

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

KEITH B. ASHDOWN, STAFF DIRECTOR  
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July 7, 2015

Ms. Linda Halliday  
Deputy Inspector General  
Office of the Inspector General  
U.S. Department of Veterans Affairs  
810 Vermont Avenue NW  
Washington, DC 20420

Dear Ms. Halliday:

I welcome you to your position as the Deputy Inspector General of the Veterans Affairs Office of Inspector General (VA OIG). I hope that your new leadership will restore trust in the VA OIG and improve transparency and accountability for our nation's veterans. Further, I strongly urge you to reevaluate the VA OIG's noncooperation with the ongoing investigation of the Committee on Homeland Security and Governmental Affairs into the tragedies that occurred at the VA Medical Center in Tomah, Wisconsin (Tomah VAMC).

Given the actions of your predecessor, Richard J. Griffin, I am obliged to inform you that the VA OIG has not fully complied with the subpoena issued by the Committee on April 29, 2015.<sup>1</sup> Despite the Committee's sizeable efforts to accommodate the VA OIG, VA OIG staff has informed the Committee that the VA OIG is consciously withholding material beyond what was agreed upon by the Committee.<sup>2</sup> The refusal to produce this material has had a real and detrimental effect on the scope, substance, and pace of the Committee's investigation. In addition, the VA OIG has asserted generalized claims of deliberative process privilege and attorney-client privilege without providing a privilege log, as required by the subpoena, noting with specificity the privilege(s) asserted for each particular document withheld or redacted on the basis of privilege.<sup>3</sup> The absence of a detailed privilege log, and supporting legal points and authorities, prevents me from fully evaluating the VA OIG's assertions of privilege.

Accordingly, as a final attempt to evaluate the VA OIG's response to the Committee's subpoena, I will accept a detailed privilege log for all documents withheld or redacted on the basis of privilege, as well as an accompanying memorandum of legal points and authorities supporting the VA OIG's assertion of these privileges, by 5:00 pm. on July 21, 2015. It is my duty to notify you, however, that if the VA OIG under your leadership continues its non-

<sup>1</sup> Subpoena issued to Richard J. Griffin, Dep't of Vet. Affairs Off. of Inspector Gen., by S. Comm. on Homeland Sec. & Governmental Affairs (Apr. 29, 2015) [hereinafter "Subpoena"].

<sup>2</sup> Email from Roy Fredrickson, Dep't of Vet. Affairs Off. of Inspector Gen., to Comm. staff (May 27, 2015) [hereinafter "May 27 Email"].

<sup>3</sup> See Instructions for Responding to a Committee Subpoena ¶ A.14, *accompanying* Subpoena, *supra* note 1 [hereinafter "Subpoena instructions"].

cooperation with the Committee's investigation and does not fully comply with the subpoena, the Committee will have no choice but to explore other means of enforcing its right to the entirety of the subpoenaed material. I will address these matters in detail below.

**a. The VA OIG's compliance with the Committee's subpoena is deficient.**

For over two years, the VA OIG examined allegations of opioid over-prescription, abuse of authority, and potential drug diversion at the Tomah VAMC. In March 2014, the VA OIG administratively closed the inspection without making its findings public because it apparently valued more greatly the VA employees' "reputation and privacy" than the health and welfare of the veterans they serve.<sup>4</sup> About four months after the VA OIG closed the inspection without a publicly transparent report, Jason Simcakoski, a veteran receiving treatment at the Tomah VAMC, died in the care of the same VA employees subject to the VA OIG inspection.<sup>5</sup> In January 2015, Candace Delis took her father, Thomas Baer, to the Tomah VAMC for treatment. He later passed away after neglect and delay at the facility and Ms. Delis has said that she would not have taken her father to the Tomah VAMC if she had known about the VA OIG's secret report.<sup>6</sup>

Since January 2015, the Committee has been investigating allegations of abuse of authority, opioid over-prescription, whistleblower retaliation, veterans' deaths, and the VA OIG's health care inspection concerning the Tomah VAMC.<sup>7</sup> Over the ensuing months, the Committee made multiple attempts to secure the VA OIG's voluntary cooperation with this inquiry—particularly by requesting information necessary for the Committee to carry out its investigation.<sup>8</sup> Throughout these attempts at accommodation, the Committee sought to understand the VA OIG's particularized concerns with specific documents requested by the Committee.<sup>9</sup> The VA OIG refused to engage in this process with specificity. Because the VA

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<sup>4</sup> "Tomah VAMC: Examining Quality, Access, and a Culture of Overreliance on High-Risk Medications": *J. Hearing before the S. Comm. on Homeland Sec. & Governmental Affairs & the H. Comm. on Vet. Affairs*, 114th Cong. (2015) (prepared statement of John D. Daigh).

