

RON JOHNSON, WISCONSIN, CHAIRMAN

JOHN McCAIN, ARIZONA
ROB PORTMAN, OHIO
RAND PAUL, KENTUCKY
JAMES LANKFORD, OKLAHOMA
MICHAEL B. ENZI, WYOMING
KELLY AYOTTE, NEW HAMPSHIRE
JONI ERNST, IOWA
BEN SASSE, NEBRASKA

THOMAS R. CARPER, DELAWARE
CLAIRE McCASKILL, MISSOURI
JON TESTER, MONTANA
TAMMY BALDWIN, WISCONSIN
HEIDI HEITKAMP, NORTH DAKOTA
CORY A. BOOKER, NEW JERSEY
GARY C. PETERS, MICHIGAN

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

KEITH B. ASHDOWN, STAFF DIRECTOR
GABRIELLE A. BATKIN, MINORITY STAFF DIRECTOR

March 11, 2015

The Honorable Richard J. Griffin
Deputy Inspector General
Office of the Inspector General
U.S. Department of Veterans Affairs
810 Vermont Avenue NW
Washington, DC 20420

Dear Deputy Inspector General Griffin:

I write in response to your letter dated February 27, 2015, and our meeting on March 2, 2015. The Committee on Homeland Security and Governmental Affairs has been seeking the Department of Veterans Affairs Office of Inspector General's (VA OIG) support and cooperation to investigate the tragedies that have occurred at the VA Medical Center (VAMC) in Tomah, Wisconsin. I reiterate my request for your cooperation with this important matter and reiterate my request for the VA OIG's inspection case file relating to the Tomah VAMC with appropriate protections for patient-specific medical information.

As you know, the congressional power of inquiry "encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."¹ This Committee, in particular, is authorized under the Standing Rules of the Senate to investigate "the efficiency and economy of operations of all branches of the Government."² The Senate has specifically authorized this Committee to examine "the efficiency and economy of all branches of the Government including the possible existence of fraud, misfeasance, malfeasance, collusion, mismanagement, incompetence, corruption, or unethical practices"³

In your letter and in our meeting, you raised several issues about the Committee's attempts to accommodate the VA OIG's concerns as well as the VA OIG's barriers to complying with the Committee's request. As I have communicated to you and as Committee staff has communicated to your staff, the Committee is not seeking information that would reveal patient-specific medical records. Nonetheless, I wish to address your concerns in detail.

The Committee has attempted to accommodate the VA OIG's concerns

Notwithstanding the Committee's broad investigative authority, the Committee has made significant efforts to accommodate the general sensitivities articulated by the VA OIG about

¹ *Watkins v. United States*, 354 U.S. 178, 187 (1957).

² S. Rule XXV(k); *see also* S. Res. 445, 108th Cong. (2004).

³ S. Res. 73 § 12, 114th Cong. (2015).

documents in its Tomah VAMC case file. Since the beginning of our staffs' interaction, my staff has sought to identify and alleviate the VA OIG's particularized concerns about specific documents in the Tomah VAMC case file. Committee staff informed your staff, both verbally and in e-mail, that the Committee sought to work with the VA OIG by accepting rolling productions, appropriate redactions, and other means of accommodation. In a February 11, 2015, e-mail, Committee staff wrote to Catherine Gromek, the VA OIG's Congressional Relations Officer:

We understand that there may be sensitivities surrounding particular documents – and we're certainly willing to work with you to resolve those matters – but we requested the VA OIG investigative file to inform our oversight work. Without the entire investigative file, the Committee may not be able to assess effectively or fully the situation in Tomah. As a starting point for further discussions about the investigative file, it would be helpful for us to know how many documents need to be reviewed by your staff and precisely what restrictions the VA OIG believes apply to these documents.⁴

Ms. Gromek's response to this e-mail was to request a meeting with Committee staff.⁵

