

EXHIBIT 11

Seth Watkins

From: Knight, Tracy <tracy.knight@va.gov> on behalf of OGC FOIA Appeals <ogcfoiaappeals@va.gov>
Sent: Tuesday, June 13, 2017 11:32 AM
To: Seth Watkins
Subject: RE: FOIA Appeal re FOIA tracking no. 16-00661-F (Insurance Center)

Your appeal has been received. Thank you.

On behalf of OGCFOIAAppeals@va.gov

Tracy Knight

Government Information Specialist

Office of General Counsel (O24) - Information Law Group

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From: Seth Watkins [mailto:watkins@adduci.com]
Sent: Monday, June 12, 2017 3:19 PM
To: OGC FOIA Appeals
Subject: [EXTERNAL] FOIA Appeal re FOIA tracking no. 16-00661-F (Insurance Center)

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.

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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.
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