirements, including release of specific documents and the VHA FOIA Program;

(13) Notifying the VHA FOIA Office when the VA medical facility receives three or more FOIA requests for substantially the same records and when the facility FOIA Officer determines that records have become or are likely to become the subject of subsequent FOIA requests;

(14) Providing annual training to staff on FOIA with respect to their responsibilities as they relate to FOIA; and

(15) Notifying the VHA FOIA Office and the VISN FOIA Office of any change in status to either the primary or alternate designated FOIA Officer at the facility.

j. **VHA Personnel.** All VHA personnel are responsible for:

(1) Complying with all Federal laws and regulations, VA regulations and policies, and VHA policies;

(2) Conducting themselves in accordance with the rules of conduct concerning the disclosure or misuse of information in the government, and the VA Standards of Ethical Conduct and Related Responsibilities of Employees (see 5 CFR 2635.101, 5 CFR 2635.703 and 38 CFR 0.735-10);

(3) Searching for and providing unredacted copies of records requested by a FOIA Officer or alternate FOIA Officer, within the timeframe specified by the FOIA Officer;

(4) Informing the FOIA Officer of other locations or offices that may have records responsive to a FOIA request and why they believe that the other location or program office may have responsive records;

(5) Advising the FOIA Officer of any reason why the employee or program office believes that the records should not be released in response to a FOIA request in whole or in part; and

(6) Assisting the FOIA Officer in converting records that are responsive to the subject of a FOIA request to another format where required by FOIA, or which is more convenient or cost effective for VHA; and completion of all training requirements related to FOIA, to include at minimum annual training in VA's Talent Management System and facility sponsored FOIA training.

6. PROCEDURAL REQUIREMENTS

a. **Customer Service.**

(1) VHA emphasizes a citizen-centered approach to FOIA with a results-oriented focus. Because FOIA requesters are seeking a service from the Government, VHA components shall respond courteously and appropriately to FOIA requesters. Additionally, VHA components shall provide the public with citizen-centered ways to learn about the FOIA process, provide information about agency records that are publicly available, and provide information about the status of a person's FOIA request and any other appropriate information about the agency's response.

(2) When requests are overly broad in scope, VHA personnel must work closely with the FOIA requester to assist the requester in narrowing the scope of his/her request. FOIA Officers should be mindful that many FOIA requesters do not understand the types of records created and maintained by VA. It is for this reason that some FOIA requesters may need assistance in narrowing the scope of their request in a way that will be beneficial to both the agency and the requester. VHA component FOIA Officers must understand that just because a request is complex and may require a substantial amount of work is not a basis for denying a request. If a FOIA requester declines to provide clarification on the scope, the FOIA Officer must continue to process the

request in accordance with this directive. VHA component FOIA Officers will not engage in particularly hostile or aggressive behavior that creates an unnecessary bureaucratic hurdle, when consulting or communicating with a FOIA requester.

(3) When a VHA FOIA Officer receives a status request from a FOIA requester, the FOIA Officer shall provide, at a minimum, the date the FOIA office originally received the request, where the request resides in the FOIA Officer's processing queue, as well as an estimated timeframe upon which the FOIA request is expected to be completed.

b. Applicability of FOIA.

(1) As an agency within the Executive Branch of the Federal government, VA must comply with FOIA. As an administration within VA, all components of VHA must comply with FOIA.

(2) FOIA does not apply to: State governments, local governments and municipalities, foreign governments, state or federal courts, Congress, Presidential Transition Teams, or Offices within the Executive Office of the President whose functions are limited to advising and assisting the President.

c. Interaction with the Privacy Act.

(1) The Privacy Act provides for the confidentiality of individually identified and retrieved personal information about living individuals that is maintained in a Privacy Act system of records and permits disclosure of Privacy Act-protected records only when specifically authorized by the statute.

(2) When appropriate Privacy Act authority permits a full disclosure of the requested Privacy Act records, such requests will not be logged into the FOIA electronic tracking system for compilation on the annual FOIA report.

(3) When an agency promulgates rules that exempt a systems of records from first party right of access provisions of the Privacy Act (requests by an individual for his or her own records contained in a Privacy Act Systems of Records), in accordance with 5 U.S.C. 552a (k), requests for records from such exempt systems of records must be processed under FOIA. VHA component FOIA Officers will log such requests into the FOIA electronic tracking system in accordance with paragraph 6.h. of this directive. If appropriate routine use authority exists which would permit full disclosure of records from an otherwise exempt system of records, such requests are not to be entered into the FOIA electronic tracking system.

(4) Records which pertain to deceased individuals that are maintained in a Privacy Act system of records may be required to be entered into the FOIA electronic tracking system in accordance with paragraph 6.h. of this directive, as the Privacy Act does not apply to records maintained on deceased individuals. When full disclosure of the records pertaining to deceased individuals is made in accordance with an authorization of the next of kin or personal representative of the deceased Veteran, such requests are not required to be entered into the FOIA electronic tracking system. Requests for

medical records on deceased Veterans, which are not accompanied by a valid authorization, must be entered into the FOIA electronic tracking system.

d. Agency Records Determination.

(1) VHA records subject to FOIA are those records that are either created or obtained by VHA and under VHA's control at the time of the FOIA request. An agency record may be in any format, including: Paper, electronic (i.e. databases), microfiche, and other formats. VHA records do not lose their "agency record" status if they are physically maintained by a VHA contractor or another federal agency.

(2) Oral communications, tissue samples, an individual's memory and objects, e.g., furniture and wall paintings are not considered agency records under FOIA. Personal records are also not subject to FOIA.

(3) When making a determination if records are personal records, the FOIA Officer must consider the following:

(a) The purpose for which the document was created;

(b) The degree of integration of the record into the agency's filing system; and,

(c) The extent to which the record's author or other employees used the record to conduct agency business.

(4) In applying the test for determining whether records are personal records, FOIA Officers must document in the FOIA administrative case file the basis for determining how records are deemed personal using the factors indicated in paragraph 6.d.(3) of this directive.

e. FOIA Request Requirements.

(1) FOIA requires disclosure of VA records, or any reasonably segregable portion of a record, to any person upon written request except to the extent that any portions of such records are protected from public disclosure under one or more of the nine exceptions. A FOIA request may be made by any person (including foreign citizens), partnerships, corporations, associations, and foreign, State, or local governments.

(2) Requests for information may also be received by VHA on referral or as a consult from another federal Agency. However, requests for records by Federal agencies and their employees acting in their official capacity are not FOIA requests. Requests for records by fugitives from justice seeking records related to their fugitive status are not FOIA requests.

(3) A requester may submit a request through any mail service, by facsimile or electronically to an official FOIA mailbox established for the purpose of receiving FOIA requests. A FOIA request sent to an individual VA employee's mailbox or by any other means (e.g., phone, personal conversation, Twitter, Facebook), or to any other entity

not designated as an official FOIA mailbox, will not be considered a perfected FOIA request. If a FOIA request is received by VHA personnel who are not designated as a VHA component FOIA Officer, the individual may, in accordance with local policy, forward the request to the appropriate, designated VHA component FOIA Officer. Otherwise, if VHA personnel receive requests for records and local policy does not require such employees to forward to the designated VHA component FOIA Officer, the employee must advise the requester on the proper procedure for making a FOIA request.

(4) The requester must submit their request in writing and describe the records sought in enough detail to allow VHA personnel to locate them with a reasonable amount of effort.

(5) If a request, regardless of the method in which the request was received (i.e., mail, facsimile or Email), concerns documents that are protected by another confidentiality statute, as long as the documents are to be processed under FOIA any form of signature is acceptable. **NOTE:** *If the documents are to be processed under the confidentiality statutes and not FOIA, other signature requirements may apply.*

(6) Records or information customarily furnished to the public in the regular course of the performance of official duties may be furnished without a written request. If the information sought is available on a VA public Web site, a VHA employee may provide the Web site address to the requester to avoid having the requester submit a FOIA request for the information. FOIA Officers should keep in mind that all FOIA requesters do not have readily available access to the Internet. When so notified by the FOIA requester, the FOIA Officer must provide a hard copy of the requested records to the FOIA requester.

(7) FOIA requesters may request records in specific forms or formats. In these instances, VHA components shall make reasonable efforts to:

- (a) Provide the record in any form or format requested if the record is readily reproducible in that form or format in the components automated system;
- (b) Ensure that the copy provided is in a form or format that is reasonably usable;
- (c) Maintain records in forms or formats that are reproducible; and,
- (d) Use available office equipment to digitally reproduce hard copy records onto digital media if requested.

(8) In responding to requests for records, VHA components shall make reasonable efforts to search for records in electronic form or format if maintained in automated systems, except when such efforts would significantly interfere with the operation of the automated systems. Such determinations shall be made, by the VHA component FOIA Officer, on a case-by-case basis and must be fully documented in the FOIA administrative case file.

(9) A FOIA requester does not have to designate his/her written request as a FOIA request in order for the request to be processed as a FOIA request. Likewise, the requester does not have to explain why access to official records is desired. FOIA Officers may, for the purposes of seeking clarification and assisting requesters in narrowing the scope of their request, ask a requester about the purposes for which they seek the records; however, if the FOIA requester does not wish to provide a purpose for requesting the records, the FOIA request may not be denied on such basis.

(10) Requests from United States citizens and foreign nationals admitted for permanent residence in which they seek information about themselves which is retrieved by their names or other personal identifiers are to be processed under both FOIA and the Privacy Act. In reviewing such requests, the statute that provides the greatest right of access is applied. In most circumstances, when a request from these individuals is made for which the requested information is maintained in a Privacy Act system of records, the request will be processed under the Privacy Act first party right of access provisions. These requests only have to be entered in the FOIA electronic tracking system as indicated in paragraph 6.c. above.

f. **Requests from Congress.**

(1) Requests from Members of Congress who are not seeking records on behalf of a congressional committee or subcommittee, or on behalf of the House of Representatives or the Senate sitting as a whole, should not be processed through FOIA channels; however, any release of information will be consistent with a release to any individual pursuant to FOIA and its withholding exemptions. In these cases, the member will not be provided with FOIA appeal or Office of Government Information Services (OGIS) rights.

(2) VHA may disclose any agency records to a Committee or Subcommittee of Congress having oversight jurisdiction of VA activity to which the information pertains, including individually-identifiable information without the record subject's prior signed, written authorization, provided that the Chair of the Oversight Committee or Subcommittee makes the request, in writing, on behalf of the Committee or Subcommittee (e.g., House and Senate Committees on Veterans Affairs, House Committee on Oversight and Government Reform, Senate or House Appropriations Committees) on Committee letterhead for Committee or Subcommittee oversight functions.

(3) When individually-identifiable information is provided to a Committee or Subcommittee, for purposes of oversight, the VHA official providing the information should advise the Committee or Subcommittee, in writing, that the information is being released for official purposes only; and that given its private, confidential nature, the information needs to be handled with appropriate sensitivity.

(4) If a Member of Congress chooses to request VHA records pursuant to FOIA, then the provisions of this directive pertaining to processing a FOIA request apply.

(5) In the instance where a constituent is seeking response to a FOIA request through their congressional Member, such requests from the constituent must be processed as a FOIA request and in accordance with the provisions of this directive. If the records are pertaining to records protected by another confidentiality statute, the congressional request must be accompanied by a signed authorization of the constituent.

g. Receiving a FOIA Request.

(1) If a VHA employee receives a written request for records, the individual may, in accordance with local facility policy, forward the request to the appropriate, designated VHA component FOIA Officer. If local policy does not require such requests be forwarded, the VHA employee receiving the written request for records must advise the requester on the proper procedure for making a FOIA request. All FOIA requests must be processed by the designated FOIA Officer or alternate FOIA Officer. In VA medical facilities, Veteran requests for medical records are routinely processed by local Health Information Management (HIM), Release of Information (ROI) departments. VA medical facility policies must address which types of requests will be processed by the ROI department. When the HIM, ROI department processes requests which must be logged into the FOIA electronic tracking system in accordance with paragraphs 6.c. and 6.h., such staff must be formally designated signature authority to sign the initial agency decision letter, by the VA medical facility Director. If the employee is unsure which office should receive a request, the employee should contact the facility's FOIA Officer for guidance.

(2) Employees interacting with the FOIA requester pertaining to their request should inform the requester of any referrals and provide contact information of the facility's FOIA Officer.

(3) Immediately upon receipt of a FOIA request for records, the FOIA Officer must date stamp the request. The date stamp must, at a minimum, contain the words "FOIA Office", the received date to include month, day, and year for which the request was received by the FOIA Office, the initials of the FOIA Officer and the FOIA electronic tracking system control number for the request. The date stamp may be electronically generated, stamped with an ink stamp or handwritten. All FOIA requests must be date stamped prior to uploading into the FOIA electronic tracking system.

(4) The FOIA Officer will proceed to review the request to determine if the request is made in compliance with FOIA and the VA's regulations implementing FOIA. A FOIA request must be in writing and reasonably describe the records sought in enough detail to allow VA personnel familiar with the requested records to locate them with a reasonable amount of effort. If the request involves records for which there is a personal privacy interest, the requester's signature is required. The FOIA Officer will also review the request to determine if the requester is seeking a fee waiver or expedited processing. In addition, the FOIA Officer will determine if a substantial interest notification is required, in accordance with paragraph 6.i. Finally, the FOIA Officer must also make a determination if the request was sent to the correct agency

component. If the request was not sent to the correct agency component, the FOIA Officer will refer the request to the correct component. Each of these items is addressed in subsequent paragraphs of this directive.

