Department of Veterans Affairs

Memorandum

Date: March 26, 1999

VAOPGC ADV 5-99

From: General Counsel (02)

Subj: Request for Legal Opinion on Releasing Information from EEO Files

To: Deputy Assistant Secretary for Resolution Management (08)

ISSUES:

I. To what extent are ORM employees authorized to release information from EEO complaint files to VA management, responsible management officials (RMOs), complainants, and VA attorneys?

II. Must the Office of Resolution Management (ORM) provide an EEO complainant with a copy of the investigative file, when VA and the complainant have entered into a settlement agreement during the investigation of the complaint?

DISCUSSION:

1. This is in response to your written request for legal advice on four matters affecting policy decisions to be made by the Office of Resolution Management (ORM). This opinion will discuss only the two matters concerning release of information; a second opinion will consider the questions about Alternative Dispute Resolution and background investigations.

I. RELEASE OF INFORMATION TO VA EMPLOYEES

2. The first information-law issue concerns the extent to which ORM employees are authorized to discuss EEO cases with, and release information to, VA management, responsible management officials, and complainants. We are also including a discussion of releasing these files to VA attorneys, since recently we have received a number of questions in that regard from the field.

3. As background to this matter, in the early 1990's, the House Veterans' Affairs Oversight and Investigations Subcommittee began inquiring into cases of sexual harassment in VA facilities. Subsequently, VA implemented a "zero tolerance" policy against sexual harassment, and promised to improve its equal employment opportunity system. The Subcommittee reinvestigated the problem of sexual harassment in 1997, and

concluded that VA needed to make additional, organizational changes to address problems. Congress accordingly enacted legislation entitled "Equal Employment Opportunity Process in the Department of Veterans Affairs" (the EEO Act), Title I, Pub.L. No. 105-114 (Nov. 21, 1997). The House Report accompanying the EEO Act contains this description of Congressional intent:

> …[I]t is critical for VA to establish and maintain an EEO complaint resolution and adjudication system that is both in fact and in the perception of VA employees fair, impartial and objective. The complaint process should be completely free and independent of undue influence, and the appearance thereof, from supervisors, line managers or directors. Objectivity and fairness should permeate the complaint process, from its initial informal stages through the Department's final agency decisions. Accordingly, the Committee has concluded that the processing of unlawful discrimination complaints should occur outside the particular facility where the alleged discriminatory conduct was said to have arisen...

H.R. Rep. No. 292, 105th Cong., 1st Sess., at 5 (1997).
[Emphasis added.]

4. Thus, in deciding what disclosures are authorized, VA must be mindful of clear Congressional concerns that VA insulate management from the process, in order to ensure fairness and to avoid discouraging employees from filing complaints due to fear of reprisal. Disclosures must strike a proper balance between the legitimate needs of management and others for information from those files, and the legislative mandate for a new EEO system in VA that requires an independent body to process EEO complaints outside of the facility where the conduct allegedly occurred. Furthermore, disclosures must be consistent with EEOC guidance and with the Privacy Act. Both balance the personal privacy right of the complainant against possible disclosures to management and other VA employees. These three factors can be considered within the framework of the "need to know" exception to the Privacy Act.

5. The Privacy Act, 5 U.S.C. § 552a, applies to any records about an individual which are retrieved by that individual's name or personal identifier (such as Social Security or C-file number). The Privacy Act prohibits disclosure of any records about an individual which are retrieved by that individual's name or personal identifier, without that individual's prior written consent, unless disclosure is specifically authorized by the Act.

6. All records, from which information is retrieved by the name or personal identifier of an individual, must be maintained in what is called "a Privacy Act system of records," published in the Federal Register. ORM maintains one system of records, entitled EEOC/GOVT-1. (Hereinafter referred to as the EEOC system of records.) When an

employee or applicant contacts an EEO counselor, or files a complaint, any resulting information or documents are placed in this system of records, which belongs to the Equal Employment Opportunity Commission (EEOC), but which is located at the agency where the complaint was filed. According to the system of records notice, these files contain information or documents compiled during the precomplaint counseling and the investigation of complaints. In VA, such files are generally maintained at the ORM field office where the complaint was filed, by the name of the complainant. ORM employees of the field office which has custody of the records determine whether to release these complaint records in accordance with any instructions from the EEOC and consistent with the Privacy Act.