<sup>5</sup> See Aaron Glantz, Opiates Handed Out Like Candy to 'Doped-Up' Veterans at Wisconsin VA, *Reveal*, Jan. 8, 2015, <https://www.revealnews.org/article-legacy/opiates-handed-out-like-candy-to-doped-up-veterans-at-wisconsin-va/>.

<sup>6</sup> Donovan Slack, *Lawmakers want hearing in Tomah*, GREEN BAY PRESS GAZETTE, Feb. 13, 2015.

<sup>7</sup> See Letter from Ron Johnson & Thomas R. Carper, S. Comm. on Homeland Sec. & Governmental Affairs, to Richard J. Griffin, Dep't of Vet. Affairs Off. of Inspector Gen. (Apr. 29, 2015) [hereinafter "Apr. 29 Letter"].

<sup>8</sup> See Letter from Sen. Ron Johnson, Chairman, S. Comm. on Homeland Security & Governmental Affairs, to Hon. Richard J. Griffin, Deputy Inspector Gen., Office of Inspector Gen., U.S. Dep't of Veterans Affairs (Jan. 14, 2015) (on file with Comm.); Letter from Sen. Ron Johnson, Chairman, S. Comm. on Homeland Security & Governmental Affairs, to Hon. Richard J. Griffin, Deputy Inspector Gen., Office of Inspector Gen., U.S. Dep't of Veterans Affairs (Feb. 25, 2015) (on file with Comm.); Letter from Sen. Ron Johnson, Chairman, S. Comm. on Homeland Security & Governmental Affairs, to Hon. Richard J. Griffin, Deputy Inspector Gen., Office of Inspector Gen., U.S. Dep't of Veterans Affairs (Mar. 11, 2015) (on file with Comm.) [hereinafter "Mar. 11 Letter"]; Letter from Sen. Ron Johnson, Chairman, S. Comm. on Homeland Security & Governmental Affairs, to Hon. Richard J. Griffin, Deputy Inspector Gen., Office of Inspector Gen., U.S. Dep't of Veterans Affairs (Apr. 20, 2015) (on file with Comm.) [hereinafter "Apr. 20 Letter"].

<sup>9</sup> See Mar. 11 Letter, *supra* note 8; Apr. 20 Letter, *supra* note 8.

OIG refused to fully cooperate on a voluntary basis, the Committee had no choice but to resort to the compulsory process. As the Chairman of the Committee, I issued a subpoena to Mr. Griffin, as Deputy Inspector General, on April 29, 2015, for four categories of documents.<sup>10</sup> Ranking Member Carper supported this subpoena.<sup>11</sup>

On May 29, 2015, Roy Fredrikson, the Deputy Counselor to the Inspector General, wrote to Committee staff that the VA OIG had completed its production of documents.<sup>12</sup> Mr. Fredrikson certified that the production “is complete and accurate to the best of [his] knowledge and belief.”<sup>13</sup> Mr. Fredrickson also wrote that the VA OIG had redacted several categories of information from the material produced, including:

- “[I]nformation protected under 38 U.S.C. Sections 5701, 5705, and 7332”;
- “[I]nformation that might identify a patient”;
- “[I]nformation that might associate specific testimony with witnesses who were promised confidentiality”; and
- “[D]raft reports and communications between IG employees addressing the course of the inquiry or the interpretation of evidence [that] has [*sic*] been redacted under the deliberative process privilege.”<sup>14</sup>

Mr. Fredrikson further wrote that the VA OIG had withheld two categories of documents, including:

- “1,812 pages of patient progress notes”; and
- “[A]ll communications by and between OIG counsels and OIG personnel [that] has [*sic*] been withheld under both the attorney client and deliberative process privileges.”<sup>15</sup>

