

EXHIBIT 10

Seth Watkins

From: Seth Watkins
Sent: Monday, June 12, 2017 3:19 PM
To: 'OGC FOIA Appeals'
Subject: FOIA Appeal re FOIA tracking no. 16-00661-F (Insurance Center)
Attachments: Exhibit A.pdf; Exhibit B.pdf

To whom it may concern:

Pursuant to 38 C.F.R. § 1.559, this will appeal the denial of information requested under FOIA.

Pending before the U.S. Department of Veterans Affairs (“VA”) is a request dated and emailed to VA on October 8, 2015 (“FOIA Request”). A copy of the FOIA Request is forwarded below and also is attached as **Exhibit A**. VA’s “response,” emailed by VA on June 7, 2017 (“Response”), is attached as **Exhibit B**.

VA’s Response is deficient, and deemed by requester to be a denial of requested records, for at least the following reasons that are hereby administratively appealed.

VA took **20 months (609 days)** to respond to this FOIA Request, releasing twenty-seven (27) documents all dated no later than October 2015, i.e. *circa* the date that this FOIA Request was submitted. It is apparent that VA did not conduct a reasonable search for responsive records and applied an improper cut-off date to its search.

“[A] temporal limit pertaining to FOIA searches . . . is only valid when the limitation is consistent with the agency’s duty to take reasonable steps to ferret out requested documents.” *McGehee v. CIA*, 697 F.2d 1095, 1101 (D.C. Cir. 1983), *vacated in part in other respects*, 711 F.2d 1076 (D.C. Cir. 1983) (per curiam); *concur Public Citizen v. Dep’t of State*, 276 F.3d 635, 644 (D.C. Cir. 2002), *aff’d in relevant part and rev’d on other grounds*, 276 F.3d 634 (D.C. Cir. 2002) (the proposition that a “time-of-request cut-off date” is always reasonable has been “expressly rejected”). The burden of establishing the reasonableness of temporal limitations on a search lies with the agency. *McGehee*, 697 F.2d at 1101.

When there has been a lengthy passage of time between the date the FOIA request was submitted to the agency and the date when the agency finally issues a response “determination,” and ultimately produces documents, the propriety of a “time-of-request cut-off date” is viewed with great skepticism. *Id.* at 1103-04.

“[T]he most appropriate cut-off date for [a] search would be the date of [VA’s] **final decision** . . . Surely, at that point, Plaintiff[] [is] put on notice that the VA [is] no longer searching for records. Additionally, . . . such a cut-off date in the absence of a published cut-off date ‘is consistent with the agency’s duty to take reasonable steps to ferret out requested documents.’” *Dayton Newspaper, Inc. v. VA*, 510 F. Supp. 2d 441, 450-51 (S.D. Ohio 2007).

Additionally, “[l]imiting a search by applying a cut-off date, without providing notice of the date to the requester, renders the search unreasonable.” *Dayton Newspaper*, 510 F. Supp. 2d at 449; see also *McGehee*, 697 F.2d at 1105.

The Response provided only a single document specifically concerning VA’s comprehensive review of the TSGLI program, entitled TSGLI YEAR-TEN REVIEW: PRE-REVIEW STUDY which was created August 10, 2015. VA failed to provide any other documents specifically concerning that review.

In sum, requester appeals (1) VA’s failure to conduct a reasonable search for responsive records, (2) VA’s failure to provide any notice of a cut-off date used for its search, and (3) VA’s use of an unreasonable cut-off date, substantially earlier than June 7, 2017 (the date on which VA finally provided a response to the FOIA Request).

Please respond to this appeal within 20 business days in accordance with 5 U.S.C. § 552(a)(6)(A)(ii).

If you have any questions regarding the FOIA Request or this administrative appeal, please contact the undersigned by email or by telephone.

Thank you for your attention to this matter.