7. As indicated, the Privacy Act prohibits disclosure of records from the EEOC system of records (or disclosure of information from these records) without the complainant's prior written consent, unless an exception applies. Under the "need to know" exception [subsection (b)(1) of the Privacy Act], records may be disclosed to another VA employee without prior written consent if the employee has a need for that record (or information from a record) in performing his or her official duties. Subsection (b)(1) of the Privacy Act provides that such records may be disclosed "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties."

8. This opinion identifies the nature of a VA employee's need for records at certain stages of an EEO proceeding. Before releasing records, ORM employees are required to make judgments concerning whether VA employees need the records for official duties. The VA employee may need an entire file, or simply some information from the file to satisfy the official purpose at hand. Disclosures should be commensurate with the need to know and be limited to only that amount of information necessary to assist an employee in the performance of the duties requiring disclosure.

A. THE PRECOMPLAINT COUNSELING STAGE

9. The precomplaint counseling stage includes all counseling efforts up to, but not including, the filing of a complaint and preparation of the written Counselor's report. The relevant documents at this stage are the Counselor's notes, and documents gathered by the Counselor or provided by the complainant. The persons likely to request these materials are the complainant (or representative), RMOs, and facility management.

10. Disclosure to the Complainant. As discussed in paragraph 25, the complainant has no access right to the records under the Privacy Act, and therefore cannot compel the agency to release copies of records from the file at this stage of the proceeding. There is no regulatory entitlement to these documents at this stage either. Under EEOC's regulatory scheme, in the final interview, the counselor orally explains what information

was obtained in the precomplaint counseling, so the complainant can decide whether to go forward with a formal complaint. In exempting the EEOC system of records under subsection (k)[1], the EEOC has decided that complainants do not require copies of the documents gathered or the Counselor's notes in order to make that decision. They should have received sufficient oral information in the final interview. Thus, the only disclosure required is that oral information communicated by the counselor in the final interview.[2]

11. Disclosure to the RMO. The purpose of the complaint process is first to evaluate the validity of an employment discrimination allegation, and, where valid, provide relief at the most informal level possible. At the counseling stage, the RMO simply needs notice of, and opportunity to respond to, the allegations raised by the complainant. The RMO is merely a witness who has no independent "need to know" what is contained in the subject documents. Under the "need to know" exception, the counselor is authorized to disclose a limited amount of information from the file to the RMO to gain information about what happened, or to hear the RMO's side of the events at issue. However, this exception is not generally broad enough to include a wholesale disclosure of notes and documents. Furthermore, if ORM counselors determine that it is necessary to disclose some additional information to an RMO in order to informally resolve the case, they may do so. Any request from an RMO (without the complainant's prior written consent) before an investigation has begun should be denied as barred by the Privacy Act.

12. Disclosure to Management. Disclosure should be guided by the reason the information is sought, balanced against the constraints identified above, i.e., the need to maintain the perception and reality of a complaint resolution system which is fair and independent of management. The needs often asserted by management are, first, to consider settlement of issues raised; second, to know what has transpired at the facility; and third, to conduct any necessary disciplinary action. As to the first need, both the EEOC and VA have strong policies in favor of resolving these cases at the earliest possible stage. In order to do so, management clearly must understand the issues and what has transpired, in order to evaluate whether settlement is appropriate. ORM employees could disclose the issues and bases raised by the complainant during the informal counseling. If management seeks disclosure of any other information in the file, the need to know would have to be compelling before disclosure would be authorized. As to the general need to be informed about what is going on at a facility, ordinarily only general information, sufficient for management to undertake their own detailed inquiry, would seem to be authorized. With regard to management's need for the file for purposes

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[1] See Discussion in paragraph 25.

[2] Even though neither the Privacy Act nor EEOC regulations require disclosure at this point of the proceedings, ORM employees could still make a discretionary disclosure. However, members of my staff conferred with ORM officials who have confirmed that they intend to follow the arrangement instituted by the EEOC which does not contemplate disclosure of the file to the complainant until the investigation has been completed.

of discipline, it would almost always be premature to disclose information or documents from the file at this point in the complaint process for that purpose. It should be noted that if the manager making the request is also the RMO, the request should be denied. Such a request should be made from management at a level above that of the RMO.