Ms. Gromek's response suggested to the Committee that the VA OIG sought the meeting to discuss a means of accommodation. In this spirit, Committee staff accepted Ms. Gromek's offer of a meeting with the express goal of "work[ing] with [the VA OIG] to facilitate the production" of the case file.⁶ Again, Committee staff reiterated the Committee's willingness to accommodate the VA OIG, writing: "We are willing to accept a partial production early next week of information that does not contain sensitivities, followed by later productions of the information your team needs to review more closely."⁷

On February 18, 2015, Committee staff met with VA OIG staff, including Maureen Regan, the Counselor to the Inspector General, for what Committee staff believed would be a discussion toward a reasonable accommodation that would allow the Committee to receive the requested information while addressing the VA OIG's concerns.⁸ At this meeting, Committee staff again reiterated the Committee's willingness to accommodate the VA OIG's particularized concerns. Ms. Regan, however, explained the VA OIG's perceived barriers toward compliance with the Committee's request without explaining any specific concerns about particular documents in the case file. When Ms. Regan began referring to a list of "categories" of documents in the VA OIG's case file, Committee staff requested a copy of the list to better inform the discussion about the case file's contents and to understand the VA OIG's concerns about particular documents. Ms. Regan declined the very reasonable request to share the list.

⁴ Email from Comm. staff to Catherine Gromek, Feb. 11, 2015.

⁵ E-mail from Catherine Gromek to Comm. staff (Feb. 13, 2015).

⁶ E-mail from Comm. staff to Catherine Gromek (Feb. 13, 2015).

⁷ E-mail from Comm. staff to Catherine Gromek (Feb. 13, 2015).

⁸ Meeting between Comm. staff & Catherine Gromek, Maureen T. Regan, & Darryl Joe (Feb. 18, 2015).

After the February 18 meeting, Committee staff again reiterated a hope to work collaboratively and expressed a willingness to be flexible with the VA OIG's concerns over the particular sensitivities of specific documents.⁹ In a further effort to accommodate the VA OIG, Committee staff again requested the document containing the "categories" to inform further discussions about the VA OIG's particularized concerns with documents in the Tomah VAMC case file.¹⁰ In response to the Committee's request, Ms. Gromek wrote: "[W]e are looking through the documents in the background category and should be able to provide you with some documents on Monday [February 23rd]."¹¹ Committee staff expressed gratitude that the VA OIG would begin document production, and asked for clarification on what documents to expect, writing: "Should I infer from the omissions in your reply that the VA OIG is refusing to produce the rest of the investigative file as well as the document categories sheet that Ms. Regan refused to share with us on Wednesday [February 18th]? Please advise."¹²

Ms. Gromek never clarified what documents the VA OIG would produce, and the VA OIG produced no documents to the Committee on Monday, February 23. Based on the omissions in Ms. Gromek's e-mail and absent written or verbal clarification, the Committee was left to presume that the VA OIG had refused to accommodate the Committee by providing the list of "categories" of documents contained in its case file. As of February 25, the VA OIG had produced no documents to the Committee, had declined to pursue particularized efforts at accommodation through rolling productions and limited redactions, and had refused to provide the Committee with a basic list of the contents of its Tomah VAMC case file. Despite four weeks to reach accommodation with the VA OIG, the Committee had made no progress toward receiving material from the Tomah VAMC case file until after my letter to you of February 25.¹³

There are no absolute barriers to the VA OIG's cooperation with the Committee's request for the Tomah VAMC case file

The Committee has requested the VA OIG's case file pertaining to the Tomah VAMC to inform the Committee's oversight of the Tomah VAMC. Congress established offices of inspectors general to assist in oversight of the executive branch and work in partnership with Congress to combat waste, fraud, and abuse.¹⁴ Indeed, the purpose of inspectors general, as stated in section 2 of the Inspector General Act, is to keep Congress "fully and currently informed about problems and deficiencies relating to [executive branch] programs and the necessity for and progress of corrective action."¹⁵

You and your staff have raised several issues that you believe prevent your compliance with the Committee's request. The Committee has sought to work with your office to address these concerns. In further examining the issues you raise, I see no statutory or constitutional

⁹ E-mail from Comm. Staff to Catherine Gromek (Feb. 18, 2015).

