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May 1, 2015

The Honorable Robert A. McDonald
Secretary
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

Dear Secretary McDonald 

Prior to addressing your letter of April 29, 2015, I would like to start by providing a bit of history about the highly successful track record of the House Committee on Veterans' Affairs ("Committee") when it comes to exposing serious and systemic instances of mismanagement, malfeasance, and dishonesty at the Department of Veterans Affairs. This Committee exposed the Department's delays-in-care scandal at an April 9, 2014, congressional hearing, setting in motion a sequence of events that essentially forced the resignation of your predecessor and led to you becoming Secretary. Since some of these events pre-date your tenure at VA, I'd like to highlight some of the more pertinent details regarding how the scandal developed.

- Following the April 9 hearing referenced above, former VA Under Secretary for Health Robert Petzel told the Senate Committee on Veterans' Affairs on April 30, 2014, there was no evidence to support the allegations of wait time manipulation in Phoenix. As you may know, VA's Inspector General later said that wait time manipulation and inappropriate scheduling practices were not only prevalent in Phoenix, but were also a systemic problem across the entire Department.
- On May 28, 2014, VA's Assistant Deputy Undersecretary for Health for Clinical Operations Dr. Thomas Lynch implied to this Committee that there were no secret waiting lists in Phoenix, stating "I was not able to identify any lists that I thought were secret." Incredibly, Lynch's apparent denial came on the same day VA's Inspector General released a report that highlighted multiple lists that "were something other than the official EWL," otherwise known as secret lists.
- About two weeks before his resignation, former Secretary Shinseki said the following to reporters regarding deaths linked to delays in VA care: "We went back in time 15 years. Out of that, we probably looked at 250 million consults. That was narrowed down to 76 institutional disclosures, of which there were 23 deaths that had occurred[.]" According to a December 15, 2014, VA Inspector General report,¹ that statement – and numerous others VA officials made regarding deaths related to delays in care – was false.

One can only wonder what the situation at VA would be like today if we had simply believed the VA officials referenced above, allowing their statements to go unchallenged. Thankfully, there

¹ The report is available at: <http://www.va.gov/oig/pubs/VAOIG-14-04705-62.pdf>.

is no need to wonder, as our Committee, a determined press, and an outraged American public pushed for answers in the face of VA's public denials, ensuring the truth about VA's delays-in-care crisis was exposed.

In response to your letter of April 29, 2015 concerning the Committee's business meeting, as I am sure you are by now aware, (i) that business meeting was held, and (ii) the Committee voted in favor of issuing the subpoena for files from the Philadelphia Regional Benefit Office. That vote not only was without opposition, but it also was without any cautionary comments by any Committee Member.

I now turn to the concerns raised in your April 29, 2015 letter.

First, your letter states that "[h]ad the Committee staff agreed to certain privacy conditions, your staff would have seen all relevant and applicable files." At the outset, I note that this is not an issue with Committee staff, who were following my express direction on this matter. I personally have made numerous requests for this documentation to be provided in full, both in writing (on December 19, 2014 (Enclosure 1), March 24, 2015 (Enclosure 2), and April 7, 2015 (Enclosure 3)), as well as at public hearings (on March 16, 2015² and April 22, 2015³). The fact that you, as Secretary of VA, now are attempting to hang the problems associated with your Department's unwillingness to provide the complete documentation I requested around the necks of my staff, is nothing short of disingenuous.

Second, your letter states that VA redacted portions of documents provided to the Committee because they are "not necessary for the Committee's oversight needs and [] would undermine the critical equal opportunity complaint process if publicly released." In response, I remind you that neither you nor VA has the constitutional or legal authority to substitute your judgment for what this Committee needs or does not need to conduct an investigation within its jurisdiction. This Committee and its staff repeatedly have demonstrated that it knows what it is doing regarding oversight, as the recent VA scandal discussed above establishes. The Committee also has proved that the VA is badly in need of congressional oversight.

Third, regarding the issue of public release by the Committee, I note that federal courts, including the controlling court in this jurisdiction – the United States Circuit Court for the District of Columbia – have held (i) that releasing information to a congressional committee of jurisdiction is *not* considered to be public release, and (ii) once documents are in congressional control, the courts will presume that committees of Congress will exercise their powers responsibly and with proper regard to the rights of the parties.⁴ Thus, VA's continued failure to

² In denying VA's eleventh-hour request to provide Committee staff with an in-camera review of the EEO and MSPB documents, I stated, "Let there be no mistake or misunderstanding. When this Committee requests documents, I would expect production to be timely, complete, and accurate. I don't expect a litany of questions about the purpose of a request, a negotiation about how or when it will be answered, or a tutorial from VA officials about how the committee should conduct its business."

³ In response to Ms. Diana Rubens stating, "the Department was interested in ensuring they had an understanding of what information you were looking for," I replied, "All, A-L-L, all EEO files and MSPB files."