(5) VHA FOIA offices will utilize three processing tracks in addressing a request for records: Simple, complex, and expedited. The determination of whether a FOIA request will fall under the simple or complex track type will be based upon the amount of work and/or time needed to process the request, including consideration of the number of pages involved. The FOIA Officer must advise the requester of the track into which the request has been placed and the criteria of the faster track. Requesters whose requests do not qualify for the fastest (simple) processing queue shall be given an opportunity to limit, in writing, the scope of the request in order to qualify for the faster queue. The expedited processing track type is reserved only to those requests which qualify for expedited processing after a demonstration of compelling need. Expedited processing is addressed in more detail in paragraph 6.k. of this directive.

(6) VHA components shall process FOIA requests on a first-in-first-out basis within each track type.

(7) The FOIA Officer must enter the request into VA's FOIA electronic tracking system in accordance with paragraph 6.h. of this directive.

(8) Within 10 business days of receipt of the request, the FOIA Officer must formally acknowledge the request by sending the requester an acknowledgment letter. At a minimum, the acknowledgement letter must include the following:

(a) The procedural history of the FOIA request, including the original requested date and the final receipt date by the VHA component FOIA Office processing the request;

(b) If the request was referred to the component FOIA Officer by another component, an indication of such referral must be noted, including the date of the referral;

(c) An exact description of the records sought;

(d) The FOIA tracking number;

(e) Indication of the request track type into which the request has been placed and if the request was placed in the complex track type, the criteria of the faster track;

(f) If portions of the request are being processed by other VA or VHA components, reference to the other request(s) and the tracking number for such request(s);

(g) The records cut-off date or an indication of the period of time for which records will be searched; and,

(h) The name, telephone number, and Email address of the FOIA Officer handling the request.

(9) Upon receipt of the request, the FOIA Officer must immediately begin assembling the FOIA administrative case file for the request.

h. **FOIA Electronic Tracking System.**

(1) When a FOIA Officer receives a FOIA request, the FOIA Officer must log the request into VA's FOIA electronic tracking system within 1 business day of receipt. Under certain circumstances, Privacy Act requests must be logged into the VA's FOIA electronic tracking system, which are addressed in further detail in paragraph 6.c. of this directive. Requests which do not meet the definition of a "perfected" FOIA request must also be logged into the electronic tracking system, for purposes of generating VA's annual FOIA report, to include requests which are closed due to fee-related issues and requests which clarification is required.

(2) When logging a request into the VA's FOIA electronic tracking system, the FOIA Officer must log in the request in full, to include fee waiver requests and expedited processing requests. The FOIA Officer must pay particular attention to requested and received dates by ensuring that all information contained in the FOIA electronic tracking system is accurate. Finally, the FOIA Officer must include an exact duplication of the description, provided by the requester, of the requested records in the FOIA electronic tracking system. Under no circumstances should individually-identifiable information be contained in the description section of the FOIA electronic tracking system. All of these actions support an accurate annual FOIA report to Congress.

(3) When logging a request into the FOIA electronic tracking system, there are four "request types." The FOIA Officer must indicate the appropriate "request type." The following are the request types utilized by VA:

(a) FOIA. This request type is utilized for all FOIA requests involving records that do not reside in a Privacy Act System of Records.

(b) FOIA/PA. This request type is utilized for requests which are being logged into the FOIA electronic tracking system that pertain to records which reside in a Privacy Act Systems of Records. Some examples of this request type include deceased Veteran medical record requests in accordance with paragraph 6.c. of this directive, third party medical record requests in which a FOIA exemption is being cited and requests for Uniform Offense Reports. All other FOIA requests must not be logged as a FOIA/PA request type.

(c) Consultations. This request type is utilized when a FOIA Officer receives records from another federal agency for which the other federal agency has determined that a portion of the responsive records located pertain to records created or maintained by VA. In this instance, the other federal agency may consult with the appropriate VHA FOIA Officer for a release determination concerning those records. Under a consultation, the other federal agency will require VHA to review the responsive records and provide recommendations on release back to the FOIA Officer at the consulting agency. In this instance, the VHA component FOIA Officer will not respond directly to

the FOIA requester. However, the consultation request from the other federal agency will be logged into the electronic FOIA tracking system under this request type. Consultations are further discussed in paragraph 6.p. of this directive.

(d) Referrals. This request type is utilized when a FOIA Officer receives a FOIA request from another federal agency in which the other agency locates responsive records that should be referred to the VA for its direct response to the FOIA requester. Referrals are further discussed in paragraph 6.p. of this directive.

(4) A date stamped copy of the FOIA request must be uploaded into the FOIA electronic tracking system, as well as a copy of the FOIA Officer's signed acknowledgement letter.

(5) All correspondence generated by the FOIA Officer must contain the FOIA tracking number generated from VA's FOIA electronic tracking system in addition to the direct contact information, including the telephone number, of the component FOIA Officer processing the request. All correspondence to and from the requester must be logged into the VA's FOIA electronic tracking system.

(6) Subsequent to the initial entry of the FOIA request into the FOIA electronic tracking system, the FOIA Officer must update the FOIA electronic tracking system with every action taken on a FOIA request, which includes, but is not limited to:

(a) Placing a request on hold for clarification or fee-related purposes. Issues related to clarification are addressed further in paragraph 6.m. of this directive. Issues related to fees are addressed further in paragraph 6.n. of this directive. All correspondence related to fees and requests for clarification must be uploaded in the FOIA electronic tracking system.

(b) Fees and fee estimates, which are addressed further in paragraph 6.n. of this directive, must be entered into the FOIA electronic tracking system. This includes generating the fee invoice through the FOIA electronic tracking system. Copies of the FOIA Officer's fee estimate correspondence, as well as a copy of the fee invoice, must be uploaded in the FOIA electronic tracking system.

(c) Any referrals of a FOIA request to another VA component, with an exception to the Office of the Inspector General (OIG), must be uploaded and transferred within the FOIA electronic tracking system using the transfer function. Requests requiring referral to VA's OIG must be manually referred directly to OIG's FOIA Officer outside of the FOIA electronic tracking system.

(d) Any referrals of a FOIA request to another federal agency must be logged into the FOIA electronic tracking system. However, the FOIA Officer will not complete the referral in the FOIA electronic tracking system. The referral must be made via Email or through postal mail to the receiving federal agency's FOIA Office. In these instances, the VHA FOIA Officer will close the request in VA's FOIA electronic tracking system utilizing the closure status of "Other Reasons", indicating "Records referred to other agency".

(e) All final closures of a request must be accurately recorded in the FOIA electronic tracking system immediately upon response to the FOIA requester. In addition to full releases and partial denials citing FOIA exemption(s), there are a number of other reasons for which a request may be closed in the FOIA electronic tracking system, to include, but not limited to:

1. No Records: A reasonable search of files failed to identify responsive records.
2. Records Referred to Other Agency: After conducting a reasonable search for responsive records, the FOIA Officer has determined that the requested records may reside with another federal agency. In some instances, the FOIA Officer may locate specific records that were generated at another federal agency. In this instance, the FOIA Officer should refer the located records to the other federal agency for release determination. Referrals are discussed in further detail in paragraph 6.p. of this directive.
3. Request Withdrawn: The request is withdrawn by the requester.
4. Fee-Related Reason: The requester is unwilling to pay fees associated with a request; the requester is past due in the payment of fees from a previous FOIA request; or the requester disagrees with the fee estimate.
5. Records Not Reasonably Described: After attempts to clarify the request with the requester, the records sought have not been described with sufficient particularity to enable the VHA component to locate it by conducting a reasonable search.
6. Not a Proper FOIA Request for Some Other Reason: The requester has failed unreasonably to comply with procedural requirements, other than fee-related requirements, imposed by this directive or by VA implementing regulations.
7. Not an Agency Record: The information requested is not a record within the meaning and definition of an “agency record” (e.g. personal records and inanimate objects). See paragraph 6.d. for further clarification on what records constitute “agency records.”
8. Duplicate Request: The request is a duplicate request (e.g. a requester asks for the same information more than once). This includes identical requests received from the same requester for the same information through different means (e.g., Email, facsimile, mail, courier) at the same or different times.
9. Requester Died: Requester died prior to the completion of processing the FOIA request.
10. Glomar Response: The response being provided is a Glomar response in which the VA is neither confirming nor denying the existence of records. Glomar responses are further discussed in paragraph 7.h.(6) of this directive.

11. Subsumed by Litigation: The request is administratively closed because the requester has filed a legal action in Federal court. If this is the case, the FOIA Officer must consult with VA's Office of the General Counsel (OGC) to determine whether they should continue processing the FOIA request. The opinion of OGC must be fully documented in the FOIA administrative case file.

12. Administratively Closed: The request is closed for any other reason not included in the other closure types. This closure status should be rarely used.

(7) To ensure that the FOIA electronic tracking system remains compliant with the procedures set forth in this directive, as well as being a reliable and accurate source of data for generating VA's annual FOIA report, the VHA FOIA Office will monitor and audit the FOIA electronic tracking system, to include audits of all VHA component entries. The results of such audits will be shared, on a quarterly and annual basis, with VHA leadership. In addition, VISN FOIA Officers will conduct routine audits of VA facility compliance within their respective VISN.

i. **Substantial Interest Notification and Review.**

(1) To foster ongoing communication and awareness on matters of significant importance to VA and VHA leadership, FOIA Officers must provide notification and seek review of substantial interest FOIA requests.

(2) A substantial interest FOIA Request is a request for information in which there has been or is likely to generate substantial public interest. This includes, but is not limited to, the following types of requests, regardless of the requester: (1) those related to a threat to the public health; (2) high profile local or national incidents or situations involving VA beneficiaries, employees or officials; and (3) incidents involving an alleged breach of the public trust (e.g., waste, fraud, or abuse).

(3) In some circumstances, Privacy Act requests may involve matters of a substantial interest. If, upon review of a Privacy Act request, the reviewing office determines that the release of the records meets the definition of a substantial interest request, the FOIA Officer must comply with the requirements specified in this paragraph. This requirement only applies to third party Privacy Act requests. First party Privacy Act requests will never be considered of a substantial interest.

(4) All VHA components must develop local policies and procedures which comply with the requirements of this paragraph, in coordination with local ROI departments, which outlines a process for how substantial interest request notifications will be provided to the FOIA Officer.

(5) Upon review of all FOIA requests and Privacy Act requests processed under FOIA, the appropriate FOIA Officer, or ROI staff in accordance with local policy, will review and make a determination if the request meets the definition of a substantial interest FOIA request. A similar review must be conducted of all third party Privacy Act requests. If the request meets the definition, the FOIA Officer must notify the VHA FOIA Office of the request following the designated procedures outlined below. This

notification must be sent within one business day of receipt by agency personnel designated to receive FOIA and Privacy Act requests.

(6) The notification to the VHA FOIA Office will be made via Email at VHAFOIASIReview2@va.gov. At a minimum, the following information must be included with the substantial interest notification:

(a) The Email subject line must read “SIFOIA Notification”, along with the facility name and the FOIA request tracking number.

(b) The body of the Email must contain the following statement, using Arial font size 12: “Attached to this Email is a FOIA request received by the [insert facility name] from [insert requester’s name and organization] on [insert date received by the FOIA Officer].” In addition, the body of the Email should also contain the following headers: Who, Affiliation, What, Assigned VHA FOIA Officer and Estimated Closure Date. The header labeled “Who” is designated to include the name of the FOIA requester(s). The header labeled “Affiliation” is designated to include the identification of the company or organization for which the requester is affiliated with. If no affiliation is known, the FOIA Officer must indicate that the affiliation is unknown. The header “What” references an exact duplication of what records or information the requester is seeking from VA. The header “Assigned VHA FOIA Officer” is designated to include the name of the FOIA Officer processing the substantial interest request. The header “Estimated Closure Date” is designated to provide the FOIA Officer’s best estimate for which completion of the FOIA request is anticipated.

(c) An unredacted, date-stamped copy of the FOIA request must be attached to the Email submission.

(7) Upon receipt of a substantial interest notification, the VHA FOIA Office will review and advise the processing FOIA Officer if the response requires further review prior to disclosure. If the VHA FOIA Office determines that the request meets the criteria for a substantial interest request, the VHA FOIA Office will provide notification to VA and VHA senior leadership of the substantial interest request.

(8) Under no circumstances should the substantial notification procedure delay or impact the FOIA Officer’s processing of the FOIA request. The FOIA Officer must always continue processing a FOIA request during the notification procedure.

(9) If the VHA FOIA Office indicates that the response will require further review, upon completion of the processing of the FOIA request, the FOIA Officer processing the request must submit a review notification of a substantial interest FOIA request to the VHA FOIA Office electronically. Under no circumstances should a VHA component FOIA Officer close a substantial interest FOIA request for any reason without review by the VHA FOIA Office.

(10) The review notification must be sent to VHAFOIASIReview2@va.gov and must include the following information:

(a) The Email subject line must read “SI FOIA Review:”, along with the facility name and the request tracking number.

(b) An unredacted, date stamped copy of the initial FOIA request.

(c) The proposed initial agency decision letter.

(d) Copies of all responsive records as the FOIA Officer intends to release them to the requester.

(e) The Vaughn index, if applicable (see appendix A, paragraph 1.b.).

(11) Once the review notification is submitted, the VHA FOIA Office will review the contents of the response and advise VA and VHA leadership on the contents of the response for awareness purposes. FOIA Officers may not make disclosures of information on substantial interest requests until the review procedure is complete and they are informed by the VHA FOIA Office that the substantial interest review is complete.