Of this material cited by Mr. Fredrikson as redacted or withheld, the Committee only agreed to the protection of patient-specific information.<sup>16</sup> The statutory barriers cited by Mr. Fredrikson—38 U.S.C. §§ 5701, 5705, and 7332—have already been addressed in prior correspondence with the VA OIG.<sup>17</sup> The common-law privileges asserted by Mr. Fredrikson—the deliberative process privilege and the attorney-client privilege—are not always binding upon a congressional inquiry. Further, Mr. Fredrikson failed to acknowledge an entire category of subpoenaed material—“[a]ll reports closed administratively by the Department of Veterans Affairs Office of Inspector General between January 1, 2006, and March 17, 2015.”<sup>18</sup> The VA

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<sup>10</sup> See Subpoena, *supra* note 1.

<sup>11</sup> See Apr. 29 Letter, *supra* note 7.

<sup>12</sup> May 27 Email, *supra* note 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See Apr. 29 Letter, *supra* note 7; Subpoena, *supra* note 1.

<sup>17</sup> See Mar. 11 Letter, *supra* note 8; Apr. 20 Letter, *supra* note 8.

<sup>18</sup> Subpoena, *supra* note 1.

OIG has not produced a single report to the Committee, but instead has asserted that its posting of redacted reports on its website suffices.<sup>19</sup>

In reviewing the VA OIG's response to the subpoena, and in weighing the Committee's growing need for the information, I find that the VA OIG's compliance with the subpoena is deficient.

**b. The VA OIG's generalized reasons for noncompliance with the subpoena are insufficient.**

As I have explained several times to the VA OIG, the Committee is willing to accept appropriate and limited redactions of patient-specific medical information. Beyond that narrow set of information, the Committee expects that the VA OIG to produce all subpoenaed material. In his email dated May 27, 2015, Mr. Fredrikson raised four generalized bases for redacting and withholding information in response to the Committee's subpoena: the deliberative process privilege, the attorney-client privilege, federal statutes, and promises of "confidentiality." The VA OIG has not provided sufficient information to support the generalized assertions of the privilege, and the statutory and "confidentiality" bases are without merit. I will address each basis in turn.

***1. The VA OIG's generalized assertion of the deliberative process privilege is not appropriate.***

Mr. Fredrikson's May 27 email and the June 4 letter from Mr. Griffin cited the deliberative process privilege as a basis for withholding and redacting documents in response to the Committee's subpoena.<sup>20</sup> The deliberative process privilege is a common-law privilege that "disappears" in the face of potential government misconduct.<sup>21</sup> Given the allegations concerning the Tomah VAMC, and the need for a full and thorough Congressional investigation, the VA OIG's generalized assertion of the deliberative process privilege is inappropriate.

The VA OIG has informed the Committee that it is withholding draft material and has redacted information from documents produced to the Committee on the basis of the deliberative process privilege. However, the VA OIG has provided no privilege log, as required by the subpoena, and offered no specificity with respect to the documents that it has withheld or redacted on the basis of the deliberative process privilege. Moreover, the VA OIG has provided no legal analysis in the May 27 email supporting its basis for withholding or redacting information in the face of a congressional subpoena.

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<sup>19</sup> Letter from Richard J. Griffin, Dep't of Vet. Affairs Off. of Inspector Gen., to Ron Johnson, S. Comm. on Homeland Sec. & Governmental Affairs (June 4, 2015) [hereinafter "VA OIG June 4 Letter"]; E-mail from Catherine Gromek, Dep't of Vet. Affairs Off. of Inspector Gen., to Comm. staff (Apr. 22, 2015).

<sup>20</sup> May 27 Email, *supra* note 2; VA OIG June 4 Letter, *supra* note 19.

<sup>21</sup> *In re Sealed Case (Espy)*, 121 F.3d 729, 745-46 (D.C. Cir. 1997).

As a final attempt to allow the VA OIG to articulate with specificity the documents that it is withholding or has redacted on the basis of the deliberative process privilege, the Committee will accept a privilege log—with all the information required in the subpoena’s instructions<sup>22</sup>—and an accompanying memorandum of points and authorities supporting the VA OIG’s assertion of this privilege by 5:00 pm. on July 21, 2015. In addition, to the extent that any documents withheld or redacted on the basis of the deliberative process privilege have been withheld or redacted on the basis of executive privilege, the assertion of executive privilege must be made by the appropriate Executive Branch official. However, without more specificity, I cannot accept the VA OIG’s generalized assertion of the deliberative process privilege.