⁴ See, e.g., *F.T.C. v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980); *Exxon Corp. v. F.T.C.*, 589 F.2d 582, 585-86 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979); *Ashland Oil Co., Inc. v. F.T.C.*, 548 F.2d 977, 979 (D.C. Cir. 1976); *Moon v. CIA*, 514 F.Supp. 836, 849-51 (S.D.N.Y. 1981).

provide requested documentation, on the erroneous belief that such release constitutes a public disclosure, not only is contrary to controlling law, but also is unacceptable to the Committee.

Fourth, your letter cites specific examples where you believe the Committee publicly released information that it should not have and, consequently, attempts to justify the redactions VA made as “reasonable.” While I take issue with that belief, and note that the Committee took yesterday what it believes was a reasonable action in issuing a subpoena to compel documentation VA has for months failed to provide, I address each example in turn.

- The first bulleted concern involves a VA response letter containing the grade level and promotion history of a GS-level employee who had not received a relocation reimbursement. First, according to the Office of Personnel Management, an employee’s name, present and past position titles and occupational series, present and past grades, all are available to the public.⁵ Second, I note that both an employee’s grade level and promotion history also are available online and easily accessed by the general public.⁶
- Both the second and third bulleted concerns involve media inquiries about VA’s adverse employment action report. First, neither of these reports contained any personally identifiable information. Second, I remind you that it was your own misstatements to the media – that 60 people had been fired for manipulating wait times – that precipitated the need for us to release the documents in question. As you know, the number of people VA has actually fired for manipulating wait times is zero. Third, it is this Committee’s position that if media asks us whether certain information is accurate, we have a duty to inform them that information – including, but not limited to statements from you or any representative of the VA – is, in fact, false. Otherwise, the Committee would be expressing its tacit support for those false statements, which prevents the public from being correctly informed.
- The fourth bulleted concern involves the media’s possession of the names of Administrative Investigation Board (AIB) panelists. First, the Committee was not the original source of that story’s information. Second, in the future, before making conclusory statements, I would hope that, just as we ensure we have solid evidence before asserting VA wrongdoing, the Department would do the same.

Fifth, you state that VA’s “actions to date demonstrate [its] good faith efforts to accommodate the Committee’s request.” Personally, I believe that the overwhelmingly bipartisan nature of the subpoena issued yesterday was a testament by the Committee that VA is not operating in good faith regarding at least this request. Further, the assertions made in your letter that VA unilaterally decided to withhold information and the fact that the first partial production of the subject request was made on April 14, nearly four months after my initial request, is evidence that VA’s good faith is absent.

⁵ See 5 C.F.R. § 293.311.

⁶ For example, such information for federal government employees in 2014 is available at: http://php.app.com/fed_employees14/search.php.

Sixth, your letter asserts that 9,000 pages of materials have been provided in the last two weeks. As I noted at the business meeting yesterday, that total included some that arrived late last night without the password to access that material. Those materials are replete with redactions, in some cases where entire pages are blacked out, leading any reasonable person to presume that there is something to hide, and not that VA is making an attempt to protect legitimate privacy interests (Enclosure 4 illustrates an example). Additionally, regarding your related complaint, I will not belabor you with the very significant time and resources that I, this Committee, and its staff have dedicated to simply trying to obtain the incomplete information we have received pursuant to this request after months of attempts.

Seventh, your letter states that “VA has attempted to engage with staff to ensure [its] efforts were focused on the needs of the Committee[.]” Unfortunately, related to my months-long outstanding request for the Philadelphia files, the head of your Office of Congressional and Legislative Affairs told Committee staff, during the February 26, 2015, meeting between you and me, that the delays that were occurring were happening in the Office of General Counsel. However, it turned out that when these statements were made to Committee staff, the documents were not yet in the possession of the General Counsel’s office. So VA’s “attempts to engage” my staff were by disseminating false information to it. Whether the provision of that false information was intentional or not remains an issue.

Finally, VA’s own rampant lack of accountability is what led to the situation wherein the Committee must review these types of files to determine the nature of the workplace environment and management within one of its offices. The Department’s continuing and pathological aversion to provide prompt, complete, and accurate responses to our requests can only be judged as an attempt to cover up bad information. It is disheartening that I must continually remind VA of its obligation to provide this Committee with complete, accurate information in a timely manner.

Contrary to the assertions in your letter, it is the VA’s actions to stonewall this Committee – actions that began long before your tenure as Secretary, and continue to occur today – which has eroded the confidence of Veterans and the American people in our ability to work together. I trust that through VA’s immediate cessation of its groundless efforts to withhold information, we can rebuild that confidence. If you have any questions or concerns, please contact Jon Towers, Staff Director, at (202) 225-3527.

Sincerely,



JEFF MILLER
Chairman

JM/jh

Enclosures

Cc: Corrine Brown, Ranking Member