Sincerely,

/s/

Seth A. Watkins

Seth A. Watkins, Ph.D.
ADDUCI, MASTRIANI & SCHAUMBERG LLP
1133 Connecticut Avenue, NW
Washington, DC 20036
Tel. 202-407-8647
Main FAX 202-466-2006
Email watkins@adduci.com

The information contained in this e-mail message may be privileged, confidential and protected from disclosure. If you are not the intended recipient, any dissemination, distribution or copying is strictly prohibited. If you think that you have received this email message in error, please email the sender at "watkins@adduci.com." Thank you.

From: King, Jeanne VBAPHILINS [mailto:jeanne.king@va.gov]
Sent: Wednesday, June 07, 2017 4:55 PM
To: Seth Watkins <watkins@adduci.com>
Subject: Response to FOIA Request

Mr. Watkins:

RE: FOIA # 16-00661-F

I am writing to you in regard to your previous FOIA request to this office, which request you forwarded to my attention on October 8, 2015. I have enclosed the attached correspondence for your records.

Per your request, I will be forwarding today to your attention a series of nine (9) separate emails with the documents that are being released to you in response to your previous request. The documents are in electronic format, as PDF documents. The reason for the separate series of emails is due to the size of the attachments, to avoid clogging up your or my inbox.

If you have any questions after receiving these emails, you may contact me at this email address or via my phone # at 215-842-2000, ext. 4839. I am available from Monday—Friday, 9:30 AM to 6 PM, EST.

Sincerely,

Jeanne King

Jeanne King
Attorney-Advisor/FOIA Officer
VA Insurance Service

From: Seth Watkins [<mailto:Watkins@adduci.com>]
Sent: Thursday, October 08, 2015 2:54 AM
To: VAVBAPHI/INS/FOIA
Subject: [EXTERNAL] FOIA Request

This is a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

On behalf of our client Hugh C. McKinney, we hereby request copies of the following records under FOIA, preferably sent to the requester’s undersigned attorney by email in electronic format (pdf):

- all records in any way concerning or relating to the “comprehensive review” referenced in the statement “**VA, in consultation with DoD, is currently conducting a comprehensive review of the TSGLI program as it approaches its 10th year anniversary in December 2015 to ensure that the program is operating effectively and meeting the intent of Congress,**” which statement was made on page 2 of the attached letter from Robert L. Nabors II of the U.S. Department of Veterans Affairs to Seth A. Watkins, dated August 6, 2015, concerning denial by the VA of the Petition for Rulemaking by Army First Sergeant Hugh Campbell McKinney, Retired, to Amend 38 C.F.R. § 9.20 Governing Traumatic Injury Protection Provided by Statute at 38 U.S.C. § 1980A (note that the denial of the rulemaking petition is the subject of a Petition for Review filed on behalf of petitioner/requester with the U.S. Court of Appeals for the Federal Circuit on October 5, 2015, *McKinney v. McDonald*, No. 16-1032).

We hereby consent to pay all costs incurred for search, duplication and review of materials up to \$250.00. If additional costs will be required, please contact me for my approval.

If any records are withheld from release, please identify the withheld records by producing and providing to me an index pursuant to *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973).

If the Veterans Benefit Administration (and/or the VA Insurance Center) does not have custody or control over certain requested and responsive records but knows or believes that another component of the VA subject to FOIA does, please forward this FOIA request to the appropriate person and inform us that you have done so.

Please respond within 20 business days in accordance with 5 U.S.C. § 552(a)(6)(A).

If you have any questions about this request, please contact me immediately by the means listed below.

Thank you for your assistance with this matter.

Sincerely,

/s/

Seth A. Watkins

Seth A. Watkins, Ph.D.
ADDUCI, MASTRIANI & SCHAUMBERG LLP
1133 Connecticut Avenue, NW
Washington, DC 20036
Tel. 202-407-8647
Main FAX 202-466-2006
Email watkins@adduci.com

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This message has been scanned for malware by Websense. www.websense.com

EXHIBIT A

Seth Watkins

From: Seth Watkins <Watkins@adduci.com>
Sent: Thursday, October 08, 2015 2:54 AM
To: FOIA.VBAINS@va.gov
Subject: FOIA Request
Attachments: 2015.08.06 letter from Robert L. Nabors II.pdf