**2. *The VA OIG’s generalized assertion of the attorney-client privilege is not appropriate.***

Mr. Fredrikson’s May 27 email also cited the attorney-client privilege as a basis for withholding documents in the face of the Committee’s subpoena.<sup>23</sup> Like the deliberative process privilege, the attorney-client privilege is a common-law privilege not rooted in the Constitution.<sup>24</sup> The recognition of this narrow judge-made privilege is a matter of discretion for a congressional committee utilizing its constitutional investigative authority.<sup>25</sup> Since the 1950s, congressional committees have exercised discretion in recognizing the attorney-client privilege, finding in 1977 that precedents “fully sustain rejecting a claim of attorney-client privilege if it impedes in any manner whatsoever the necessary inquiries of the Congress.”<sup>26</sup> Given the Committee’s need for all relevant material concerning the Tomah VAMC and the absence of a privilege log from the VA OIG, the VA OIG’s generalized assertion of the attorney-client privilege is inappropriate.

The mere fact that the communication includes an attorney does not automatically make the communication privileged under the attorney-client privilege.<sup>27</sup> The attorney must be acting as an attorney and the communication must be for the purposes of securing legal services.<sup>28</sup> The attorney-client privilege, therefore, does not apply “to legal advice given by an attorney acting outside the scope of his or her role as [an] attorney.”<sup>29</sup> From the information available to the Committee, it is not clear that all material withheld by the VA OIG on the basis of the attorney-client privilege meets this standard.

As with the deliberative process privilege, the VA OIG has withheld documents subpoenaed by the Committee on a generalized assertion of the attorney-client privilege without

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<sup>22</sup> See Subpoena instructions, *supra* note 3, ¶ A.14.

<sup>23</sup> May 27 Email, *supra* note 2.

<sup>24</sup> Morton Rosenberg, *When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry* (2009).

<sup>25</sup> See, e.g., Glenn A. Beard, *Congress v. the Attorney-Client Privilege A “Full and Frank Discussion,”* 35 Am. Crim. L. Rev. 119, 122-27 (1997).

<sup>26</sup> *Id.*

<sup>27</sup> Rosenberg, *supra* note 24, at 39.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

providing a privilege log as required by the subpoena or providing any specificity with respect to the material withheld. The VA OIG's May 27 email offered no legal analysis supporting the VA OIG's assertion of the attorney-client privilege. The absence of this information prevents me from fully assessing the VA OIG's assertion of the privilege with particularity. As currently invoked, the VA OIG's assertion of the attorney-client privilege is too broad.

As a final attempt to allow the VA OIG to articulate its assertion of the attorney-client privilege with specificity, the Committee will accept a privilege log—with all the information required in the subpoena's instructions<sup>30</sup>—and an accompanying memorandum of points and authorities supporting the VA OIG's assertion of this privilege by 5:00 pm. on July 21, 2015. Without more specificity, however, the VA OIG's generalized assertion of the attorney-client privilege is overly broad and I cannot accept such a blanket invocation of the privilege.

***3. Federal veterans statutes do not prohibit the VA OIG from producing documents pursuant to a Congressional subpoena.***

Mr. Fredrikson's May 27 email asserted three federal veterans statutes as a basis for the VA OIG's noncompliance with the Committee's subpoena—38 U.S.C. §§ 5701, 5705, and 7332.<sup>31</sup> Mr. Griffin's letter accompanying the white paper made a similar argument.<sup>32</sup> In both communications, the VA OIG asserted that the authority to release these records is vested in the VA secretary, not the Office of Inspector General.<sup>33</sup> I am disappointed that the VA OIG continues to rely on these arguments to support its decision to redact and withhold information from the Committee. I addressed these matters previously in a letter to Mr. Griffin dated March 11, 2015.<sup>34</sup>

As I explained in my March 11 letter, two of the statutes the VA OIG cites as barriers to compliance with the Committee's oversight contain express exceptions for producing information to Congress. Specifically, 38 U.S.C. § 5705(b)(4) provides that “[n]othing 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.”<sup>35</sup> As noted several times before, the Committee has jurisdiction pursuant to Rule XXV of the Standing Rules of the Senate and S. Res. 73 (114<sup>th</sup> Congress).<sup>36</sup> Likewise, 38 U.S.C. § 5701(b)(3) allows for the disclosure of records “when required by any department or other agency of the United States Government.”<sup>37</sup>

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<sup>30</sup> See Subpoena instructions, *supra* note 3, ¶ A.14.

