

**Department of
Veterans Affairs**

Memorandum

Date: MAY 13 2014

From: General Counsel (024)

Subj: Litigation Hold Concerning Alleged Consult and Appointment Delays within the VA Health Care System (VHA)

To: Under Secretary for Health (10)
Executive in Charge for Information Technology (005)

1. **Purpose.** This litigation hold memorandum is to inform you about the situation described above and the legal obligation of the Department of Veterans Affairs (VA) to preserve information that may be relevant to consult and appointment delays within VHA. This memorandum explains what to do if you, as an employee, contractor, volunteer, trainee, or other agent or representative of VA, have information in your possession, custody, or control that may be relevant to this potential litigation, including the steps you must take to preserve that information.

Please read the entire memorandum even if you believe that you have no knowledge or relevant information about this matter. This litigation hold supplements but does not supersede prior litigation hold notices in other matters.

2. **Background.** Consult and appointment delay issues at various VA Medical Centers have allegedly resulted in harm to Veterans. VA has received requests for information regarding consult delays throughout VHA.

3. **Relevant Information.** Relevant information consists of documents, both paper and electronic, about or related to the matter, including information related to: consult and appointment delays. Please note that relevant information may include documents that are confidential, privileged, or otherwise protected from disclosure. Additionally, the Office of General Counsel anticipates that relevant information will include, in addition to individual patients' records, information about scheduling, room utilization, equipment availability, provider availability, and other matters.

4. **Legal Obligation.** All VA personnel, including employees, contractors, volunteers, or other agents, who possess, maintain, or have control over information relevant to this matter are required to preserve such information until this Office advises in writing that the litigation hold is lifted. Failure to preserve relevant information, even if inadvertent, may result in severe sanctions for VA, such as monetary penalties, adverse inferences, exclusion of evidence, and default

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judgment against the Department. Intentional destruction or deletion of relevant information could expose you to criminal liability.

5. **Preservation.** VA's duty to preserve includes each individual's obligation to make diligent, good faith efforts to identify and retain all potentially relevant material. As of the date of this memorandum and until further notice from this Office, you are required to take all reasonable steps to identify and preserve any relevant information, including the following:

- Retain all relevant information in your possession. When we need to collect the information from you, we will notify you of the method for transmitting the information.
- Do not delete, discard, overwrite, or destroy any information that might be relevant even if it appears unimportant. If you believe that any relevant information might be destroyed, you must suspend, or arrange for the suspension of, the scheduled destruction.
- Forward or distribute this memorandum to anyone who might have relevant information but may not have received this document.
- Notify the OGC attorneys identified in paragraph 9 if you believe that you or another person with relevant information might leave VA before the information is collected.

Please keep in mind that the identification and preservation of relevant information should be broad and inclusive. If you are unsure whether a certain document is relevant, err on the side of caution and retain the information until you have consulted with the attorneys identified below.

You must immediately notify the appropriate technical personnel responsible for operating the systems that store your responsive electronic records or who are responsible for storing your paper or other hard-copy records of the need to preserve the records, including advising them that they are not to destroy any responsive records until advised by Office of General Counsel that they may resume destruction of records. This duty to notify includes non-VA entities that may be storing records for you.

6. **Documentation of Preservation.** In the event any questions arise regarding your compliance with the litigation hold, it is in your interest to document the steps taken to identify and preserve all relevant information, including:

- Where you searched (e.g., Outlook, network folders, paper files);
- When you searched;

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- How you searched (e.g., by keyword, date);
- Where you found the relevant information (e.g., filepath); and
- To whom you forwarded or distributed the memorandum.

7. **Types and Sources of Information.** The information may be in a tangible form (e.g., paper) or electronic form (e.g., email, word processing documents, spreadsheets, databases, electronic calendars). The information may be found in office files, desktop or laptop computers, hard drives, portable storage media (e.g., CDs, DVDs, flash drives), mobile communication devices (e.g., cell phones), and other locations where documents, either paper or electronic, may be stored. Sources of information may include personal computers or personal email accounts if they were used to conduct agency business.

8. **Form or Format.** The information should be preserved in the originally-created, or "native," format, and in the way they were created, collected, or filed in the ordinary course of business. For example, if a document was created or received in Microsoft Word, you must preserve the electronic version in Word (with the extension .DOC or .DOCX), not in Adobe Acrobat (with the extension .PDF) or on paper. Similarly, if a document is a Microsoft Outlook message, it must be retained as an email (with the extension .PST or .MSG), not as a paper copy.

9. **Point of Contact.** If you have any questions concerning this memorandum, please contact Jennifer Gray at 202-461-7634 or Navin Jayaram at 202-461-7684. For technical questions regarding the preservation of electronically stored information (ESI), please contact your chief information officer (CIO). <https://vaww.sde.portal.va.gov/aboutus/Lists/SupvList/CityState.aspx> for facilities; and <https://vaww.sde.portal.va.gov/aboutus/Lists/SupvList/VACO.aspx> for VACO.



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