This is a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

On behalf of our client Hugh C. McKinney, we hereby request copies of the following records under FOIA, preferably sent to the requester's undersigned attorney by email in electronic format (pdf):

- all records in any way concerning or relating to the "comprehensive review" referenced in the statement "**VA, in consultation with DoD, is currently conducting a comprehensive review of the TSGLI program as it approaches its 10th year anniversary in December 2015 to ensure that the program is operating effectively and meeting the intent of Congress,**" which statement was made on page 2 of the attached letter from Robert L. Nabors II of the U.S. Department of Veterans Affairs to Seth A. Watkins, dated August 6, 2015, concerning denial by the VA of the Petition for Rulemaking by Army First Sergeant Hugh Campbell McKinney, Retired, to Amend 38 C.F.R. § 9.20 Governing Traumatic Injury Protection Provided by Statute at 38 U.S.C. § 1980A (note that the denial of the rulemaking petition is the subject of a Petition for Review filed on behalf of petitioner/requester with the U.S. Court of Appeals for the Federal Circuit on October 5, 2015, *McKinney v. McDonald*, No. 16-1032).

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Thank you for your assistance with this matter.

Sincerely,
/s/
Seth A. Watkins

Seth A. Watkins, Ph.D.
ADDUCI, MASTRIANI & SCHAUMBERG LLP
1133 Connecticut Avenue, NW
Washington, DC 20036
Tel. 202-407-8647
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DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON DC 20420

August 6, 2015

Mr. Seth A. Watkins, Ph.D.
Adduci Mastriani & Schaumberg LLP
1133 Connecticut Ave., N.W.
Washington, D.C. 20036

Dear Dr. Watkins:

This is in response to your petition pursuant to 5 U.S.C. § 553(e) ("Petition"), requesting that the Department of Veterans Affairs (VA) revise 38 C.F.R. § 9.20 governing the Servicemembers' Group Life Insurance Traumatic Injury Protection (TSGLI) program. You filed this request on behalf of Hugh C. McKinney, a retired service member, whose TSGLI claim alleging loss of activities of daily living (ADLs) due to a stroke that was caused by a traumatic brain injury from an improvised explosive device (IED) was denied by the United States Army.

The Petition requests that VA:

1. Amend the definition of "traumatic event" in 38 C.F.R. § 9.20(b)(1) to include "application of . . . explosive ordnance . . . causing damage to a living being."
2. Amend the definition of "traumatic injury" in 38 C.F.R. § 9.20(c)(2)(ii) to include a "physical illness or disease . . . caused by . . . explosive ordnance."
3. Amend the list of exclusions in 38 C.F.R. § 9.20(e)(4)(i) to provide that a scheduled loss resulting from "physical illness or disease caused by explosive ordnance" will not be excluded from TSGLI coverage.
4. Add the following definition of "explosive ordnance" to 38 C.F.R. § 9.20(e)(6): "all munitions containing explosives, . . . includ[ing], but . . . not limited to, improvised explosive devices (IEDs)."

Petition, at 2-3.

Congress established the TSGLI program to provide financial assistance to severely injured servicemembers who suffer a traumatic injury directly resulting in a TSGLI scheduled loss. See Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 1032, 119 Stat. 231, 257. TSGLI coverage is modeled after commercial Accidental Death and Dismemberment (AD&D) insurance coverage, specifically, the "dismemberment" portion

2.

Mr. Seth A. Watkins, Ph.D.

of the coverage, and accordingly VA's implementing regulation at 38 C.F.R. § 9.20 is based on commercial AD&D policies. 70 Fed. Reg. 75,940 (Dec. 22, 2005).