<sup>31</sup> May 27 Email, *supra* note 2.

<sup>32</sup> VA OIG June 4 Letter, *supra* note 19.

<sup>33</sup> May 27 Email, *supra* note 2; VA OIG June 4 Letter, *supra* note 19.

<sup>34</sup> See Mar. 11 Letter, *supra* note 8, at 6-7.

<sup>35</sup> 38 U.S.C. § 5705(b)(4) (emphasis added).

<sup>36</sup> S. Rule XXV(k); S. Res. 73 § 12, 114<sup>th</sup> Cong. (2015).

<sup>37</sup> 38 U.S.C. § 5701(b)(3)

In addition, as I have reiterated to the VA OIG multiple times, the Committee is willing to accommodate its specific concerns over the dissemination of private veteran healthcare information, including information covered by § 7332.<sup>38</sup> The schedule of the subpoena itself notes that the Committee is “willing to accommodate the Department of Veterans Affairs Office of Inspector General by accepting appropriate redactions of veteran-specific health information or by accepting an *in camera* review of veteran-specific health material.”<sup>39</sup> Ranking Member Carper and I also made that clear in our letter to Mr. Griffin accompanying the subpoena.<sup>40</sup> Given these circumstances, the blanket assertion that these three federal statutes prevent the VA OIG’s compliance with the subpoena is unfounded and a disingenuous basis for refusing to comply fully with the subpoena.

Moreover, I have already addressed in prior correspondence the argument that the VA OIG has no authority to release this information.<sup>41</sup> The Committee has subpoenaed material in the current custody, possession, and control of the VA OIG. To require the VA to approve the VA OIG’s release of information pursuant to a congressional subpoena would contravene the text and spirit of the Inspector General Act.<sup>42</sup> Even accepting the VA OIG’s position, however, it is incumbent upon the VA OIG as the subpoenaed party to take all necessary steps to comply with the subpoena’s requirements. It is not clear that has occurred in this case.

***4. Promises of confidentiality are not appropriate bases for redacting information in the face of a congressional subpoena.***

Mr. Fredrikson’s email of May 27 also noted that the VA OIG redacted information due to promises of “confidentiality.”<sup>43</sup> Although Mr. Fredrikson provided no statutory or regulatory basis for this assertion, I assume that this assertion is rooted in the VA OIG’s authority under the Inspector General Act. As I have explained to the VA OIG several times, the Inspector General Act makes abundantly clear 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.”<sup>44</sup> While I recognize the importance of confidentiality for investigative purposes, the Committee has a great need for this material. In this case, I find that the Committee’s need for a full record necessitates the production of this information in accordance with the VA OIG’s obligation under the Inspector General Act.

In sum, I have carefully considered the common-law privileges, statutes, and other barriers that the VA OIG asserts prevent its full compliance with the Committee’s subpoena. With respect to the common-law privileges, the VA OIG has not provided a privilege log, as required by the subpoena, or any supporting legal arguments. In the absence of this information,

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<sup>38</sup> Mar. 11 Letter, *supra* note 8.

<sup>39</sup> Subpoena, *supra* note 1.

<sup>40</sup> See Apr. 29 Letter, *supra* note 7.

<sup>41</sup> See Mar. 11 Letter, *supra* note 8, at 6-7.

<sup>42</sup> See 5 U.S.C. app § 5(e)(3).

<sup>43</sup> May 27 Email, *supra* note 2.

<sup>44</sup> 5 U.S.C. app. § 5(e)(3).

the VA OIG's broad and generalized assertions of these privileges are inappropriate. In addition, for the reasons that I have previously articulated to the VA OIG, I do not believe the statutes prevent its compliance with the subpoena. Finally, the Inspector General Act does not permit the VA OIG from redacting information to Congress on the basis of "confidentiality." Accordingly, there is no valid basis for redacting and withholding the material responsive to the Committee's subpoena beyond the veteran-specific medical information that the subpoena expressly exempts.