¹⁰ *Id.*

¹¹ E-mail from Catherine Gromek to Comm. staff (Feb. 19, 2015).

¹² E-mail from Comm. staff to Catherine Gromek (Feb. 20, 2015).

¹³ The VA OIG produced "background" material to the Committee on February 27, 2015.

¹⁴ Wendy Ginsberg and Michael Green, *Federal Inspectors General History, Characteristics, and Recent Congressional Actions*, CONGR. RESEARCH SERV. (Dec. 8, 2014).

¹⁵ 5 app. U.S.C. § 2.

basis that serves as a prohibition on your office's cooperation with the Committee's request. I will address each argument in turn.

1. There is a "legitimate oversight purpose" to the Committee's request

In your letter, you wrote that the Committee has articulated no "legitimate oversight purpose" to support its request for the Tomah VAMC case file.¹⁶ You also wrote that the case file "would not be relevant" for a congressional investigation into what occurred in Tomah.

I am disappointed that you believe there to be no "legitimate" purpose for my request and that the case file has no relevance to the Committee's work. It is the Committee's prerogative, and not that of the Executive Branch, to determine its legitimate oversight interests and the scope of its investigative work. But to assuage your concerns, as the Committee staff has explained to your staff, this Committee is the chief investigative committee of the Senate and it is examining the circumstances surrounding the recent public reports of malfeasance and misfeasance at the Tomah VAMC. The healthcare inspection conducted by your office, examining similar issues and many of the same individuals, is highly relevant to the Committee's work.

The need for congressional oversight and potential legislative action necessitates the Committee's request for the Tomah VAMC case file. The family of at least one veteran who passed away after neglect and delay at the Tomah VAMC has said publicly that she would not have taken her father to the Tomah VAMC for treatment had she known about the problems in the Tomah VAMC.¹⁷ In addition, another veteran died of a narcotic opioid drug overdose at the Tomah facility five months after the VA OIG administratively closed its inspection.¹⁸ This veteran received treatment from some of the same healthcare providers that your office reviewed in its healthcare inspection.¹⁹

Although you believe the VA OIG has been transparent in its inspection of the Tomah VAMC, the fact remains that the VA OIG administratively closed its inspection of the Tomah VAMC in March 2014 and the report was not posted on the VA OIG website until February 2015. According to VA OIG staff, the decision to close the inspection rested with the Assistant Inspector General for Healthcare Inspections and was never raised to your or Ms. Regan's attention.²⁰ If whistleblowers had not contacted Congress, it is likely that Congress would have never learned that the VA OIG conducted a nearly three-year review of the opioid practices at the Tomah VAMC. These circumstances compel thorough and careful congressional attention.

¹⁶ Letter from Richard J. Griffin, VA Office of Inspector Gen., to Ron Johnson, S. Comm. on Homeland Sec. & Gov't Affairs 1, 2-3 (Feb. 27, 2015).

¹⁷ See Donovan Slack, *Lawmakers want hearing in Tomah*, GREEN BAY PRESS GAZETTE, Feb. 13, 2015.

¹⁸ Aaron Glantz, *Opiates handed out like candy to 'doped-up' veterans at Wisconsin VA*, THE CENTER FOR INVESTIGATIVE REPORTING, Jan. 8, 2015.

¹⁹ *Id.*

²⁰ Meeting between Comm. staff and John Daigh, Alan Mallinger, & Catherine Gromek (Feb. 4, 2015); Meeting between Comm. staff & Catherine Gromek, Maureen T. Regan, & Darryl Joe (Feb. 18, 2015).