B. AFTER A FORMAL COMPLAINT IS FILED

1. Request is Made Before Completion of the Investigation

13. Disclosure to the Complainant. As discussed in more detail in paragraphs 24-27, the complainant does not have a right under the Privacy Act to the counseling stage records. However, the EEOC regulations (29 C.F.R Part 1614) provide that once a formal complaint is filed, the Counselor must draft a report and submit it to the applicable ORM field office and the aggrieved person. See 29 C.F.R. § 1614.105(c). Further, the EEOC Management Directive, EEO MD-110 (October 22, 1992), pp.2-24, paragraph VII.A., provides that the Counselor must submit the report to the complainant *within 15 days* after notification by the EEO Officer or other appropriate officials that a formal complaint has been filed[3].

14. Disclosure to the RMO. From the formal complaint filing until the EEO investigator contacts the RMO as a witness, RMOs do not generally have a need to know which would justify any disclosures. The counselor has presumably made the RMO aware of the allegations during the counseling period. The investigator may disclose information from the file to the RMO in order to uncover more facts, but there is no need that would justify a broad release of all the documents in the file by the investigator, or pursuant to the request of the RMO.

15. In this regard, see EEOC Management Directive, EEO M-110 (October 22, 1992), pp. 5-12 to 5-13. The Directive states in pertinent part:

> The responsible management official should have access to case materials to the extent needed to respond to allegations and give evidence. The agency has the burden of determining what case material may be released in accordance with the Privacy Act.

Thus, investigators must decide on a case-by-case basis what material may be released in order to give RMOs notice and an opportunity to fully respond to all of the allegations in the EEO complaint and to matters raised by other witnesses during the investigation.

[3] Although it is not entirely clear that the EEOC regulation and directive would overcome the statutory preclusion to access by the Privacy Act, we will defer to the EEOC in this matter since it is that agency's system of records.

16. Disclosure to Facility Management. With regard to facility management, again, as in paragraph 12, the ORM employee must assess the reasons offered by the official. For example, if the request demonstrates a need to know for purposes of assessing settlement potential, release is authorized to the extent it is consistent with that purpose. ORM employees would accordingly be authorized to disclose the content of the relevant portions of the Counselor's Report to management pursuant to the "need to know" exemption. If the request is premised on the more general interest in what is happening within the organization, the disclosure may be more limited, or possibly, denied. As at the precomplaint counseling stage, almost all requests for information for disciplinary purposes would be premature, and thus could not be honored at that time, under the Privacy Act.

2. Request is Made
After Completion of the Investigation

17. Disclosure to the Complainant. A complete copy of the file is provided pursuant to EEOC regulations. See 29 C.F.R. § 1614.108(f), which provides in pertinent part: "Within 180 days from the filing of the complaint, . . . the agency shall notify the complainant that the investigation has been completed, *shall provide the complainant with a copy of the investigative file*. . . ." [Italics supplied.] This includes the precomplaint documents, the formal complaint, the acceptability determination, the appointment of the investigator, sworn statements, and any other documentary evidence compiled.

18. Disclosure to the RMO. The RMO may obtain a copy of his or her own affidavit. With respect to the entire complaint file, the following rules apply:

> (a) When the Complainant Does Not Request a Hearing. If the complainant does not request a hearing, the RMO does not need to know any more information, since the RMO has no role in the only remaining element of the process, i.e., the Department's decision on the matter. Any request from an RMO at this stage will be denied as barred by the Privacy Act.
> (b) When the Complainant Requests a Hearing. If the complainant asks for a hearing, the RMO must appear as a witness. The agency representative represents VA and the RMO (if the VA interests are consistent with the RMO's interests). Representatives are usually Regional Counsel or General Counsel employees, or Human Resources employees. The agency representative must have a copy of the entire file. Since the agency representative will make available relevant portions of the complaint file to the RMO during preparation for the hearing, the RMO has no independent "need to know" for the file. Thus, if an RMO asks ORM employees for copies of documents, ORM would deny the request under the Privacy Act,

advising that the RMO must contact the agency representative for any appropriate disclosures. Where the interests of VA and the RMO are inconsistent, there can be a need to know to disclose information from the complaint file to the RMO to permit full preparation for a hearing. In such cases ORM employees should contact the Office of General or Regional Counsel for guidance regarding such disclosures.