**c. The VA OIG's release of 140 previously closed health care inspections on its website does not satisfy the terms of the Committee's subpoena.**

Additionally, the VA OIG is noncompliant with item 2 on the subpoena schedule, which requires the VA OIG to produce "[a]ll reports closed administratively by the Department of Veterans Affairs Office of Inspector General between January 1, 2006, and March 17, 2015."<sup>45</sup> The VA OIG has implied that its publication of 140 previously-unreleased health care inspection reports, with redactions, on its website suffices as compliance with this item.<sup>46</sup> There are two reasons why this justification is inadequate and the VA OIG's actions are insufficient to comply with the subpoena's terms.

First, by its plain language, the subpoena is not limited solely to the VA OIG's health care reports. Given the VA OIG's predilection for issuing nonpublic reports, it is probable that there are other types of reports closed administratively by the VA OIG between January 1, 2006, and March 17, 2015. The subpoena covers this material as well. Moreover, it is not clear that the 140 health care reports published by the VA OIG are the entire universe of health care reports closed administratively. Neither Mr. Griffin nor any employee of the VA OIG has certified that the VA OIG has published *all* reports closed administratively by the VA OIG.

Second, the 140 health care inspection reports posted on the VA OIG's website contain redactions—appropriate for public dissemination—but inapplicable when requested by Congress. As explained to the VA OIG several times, and reiterated above, the statutes protecting public disclosure of certain information have express exemptions for disclosing information to Congress.<sup>47</sup> Accordingly, even if the 140 health care reports were the entire universe of reports closed administratively between January 1, 2006, and March 17, 2015, and if the Committee accepted public posting as a production pursuant to the subpoena, the redactions are without merit for purposes of compliance with the Committee's subpoena.

The VA OIG has justified withholding OIG reports from Congress on the basis that they are "technically available" if Members of Congress request the reports through the Freedom of Information Act.<sup>48</sup> The VA OIG has provided no legal analysis supporting the position that an Executive Branch agency may comply with a congressional subpoena via the Freedom of Information Act—undoubtedly because no such support exists. The VA OIG's position ignores

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<sup>45</sup> Subpoena, *supra* note 1, item 2.

<sup>46</sup> VA OIG June 4 Letter, *supra* note 19.

<sup>47</sup> See Mar. 11 Letter, *supra* note 8.

<sup>48</sup> Donovan Slack, *Newly released VA reports include cases of veteran harm, death*, USA Today, Apr. 29, 2015.



the requirements of the Inspector General Act and displays a fundamental misunderstanding of the position of the VA OIG in our system of government. For the reasons above, the VA OIG is noncompliant with the subpoena's requirement to produce *all* reports closed administratively by the VA OIG from January 1, 2006, to March 17, 2015.

**d. The VA OIG has inappropriately redacted information beyond veteran-specific medical information.**

In Mr. Griffin's cover letter accompanying the white paper, he noted that the VA OIG consciously redacted records "consistent with the legal concerns and restrictions raised in [the VA OIG's] February 27, 2015, letter."<sup>49</sup> Mr. Griffin failed to mention that I considered and addressed these "legal concerns and restrictions" in my letters to him dated March 11, 2015, and April 20, 2015.<sup>50</sup> The VA OIG's decision to redact information knowing that the Committee would not accept it suggests a dangerous disregard for the congressional investigative authority.

The Committee is not seeking and has not requested veterans-specific medical information.<sup>51</sup> The Committee offered to allow appropriate and limited redactions for veterans-specific medical information to protect the sensitive health information of patients seeking treatment at the Tomah VAMC. The VA OIG has taken advantage the Committee's accommodation, redacting information beyond veterans-specific medical information to include internal VA OIG communications and even publicly available news articles.<sup>52</sup> As discussed above, there is no basis for these redactions, which I previously considered and addressed, and they appear to be a calculated, bad-faith effort to obstruct an ongoing congressional investigation.

**e. The VA OIG made little effort to produce information transcribed from interview tapes as "inaudible."**

The white paper and the accompanying cover letter express the VA OIG's belief that it went to great lengths to respond to the Committee's subpoena.<sup>53</sup> I am disappointed that it took the issuance of a subpoena to force the VA OIG's cooperation with the Committee's investigation. Even in complying with the subpoena, it appears that the VA OIG made little effort to overcome a minor difficulty in producing this material. The VA OIG preferred to leave the production incomplete rather than take reasonable and appropriate steps to fully satisfy the Committee's subpoena.