(12) The substantial interest review procedure prescribed by this directive includes any and all responses to the request, to include full grants, partial grants in which a FOIA exemption is cited, full denials, no records responses or any other administrative reasons for closure of the substantial interest request, including withdrawals and fee related closures.

j. **Time Limits.**

(1) A request for records received at a VHA component must be promptly referred for action to the appropriate FOIA Officer. The component has 20 business days to provide a final response determination to the FOIA requester.

(2) All VHA components receiving FOIA requests must acknowledge receipt of a FOIA request within 10 business days of receipt. Acknowledgement letters are discussed in greater detail in paragraph 6.g.(8) of this directive.

(3) The statutory time period to make a release determination on a FOIA request usually begins on the date when the FOIA Office responsible for the requested records receives the request. If a requester mistakenly sends a FOIA request to a VA component that is designated to receive FOIA requests, that receiving component FOIA Officer is obligated to route the misdirected request to the appropriate component FOIA Officer within 10 business days of receiving the request. If the initial receiving component FOIA Officer fails to route such a request to the proper component FOIA Officer within ten business days, the proper component’s 20-day time period to make a request determination begins to run on the tenth day nevertheless.

(4) When a request is sent directly to a VA component office not designated to receive FOIA requests, the statutory time period does not begin until it is received by a VA component FOIA Office designated to receive FOIA requests.

(5) If exceptional or unusual circumstances exist, the FOIA Officer may take an additional 10 business days to process the request. The requester will be notified of the unusual circumstances, that a time extension has been taken and the date by which the VA expects to complete processing of the request. Such notification must be provided to the requester prior to the expiration of the original 20 business day time period. Where an extension is for more than 10 additional business days, the FOIA Officer shall advise the requester of this in writing and provide the requester an opportunity to narrow the scope of the request or arrange for an alternative timeframe. When the VHA component FOIA Officer extends the time limits by more than 10 additional working days, in the written notice to the requester, the VHA component FOIA Officer must notify the requester of the right to seek dispute resolution services from the OGIS.

(6) Unusual circumstances include the following:

(a) The need to search for and collect the requested records from field facilities or other components other than the office processing the request;

(b) The need to search for, collect, and examine a voluminous amount of records; and,

(c) The need to consult with another agency or two or more agency components as a result of those components having a substantial interest in either the determination or the subject matter of the request.

(7) Exceptional circumstances are not affirmatively defined in FOIA; however, an unpredictable agency workload of requests and resource limitations may be considered an exceptional circumstance if the VHA component can demonstrate reasonable progress in reducing its backlog of pending requests.

k. **Expedited Processing.**

(1) A FOIA requester may make a request for expedited processing with a certification of "compelling need."

(2) A compelling need is defined as:

(a) Involving an imminent threat to the life or physical safety of an individual;

(b) In the case of a request made by a person primarily engaged in disseminating information, an urgency to inform the public concerning actual or alleged Federal government activity;

(c) In the discretion of the FOIA Officer, the request warrants such expedited treatment; or

(d) There is widespread and exceptional interest in which possible questions exist about the government's integrity which may affect public confidence.

(3) A requester submitting an expedited processing request must submit a statement, certified to be true to the best of the requester's knowledge and belief, providing a detailed basis for how there is a compelling need. FOIA Officers must grant such requests for expedited processing when compelling need is shown. The burden of demonstrating that the requested information is urgently needed is on the requester.

(4) When a requester seeks expedited processing, the VHA component FOIA Officer must make a determination and notify the requester of its decision whether or not to grant expedited processing within 10 calendar days of receipt of the request and notify the requester of this determination in writing. If expedited processing is granted, the request must be processed in the expedited track behind any previously granted expedited processing requests, but before any requests in either the complex or simple track type.

(5) If expedited processing is granted, VA must give priority to that FOIA request and process the requested records for disclosure as soon as practicable.

(6) Each VHA component must record expedited processing determinations in the FOIA electronic tracking system and in the FOIA administrative case file. A scanned copy of the signed expedited processing decision must be uploaded into the FOIA electronic tracking system.

(7) If a FOIA Officer denies a request for expedited processing, the FOIA requester must be advised of such denial in writing, including the basis for denying the request. When an expedited processing request is denied, the FOIA requester must be provided notice of their right to appeal, as well as instructions for submitting such appeal as discussed in paragraph 6.r. of this directive. Additionally, when an expedited processing request is denied, the FOIA requester must be provided notice of their right to seek assistance and dispute resolution services from the VHA FOIA Public Liaison and OGIS.

I. Searching for Records.

(1) Upon receipt of a perfected request by the appropriate VHA component, the FOIA Officer will make a reasonable effort to search for records responsive to the request. This includes searching for records in electronic form or format, unless to do so would interfere significantly with the agency's automated information systems.

(2) FOIA and VA's implementing regulations require that the description of the records being sought by a FOIA requester must be such that it enables agency employees familiar with the subject area to locate the record with a reasonable amount of effort. In the instance that a requester fails to provide enough information to locate the requested record, the FOIA Officer must seek clarification from the FOIA requester. Clarification is discussed further in paragraph 6.m. of this directive.

(3) If a requester specifies the specific time frame for which records are being requested, VHA components must honor such requests. However if a FOIA requester fails to provide a cut-off date for responsive records, the cut-off date will be the date in

which the request was received by the component FOIA Officer processing the request. The cut-off date must be indicated in the acknowledgement letter and each subsequent correspondence to the requester.

(4) The responsibility of providing oversight of a search under FOIA resides with the VHA component FOIA Officer processing the request. The FOIA Officer must identify all potential locations where responsive records may be maintained or stored and direct staff in those locations to conduct searches. In directing the search, the FOIA Officer must identify the specific search terms to be utilized, the timeframe for responsive records, as well as instructions on how to conduct searches of both electronic and paper records.

(5) All VHA employees are responsible for providing the results of their search to the VHA component FOIA Officer. In providing such response, the employee must provide the component FOIA Officer with the search terms utilized, the timeframe for responsive records, a description of the method in which the search was conducted and a listing of all locations searched, along with an indication of whether those locations were for electronically stored or paper-based records. Employees must provide information with the highest degree of specificity to the component FOIA Officer, such as listing every electronic database that was searched utilizing the search terms. Employees searching for records must advise the component FOIA Officer of any other potential locations for which they are aware that responsive records may exist.

(6) The fact that a request involves searching a large number of records, does not, in and of itself, entitle a VHA component FOIA Officer to deny the request on the basis that the records request is not reasonably described. FOIA Officers must make a reasonable interpretation of the requested records. The component FOIA Officer's decision on the reasonableness of the description must be based on knowledge of its files and not on the potential volume of records that may be located, and the concurrent review effort to determine releasability. Component FOIA Officers must document such decisions on reasonableness in the FOIA administrative case file.

(7) The reasonableness of VHA's search can depend on whether VHA properly determined where responsive records were likely to be found and searched those locations, or whether VHA improperly limited its search to certain records system. For this reason, FOIA Officers must consider all potential locations where responsive records may reside, and take reasonable efforts to search all of those locations. This decision must be reflected in the FOIA administrative case file.

(8) **Electronic Records.** A request for records includes a request for electronic records. The FOIA request does not need to specify electronic records. Agency records maintained in electronic format are records subject to FOIA.

(a) When searching for records, FOIA Officers should routinely consider Email, records maintained on personal computers and diskettes, management information systems (e.g., shared electronic systems such as local area networks and wide area networks), databases and registries, as well as any other electronic records.

(b) VHA must make reasonable efforts to search for records kept in an electronic format as well as maintained on paper, except when searching would significantly interfere with the operation of a VA automated information system.

m. **Clarification of Requests.**

(1) If a VHA component FOIA Officer determines that the request does not reasonably describe the records sought in sufficient detail to search for responsive records, or that the scope of the request is overly broad, the VHA component FOIA Officer must notify the requester, in writing, of the reasons for which the request is insufficient. The VHA component FOIA Officer will also provide the requester with the opportunity to discuss the request by documented telephonic communication or written correspondence in order to modify the request. Copies of the clarification notice and any subsequent documented telephonic communication or written correspondence must be included in the FOIA administrative case file and uploaded in the FOIA electronic tracking system.

(2) When a VHA component FOIA Officer seeks clarification regarding a request, the notice to the requester must include a detailed deadline for which the requester must respond. All VHA component FOIA Officers will allow the requester 30 calendar days from the date of the clarification notice to respond to such notice. The VHA component FOIA Officer shall advise the requester that if a response is not received within the 30 calendar days, he or she will conclude that the requester is no longer interested in pursuing the request and will close VHA's files on the request.

(3) VHA component FOIA Officers may toll the time period for purposes of clarification with the requester. Tolling for clarification purposes may only occur one time. Subsequent attempts at clarification will not qualify for tolling. For this reason, VHA component FOIA Officers should take special precaution to seeking clarification on all related issues prior to contacting the requester. When a request is tolled, the VHA component FOIA Officer will place the request in an "on hold" status in the FOIA electronic tracking system; however, immediately upon receipt of the requester's clarification, the request must be removed from the "on hold" status.

n. **Fees and Fee Waivers.**

(1) **General.** VHA component FOIA Officers shall charge for processing requests under FOIA except where fees are limited or where a waiver or reduction in fees is granted. VHA components shall ordinarily collect all applicable fees before releasing copies of requested records to a requester. Requesters must pay fees by check or money order payable to the Treasury of the United States.

(2) **Fees to be Charged.** The following fees will be used when calculating the fee owed pursuant to a request.

(a) **Search.** Search means the process of looking for and retrieving records that are responsive to a request, including line-by-line or page-by-page identification of responsive information within records. Search also includes reasonable efforts to locate

and retrieve information from records maintained in electronic form or format. The VHA component will conduct searches in the most efficient and least expensive manner reasonably possible. The FOIA Officer may charge for time spent searching even if he or she does not locate any responsive records or if any records located is withheld as entirely exempt from disclosure.

1. Search Fees. When a FOIA Officer determines that a search fee applies, the fee will be based on the hourly salary of the VA personnel performing the search, plus 16 percent of the salary. The type and number of personnel involved in addressing the request depends on the nature and complexity of the request and responsive records. Fees are charged in quarter hour increments.

2. Computer Search Fees. In cases where a computer search is required, the requester may be charged the direct costs of conducting the search. When a computer search is required, VA will combine the actual costs of operating the central processing unit (CPU), if applicable, for that portion of the operating time that is directly attributable to search for records responsive to the FOIA requests, along with the hourly cost of the individual operating the computer, plus 16 percent of the operator's salary.

(b) Duplication. Duplication means making a copy of a record necessary to respond to a FOIA request. Copies may take the form of paper, microform, audiovisual materials or machine readable-documentation, among others. The copy provided must be in a form that is reasonably usable by requesters. When a duplication fee applies, the FOIA Officer will charge a fee of \$0.15 per one-sided page for a paper photocopy of a record; no more than one copy will be provided. For other forms of duplication, including electronic copies, the FOIA Officer will charge the direct costs of that duplication.

(c) Review. Review means examining a record including audiovisual, electronic mail, data bases, documents or records in any other format in response to a commercial use request to determine whether any portion of it is exempt from disclosure. Review includes the deletion of exempt material or other processing necessary to prepare the record(s) for disclosure. Review time includes time spent contacting any submitter and considering or responding to any objections to disclosure made by a submitter under 38 CFR 1.558(d), but does not include time spent resolving general legal or policy issues regarding the application of exemptions. Review costs are recoverable even if, after review, a record is not disclosed.

(d) Review Fees. When a FOIA Officer determines that review fees apply, the fee will be based on the hourly salary of the VHA component FOIA Officer conducting the review, plus 16 percent of the salary. Fees are charged in quarter hour increments.

(3) Categories of FOIA Requesters for Fee Purposes.

(a) There are three categories of FOIA requesters: commercial use requesters; educational and non-commercial scientific institutions requesters and representatives of news media; and all other requesters. Specific levels of fees must be charged for each of these categories in accordance with 38 CFR 1.561.

(b) Commercial Use Requesters.

1. A commercial use request means a request from, or on behalf of, one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. To determine whether a request properly belongs in this category, consideration must be given to the use in which a requester will utilize the documents requested. Where the use of the records sought is not clear in the request additional information must be obtained from the requester before assigning the request to a specific category.

2. The full direct costs of searching for, reviewing for release, and duplicating the records must be charged to a commercial use requester. Such requesters are not entitled to 2 hours of free search time or 100 free one-sided pages of reproduced documents. Moreover, the commercial use requester must be charged the cost of searching for and reviewing records even if there is ultimately no disclosure of records.

(c) Educational and Non-commercial Scientific Institution Requesters.

1. An educational institution is defined as a pre-school, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education which operates a program or programs of scholarly research. To determine whether a request properly belongs in this category, the request must be evaluated to ensure that it is apparent from the nature of the request that it serves a scholarly research goal of the institution, rather than an individual goal of the requester or a commercial goal of the institution. Both teachers and students may qualify for classification as an educational institution. To qualify for reduced fees as an educational institution, the requester – whether teacher or student – must seek the information in connection with his or her role at the educational institution. In other words, the requester may not seek the information for personal purposes or commercial use purposes. Typically, the teacher's role in an educational institution is to teach, research and produce scholarly works. Thus, requests pertaining to these purposes would qualify for reduced fees as an educational institution. Similarly, a student's role is to pursue coursework, conduct research to support such coursework, produce scholarly articles resulting from such research and pursuing other school-sponsored activities, all of which would qualify the student for reduced fees as an educational institution.