2. Federal statutes do not absolutely prevent the VA OIG's cooperation with the Committee's oversight

In your letter and in our meeting, you indicated that federal statutes prevent the VA OIG's compliance with the Committee's request for the Tomah VAMC case file. I have reviewed the information and I believe these statutes do not present a bar for the VA OIG's cooperation. Moreover, as the Committee has indicated from the outset, the Committee is willing to work with the VA OIG on a particularized basis to address concerns about specific documents in the case file. I will address each statute in turn.

a. The Inspector General Act

You wrote that the Inspector General Act limits the information that an IG office may share with Congress.²¹ However, the Act provides inspectors general with discretionary authority as to what information they may disclose, and the provisions cited in your letter give you specific discretion on whether to disclose investigatory information.²² In fact, the IG Act explicitly states that nothing in the Act "shall be construed to authorize or permit the withholding of information from Congress, or from any committee or subcommittee thereof."²³ Other Inspectors General in the past have recognized Congress's authority to receive such information from an IG office, including material with "Executive Branch confidentiality interests."²⁴

For example, in 2006, the Department of Justice Office of Inspector General provided the Senate Judiciary Committee with documents in relation to allegations raised by a FBI special agent.²⁵ These documents consisted of OIG Memoranda of Interviews, affidavits, and an interview transcript. In that case, the DOJ OIG provided the FBI special agent's 26-page written comments to the draft OIG report and polygraph examination reports of a group of FBI personnel. The names of FBI personnel were provided to Congress without redactions.

Similarly, in 2013 and 2014, the Treasury Inspector General for Tax Administration (TIGTA) produced to several congressional committees documents relating to its examination of allegations of politically oriented targeting by the Internal Revenue Service.²⁶ TIGTA voluntarily produced these documents – with limited redactions for confidential taxpayer

²¹ Letter from Richard J. Griffin, VA Office of Inspector Gen., to Ron Johnson, S. Comm. on Homeland Sec. & Gov't Affairs 5 (Feb. 27, 2015) ("In response to a specific request for all records relating to interviews conducted, particularly with current or former employees, Ms. Regan noted that the IG Act itself prohibits the disclosure of the identity of individuals who submit complaints or provided information to the IG.").

²² See, e.g., 5 app. U.S.C. § 7(b) ("[U]nless the Inspector General determines that such a disclosure is unavoidable during the course of the investigation.").

²³ 5 app. U.S.C. § 5(e)(3).

²⁴ Letter from Richard J. Griffin, VA Office of Inspector Gen., to Ron Johnson, S. Comm. on Homeland Sec. & Gov't Affairs 5 (Feb. 27, 2015).

²⁵ Letter from U.S. Department of Justice, Office of Inspector General to Chairman Arlen Specter, Ranking Member Patrick Leahy and Senator Charles Grassley (Mar. 24, 2006).

²⁶ H. COMM. ON OVERSIGHT & GOV'T REFORM, THE INTERNAL REVENUE SERVICE'S TARGETING OF CONSERVATIVE TAX-EXEMPT APPLICANTS: REPORT OF FINDINGS FOR THE 113TH CONGRESS (2014); S. PERMANENT SUBCOMM. ON INVESTIGATIONS, IRS AND TIGTA MANAGEMENT FAILURES RELATED TO 501(C)(4) APPLICANTS ENGAGED IN CAMPAIGN ACTIVITY (2014).

information²⁷ – which included investigative memoranda, interview notes, deliberative material, draft audit reports, and similar material.

The IG Act does not present a bar for compliance with the Committee’s request, as other Inspectors General have recognized. This Committee has both primary legislative and oversight jurisdiction over the IG community. If you continue to have real concerns about disclosing such information, the Committee has been – and will continue to be – prepared to work with you to help alleviate those concerns. But by its plain language, the IG Act does not prevent your compliance with the Committee’s request for the Tomah VAMC case file.

b. Statutes pertaining to veterans healthcare information

In your letter, you cited a number of statutes specific to veterans’ medical information.²⁸ As Committee staff has explained to your staff, the Committee seeks to work with the VA OIG to protect sensitive patient information. The Committee will accept *in camera* review of this material, as well as appropriate redactions for patient-sensitive information. However, I do not read these statutes as preventing the Committee’s absolute access to the Tomah VAMC case file; in fact, two of the statutes you cite have express exemptions for disclosing records to Congress.