19. Disclosures to Management. As in the case of the RMO, management's "need to know" will vary depending on whether a hearing has been requested.

(a) When the Complainant Does Not Request a Hearing. Management requests for a copy of the investigator's report should be granted at this stage, since it contains a summary of the evidence. It will satisfy the need for information by management to determine appropriateness of settlement. Management requests for additional portions of (or the entire) complaint file, should be determined by their relevance to the settlement purpose, assuming that is the purpose of the request. As to the "general interest" in occurrences at the facility, and for disciplinary purposes, need to know might be established, at least to the point of limited disclosures suitable for providing guidance for further inquiry by the facility.

(b) When the Complainant Requests a Hearing. Management has a clear need to know the contents of the entire file in order to consider settlement and to prepare for the hearing. Thus, a copy should be provided. This may often be accomplished by disclosure to the agency representative.

3. Request is Made After a Final Agency Decision is Issued

20. Disclosure to the Complainant. The complainant should have already received a complete copy of the file pursuant to 29 C.F.R. § 1614.108(f), after the investigation had been completed. The Administrative Judge makes the hearing transcript available, and the Office of Employment Discrimination Complaint Adjudication sends a copy of the decision to the complainant.

21. Disclosure to RMO. If an RMO request is made after an OEDCA decision, the request may be denied unless discipline has been proposed. If discipline is being considered, the RMO should have all pertinent information in order to ensure that all points of view are properly considered by the Department regarding any disciplinary action. All portions of the file which reasonably relate to the disciplinary charges should be disclosed pursuant to the need-to-know exception.

22. Disclosures to Management.

(a) Finding of Discrimination. If discrimination has been found, management must consider whether discipline should be taken against the RMO, and, whether other preventative measures need to be undertaken. That portion of the file needed for disciplinary purposes, including transcripts, hearing exhibits, and a copy of the investigation (if it has not already been provided), should be made available. In order to inform management about what is going on in the facility, a copy of the decision alone would ordinarily suffice. If preventative measures are indicated, more information may be disclosed under the need to know exception. Further, management may review those portions of the file necessary to settle other issues such as compensatory damages and attorneys fees.

(b) No Finding of Discrimination. When there is no finding of discrimination, the decision alone would ordinarily be sufficient to meet management needs.

II. RELEASING RECORDS TO THE OFFICE OF GENERAL COUNSEL AND REGIONAL COUNSELS

23. We now turn to the issue of what information can be released to Regional Counsels and the Office of General Counsel. As in the foregoing discussion of releasing information to RMOs and management, the "need to know" of Regional and General Counsel employees must be assessed according to what official duties are being performed. To the extent Regional or General Counsel attorneys represent management, their "need to know" is equivalent to that of management. Under other circumstances (e.g., litigation, giving legal advice, responding to Congressional oversight requests) their need to know would be commensurate with the nature of the official duties at hand.

III. RELEASE OF RECORDS AFTER SETTLEMENT

24. We now turn to the second question, which arose when a complainant requested a copy of the investigative file after signing a settlement agreement. ORM denied the request. The issue is whether VA must provide an EEO complainant with a copy of documents compiled during an investigation which was suspended due to a settlement being reached.

25. In most situations, under the Privacy Act, individuals have the right to see VA records when those records are retrieved by their names or other identifiers. 5 U.S.C. § 552a(d)(1). For example, if an employee asks for his or her Official Personnel Folder, VA must grant access because it is retrieved by that employee's name. However, a

Federal agency can sometimes prevent an individual from gaining access to his or her own file, if the agency promulgates special regulations and publishes notice in the Federal Register, pursuant to an exemption to the Privacy Act contained in subsection (k). The EEOC opted to implement this process, and promulgated regulations to exempt the EEOC/GOVT-1 system of records from the provisions of the Privacy Act which mandate first-party access. Thus, even though a complaint file is retrieved by the name of the complainant, the usual right to access does not apply and the ORM should refuse to grant the complainant access to the file under the Privacy Act.