The TSGLI statute provides benefits to a person insured under Servicemembers' Group Life Insurance for a TSGLI scheduled loss that "results directly from a traumatic injury . . . and from no other cause." 38 U.S.C. § 1980A(c)(1); *see also* 38 C.F.R. § 9.20(d)(2). VA defined the term "traumatic event" to mean "the application of external force, violence, chemical, biological, or radiological weapons, or accidental ingestion of a contaminated substance causing damage to a living being." 38 C.F.R. § 9.20(b)(1). The term "injury" ordinarily refers to an injury caused by external violence, as opposed to a disease. 70 Fed. Reg. at 75,941. When VA first promulgated 38 C.F.R. § 9.20, the Department recognized that the process by which pyogenic infection, chemical, biological, or radiological weapons, or accidental ingestion of a contaminated substance produces immediate harm may be characterized as a disease process; however, the Department included physical illness or disease caused by such hazards within the definition of "traumatic injury" in 38 C.F.R. § 9.20(c)(1) because "including immediate traumatic harm due to those unique hazards of military service is consistent with the purpose of TSGLI." *Id.*

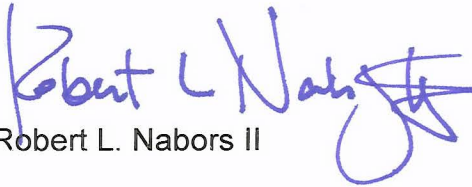
The Petition contends that IEDs are also a unique hazard of military service and, therefore, the TSGLI program should cover losses due to physical illness or disease caused by IEDs. Petition, at 18-24. VA is required to consult with the Department of Defense (DoD) on all TSGLI regulations. 38 U.S.C. § 1980A(j). VA, in consultation with DoD, is currently conducting a comprehensive review of the TSGLI program as it approaches its 10th year anniversary in December 2015 to ensure that the program is operating effectively and meeting the intent of Congress. As part of this review, VA will analyze the relationship between explosion of an IED and development of a physical illness or disease, which is raised in the Petition. A decision on this issue will require consultation with military medical experts and review of the latest research, including Institute of Medicine reports such as *Gulf War and Health: Long-Term Effects of Blast Exposures* (2014). Also, because VA is obligated to manage the TSGLI program "on the basis of sound actuarial principles," 38 U.S.C. § 1980A(e)(4), VA must also conduct an actuarial assessment of any such regulatory amendment on the TSGLI program.

3.

Mr. Seth A. Watkins, Ph.D.

For the foregoing reasons, VA is unable at this time to adopt the changes requested in the Petition. Accordingly, the Petition is denied. Please be assured, however, that we will carefully consider your suggested amendments and the views expressed in the Petition when formulating future proposals regarding the TSGLI regulations. We appreciate your interest in this matter.

Sincerely,



Robert L. Nabors II

EXHIBIT B

Seth Watkins

From: King, Jeanne VBAPHILINS <jeanne.king@va.gov>
Sent: Wednesday, June 07, 2017 4:55 PM
To: Seth Watkins
Subject: Response to FOIA Request
Attachments: FOIAResponseSethWatkins.pdf

Mr. Watkins:

RE: FOIA # 16-00661-F

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Sincerely,

Jeanne King

Jeanne King
Attorney-Advisor/FOIA Officer
VA Insurance Service

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Subject: [EXTERNAL] FOIA Request

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comprehensive review of the TSGLI program as it approaches its 10th year anniversary in December 2015 to ensure that the program is operating effectively and meeting the intent of Congress,” which statement was made on page 2 of the attached letter from Robert L. Nabors II of the U.S. Department of Veterans Affairs to Seth A. Watkins, dated August 6, 2015, concerning denial by the VA of the Petition for Rulemaking by Army First Sergeant Hugh Campbell McKinney, Retired, to Amend 38 C.F.R. § 9.20 Governing Traumatic Injury Protection Provided by Statute at 38 U.S.C. § 1980A (note that the denial of the rulemaking petition is the subject of a Petition for Review filed on behalf of petitioner/requester with the U.S. Court of Appeals for the Federal Circuit on October 5, 2015, *McKinney v. McDonald*, No. 16-1032).

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If the Veterans Benefit Administration (and/or the VA Insurance Center) does not have custody or control over certain requested and responsive records but knows or believes that another component of the VA subject to FOIA does, please forward this FOIA request to the appropriate person and inform us that you have done so.

