

## **KRAUSE LAW, PLLC**

**Military. Veterans. Families.**

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The Honorable Johnny Isakson  
Chairman, Senate Veterans Affairs Committee  
131 Russell Senate Office Building  
Washington, D.C. 20510

Senator Isakson,

Once again, the Department of Veterans Affairs (“VA”) has delved into an area of controversial behavior, leading the public to believe the leadership in VA, Congress and the White House is absent.

On July 22, 2015, Veterans Health Administration (“VHA”) FOIA Office director Timothy Graham, J.D., created a blanket denial in the form of a memorandum for all FOIA requests from reporters, Veterans and advocates concerning a new scandal. This scandal involved medical leadership within VHA across the country using unqualified doctors and unethical procedures to assess traumatic brain injury. The actions by VHA leadership were in contravention to community medical standards and VA policies. The effect of the scandal was to erroneously assess Veterans with possible traumatic brain injuries, which generally resulted in improper denials. Such denials resulted in improper withholding of desperately needed health care, rehabilitative care, and financial support.

The VA memorandum (“memo”) is a sign VA is circling its wagons to evade accountability now that news media reporters are reporting on the scandal. According to recent reports by NBC News,<sup>1</sup> national newspapers, and local radio, reporters exposed that VA gave Veterans medical and mental health examinations by unqualified medical professionals from 2010 to 2015. VA admitted the people performing the exams did not have fundamental training, certifications, or privileges to complete initial traumatic brain injury (“TBI”) diagnosis. The memo contorts current FOIA Exemption 6 to include a blanket prohibition against disclosure of information about the doctors involved in both this scandal and Camp Lejeune Veterans’ examinations. However, Exception 6 merely references exemptions for disclosing information from a Veteran’s record or a VA employee personnel record. The VA memo claims such “gathering” of information by reporters would facilitate “criminal behavior” by some disabled Veterans. It goes on to indicate the privacy rights of the doctors outweigh public interest in disclosure.

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<sup>1</sup> <http://www.kare11.com/media/cinematic/video/31200815/unqualified-doctors-performed-brain-injury-exams-at-minneapolis-va-medical-center>

The VA memo further misconstrues the spirit of guidance from former Attorney General Eric Holder to increase access to government data, not restrict access as claimed by VA, here.<sup>2</sup> However, the names and work locations of these employees are already disclosed publicly on VA.gov., and disclosure would not prevent the anecdotal “crimes” the VA memo claims Veterans may engage in should the agency follow FOIA law as written. Put another way, VA employees DO NOT have (with the exception of law enforcement)<sup>3</sup> any expectation of privacy in the manner suggested in the memo. The information sought is not limited to the personnel files of the VA employees or within a Veteran’s records. As such, disclosure is mandatory.

It is clear that the legal interpretation in the memo was biased with the end goal being to evade accountability rather than to follow the law. To borrow from legal scholar Henry Campbell Black, such an “artful” interpretation by VA employees is clearly intended to “give a meaning to the text other than the one he knows to have been intended.”<sup>4</sup> Here, VA is orchestrating an artistic interpretation of the law and White House policy to evade accountability and oversight. To support that goal, VA, through its memo, concocted this unlawful and biased Policy Change to justify withholding vital information from the public and Veterans. However, a mere director within VA does not have authority to Change Policy or narrow regulations that are intended to be broadly interpreted in favor of disclosure. Instead, changes to FOIA regulations that narrow access or rights should generally pass through Notice and Comment Rulemaking under APA to ensure stakeholder involvement and fairness.

Even more problematical are new revelations that the Office of General Counsel (“OGC”) may have directed employees to obstruct FOIA requests from patients, Veteran representatives and the American public.<sup>5</sup> VHA employees indicated the VA memo in question was written under close advisement with OGC. The attempt by VA employees to make Policy Changes in violation of existing law is becoming more commonplace every day<sup>6</sup>. But VA employees do not have the proper authority to make a change to any policy. The OGC does not have the right to tell an employee to intentionally commit an act or do something known to be unlawful. Yet this is apparently the new standard at the agency, which is also in conflict with policies and procedures defined by the Office of Government Information Services (“OGIS”).<sup>7</sup>

VA flaunting of the law, processes and procedures carefully crafted to protect the Constitutional rights of all Americans is a slap in the face of all true defenders of freedom who fought to protect our great country from its enemies.

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<sup>2</sup> Attorney General website “As the lead federal agency responsible for implementation of the FOIA across the government, the Department of Justice is especially committed to encouraging compliance with the Act by all agencies and to fulfilling President Obama’s goal of making this Administration the most open and transparent in history.”

<sup>3</sup> 5 USC 552(b)(5)

<sup>4</sup> Black, Henry, “Construction And Interpretation Of The Laws.” West Publishing, St. Paul, MN, (1896), 6.

<sup>5</sup> This is a direct violation of the United States Code (USC) 5 USC § 552, Public Law (PL) 110-175 (The Open Government Act), 38 USC 501 (b)(1), and several sections of the Code of Federal Regulations (CFR) within VA. (38 CFR §§ 1.552a,(f)(3); 1.578.

<sup>6</sup> Regulatory Flexibility Act (5 U.S.C. §§ 601-12)

<sup>7</sup> OGIS Regulations and Procedures - Notices- OGIS Privacy Act System of Records Notice

Sadly, the current scheme is really a continuation of a history of VA thumbing its nose at the law, as acknowledged by the Federal Circuit two years ago. *Nat'l Org. Of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs*, 725 F.3d 1312 (Fed. Cir. 2013). There, VA was caught promulgating a rule that impeded on the due process rights of a Veteran. That same rule would have resulted in an unlawful divestment of property in the form of benefits from many other Veterans if left unchallenged. The action by VA was clearly an unlawful act created with the intent to deprive Veterans of their vested property rights without due process of law. The Court ultimately rebuked VA for failing to keep its promises to Veterans and even threatened sanctions for its unlawful behavior. Later, it was revealed that the failure affected many Veterans for many years.

In conclusion, VA employees continue to defy existing laws and make unsupported policy changes at a whim. VA leaders and employees alike continue to promote protection for themselves over the interests of Veterans, at all costs. Congress MUST act to STOP this runaway train wreck called VA. OUR Veterans are suffering at the hands of a few malicious and self-centered individuals whom have come to believe no one will hold them accountable. Some years ago, one VA Director of a Regional Office once told me:

*"You can tell the Secretary what I'm doing wrong for all I care. Secretaries come and go, Presidents come and go, but I'm still here and I'm going to continue to do things my way. If you don't like it, too bad."*

This Director was blatantly abusing his authority over an individual veteran and intended to continue doing so. This is the prevailing attitude in VA and clearly the status quo.

In response to this persistent behavior, we respectfully seek your action to stop these practices and protect the interests of Veterans impacted by unlawful Policy Changes by VA employees and VA leaders.

Respectfully,

Benjamin Krause, Esq.  
Krause Law, PLLC

Thomas Bandzul, Esq.  
Legislative Counsel  
Veterans and Military Families for Progress

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cc: Copy List

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