2. A non-commercial scientific institution is one that is not operated on a commercial basis (as that term is referenced under commercial use request) and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. To be in this category, the request must demonstrate that the request is authorized by and is made under the auspices of a qualifying institution and the records are sought to further scientific research and are not sought for a commercial use.

3. Educational and Non-commercial Scientific Institution requesters must be charged only for the cost of reproduction, excluding charges for the 100 one-sided pages.

(d) Representative of the News Media.

1. A representative of the news media is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals who make their products available for purchase or subscription or free distribution to the general public. These examples are not all-inclusive. As methods for news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media that otherwise meet the criteria for news media shall be considered to be news media entities.

2. Freelance journalists may be regarded as working for a news media entity if they can demonstrate a solid basis for expecting publication through that entity, even though not actually employed by it. A publication contract would be the clearest proof, but the requester’s publication history may also be considered. To be in this category, the requester must not be seeking the requested records for a commercial use; a records request supporting the requester’s news-dissemination function shall not be considered to be for a commercial use.

3. Representatives of the news media requesters will be charged only for the cost of reproduction, excluding charges for the first 100 one-sided pages.

(e) All Other Requesters.

1. All other requesters are those that do not fit into any of the other categories of requesters described in this paragraph.

2. All other requesters will be charged fees to recover the full, reasonable direct costs of searching for and reproducing records responsive to a request, except the first 2 hours of search time and the first 100 one-sided pages of reproduction.

(f) Requests from Attorneys. Fees are assessed based on the category determined to be appropriate for the requester’s status. The fee status of the requester that is an attorney representing a client is normally determined by the fee status of the attorney’s client. If the fee status of the client is unclear, then the VHA component FOIA Officer must ask the requester for clarification. The attorney does not need to reveal the identity of the client, only the client’s fee status. If the attorney does not provide enough information to determine the fee status, or if the attorney refuses to provide information, then the VHA component may assign commercial fee status to the requester.

(4) **Schedule of Fees.** The following table summarizes various service charges for certain activities that may be assessed to a requester, dependent on the requester type:

Activity	Fees
Duplication of standard size (8 ½" x 11"; 8 ½" x 14"; 11" x 14") paper records	\$0.15 per page.
Duplication of non-paper items (e.g. x-rays), paper records which are not of a standard size (e.g., architectural drawings/construction plans or EKG tracings).	Direct cost to VA.
Record search by manual (non-automated) methods.	Basic hourly salary rate of the employee(s), plus 16 percent.
Record search using automated methods, such as by computer.	Direct cost to perform search.
Record review (for Commercial Use Requesters only).	Basic hourly rate of employees performing review to determine whether to release records and to prepare them for release, plus 16 percent.
Other activities, such as: Attesting under seal or certifying that records are true copies; sending records by special methods; forwarding mail; compiling and providing special reports, drawings, specifications, statistics, lists, abstracts or other extracted information; generating computer output; providing files under court process where the federal government is not a party to, and does not have an interest in, the litigation.	Direct cost to VA.

(5) **Fee Estimates and Invoices.**

(a) When a FOIA Officer determines or estimates that the fees to be charged for processing a FOIA request will amount to more than \$25.00 or the amount set by Office of Management and Budget (OMB) fee guidelines, whichever is higher, the FOIA Officer will notify the requester in writing of the actual or estimated amount of the fees, and ask the requester to provide written assurance of the payment of all fees or fees up to a designated amount, unless he or she has indicated a willingness to pay fees as high as those anticipated. VHA component FOIA Officers will not assess fees if the total assessable fees are less than or equal to \$25.00.

(b) Any such agreement to pay the fees shall be memorialized in writing through issuance of a notice. The fee estimate notice will be uploaded into the FOIA electronic tracking system. Such notice will offer the requester the opportunity to confer with VHA personnel with the object of reformulating the request to meet his/her needs at a lower cost.

(c) When the requester does not provide sufficient information upon which VA can identify a fee category or an issue otherwise arises regarding fee assessment, the FOIA Officer may seek clarification from the requester. In either case, the timeline for responding to the request will be tolled and no further work will be done on it until the fee issue has been resolved. When a request is tolled, the VHA component FOIA Officer will place the request in an “on hold” status in the FOIA electronic tracking system; however, immediately upon receipt of sufficient information to resolve the fee issues, including advanced payment, the request must be removed from the “on hold” status.

(d) In estimating and assessing fees, the VHA component FOIA Officer must provide the requester 10 business days to respond to the fee estimate. The specific deadline for response to the fee estimate must be clearly identified in the fee estimate notice. If the VHA component FOIA Officer does not receive a written response within 10 business days after contacting the requester regarding a fee issue, it will be assumed that the requester no longer wishes to pursue the request and will close the file on the request.

(e) All fee estimates issued by the VHA component FOIA Officer must be accompanied by a detailed invoice of the estimated fees, which shows individual, specific charges for search, review and duplication costs. The detailed invoice of estimated fees must be uploaded into the FOIA electronic tracking system. In addition, VHA component FOIA Officers must utilize the billing function within the FOIA electronic tracking system to record fee estimates, payments and final billing invoices.

(f) All fee notices issued by VHA component FOIA Officers must advise the requester of their right to file an appeal of the fee estimate and provide instructions for filing an appeal in accordance with paragraph 6.r. of this directive. Additionally, when a fee estimate is issued, the FOIA requester must be provided notice of their right to seek assistance and dispute resolution services from the VHA FOIA Public Liaison and OGIS.

(6) **Refunds.** In the event that a VHA component discovers that it has overcharged a requester or that a requester has overpaid, the component shall promptly refund the charge to the requester by reimbursement methods that are agreeable to the requester and the component. VHA component FOIA Officers must work closely with their local accounting office to process refund requests due to overpayment.

(7) **Advanced Payments.** When considering whether to require a requester to make an advanced payment, the VHA component FOIA Officer will consider:

(a) If fees are likely to exceed \$250.00, VA will notify the requester of the estimated cost and either obtain satisfactory assurance of full payment, or require an advance payment of up to the full estimated fee. Such notice will be uploaded into the FOIA electronic tracking system.

(b) If a requester has previously failed to pay a charged fee within 30 days, VA will, before processing a new request, require payment of the full amount owed on the previous request and an advance payment on the new request, plus any applicable interest.

(c) When a requester has a history of prompt payment, the VHA component FOIA Officer may accept a satisfactory assurance of full payment from a requester rather than an advance payment.

(d) In cases in which the VHA component FOIA Officer requires advance payment, the timeline for responding to the request will be tolled and further work will not be done on it until the required payment is received. VHA components must provide a FOIA requester ten (10) business days in which to submit advance payment. The deadline for advance payment must be specified in the notice provided to the requester.

(8) Restrictions on Assessing Fees.

(a) Regardless of fee category, no fees may be charged by any VHA component if the total assessable fees are less than or equal to \$25.00.

(b) No search fee will be charged for requests by educational institutions, non-commercial scientific institutions or representatives of the news media. No review fees will be charged for educational institutions, non-commercial scientific institutions, representatives of the news media or all other requesters.

(c) Fees will only be assessed on a quarter hour (15 minutes) basis or more. VHA component FOIA Officers will not assess fees for searches or reviews that take less than a quarter hour.

(d) Limitations on Search Fees:

1. No search fee (or duplication fee, when the records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution or a representative of the news media) will be charged if the VHA component fails to comply with the time limit provisions contained in paragraph 6.j. of this directive and if no unusual or exceptions circumstances apply to the processing of the request as described in paragraphs 6.j.(5)-6.j.(7) of this directive.

2. If unusual circumstances apply and the VHA component FOIA Officer has determined that the request will not be processed within the 20 business days afforded under FOIA, the VHA component FOIA Officer will provide a timely written notice to the requester that there will be a delay of an additional 10 days. A timely written notice to the requester is one that is provided in advance of the expiration of the 20 business days.

3. If a VHA component FOIA Officer fails to provide a timely written notice, no search fees (or duplication for those requesters with preferred fee status) may be assessed.

4. If unusual circumstances apply and the pool of responsive records contains more than 5,000 pages of records necessary to respond to the request, search fees may be assessed only if timely written notice has been made to the requester and the VHA component FOIA Officer has made not less than three good faith attempts to discuss, with the requester, how he/she could effectively limit the scope of the request. Such good faith attempts may be made via written mail, electronic mail or telephone. VHA component FOIA Officers must document all of the good faith attempts to discuss the request with the requester in the FOIA administrative file.

5. Duplication and review fees may be charged to a commercial use requester and duplication fees may be charged for “all other” requesters in all circumstances.

(e) VHA components may provide free copies of records or free services in response to an official request from other government agencies and Congressional offices when the VHA component head or designee determines that doing so will assist in providing medical care to a VA patient or will otherwise assist in the performance of VA’s mission.

(9) **Aggregating Requests.** Whenever a FOIA Officer reasonably believes that a requester or group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the FOIA Officer may aggregate those requests and charge fees accordingly. FOIA Officers may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. Where requests are separated by a longer period, the FOIA Officer will aggregate them only where there exists a solid basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

(10) **Charging Interest and the Debt Collection Act of 1982.** VHA component FOIA Officers may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue until payment is received by the component. VHA components will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset. When a requester has an outstanding debt with any VHA component or Federal agency, the VHA component FOIA Officer will administratively close all of the requester’s requests after giving notice to the requester. The requester must be advised that any administratively closed requests may be resubmitted once the full amount owed, plus any applicable interest, is paid. Such notice must be uploaded in the FOIA electronic tracking system.

(11) Fee Waivers and Reduction of Fees.

(a) A FOIA requester may make a request for a fee waiver.

(b) VHA will waive or reduce fees for records provided in response to a FOIA request when the VHA component FOIA Officer determines that furnishing the record is in the public interest and is not primarily in the commercial interest of the requester.

(c) To determine public interest, the VHA component FOIA Officer must consider the following factors:

1. The records must concern identifiable operations or activities of the government with a connection that is direct and clear, not remote or attenuated.
2. The records must likely contribute to an understanding of government operations and activities. In order for the disclosure to likely contribute to an understanding of government operations or activities, the requested records must be meaningfully informative and contribute to an increased public understanding of those operations or activities. The disclosure of information that is already in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding.
3. The records must contribute to the understanding of the public at large, i.e., a reasonably broad audience of persons interested in the subject. A requester's expertise in the subject area and ability and intention to effectively convey the information to the public is considered. A representative of the news media will satisfy this consideration.
4. The records must contribute significantly to public understanding of government operations. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. VHA components shall not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the Government is important enough to be made public.

(d) To determine whether disclosure is in the commercial interest of the requester for purposes of a fee waiver, VHA components will consider the following factors:

1. Whether the requester has a commercial interest that would be furthered by the requested disclosure (requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration).
2. Whether the magnitude of the commercial interest is sufficiently large, in comparison with the public interest, that disclosure is primarily in the commercial interest of the requester. Components shall presume that where a representative of the news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market Government information for direct economic return shall not be presumed to primarily serve the public interest.

(e) When a requester seeks a fee waiver, the VHA component FOIA Officer must make a determination and notify the requester of its decision whether or not to grant a fee waiver and notify the requester of this determination in writing. Such notification must be made within 10 business days of receipt of the fee waiver request.

(f) Each VHA component FOIA Officer must record fee waiver determinations in the FOIA electronic tracking system and in the FOIA administrative case file. A scanned copy of the signed fee waiver decision must be uploaded into the FOIA electronic tracking system.

(g) If a FOIA Officer denies a request for a fee waiver, the requester must be advised of such denial in writing, including the basis for denying the request. When a fee waiver request is denied, the FOIA requester must be provided notice of their right to appeal, as well as instructions for submitting such appeal as discussed in paragraph 6.r. of this directive. Additionally, when a fee waiver request is denied, the FOIA requester must be provided notice of their right to seek assistance and dispute resolution services from the VHA FOIA Public Liaison and OGIS.

o. Reviewing Records for Release Determination.

(1) VHA administrative records not retrieved by name, social security number or other identifier must be made available to the greatest extent possible in keeping with the spirit and intent of FOIA. Before releasing records in response to a FOIA request, the record must be reviewed, in accordance with this directive, to determine if all or only portions of the record can be released. This review must be conducted by the appropriate VHA component FOIA Officer or their designated alternate.

(2) When a VHA component FOIA Officer receives a request for records and conducts a search for responsive records, oftentimes such search will yield records for review. It is the sole responsibility of the VHA component FOIA Officer to conduct a line-by-line review of the all responsive records for release determination. Release determination may depend on several factors, including whether the located records are responsive to the FOIA request and whether the located records are subject to one or more of FOIA's nine statutory exemptions. FOIA exemptions are discussed further in paragraph 7 of this directive.

(3) If, upon locating potentially responsive records, a VHA component FOIA Officer identifies records that either originated with another VA component or agency, or which contain information provided by, or of substantial interest to, another component or agency, the VHA component FOIA Officer processing the request must immediately refer or consult with the other components having interests in the responsive records. Referrals and consultations are further addressed in paragraph 6.p. of this directive.

(4) When a decision is made to release a record, a copy should be made available promptly to the requester.