Please respond within 20 business days in accordance with 5 U.S.C. § 552(a)(6)(A).

If you have any questions about this request, please contact me immediately by the means listed below.

Thank you for your assistance with this matter.

Sincerely,

/s/

Seth A. Watkins

Seth A. Watkins, Ph.D.
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DEPARTMENT OF VETERANS AFFAIRS
Insurance Center
5000 Wissahickon Avenue
Philadelphia, PA 19144

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June 7, 2017

Seth Watkins
Seth A. Watkins, Ph.D.
Adduci, Mastriani & Schaumberg LLP
1133 Connecticut Avenue, NW
Washington, DC 20036

In Reply Refer To:
FOIA # 16-00661-F

Dear Mr. Watkins:

The enclosed documentation is in response to your Freedom of Information (FOIA) request, dated October 8, 2015. Your request was forwarded to this office, the VA Insurance Center, as we supervise all VA life insurance programs for active duty service members, reservists, and veterans. Your request has been assigned FOIA tracking # 16-00661-F; please use this number in any correspondence to our office regarding your request.

Your correspondence stated:

On behalf of our client Hugh C. McKinney, we hereby request copies of the following records under FOIA, preferably sent to the requester's undersigned attorney by email in electronic format (pdf):

- all records in any way concerning or relating to the "comprehensive review" referenced in the statement "**VA, in consultation with DoD, is currently conducting a comprehensive review of the TSGLI program as it approaches its 10th year anniversary in December 2015 to ensure that the program is operating effectively and meeting the intent of Congress,**" which statement was made on page 2 of the attached letter from Robert L. Nabors II of the U.S. Department of Veterans Affairs to Seth A. Watkins, dated August 6, 2015, concerning denial by the VA of the Petition for Rulemaking by Army First Sergeant Hugh Campbell McKinney, Retired, to Amend 38 C.F.R. § 9.20 Governing Traumatic Injury Protection Provided by Statute at 38 U.S.C. § 1980A (note that the denial of the rulemaking petition is the subject of a Petition for Review filed on behalf of petitioner/requester with the U.S. Court of Appeals for the Federal Circuit on October 5, 2015, *McKinney v. McDonald*, No. 16-1032).

In response to your request, we have released copies of the following records; the enclosed records will be forwarded to your email address in electronic format:

1. Document titled "United States Court of Appeals for the Federal Circuit—Notice of Docketing—Case # 16-1032—McKinney v. McDonald—Date October 7, 2015—Petition for Review of: United States Department of Veterans Affairs"
2. Document titled "Partial Foot Amputations in the Combat Wounded", published in the Journal of Surgical Orthopaedic Advances, Volume 20, Spring, 2011
3. Document titled "Blast Injuries", published in the New England Journal of Medicine, 2005
4. Document titled "2014 Wounded, Ill and Injured Compensation and Benefits Handbook", published by the Office of Warrior Care Policy, Department of Defense
5. Document titled: "Traumatic Injury Protection Rider to Servicemembers' Group Life Insurance," citation 72 FR 10362, Federal Register, dated March 8, 2007
6. Document titled: "Traumatic Injury Protection Rider to Servicemembers' Group Life Insurance", citation 70 FR 75940, Federal Register, dated December 22, 2005
7. Document titled "McKinney v. McDonald Summary, Court of Appeals for the Federal Circuit, October 9, 2015"
8. Document titled: "Application of the Mangled Extremity Severity Score in a Combat Setting", Military Medicine, July 2007
9. Document titled: "Simultaneous Revascularization and Coverage of a Complex Volar Hand Injury: Case Report Using a Contralateral Radial Forearm Flow-Through Flap", Military Medicine, August 2008
10. Document titled: "Shotgun Injury to the Arm: A Staged Protocol for Upper Arm Salvage", Military Medicine. March 2010
11. Document titled: "Traumatic Brain Injury-Related Hypopituitarism: A Review and Recommendations for Screening Combat Veterans", Military Medicine, August 2010
12. Document titled "Minimally Invasive Shortening Humeral Osteotomy to Salvage a Through-Elbow Amputation", Military Medicine, September, 2010
13. Document titled "Blast Injury", Military Medicine, March, 2011
14. Document titled: "For Combat Wounded: Extremity Trauma Therapies from the USAISR", Military Medicine, June 2011
15. Document titled: "Medical Costs of War in 2035: Long-Term Care Challenges for Veterans of Iraq and Afghanistan", Military Medicine, November, 2012