Specifically, 38 U.S.C. § 5705(b)(4) states: “Nothing in this section shall be construed as authority to withhold any record or document from a committee of either House of Congress or any joint committee of Congress, if such record or document pertains to *any* matter within the jurisdiction of such committee or joint committee.”²⁹ This Committee has jurisdiction pursuant to Rule XXV of the Standing Rules of the Senate and S. Res. 73 (114th Congress). Likewise, 38 U.S.C. § 5701(b)(3) allows the disclosure of records “[w]hen required by any department or other agency of the United States Government.”³⁰

You also wrote that the VA OIG cannot disclose records covered under these statutes because the statutes place this authority with the Secretary of the VA.³¹ As your staff knows, the Committee has requested directly from the VA separate information in the possession of the VA. In my request to you, I am seeking records in the possession of the VA OIG. As you know, the IG Act makes clear that inspectors general are considered to be separate entities from the agencies they oversee.³² The Act also specifies that nothing in the Act “shall be construed to authorize or permit the withholding of information from Congress, or from any committee or subcommittee thereof.”³³ Accordingly, I do not believe that you must seek the approval of the VA to disclose material in the custody and control of the VA OIG.

²⁷ See 26 U.S.C. § 6103; see 5 app. U.S.C. § 5(e)(3).

²⁸ Letter from Richard J. Griffin, VA Office of Inspector Gen., to Ron Johnson, S. Comm. on Homeland Sec. & Gov’t Affairs 4 (Feb. 27, 2015).

²⁹ 28 U.S.C. § 5705(b)(4) (emphasis added).

³⁰ 38 U.S.C. § 5701(b)(3).

³¹ Letter from Richard J. Griffin, VA Office of Inspector Gen., to Ron Johnson, S. Comm. on Homeland Sec. & Gov’t Affairs 4 (Feb. 27, 2015).

³² See 5 app. U.S.C. §§ 2, 6.

³³ 5 app. U.S.C. § 5(e)(3).

Once again, the Committee seeks to work collaboratively with you to identify with precision patient-sensitive information and limit access to that material appropriately. However, the statutes you cite do not present an absolute bar on your compliance with my request for information contained in the Tomah VAMC case file.

c. The Privacy Act

Your letter also cited the Privacy Act as a barrier toward compliance with the Committee's request for the Tomah VAMC case file.³⁴ Again, the plain language of the Privacy Act contains an express exemption for disclosing records to Congress. The statute reads:

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to any agency . . . unless disclosure of that record would be—

. . .

(9) to either House of Congress, or, to the extent of the matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee.³⁵

As explained, the Committee has jurisdiction over this matter pursuant to Senate Standing Rule XXV and S. Res. 73 (114th Congress). This exemption contains no limitation on the purpose or use of the records; however, as detailed above, the Committee has a specific oversight need for the Tomah VAMC case file. Accordingly, the Privacy Act presents no barrier to disclosing VA OIG records to the Committee.

d. Office of Legal Counsel Opinion

Your letter also cites to an opinion issued by the Justice Department's Office of Legal Counsel (OLC) in 1989 as an additional barrier to compliance with the Committee's request for the VA OIG's Tomah VAMC case file.³⁶ Although not statutory in nature, I wish to address this concern as well.

As explained, the Committee has presented from the outset of its interaction with the VA OIG the Committee's justification for and need of the Tomah VAMC case file. In this respect, contrary to your assertion, the Committee has already fulfilled its "duty . . . to justify its requests."³⁷ Moreover, the OLC opinion that you cited concerns the accommodation process for "essential" confidential executive branch information.³⁸ The VA OIG has not asserted that the entire Tomah VAMC case file is of an essential confidential nature. As noted, the Committee is ready to work with the VA OIG to alleviate any concerns about the information in the Tomah

³⁴ Letter from Richard J. Griffin, VA Office of Inspector Gen., to Ron Johnson, S. Comm. on Homeland Sec. & Gov't Affairs 4 (Feb. 27, 2015).