(5) When a request for a record is denied in whole or in part, the VHA component FOIA Officer shall provide the requester in writing an explanation of the substantive basis for denial, including the specific citation of the statutory exemption(s) applied, along with the notice that the requester has a right to file an appeal. This notice is called the initial agency decision or IAD. The IAD must further advise the requester on the instructions for filing an appeal. Appeals are further discussed in paragraph 6.r. of

this directive. The basis for the adverse determination (denial) of records shall be sufficiently detailed in the IAD to permit the requester to make an informed decision concerning an appeal. Additionally, when a request for a record is denied in whole or in part, the FOIA requester must be provided notice of their right to seek assistance and dispute resolution services from the VHA FOIA Public Liaison and OGIS.

(6) FOIA requires that all VHA components must reasonably segregate portions of responsive records that are not protected by one or more of FOIA's nine statutory exemptions from the portions of the records that are not subject to exemption. However, when the nonexempt information is so inextricably intertwined with exempt information that segregation is not possible, VHA component FOIA Officers may withhold the records in their entirety. If a VHA component FOIA Officer withholds records in their entirety as not capable of being segregated, a detailed explanation of how segregation was not possible must be included in the FOIA administrative case file.

(7) When a request is granted in part, the VHA component FOIA Officer shall mark, redact, or annotate the records to be released to show the amount of information deleted and, where technically feasible, indicate the exemption at the place of redaction unless doing so would harm an interest protected by an applicable exemption. All VHA component FOIA Officers must strictly abide by the following standards for redaction:

(a) Redactions must be clearly indicated on the responsive records. For this reason, a VHA component FOIA Officer will not white out portions of the records in a way that the requester cannot identify the amount of information being withheld.

(b) The component FOIA Officer must clearly indicate on the top of, or beside of, the redaction which exemption is being asserted for withholding the portion of the record being redacted. If more than one exemption is being asserted to withhold the records, all exemptions must be indicated.

(c) If full pages are being withheld, the VHA component FOIA Officer must insert a blank page indicating the total number of pages being withheld. The blank page should be located at the exact location in the responsive records where the full page or pages are being withheld. This may require the VHA component FOIA Officer to insert multiple pages throughout the responsive records. The inserted pages must be annotated with the total number of pages withheld and the exemption(s) being cited to withhold the information.

(d) All responsive records must be Bates numbered. Bates numbering is the process of applying a set of identifying, sequential numbers to a set or collection of documents. Bates numbering may be applied electronically, by stamping, or handwritten.

(e) If redacting records in an electronic format, VHA component FOIA Officers will preserve three copies of the electronic records, to include an unredacted version, a redacted version and an electronic version in which redactions are indicated but not accepted.

(8) **Requests Involving Multiple Facilities.** In the spirit of providing the highest level of customer service, VISN FOIA Officers must consolidate responses to FOIA requests which involve responses to the same request from three or more VHA health care facilities within their respective VISN. Such consolidated responses will be processed by the VISN FOIA Officer.

(9) **Non-responsive Materials Intertwined with Responsive Materials.** VHA component FOIA Officers, at their discretion, may release non-responsive information. Responsive documents may contain a significant amount of non-responsive information, the review of which may cause delays in responding to the requester. If a VHA component FOIA Officer determines that release of the non-responsive portions of records would substantially delay the final response to the FOIA requester, the VHA component FOIA Officer may withhold the non-responsive materials in their entirety. If the non-responsive records are withheld, the VHA component FOIA Officer must follow the same procedures for redaction as stipulated in paragraph 6.o.(6) of this directive. The redacted or deleted records must be clearly annotated as “non-responsive”.

(10) **Initial Agency Decision (IAD) Letter.** When a VHA component FOIA Officer closes a FOIA request in the FOIA electronic tracking system, such closure must be accompanied with an IAD letter signed by the program office, VISN or VA medical facility Director, or the designated FOIA Officer, addressed and sent to the FOIA requester. Because the IAD serves as the foundation for explaining the agency’s decision to the FOIA requester, it is imperative that the IADs of VHA components be uniform. VHA component FOIA Officers are expected to clearly address the following information in the IAD:

(a) The procedural history of the FOIA request, including the original receipt date, dates of any subsequent correspondence relevant to the release determination.

(b) If the request was referred to the component FOIA Officer by another component, an indication of such referral must be noted, including the date of the referral.

(c) A description of the records sought.

(d) The FOIA tracking number.

(e) If portions of the request are being processed by other VA or VHA components, the IAD must reference the other request(s) and provide the tracking number for such request(s).

(f) The records cut-off date or an indication of the period of time for which records were searched.

(g) For every piece of information or document which is disclosed.

1. Provide the title and/or general description of the contents.

2. A reference to the number of pages disclosed.

(h) For every piece of information or document which is either withheld in its entirety or redacted in part,

1. Provide the title and/or a general description of the contents withheld or redacted, disclosing as much information as possible without disclosing the underlying information and/or thwarting the exemption's purpose.

2. The exemption(s) upon which the VHA component FOIA Officer relied upon. The citation of an exemption must explain what the exemption protects.

3. An explanation as to how the redacted or withheld information falls within the exemptions cited by the VHA component FOIA Officer, to include a thorough justification on how the subject records qualify for withholding under the exemption. Specifically, the VHA component FOIA Officer must address how the release of the requested records would result in harm to the applicable FOIA exemption. VHA component FOIA Officers may cite applicable case law to support the Agency's position.

4. If using an exemption which requires a showing of harm, explain how disclosure of the material in question would cause the requisite degree of harm.

5. A statement of the types of information being withheld (e.g., home address, social security number and date of birth).

6. A reference to the number of pages disclosed and the number of pages withheld in their entirety. When only portions of documents are withheld, the redactions must be made in accordance with paragraph 6.o.(7) of this directive.

(i) If any adverse determinations are made, appeal rights must be provided.

(j) If any adverse determinations are made, the requester must be advised of his/her right to seek assistance and/or dispute resolution services from the VHA FOIA Public Liaison and OGIS.

NOTE: *The IAD may include other remarks from the agency if they are relevant to the request and provide clarifying information for the FOIA requester.*

(11) **Unofficial Release of VHA Information.** Records released by the authority of this directive, or under circumstances in which a VA or VHA official with the appropriate authority has authorized the release of information to the public are considered to be in the public domain. The disclosure of exempt records, without authorization by the appropriate VA or VHA official, is not an official release of information; accordingly, it is not a FOIA release. Such a release does not waive the authority of the VHA to assert FOIA exemptions to withhold the same records in response to a FOIA request. Additionally, while the authority may exist to disclose records to individuals in their official capacity, the provisions of this directive apply if the same individual seeks the records in a private or personal capacity.

p. **Referrals and Consultations.**

(1) If a VHA component FOIA Office receives a misdirected FOIA request for records originated by another VA or VHA component, it shall refer the request to the correct VA or VHA component FOIA Office and advise that office of the date the request was originally received. The VHA component FOIA Officer must provide notice to the FOIA requester of all referrals. Copies of such notice must be uploaded in the FOIA electronic tracking system.

(a) This routing requirement only applies to those requests directed to a VHA component FOIA Officer that seek VA documents. If responsibility for the requested records rests with a non-VA agency (e.g. Department of Defense), then the VHA component need only advise the requester to submit the request to the proper agency.

(b) Prior to referring a request to another VA or VHA component FOIA Office outside of the VHA component that received the request, the VHA component FOIA Officer processing the initial request must consult with the other VA or VHA component's FOIA Office to determine if referral is appropriate. The request must not be referred until after the appropriate receiving FOIA Office is contacted and agrees to receive the request. Documentation to support the referral of the FOIA request must be documented in the referring component's FOIA administrative case file.

(2) Referrals are also relevant when a VHA component holds a responsive record originated by another VA or VHA component or agency outside of the VA. In these cases, the VHA component shall refer a FOIA request for that record, as well as a copy of the records, to the originating VA or VHA component or agency for review and response determination directly to the requester. Referrals of records shall not be made to non-Federal agency entities (i.e. State or local governments). In these cases, the non-Federal agency entity may be consulted for a release recommendation; however, response to the requester remains the responsibility of the VHA component locating the record. If the VHA component holding the record has equity interest in the document, it shall provide an opinion on the releasability of the record with the referral. The name of the VHA component FOIA Officer responsible for the decision to withhold all or parts of the record must be provided. Whenever a record is referred to another VA or VHA component or to an agency outside of VA for a release determination and direct response, the requester must be informed of the referral. The VHA component referring the request must include a point of contact name, telephone number, postal address and an Email address in the notice. Such notice must be uploaded in the FOIA electronic tracking system.

(3) When a VHA component locates a responsive record that it originated and determines that another VA or VHA component or agency outside of VA has a valid interest or equity in the record, the VHA component must consult with the other VA or VHA component or agency and obtain its release recommendation. The consulted agency shall provide its release recommendation back to the originating VHA component, which shall then respond to the requester. Normally, the requester will not be advised of this consultation unless information is withheld by the consulted agency.

The VHA component FOIA Officer must provide written notice to the component or agency receiving the consultation request, which will clearly outline the deadline for responding to the consultation request. A copy of the consultation request must be uploaded in the FOIA electronic tracking system.

(4) VHA components that receive consultations or referrals shall process them in accordance with the time limits established by FOIA and this directive, based upon the date of initial receipt of the perfected FOIA request by the federal government agency that initially received the request.

q. **FOIA Administrative Case File.**

(1) The VHA component FOIA Officer must maintain an administrative case file for every request recorded in the FOIA electronic tracking system and recorded for purposes of the annual FOIA report. Administrative case files may be maintained in paper or electronic form. If maintained in paper form, the administrative case file must be secured in a locked filing cabinet, with access being provided, at a minimum, to both the primary and alternate FOIA Officer. If maintained in electronic form, the administrative case file must be stored in a central location which permits, at a minimum, access to the primary and alternate FOIA Officer.

(2) The contents of the VHA component FOIA administrative case file must be maintained in chronological order. In addition to all record-keeping requirements set forth in this directive, the administrative case file must contain, at a minimum, the following:

- (a) A copy of the incoming FOIA request.
- (b) All original, unredacted copies of responsive records.
- (c) A redacted copy of responsive records.
- (d) If redacted electronically, a copy of the redacted version of the document in which redactions were indicated but not accepted.
- (e) Copies of all correspondence, including the IAD, and contact with requesters, and in the case of exemption 4, the submitter, to include, but not limited to, Emails and letters concerning acknowledgement, fees, scope, clarification, predisclosure notification, notice of intent and the initial agency decision.
- (f) Documentation of the search for and location of records.
- (g) Documentation supporting the IAD.
- (h) Vaughn index, in accordance with Appendix A, paragraph 1.b. of this directive.

(3) **Records Management.** FOIA administrative case files must be maintained and disposed of in accordance with the National Archives and Records Administration (NARA) General Records Schedule and VA records control schedule (RCS 10-1).

r. **Adverse Determinations and Appeals.**

(1) **Adverse Determinations.** Whenever a component makes an adverse determination, the VHA component FOIA Officer shall promptly notify the requester of the adverse determination in writing. Adverse determinations include the following: a determination to withhold a requested record in whole or in part; a determination that the requested record does not exist or cannot be located; a determination that a record is not readily reproducible in the form or format sought by the requester; a determination that what has been sought is not a record subject to FOIA; a determination on any disputed fee matter, including the denial of a fee waiver, denial of a request for expedited processing; and failure by the requester to provide clarification. The adverse determination notice must be signed by the component head or the component's FOIA Officer, provided that written designation by the component head has been completed that authorizes signature authority. The adverse determination notice must include the following:

- (a) The name and title or position of the person responsible for the adverse determination;
- (b) A brief statement of the reason(s) for the denial, including any FOIA exemptions applied by the FOIA Officer in denying the request;
- (c) The number of pages withheld in their entirety. When records are being partially disclosed, redactions must be made in accordance with paragraph 6.o. of this directive;
- (d) Notice that the requester may appeal the adverse determination and a description of the requirements for an appeal; and
- (e) Notice that the requester has the right to seek assistance and/or dispute resolution services from the VHA FOIA Public Liaison and OGIS.

(2) **Appeals.** All adverse determinations are subject to appeal by a FOIA requester. As a result, a FOIA requester must be advised of his/her appeal rights.

(a) The requester may appeal an adverse determination denying a request, in any respect, except for those concerning Office of Inspector General (OIG) records, to the VA Office of the General Counsel (024) via Email at ogcfoiaappeals@va.gov or by postal mail to 810 Vermont Avenue, N.W., Washington, DC 20420. Any appeals concerning OIG records must be sent to the VA Office of Inspector General, Office of Counselor (50), 810 Vermont Avenue, N.W., Washington, DC, 20420. The FOIA appeal must be in writing. VA accepts facsimiles and Emails as written FOIA appeals. A legible return address must be included with the FOIA appeal and the requester may include other contact information as well, such as a telephone number and electronic mail (Email) address.

(b) Time Limits and Content of Appeal. The appeal to the VA OGC must be postmarked no later than 90 calendar days after the date of the adverse determination. The appeal must clearly identify the determination being appealed, including any assigned request number generated by the FOIA electronic tracking system. Other information should also be included, such as the name of the FOIA Officer, the address of the component, the date of the component's determination, if any, and the precise subject matter of the appeal. If appealing only a portion of the component's determination, the requester must specify which part of the determination he or she is appealing. Copies of the request and VA's response, if any, should be included with the appeal. An appeal is not perfected until VA either receives the information identified above or the appeal is otherwise sufficiently defined. Appeals should be marked "Freedom of Information Act Appeal." The General Counsel, Deputy General Counsel, or Assistant General Counsel with jurisdiction over information disclosure matters will act on behalf of the Secretary on all appeals under this section, except those pertaining to the OIG. The designated official in the OIG will act on all appeals pertaining to OIG records. A determination by the General Counsel, Deputy General Counsel, or Assistant General Counsel, or designated official within the OIG, will be the final VA action.