16. Document titled: "Subjective Sleep Disturbance in Veterans Receiving Care in the Veterans Affairs Polytrauma System Following Blast-Related Mild Traumatic Brain Injury", Military Medicine, September, 2013
17. Document titled: "Cardiomyopathy Induced by Sinus Tachycardia in Combat Wounded: A Case Study", Military Medicine, September, 2014
18. Document titled: "Characteristics of Maxillofacial Injuries and Safety of In-Theater Facial Fracture Repair in Severe Combat Trauma", Military Medicine, March, 2015
19. Document titled: "Posttraumatic Epilepsy in Operation Enduring Freedom/Operation Iraqi Freedom Veterans", Military Medicine, May, 2014
20. Document titled: "Pituitary Dysfunction after Blast Traumatic Brain Injury: The UK BIOSAP Study", Annals of Neurology, May 2013
21. Document titled: "Posttraumatic Stress Symptoms in OIF/OEF Servicemembers with Blast-Related and Non-Blast Related Mild TBI", Publication by San Antonio Military Medical Center, 2010
22. Document titled: "VA Insurance Service Project Plan for Analyzing Issue in TSGLI Petition for Rulemaking", prepared by the VA Insurance Service staff
23. Document titled: "A Guide to US Military Casualty Statistics: Operation Freedom's Sentinel, Operation Inherent Resolve, Operation New Dawn, Operation Iraqi Freedom, Operation Enduring Freedom", Congressional Research Service, August, 2015
24. Document titled: "RE: Petition to Initiate Rulemaking Submitted by Hugh McKinney Concerning TSGLI", Correspondence forwarded to VA Secretary Robert McDonald by Caring for Military Families/Elizabeth Dole Foundation, June 2, 2015
25. Document titled: "International State-of-the-Science Meeting on Blast Injury Dosimetry", published by the DoD Blast Injury Research Program Coordinating Office, June 8-9, 2010
26. Document titled: "TSGLI Year Ten Review: Pre-Review Study", prepared by the VA Insurance Service staff
27. Document titled "Wounded Warrior Pay and Entitlements Handbook", Defense Finance Accounting Service, January, 2013

Appeal Rights

As part of the 2007 amendments to the Freedom of Information Act (FOIA), the Office of Government Information Services (OGIS) was established to provide mediation services

in order to resolve disputes between FOIA requesters and federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Records and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001

E-mail:
orgis@nara.gov

Toll-free Telephone: 877-684-6448
Telephone: 301-837-1996
Facsimile: 301-837-0348

You may also choose to file an appeal by forwarding a letter to the VA Office of General Counsel (024), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. Any appeal that you submit should be marked, both on the envelope and the face of the appeal letter, with the legend "FREEDOM OF INFORMATION ACT APPEAL". A copy of your original request, and this response, should accompany any appeal.

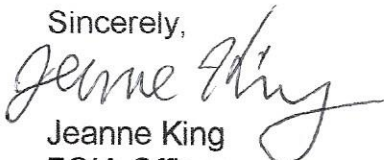
If you should choose to file an appeal, your appeal must be postmarked no later than sixty (60) calendar days after the date of the adverse determination. It must clearly identify the determination being appealed and must include any assigned tracking number. The appeal should include:

1. The name of the FOIA officer
2. The address of the component office
3. The date of the component office's determination
4. The precise subject matter of the appeal

Point of Contact

Any questions in regard to this letter should be directed to my attention. I can be reached directly by telephone at (215) 842-2000, ext. 4839 or by e-mail at jeanne.king@va.gov.

Sincerely,



Jeanne King
FOIA Officer
VA Insurance Service