³⁵ 5 U.S.C. § 552a(b).

³⁶ Letter from Richard J. Griffin, VA Office of Inspector Gen., to Ron Johnson, S. Comm. on Homeland Sec. & Gov't Affairs 3-4 (Feb. 27, 2015).

³⁷ 13 Op. O.L.C. 153, 159 (1989).

³⁸ *Id.* at 153.

VAMC case file. However, the VA OIG has provided no particularized information – in accord with its duty of accommodation – about the contents of the Tomah VAMC case file to allow the Committee to evaluate the confidentiality interests. If the VA OIG chooses to provide this particularized information, the Committee is willing to work toward accommodation.

3. The VA OIG's generalized reports on opioid use do not suffice to substitute for transparency about the Tomah VAMC healthcare inspection

In your letter and in our meeting, you cited to previously released VA OIG reports on general opioid prescription practices as examples of your commitment to transparency with respect to the Tomah VAMC healthcare inspection.³⁹ While such reports are helpful to inform general policy initiatives, they do little to illustrate the issues documented in the healthcare inspection that your office conducted at the Tomah VAMC.

Under the Inspector General Act, your office is required to submit semiannual reports to Congress.⁴⁰ The VA OIG Semiannual Report to Congress for October 1, 2013 to March 31, 2014, however, contains no mention of the Tomah VAMC healthcare inspection – closed on March 12, 2014⁴¹ – and merely notes that the VA OIG administratively closed ten such inspections.⁴² In addition, according to available records, the VA OIG did not provide details about its administrative closures during the same period, which would include the Tomah VAMC healthcare inspection, as requested by Senator Grassley and then-Senator Coburn. In sum, there had been no public transparency before February 2015 about the VA OIG's healthcare inspection of the Tomah VAMC in either its statutorily mandated reports or its responses to the request from Senators Grassley and Coburn.

Conclusion

The Committee's inability to obtain and review the VA OIG's case file pertaining to the Tomah VAMC has significantly hindered the Committee's ability to uncover the truth of what occurred at the Tomah VAMC and develop potential legislative solutions to address the many problems that appear to plague the facility. Over the course of the past several weeks, the Committee has attempted to accommodate the concerns of the VA OIG with respect to sensitive patient information in the Tomah VAMC case file. The VA OIG has not engaged in this process with any particularity about its specific concerns regarding specific documents in the case file.

For the reasons above, I reiterate my request for the production of the VA OIG case file pertaining to the Tomah VAMC. However, as a final attempt toward accommodation, as discussed in our meeting, the Committee will accept a detailed list of the contents of the case file to inform additional staff-level discussions about the VA OIG's particularized concerns for each

³⁹ Letter from Richard J. Griffin, VA Office of Inspector Gen., to Ron Johnson, S. Comm. on Homeland Sec. & Gov't Affairs 2 (Feb. 27, 2015).

⁴⁰ See 5 app. U.S.C. § 5.

⁴¹ Veterans Affairs Office of Inspector Gen., *Alleged Inappropriate Prescribing of Controlled Substances and Alleged Abuse of Authority* (Mar. 12, 2014).

⁴² Veterans Affairs Office of Inspector Gen., *Semiannual Report to Congress* (2014).

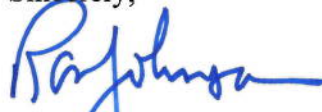
The Honorable Richard J. Griffin

March 11, 2015

Page 9

document and options to alleviate those concerns. Please ask your staff to arrange for this document to be transmitted to the Committee no later than March 16, 2015, and to schedule a staff-level meeting no later than March 20, 2015. Thank you for your attention to this important matter.

Sincerely,



Ron Johnson
Chairman

cc: The Honorable Thomas R. Carper
Ranking Member