(3) **FOIA Officer Obligations on Appeal.** When a requester appeals a determination made by a VHA component FOIA Officer, VA OGC will notify the VHA component FOIA Officer of the appeal. Within 1 business day of receiving an appeal notice from VA OGC, the VHA component FOIA Officer will acknowledge the appeals request to OGC. Such acknowledgement may take place in the form of formal written correspondence or informal correspondence, such as Email. Copies of the appeal acknowledgement must be included in the FOIA administrative case file.

(a) On appeal, VA OGC will require a complete copy of the VHA component FOIA Officer's administrative case file. The copy of the administrative case file submitted to VA OGC must be submitted electronically. If the administrative case files are not available in electronic form, a scanned copy of the administrative case file will be sufficient. At a minimum, the FOIA Officer must provide the following:

1. A copy of the initial request.
2. Documentation of the VHA component FOIA Officer's search, including, but not limited to, information regarding:
 - a. To whom the search request was sent to.
 - b. An explanation on why the request was sent to that specific individual or office.
 - c. The identity of any systems searched for responsive information.
 - d. Any search terms utilized to identify responsive records.
 - e. Whether the systems searched were paper or electronic.

3. A copy of the initial agency decision (IAD), consistent with the requirements of paragraph 6.o.(10) of this directive.

4. A complete redacted copy of all responsive documents labeled as “Redacted”. All pages must be Bates numbered. The VHA component FOIA Officer must clearly indicate any pages that have been withheld in their entirety.

5. A complete unredacted copy of all responsive documents labeled as “Unredacted”. All pages must be Bates numbered.

(b) When a VHA component FOIA Officer receives a request for administrative case files from VA OGC, such administrative case files, absent a more stringent deadline imposed by VA OGC, must be provided to VA OGC within three (3) business days of receiving the request. If a VHA component FOIA Officer anticipates that additional time may be required, the VHA component FOIA Officer must proactively engage, in advance of the deadline, with VA OGC to negotiate an alternative timeframe. In instances where a VHA component FOIA Officer fails to provide records to VA OGC in a timely manner, or fails to negotiate an alternative timeframe for delivery, the appeal request will be forwarded to the appropriate VHA component head (e.g., VISN Director, VA medical facility Director) for appropriate action.

(4) Office of Government Information Services (OGIS). The OPEN Government Act of 2007 (Pub. L. 110-175) amended FOIA by establishing the OGIS within the National Archives and Records Administration (NARA) to review agency FOIA compliance and to resolve FOIA disputes.

(a) When an adverse determination is made on a FOIA request, the requester must be advised that he/she may seek assistance and/or dispute resolution services from OGIS, as well as the various methods for contacting OGIS. OGIS may be contacted by Email at ogis@nara.gov or by telephone at 202-741-5769. Requesters also may send correspondence to OGIS via postal mail at Office of Government Information Services (OGIS), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001.

(b) OGIS offers mediation services which is an umbrella term that encompasses formal mediation, facilitation and ombudsman services. Formal mediation is the process where an agreed-upon outside mediator assists in resolving a FOIA dispute between a requester and a federal agency. Facilitation is an informal process in which OGIS staff facilitates communication among and between the parties to resolve a dispute. Ombudsman services include providing information and handling general complaints and observations. All mediation services conducted by OGIS are done so in accordance with the Administrative Dispute Resolution Act of 1996, 5 U.S.C. 571-84.

(c) OGIS is mandated to review agency FOIA policies and procedures, as well as monitoring compliance by agencies with FOIA. To accomplish this requirement, OGIS conducts agency assessment program reviews.

(d) VHA component FOIA Officers are expected to fully comply with the OGIS processes, to include mediation and agency assessment program reviews. Upon receiving an OGIS request for mediation services, the VHA FOIA Office will notify, in writing, the VHA component FOIA Officer who is handling the request, providing notice of the OGIS complaint. The notification will outline the substance of the complaint and outline general requirements for resolving the complaint. VHA component FOIA Officers must respond to all actions outlined in the notification within 3 business days, unless a different timeframe is specified by OGIS. In such instances where an alternative timeframe is required, the VHA FOIA Office will provide the modified deadline to the VHA component FOIA Officer in the written notification. VHA component FOIA Officers must respond to all OGIS actions, including requests involving mediation and requests made under the agency assessment program, in writing to the VHA FOIA Office. At no time should VHA component FOIA Officers contact OGIS directly. All OGIS requests must be handled by and through the FPL, the VHA FOIA Office.

(5) **Public Liaison.** Public law 110-175 also assigned responsibility to agency FOIA Public Liaisons (FPLs) to help resolve disputes. The VHA FOIA Office serves as the FPL for VHA. When an adverse determination is made on a FOIA request, the requester must be advised that he/she may seek assistance and/or dispute resolution services from the VHA FOIA Public Liaison, as well as the various methods for contacting the VHA FOIA Public Liaison. The VHA FOIA Public Liaison may be contacted by Email at vhafioa2@va.gov or by telephone at 877-461-5038. Requesters also may send correspondence to the VHA FOIA Public Liaison via postal mail at VHA FOIA Office (10P2C1), Attn: VHA FOIA Public Liaison, Department of Veterans Affairs, 810 Vermont Avenue, N.W., Washington, D.C. 20420.

s. **Proactive Disclosures and Frequently Requested Records.**

(1) When a VHA component FOIA Officer receives three or more FOIA requests for substantially the same records, the VHA component FOIA Officer must notify the VHA FOIA Office of this frequently requested record. The VHA FOIA Office is responsible for ensuring that all frequently requested records are publicly posted, in electronic format, in the VA's FOIA Reading Room.

(2) When a VHA component FOIA Officer determines that the records have become or likely are to become the subject of subsequent requests, the VHA component FOIA Officer must notify the VHA FOIA Office of such determination. The VHA FOIA Office will determine if the records in question require proactive disclosure.

7. FOIA EXEMPTIONS FROM PUBLIC ACCESS TO VHA RECORDS

a. **General.** Under FOIA, 5 U.S.C. 552 (b), there are nine exemptions which permit withholding of certain information from disclosure. Although it is VA policy to disclose information from VA records to the maximum extent permitted by law, there are circumstances, however, when a record should not or cannot be disclosed in response to a FOIA request. When such an occasion arises, FOIA permits records or information,

or segregable portions thereof, to be withheld under one or more of the nine (9) FOIA exemptions. These exemptions should be invoked in denying a request only after careful review and consideration of all factors surrounding the request. The contents of this directive are not meant to be a thorough or exhaustive explanation of the applicability of FOIA exemptions. VHA component FOIA Officers should consult with the Department of Justice's (DOJ) Guide to FOIA, as well as the resources provided by the VHA FOIA Office, in understanding and applying the FOIA exemptions.

b. **Discretionary Disclosures and Foreseeable Harm.** VHA component FOIA Officers shall make discretionary disclosures of exempt information, if appropriate. A discretionary release is not appropriate for information determined to be exempt pursuant to exemptions 1, 3, 4, 6, 7(C) and 7(F) of FOIA. As for the other exemptions, which primarily protect governmental interests, a discretionary release is appropriate unless the VHA component FOIA Officer can reasonably identify a foreseeable harm that would result from release of the information. The foreseeable harm must be directly associated to the purpose for which the exemption exists. The reasonably foreseeable harm must not be a speculative or abstract fear and such harms may not be related to the prevention of embarrassment either to an individual or the VA as a whole. In making this determination, VHA component FOIA Officers must consider the sensitivity of the document's content and its age. VHA component FOIA Officer's must clearly document the foreseeable harm associated with such adverse determinations in the FOIA administrative file and such harm should be provided to the FOIA requester in the VHA component FOIA Officer's initial agency decision.

c. **Exemption One, 5 U.S.C. 552(b)(1).** Exemption 1 protects from disclosure national defense or foreign policy information that has been properly classified pursuant to an appropriate Executive Order.

(1) Neither VA nor VHA has original classification authority. "Original classification" is the initial determination that information requires protection against unauthorized disclosure in the interest of national security and a designation of the level of classification. Consequently, VHA component FOIA Officers will not utilize exemption 1 in the normal course of business to support the withholding of VA-originated documents. Requests for records that were originated and originally classified by another agency must be referred to the originating agency for processing and the requester notified of the referral.

(2) Requests for information that was previously classified by an original classification authority that is incorporated, paraphrased, restated, or generated in new form in a VA document and has received a derivative classification (a determination that information is in substance the same as information that is currently classified, and a designation of the level of classification) must be processed as follows. Any classified information must be withheld and referred to the office that generated the document. The VHA component FOIA Officer and the office that generated the document must make a determination as to the extent any or all of the remainder of the information can be disclosed. A redacted version of the disclosed document, which includes the classified information, must be referred to the originating agency for processing and the

requester must be notified of the referral. Also, the requester must be advised of all withholding of information, the exemption(s) which provides for such withholdings, and that the denial may be appealed to the OGC.

d. **Exemption Two, 5 U.S.C. 552(b)(2).** Exemption 2 exempts from disclosure records that are related solely to the internal personnel rules and practices of an agency. In 2011, the United States Supreme Court issued a landmark opinion in *Milner v. Department of Navy*, 131 S. Ct. 1259 (2011), which significantly narrowed the scope of exemption 2. As set forth by the Supreme Court in *Milner*, exemption 2 is limited to records that are: (1) personnel-related rules and practices; (2) that are "related solely" to such rules and practices; and (3) that are "internal" to the agency. As a result of the decision in *Milner*, VHA component FOIA Officers routinely will not utilize exemption 2 to withhold VA records, as an articulable harm oftentimes cannot be associated with the disclosure of otherwise exempt records.

e. **Exemption Three, 5 U.S.C. 552(b)(3).** Exemption 3 exempts from disclosure records concerning matters that another statute specifically exempts. This exemption allows for the withholding of information because its release is prohibited by another statute only if one of two disjunctive requirements is met. The statute requires that the information be withheld from the public in such a manner as to leave no discretion on the issue, or the statute establishes particular criteria for withholding or refers to particular types of matters to be withheld. When withholding records under FOIA exemption 3, VHA component FOIA Officers must include the citation of the specific statute relied upon for withholding the records, unless doing so would harm the interest protected by the disclosure. For example, citing 38 U.S.C. 7332 would not be appropriate as it would indicate to a requester that the records subject is being treated for drug/alcohol abuse, sickle cell anemia or human immunodeficiency virus (HIV). In the instance that citing the statute would cause harm to the purpose of the exemption, the VHA component FOIA Officer will cite exemption 3 only. The primary exemption 3 statutes utilized by VHA components include, but are not limited to:

(1) **Title 38 U.S.C. Section 5701.** Title 38 U.S.C. Section 5701 applies to all claimants' records and lists the special circumstances in which identifying information on a claimant may be released.

(2) **Title 38 U.S.C. Section 5705.** Title 38 U.S.C. Section 5705 prohibits the unauthorized disclosure of certain medical quality assurance records which are identified in 38 CFR 17.500- 17.511, implementing VHA Directives, and facility documents.

(3) **Title 38 U.S.C. Section 7332.** Title 38 U.S.C. Section 7332 prohibits the unauthorized disclosure of medical record information maintained by VA on individuals who have applied for, been offered, or have participated in any program or activity relating to drug and alcohol abuse, infection with the HIV virus, or sickle cell anemia.

NOTE: *The disclosure provisions for these records are found in 38 CFR 1.460-1.496 and in VHA Directive 1605.01, Privacy and Release of Information.*

(4) **Title 41 U.S.C. Section 4702.** Title 41 U.S.C. Section 4702 prohibits agencies from releasing under FOIA any proposal submitted by a contractor in response to the requirements of a solicitation for a competitive proposal unless that proposal is set forth or incorporated by reference in a contract entered into between the agency and the contractor who submitted the proposal. The effect of this prohibition is two-fold:

(a) First, it provides blanket protection for the proposals submitted by unsuccessful offerors in response to a solicitation because they would not, by definition, be set forth or incorporated by reference in a contract entered into between the agency and that offeror.

(b) Second, it prohibits the release of proposals submitted by a successful offeror, provided that such a proposal is not actually set forth or incorporated by reference in the ensuing contract. The term “proposal” includes a technical, management, or cost proposal submitted by a contractor in response to the requirements of a solicitation for a competitive proposal.

(5) **Title 38 U.S.C. Section 7451.** Title 38 U.S.C. Section 7451 prohibits from disclosure the information collected by the VA in industry wage surveys conducted for establishing the compensation rates for certain health care professionals.

(6) **Title 35 U.S.C. Section 205.** Title 35 U.S.C. Section 205 authorizes federal agencies to withhold information pertaining to any invention in which the Federal Government owns or may own a right, title or interest.

(7) **Title 26 U.S.C. Section 6103.** Title 26 U.S.C. 6103 protects from disclosure certain tax return information, to include taxpayer identification numbers of third parties and certain tax convention information.

NOTE: *The Health Insurance Portability and Accountability Act (HIPAA) of 1996 and the Privacy Act are not exemption 3 statutes.*

f. **Exemption Four, 5 U.S.C. 552(b)(4).**

(1) **Overview.** Exemption 4 protects from disclosure “trade secrets and commercial or financial information obtained from a person that is privileged or confidential. Exemption 4 covers two distinct categories of information contained in federal agency records, (1) trade secrets, and (2) information that is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential. For such information to be subject to withholding under exemption 4, it must be shown that:

(a) Disclosure is likely to impair the Government’s ability to obtain necessary information in the future; or

(b) There is likelihood that release will cause the submitter of the information substantial competitive harm.