26. As discussed previously, a complainant has the right to obtain a full copy of the file pursuant to another legal authority, EEOC Regulation, 29 C.F.R. § 1614.108(f). Under that provision, any decision to release the contents of the file depends upon where the case is in the EEO process. If a complaint has been filed, and the investigation has been completed, VA must provide a copy of the investigative file to the complaint. However, if the investigation has never been completed, this regulation, on its face, does not apply, and VA is not required to provide a copy under the EEOC regulation either.

IV. MICELLANEOUS

27. If ORM employees receive a Freedom of Information Act (FOIA), 5 U.S.C. § 552, request for information contained in an EEO file, they should consult their FOIA/Privacy Act officer for advice. FOIA generally requires federal agencies to release records unless they may be withheld under a series of exemptions. The applicability of these exemptions is strictly dependent upon the facts and circumstances of the EEO case, the identity of the requester, the stage of the proceeding, etc. It might be possible for FOIA to compel disclosure of some information to a requester under some limited circumstances.

28. We also must respond to a statement contained in the request for this opinion, in which the following statement is made:

> Technically, settlement closes the process. Any information obtained by the investigator is null and void, and should be shredded.

The records gathered in response to an informal or formal EEO complaint are official Federal records, and as such, are governed by the General Records Retention Schedule which provides that they be kept for four years. (See National Archives and Records Administration, General Records Schedule 1 (Civilian Personnel Records), Transmittal No. 7, August 1995, Item No. 25.) These records are maintained for one year after resolution of the case and then transferred to the Federal Records Center where they are destroyed after three years. See the EEOC System of Records notice, "Retention and Disposal, Privacy Act Issuances, 1995 Compilation. Thus, VA may not shred the

records; ORM must retain them for one year after the case is resolved, and transfer them to the Federal Records Center for an additional three-year retention period.

29. This opinion must necessarily be general in scope, and is not intended to answer all questions that can conceivably arise concerning the release of records from EEO files. Furthermore, some releases of information under the "need to know" exemption may be affected by administrative policy decisions promulgated by appropriate officials in the Department which have not been considered in this opinion. Subject to legal requirements, officials may promulgate policy rules which can expand or contract the need to know of management, RMOs, or other employees. We encourage ORM employees to contact the Office of General Counsel and Regional Counsels as questions arise.

HELD:

I. Employees of ORM may disclose records within the agency pursuant to an exception to the Privacy Act, 5 U.S.C. § 552a(b)(1), when an employee has a need for the record in order to perform his-or her official duties. The attached chart details the extent ORM counselors are authorized to discuss EEO cases with, and release information to, VA management, responsible management officials, and the complainant on a "need to know" basis.

II. If an Equal Employment Opportunity investigation has never been completed due to a settlement between the complainant and the agency, neither the Privacy Act nor EEOC regulations require VA to provide a copy of the contents of the file to the complainant.

/s/ Original Signed
Leigh A. Bradley

Stage of the Processing	Disclosure to Complainant	Disclosure to the RMO	Disclosure to Management
Precomplaint Counseling	Information from the file which is necessary for making the decision to file a formal complaint	Information from the file which is necessary for giving notice of the allegations and an opportunity to respond.	No general disclosure unless a compelling need to know for settlement. However, limited disclosure apprising management of the issues raised by the complaint.
Formal Complaint Investigation Not completed	Complainant is entitled to a copy of EEO Counselor's report witin15 days [29 C.F.R. § 1614.105 (c)], but no other disclosure should be made until investigation is completed.	No general disclosure is appropriate. Investigator may disclose whatever information is necessary to give the RMO complete notice and full opportunity to respond to all matters raised in the complaint and investigation.	Assess need for settlement and for resolving workplace disputes; disclose according to need.
Investigation completed	Disclosure of complete copy of entire file in accordance with 29 C.F.R. § 1614.108 (f) within 180 days.	No disclosure (if there will not be a hearing). Disclosure through the agency representative (if hearing will be held).	Disclosure of investigator's report if there is no hearing. Disclosure of entire file if a hearing will be held.
Final Agency Decision Finding Discrimination	Disclosure of all documents not already received.	If discipline is proposed, disclose pertinent documents and information.	If considering whether discipline is necessary, disclose file to extent needed for that purpose.