(2) A trade secret is narrowly defined as a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.

(3) In conducting business, VA acquires proprietary information and trade secrets from businesses, corporations, or entities. The information can either be given voluntarily by businesses so that VA can accomplish its mission or it may be a required submission (involuntary submission). For example, business information must be provided in response to an Agency Request for Proposal (RFP) for services, equipment or other goods and services. The decision to participate in an RFP is voluntary, but once that decision is made the information provided as a requirement of the RFP is considered a required or involuntary submission. Once acquired, VA has a responsibility to protect sensitive business information. It may do so by withholding business information under FOIA exemption 4.

(4) The submitter may designate that specific records or portions submitted to the VA are business information, at the time of the submission or within a reasonable time thereafter. The submitter must use good faith efforts in designating records that the submitter believes could cause substantial competitive harm and thus warrant protection under exemption 4. Such designation will be considered, but will not control the FOIA Officer's decision if the requested records will be disclosed under FOIA. The designation will remain in effect for a period of not more than 10 years after receipt of the VA, unless the submitter provides acceptable justification for a longer period of time. The submitter may designate a shorter period of time.

(5) Upon receipt of a FOIA request for documents or information provided to the VA by a submitter that may contain confidential commercial information, the VHA component FOIA Officer must review the requested documents to determine if the facility may be required to disclose the records. In making this determination, the VHA component FOIA Officer may be required to review additional documents, i.e. the solicitation, the proposal and the contract. If the VHA component FOIA Officer determines that disclosure is not required, the VHA component FOIA Officer must advise the requester of the withholding, the exemption(s) which provides for such withholdings, and that the denial may be appealed to the OGC.

(6) If the VHA component FOIA Officer determines the facility may be required to disclose the records, the VHA component FOIA Officer must review the requested document(s) to determine if the submitter was required (involuntary submission) to provide the information to VA or if the information was submitted on a voluntary basis. This determination is based on if VA had legal authority to require the information submission and exercised that authority to obtain the information. Legal authority to require information submissions may be contained in statutes, executive orders, regulations, or contract solicitations such as invitations for bids (IFB's) and requests for proposals (RFP's). In making the determination if the information was a required (involuntary) or voluntary submission, the FOIA Officer may be required to review additional documents, i.e. the solicitation or request for proposal/request for quote.

(7) When documents provided by a submitter that may include confidential commercial or financial information or trade secrets are requested under FOIA, and it is determined that the VHA component may be required to disclose the records, the VHA component FOIA Officer must notify the submitter. Such notification must:

(a) Be sent by certified mail, return receipt with signature required.

(b) Include a copy of the FOIA request.

(c) Provide to the submitter copies of the requested record(s) or portions thereof that contain the requested confidential commercial information and are potentially subject to exemption 4.

(d) Advise that the submitter or its designee may object, in writing, to the disclosure of any specified portion of the record.

(e) Give the submitter 10 business days in which to submit a written objection to the disclosure.

(f) The submitter, or designee, must be specifically advised that:

1. The submitter, or designee, may object, in writing, to the disclosure of any specified portion of the record and must identify the specific record or portion of the records that should not be disclosed.

2. If it was required to submit the information or record requested and the submitter wishes it withheld, the submitter must explain, in detail, why disclosure of the specified records could reasonably be expected to cause substantial competitive harm. General assertions of harm are not sufficient to support withholding of records. Specifically, the submitter must explain in detail how and why disclosure of the specified records would likely cause substantial competitive harm. VHA component FOIA Officers should not engage in providing assistance to submitters in making such objections. The responsibility of objecting to disclosure of records rests solely with the submitter.

(g) If the submitter was not required to submit the information requested, but provided it to the VA voluntarily, the VHA component FOIA Officer must advise the submitter that the submitter must explain whether it does or does not customarily disclose such information to the general public. The responsibility of objecting to disclosure of records rests solely with the submitter.

(h) The submitter must be reminded that their objections must be contained within a single written response; oral responses or subsequent, multiple responses will not be considered.

(i) The submitter must be notified that if they fail to respond to the notice within the specified time limit, the submitter will be considered to have no objection to disclosure of the information.

(8) When VHA component FOIA Officers receives a request for records that may contain confidential commercial information protected by exemption 4, the requester will be notified that the request is being processed under the provision of VA's implementing FOIA regulations and, as a consequence, there may be a delay in receiving a response. The notice will include a copy of the notification being provided to the submitter, so long as the notice does not include any of the specific information contained in the records being requested, or any purely personal information regarding the requester. However, the submitter must be provided with the name, and if applicable, affiliated company of the FOIA requester.

(9) The FOIA Officer will consider all pertinent factors, including but not limited to the submitter's timely objections to disclosure, as well as the specific grounds provided by the submitter for non-disclosure, in determining whether to disclose confidential commercial or financial information. Information provided by the submitter after the specified time limit will not be considered.

(10) If a submitter fails to provide objections within the specified time period outlined in the notice, the VHA component FOIA Officer must make a determination on the FOIA request without the submitter's input. Where a submitter has failed to provide timely objections or has no objections, the VHA component FOIA Officer will notify the submitter by separate correspondence of the disclosure. This notice should take place at the same time as a final response is issued to the requester. The notice of release must include an exact copy of the information, as provided to the requester.

(11) When a VHA component FOIA Officer makes a determination to disclose business information over the objection of the submitter, the VHA component FOIA Officer will provide the submitter with written notice, also known as the Notice of Intent to Disclose, which includes:

(a) A statement of the reasons why each of the submitter's disclosure objections were not sustained.

(b) A description of the business information to be disclosed.

(c) A statement advising the submitter of their legal recourse, to include the following language: "If you disagree with this decision you have the right to file a reverse FOIA lawsuit in an appropriate Federal District Court, as provided in Executive Order 12600 of June 23, 1987, cited in VA's implementing regulations found at 38 CFR 1.558(e)(3) before VA releases the records."

(d) A specified disclosure date of not less than 10 business days from the date of the notice.

(12) Once the time period has passed following the Notice of Intent to Disclose, the VHA component FOIA Officer will make the appropriate disclosure to the requester following normal practice, unless the VHA component FOIA Officer has been notified by the VA OGC that the submitter has filed a reverse FOIA action in Federal District Court.

(13) Reverse FOIA action. A reverse FOIA action is one in which the submitter of information, usually a corporation or other business entity, has supplied the VA with data on its policies, operations or products, and seeks to prevent the VA from revealing it to a third party in response to a FOIA request. Reverse FOIA actions typically arise in the context of exemption 4. If a VHA component FOIA Officer is served with a complaint regarding a reverse FOIA action, the VHA component FOIA Officer must immediately notify the VHA FOIA Office, who will in turn notify the OGC. VHA component FOIA Officers must take no action on a reverse FOIA unless directed by the VHA FOIA Office, the OGC or the Assistant United States Attorney (AUSA) within the Department of Justice (DOJ).

g. Exemption Five, 5 U.S.C. 552(b)(5).

(1) **Overview.** Exemption 5 protects inter- or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” Generally, there are three privileges which VHA component FOIA Officers may apply under exemption 5, including: (1) Deliberative Process Privilege, also known as Executive Privilege; (2) Attorney-Client Privilege and (3) Attorney Work Product Privilege.

(2) **Threshold Requirement.** In order to qualify for withholding under exemption 5, a document must meet the threshold requirement of being an intra- or intra-agency document before the proper privilege can be identified in any given case. The words “memorandums” and “letters” are usually interpreted quite broadly by the courts and include virtually any document VA produces, including reports, audits, records, contract reports, forms, etc. Because in many instances the Government may seek expert advice from external entities, documents created by such external entities may qualify for protection under exemption 5 under the consultant corollary theory. Under the consultant corollary theory, courts have emphasized that agencies seek information from outside consultants, and that in providing their expertise, the consultants effectively functioned as agency employees, providing the agencies with advice similar to what it might have received from an employee.

(3) As indicated in paragraph 7.g.(1) of this directive, there are generally three privileges and types of information protected by exemption 5, which include, but are not limited to:

(a) Deliberative Process Privilege.

1. The deliberative process privilege has a general purpose of preventing injury to the quality of agency decisions. To withhold information pursuant to this privilege, the information must be both deliberative and pre-decisional and be part of the decision-making process. Specifically, there are three policy purposes which constitute the basis for this privilege, to include:

a. To encourage open, frank discussions on matters of policy between subordinates and superiors.

b. To protect against premature disclosure of proposed policies before they are actually adopted.

c. To protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.

2. If a document constitutes or reflects a VA decision or final opinion, it is not pre-decisional and not exempt under this privilege. The pre-decisional character of a document is not necessarily lost because a final agency decision has been made on the matter. Information may be withheld from documents which are created as part of the deliberative decision-making process and which reflect an employee's advice, recommendations, opinions or proposals so long as such advice, recommendations, opinions or proposals remain pre-decisional and are not incorporated into the Department's final decision. Records may remain pre-decisional throughout their record retention period, so long as such pre-decisional documents do not later become final decisions. Pre-decisional documents will lose their exempt status under exemption 5 if VA chooses expressly to adopt, or incorporate by reference, such documents in a final decision or opinion, in statements of policy or interpretations adopted by VA, or instructions to staff that affect a member of the public.

3. In general, exemption 5 may not be cited to withhold pre-decisional factual information. Ordinarily, factual material must be disclosed if the only withholding basis for consideration is the deliberative process privilege. Factual material may be withheld under other applicable exemptions. However, factual information may be protected where it has been selected out of a larger group of factual information and this selection of factual information is deliberative in nature. Factual information may also be withheld under exemption 5 where the factual material is so inextricably connected to the deliberative process that revealing the factual material would be tantamount to revealing the Department's deliberations. In application, the requested document must be reviewed and the releasable factual information must be segregated by redacting the exempt information.

4. The deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.

(b) Attorney-Client Privilege. The attorney-client privilege protects confidential communications between an attorney and a client relating to legal matters for which the client has sought professional advice. The information that the client supplies to the attorney, the advice that the attorney provides to the client in return and communications between attorneys that reflect client-supplied information are protected by this privilege. Prior to withholding any information under the attorney-client privilege, VHA component FOIA Officers, must consult with the VA OGC.

(c) Attorney Work Product Privilege. The attorney work product privilege protects documents prepared by an attorney or at an attorney's direction in reasonable anticipation of litigation. Prior to withholding any information under the attorney work product privilege, VHA component FOIA Officers, must consult with the VA OGC.

h. **Exemption Six, 5 U.S.C. 552(b)(6).**

(1) **Overview.** Exemption 6 allows for the withholding of personal information that may be contained in any Department record (including personnel, medical files and similar files) where the disclosure would constitute a clearly unwarranted invasion of personal privacy. This exemption must be considered for information of a personal nature regardless of what type of file it is located in, or even if it exists in a tangible form but not in a file.

(2) **Employee Privacy Interests.** Pursuant to 5 CFR 293.311, certain information related to federal employees, not involved in law enforcement is publicly releasable even when contained in a Privacy Act system of records. These items include: name, past and present position titles and occupational series, present and past grades, present and past annual salary rates (including performance awards and bonuses, incentive awards, merit pay amount, meritorious or distinguished executive ranks and allowances and differentials), present and past duty stations (including room numbers, shop designations or other identifying information regarding buildings or places of employment) and position descriptions, identification of job elements and those performance standards, but not actual performance appraisals, when the release would not interfere with law enforcement programs or severely inhibit agency effectiveness. VHA component FOIA Officers must understand that the regulation cited in this paragraph does not constitute an exhaustive listing of information that may be publicly disclosed pursuant to a FOIA request.

(3) **Private versus Public Interests.** Application of exemption 6 requires a balancing between an individual's right to privacy and the public interest in the material requested. The first step in the exemption 6 balancing process requires an assessment of the privacy interests at issue. In some instances, the disclosure of information may involve little or no invasion of privacy because no expectation of privacy exists. If a privacy interest does not exist, the VHA component FOIA Officer is not required to balance the private versus public interests and the information may be disclosed as exemption 6 is not applicable. Once it has been determined that a privacy interest is threatened by disclosure, the second step in the balancing process requires an assessment of the public interest in disclosure. The measure of the public interest is whether the disclosure of the information in question sheds light directly on the Department's performance of its statutory duties. Information that reveals little or nothing about the Department's own conduct does not meet this public interest standard. Generally, the privacy interest outweighs the public interest for health records on living Veterans and would be withheld under exemption 6. In addition, patient-level health information for multiple patients from a database, such as VistA, shall generally be withheld under exemption 6. Instead, aggregate data shall be provided to the FOIA requestor.

(a) If the information meets the public interest standard, for purposes of exemption 6, it must be disclosed unless such disclosure would constitute a clearly unwarranted invasion of personal privacy. This requires a balancing of the public versus the privacy interests in the requested information. **NOTE:** *This balancing test is applied even when*

the personal information requested is health information protected by the HIPAA Privacy Rule and the Privacy Act. In determining privacy interests of health information, VA regulation 38 CFR § 0.600, Core Values and Characteristics of the Department and VA ICARE values should be considered; decisions must seek to preserve and promote VA's obligation to confidentiality that is central to health care professionalism. De-identification of health information under the HIPAA Privacy Rule does not automatically mean the privacy interest in the requested information has been eliminated; the balancing test must still be applied. However, HIPAA de-identification via the Expert Determination standard, which ensures a certain level of confidentiality of the released data is likely to be preserved, may assist in the balancing test process.

(b) If a VHA component FOIA Officer determines that the privacy interests of an individual outweighs the public's interest in the disclosure of the requested information, information which could identify the individual to whom the privacy interest is associated with, may be redacted and withheld citing exemption 6. Individuals who seek records for their own benefit are not acting to further a public interest.

(4) **Practical Obscurity.** A privacy interest may exist in personal information even though the information has been publicly disclosed at some place and time. This is known as the concept of practical obscurity. Under the practical obscurity concept, information that was once publicly known may no longer be in the public's eye and has faded from memory due to the significant lapse in time since the public disclosure. In this case, the privacy interest in this type of situation may have increased over time while the public interest may have decreased. Therefore, because the privacy interest now outweighs the public interest, the VHA component FOIA Officer should now withhold the once-public information, since the balance of interests has now shifted in favor of privacy.

(5) **Deceased Individuals and Surviving Family Members.** Exemption 6 shall not be used in an attempt to protect the privacy of a deceased person. Exemption 6 may be used to protect the privacy of a deceased person's surviving family members if disclosure would rekindle grief, anguish, pain, embarrassment or result in a disruption of their peace of mind. In such situations, VHA component FOIA Officers must balance the surviving family members' privacy interests and the public's interest to determine its releasability. Additionally, under all circumstances, the deceased's Social Security Number must be withheld since it is used by the primary next of kin to receive survivor benefits.

(6) **Glomar.** Exemption 6 also applies when the fact of the existence or nonexistence of a responsive record would itself reveal information in which a privacy interest exists, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, the VHA component FOIA Officer shall neither confirm nor deny the existence or nonexistence of the record being requested. This is known as a Glomar response, and exemption 6 and/or 7(c) must be cited in the response.

i. **Exemption Seven, 5 U.S.C. 552(b)(7).** Exemption 7 of FOIA provides that records or information compiled for law enforcement purposes are exempt from

disclosure upon the identification of one of the six conditions delineated in this subsection. Law enforcement purposes include civil, criminal, military, regulatory and administrative law, including the implementation of Executive Orders or regulations issued pursuant to law. Exemption 7 may be invoked to prevent disclosure of documents not originally created for, but later gathered for, law enforcement purposes. The six conditions for which information may be withheld include:

(1) **Exemption 7(A).** This exemption applies to records compiled for law enforcement purposes when disclosure could reasonably be expected to interfere with enforcement proceedings. The use of this exemption is temporal; that is, VHA component FOIA Officers can only use it during the course of law enforcement proceedings, including any subsequent or pending proceedings resulting from the original proceeding.

(2) **Exemption 7(B).** This exemption applies to records compiled for law enforcement purposes when disclosure would deprive a person of the right to a fair trial or to an impartial adjudication. The use of this exemption is temporal and may no longer be applied when the alleged violation of law has been adjudicated through either a jury trial or a bench trial.

(3) **Exemption 7(C).** This exemption applies to records compiled for law enforcement purposes when disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy of a living person, including surviving family members of an individual identified in such a record. VHA component FOIA Officers must also consider whether a Glomar response may be appropriate in accordance with paragraph 7.(h)(6) of this directive.

(4) **Exemption 7(D).** This exemption applies to records compiled for law enforcement purposes when disclosure could reasonably be expected to disclose the identity of a confidential source, including a source within VA; a State, local or foreign agency or authority; or any private institution that furnishes the information on a confidential basis, and could disclose information furnished from a confidential source and obtained by a criminal law enforcement authority in a criminal investigation or by an agency conducting a lawful national security intelligence investigation.

(5) **Exemption 7(E).** This exemption applies to records compiled for law enforcement purposes when disclosure would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions, if such disclosure could reasonably be expected to risk circumvention of the law.

(6) **Exemption 7(F).** This exemption applies to records compiled for law enforcement purposes when disclosure could reasonably be expected to endanger the life or physical safety of any individual, including current and former federal employees.

j. **Exemption Eight, 5 U.S.C. § 552(b)(8).** Exemption 8 protects records contained in or related to examination, operation or condition reports prepared by, on behalf of, or

for the use of any agency responsible for the regulation or supervision of financial institutions. As VA is not a financial institution, VHA component FOIA Officers routinely will not utilize exemption 8.

k. **Exemption Nine, 5 U.S.C. 552(b)(9).** Exemption 9 protects records containing geological and geophysical information and data (including maps) concerning wells. VHA component FOIA Officers will rarely utilize this exemption.

l. **Waiver.** There may be circumstances that bring to light an issue of whether an exemption has been waived through some prior disclosure or as a result of an expressed authorization from the party or parties affected by the disclosure. In these instances, VHA component FOIA Officers must carefully analyze the specific nature and circumstances of the prior disclosure. As a general rule, VA may not rely on an otherwise valid exemption to justify withholding information that officially has entered the public domain. Official disclosures waive an otherwise applicable FOIA exemption. To have been officially disclosed, the information generally must have been disclosed under circumstances in which an authoritative government official allowed the information to be made public. A release of information by one agency does not constitute an official release by another agency. Therefore, for purposes of VA, the authoritative government official must be a VA governmental official. In order to constitute a waiver, the prior public disclosure must match the exempt information in question; otherwise, the difference between the two might itself be a sufficient basis for reaching the conclusion that no waiver has occurred. A FOIA plaintiff, either in the course of an appeal or litigation, bears the burden of demonstrating that the withheld information has been officially disclosed. To meet this burden, the plaintiff must demonstrate three elements, to include that the information requested:

(1) Be as specific as the information previously released.

(2) Match the information previously disclosed.

(3) Have already have been made public through an official and documented disclosure. For example, records released by the subject of the record and records leaked to the public do not constitute an official government disclosure. Official government disclosures are only made by the appropriate government official charged with disclosing records.

m. **Exclusions.** FOIA contains three special protection provisions referred to as record “exclusions.” These exclusions expressly authorize law enforcement agencies to treat especially sensitive records under certain specified circumstances as not subject to the requirements of FOIA. VA does not utilize any of the exclusions contained within FOIA; therefore, VHA component FOIA Officers are prohibited from using the exclusions until such a point that such exclusions are promulgated in VA’s implementing FOIA regulations.

8. REFERENCES

a. 5 U.S.C. 552

- b. 38 CFR Sections 1.550-1.562
- c. VA Directive 6300.
- d. VA Directive 6300.3.
- e. Attorney General's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (March 19, 2009).
- f. Guidance on the Attorney General's Memorandum, Office of Information Policy, Department of Justice (March 20, 2009).
- g. Guidance on changes to FOIA by the OPEN Government Act of 2007, Pub. L. No. 110-175, 121 STAT. 2524, Office of Information Policy, Department of Justice (October 23 and November 18, 2008).
- h. Fee Schedule and Guidelines, Office of Management and Budget, 52 Fed. Reg. 10012 (March 27, 1987).

FOIA LITIGATION AND ANNUAL REPORT TO CONGRESS

1. FOIA LITIGATION

a. **General.** By filing a complaint in the appropriate United States District Court, a FOIA requester may seek an order from the Court to compel release of information after administrative remedies have been exhausted. A FOIA requester has effectively exhausted administrative remedies when the requester has filed an administrative appeal of an adverse action or when the VHA component FOIA Officer has failed to respond within time limits prescribed by FOIA. Under some circumstances, a FOIA requester has also exhausted their administrative remedies when, after filing an appeal, the OGC, has failed to respond to the appeal within the time limits prescribed by FOIA. If a VHA component FOIA Officer is served with a complaint for a FOIA request that is still open, the VHA component FOIA Officer must immediately notify the VHA FOIA Office, who will in turn notify OGC.

b. **Vaughn Index.** In the context of FOIA litigation, the burden of sustaining the action of withholding records is on the defendant (VA). The most commonly used device for meeting this burden of proof is the Vaughn index, which was fashioned by the District Court of the United States for the District of Columbia in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). VHA component FOIA Officers are required to develop a Vaughn index for every FOIA request in which responsive records are being withheld, in whole or in part. At a minimum, the Vaughn index must include the following categories of information:

(1) **Document Number.** When multiple documents are being considered for disclosure, the VHA component FOIA Officer must number each document. The document number must be included on the Vaughn index.

(2) **Records Title.** The records title category must include a title of the responsive record.

(3) **Request Item Number.** The request item number category corresponds to which item in the requester's original request, especially in instances where the requester seeks an enumerated listing of different items, the document in question is responsive to. If the requester is not requesting multiple items in their request, the request item number will always be one.

(4) **Bates Pages.** Bates numbering is the process of sequentially numbering multiple documents. Under the bates pages category, the VHA component FOIA Officer must indicate what Bates numbered pages are assigned to that document beside each corresponding document.

(5) **Number of Pages.** The number of pages category must include the actual number of pages in each document listed on the Vaughn index.

(6) **Disposition and/or Exemptions.** In the disposition and/or exemption category, the VHA component FOIA Officer must indicate if any portions of, or the entire document, has been withheld under one or more FOIA exemptions. If a FOIA exemption was utilized to withhold either a portion of a document or a document in its entirety, the VHA component FOIA Officer must also cite the specific exemption being used to support the withholding and provide a statement of harm associated with the release of the information in the Vaughn index. The VHA component FOIA Officer must correlate how the release of the requested records would result in an adverse harm to the purpose for which the exemption exists.

c. **Jurisdiction and Venue.** The United States District Courts are vested with exclusive jurisdiction on FOIA cases. As a result, FOIA requesters are prohibited from filing a lawsuit against a Federal Agency in a State court. The process of selecting which United States District Court to file a lawsuit is known as venue. Typically, when a FOIA requester intends to sue the agency, the lawsuit may be filed in any of three locations:

(1) District Court of the United States in the district in which the FOIA requester resides or has his/her principal place of business.

(2) District Court of the United States in the district where the agency records are situated.

(3) District Court of the United States for the District of Columbia. The District Court of the United States for the District of Columbia serves as a court of universal jurisdiction for all matters involving FOIA and the Privacy Act. As a court of universal jurisdiction, the District Court of the United States for the District of Columbia is vested with jurisdiction to hear any and all FOIA and Privacy Act cases, regardless of where the requester resides or has their principal place of business and regardless of where the agency records are located.

d. **Open America Stays.** When a FOIA requester has constructively exhausted administrative remedies due to the agency's failure to comply with FOIA time limits and subsequently files a law suit, the Court may retain jurisdiction over the case, ordinarily through issuance of a stay of proceedings. The purpose of the stay of proceedings is to allow the agency additional time to complete the processing of the request. The leading case construing the provision related to stay of proceedings is *Open America v. Watergate Special Prosecution Force*, 547 F. 2d 605 (D.C. Cir. 1976). In *Open America* the Court held that "exceptional circumstances" may exist when an agency can show that it is deluged with a volume of requests for information vastly in excess of that anticipated by Congress and that the existing resources are inadequate to deal with the volume of such requests within the time limits of FOIA. If an *Open America* stay is granted, the court will provide a timeframe for which the Agency must comply with responding to the request. In order to be granted an *Open America* stay, VHA component FOIA Officers must demonstrate that they have taken due diligence and exercised good faith efforts to respond to the FOIA request in a timely manner prior to the commencement of legal proceedings.

e. **Declarations.** In litigation, the Assistant United States Attorney (AUSA) within the Department of Justice that is assigned to represent VA in court may require VHA component FOIA Officers to provide a formal declaration. A declaration is a written document that provides the testimony of the FOIA Officer in lieu of having the FOIA Officer make a formal appearance in court. In general, a declaration outlines the specific experience of the VHA component FOIA Officer, the search methodology utilized for ascertaining responsive records and the legal justification for the VHA component FOIA Officer's determinations. VHA component FOIA Officer must fully cooperate with the AUSA and the OGC attorney handling the case in developing the declaration, to include drafting of the declaration in a timely manner and in accordance with the deadlines established by the court, the AUSA and OGC.

f. **Attorney Fees and Costs.** FOIA provides for a "fee-shifting" provision permitting the trial court to award reasonable attorney fees and litigation costs to a plaintiff who has "substantially prevailed." The FOIA's attorney fees provision requires courts to engage in a two-step substantive inquiry. The court must determine first if the plaintiff is eligible for an award of fees and/or costs and it must then determine if the plaintiff is entitled to the award. The award of attorney fees and costs is entirely within the discretion of the court. When attorney fees and costs are awarded against a VHA component, that component is responsible for payment of the awarded attorney fees and costs.

2. FOIA ANNUAL REPORT TO CONGRESS

The Annual FOIA report is mandated by section (e)(1) of FOIA and completed on a fiscal year basis. Due to the magnitude of the requested statistics and the need to ensure accuracy, VHA component FOIA Officers must ensure that all requests required for the annual FOIA report are entered into the electronic tracking system in accordance with the provisions of paragraph 6.h. of this directive. VHA component FOIA Officers compliance with these requirements will facilitate quick compilation of statistics required to complete the annual FOIA report. Each September, the VHA FOIA Office will provide instructions to VHA component FOIA Officers concerning the annual FOIA report, to include a formal, written certification, to be signed by VHA Network and Facility Directors, which certifies that their applicable component is in full compliance with the reporting and tracking provisions contained in this directive. All VHA component FOIA Officers must provide an accurate, thorough and timely response to the annual FOIA report action issued by the VHA FOIA Office. In turn, the VHA FOIA Office will produce a consolidated report for submission to the VA FOIA Service for inclusion in the Department's Annual FOIA Report.