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<sup>49</sup> VA OIG June 4 Letter, *supra* note 19.

<sup>50</sup> Mar. 11 Letter, *supra* note 8; Apr. 20 Letter, *supra* note 8.

<sup>51</sup> Apr. 29 Letter, *supra* note 7; Subpoena, *supra* note 1.

<sup>52</sup> *See, e.g.*, Dep't of Vet. Affairs Off. of Inspector Gen. production of pursuant to S. Comm. on Homeland Security and Governmental Affairs subpoena (Apr. 29, 2015) at bates number 1409-1434.

<sup>53</sup> VA OIG June 4 Letter, *supra* note 19; DEP'T OF VET. AFFAIRS OFF. OF INSPECTOR GEN., ANALYSIS OF THE EVIDENCE SUPPORTING THE FINDINGS OF THE VA OFFICE OF INSPECTOR GENERAL, OFFICE OF HEALTHCARE INSPECTIONS ADMINISTRATIVE CLOSURE OF ITS INSPECTION OF COMPLAINTS REGARDING THE TOMAH, WISCONSIN, VA MEDICAL CENTER (June 4, 2015).

In particular, a number of the VA OIG interview transcripts produced to the Committee contain passages of material that were marked “inaudible” by the interview transcriber. It is unclear what effort, if any, the VA OIG took to attempt to ascertain what was said during the inaudible portions of the transcripts, but the large passages of “inaudible” transcription render these passages useless and impede the ability of the Committee to fully understand the material. Most troubling, it appears that interviews were transcribed *after* the Committee subpoenaed the VA OIG, meaning that the VA OIG could have produced the raw audio recordings to the Committee but instead chose to produce incomplete transcripts. To date, the VA OIG has made no effort to supplement its production of the transcripts with properly transcribed passages or to produce the original-source audio recordings for the Committee to conduct its own transcription. Because an audio recording falls within the definition of a “document” as defined in the instructions accompanying the Committee’s subpoena,<sup>54</sup> I ask that you please produce the original-source audio recordings of the interviews by 5:00 pm. on July 21, 2015.

#### **f. Conclusion**

The Committee on Homeland Security and Governmental Affairs is conducting a comprehensive investigation of allegations of opioid over-prescription, abuse of authority, veterans’ deaths, a culture of fear, whistleblower retaliation, and the VA OIG’s health care inspection concerning the Tomah VAMC. Since early February 2015, the Committee has attempted to secure the VA OIG’s voluntary cooperation with this inquiry. I sent the VA OIG five letters requesting its voluntary cooperation with the Committee’s work. My staff has had numerous telephone and email communications with VA OIG staff. In late April 2015, after weeks of attempting to secure the VA OIG’s voluntary assistance, I was given no choice but to resort to issuing a bipartisan subpoena to compel its cooperation.

Since then, the VA OIG has shown a contemptuous disregard for the Committee’s investigation. The VA OIG has withheld and redacted information beyond that agreed upon by the Committee. It has reasserted arguments supporting its noncompliance that I have previously rejected. The VA OIG office has drafted and released a “white paper” criticizing the Committee and attacking whistleblowers and victims of the Tomah VAMC. In short, the VA OIG has shown little willingness to support and fully comply with the Committee’s constitutional duties of Executive Branch oversight. These actions have a real and detrimental effect on the scope, substance, and pace of the Committee’s investigation into the tragedies of the Tomah VAMC.

As detailed above, I have reviewed the VA OIG’s production in response to the Committee’s subpoena, as well as the VA OIG correspondence with me and Committee staff. The VA OIG has failed to provide a privilege log, as required by the Committee’s subpoena, or any legal analysis supporting its assertions of the deliberative process and attorney-client privileges. The VA OIG has failed to produce all reports closed administratively, as required by

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<sup>54</sup> See Subpoena instructions, *supra* note 3, ¶ B.1 (“The term ‘document’ in the subpoena, the schedule, or the instructions means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to . . . electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings). . .”).

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the terms of the subpoena, and its posting of a subset of reports on its website does not suffice to satisfy the subpoena. In addition, the VA OIG has redacted information knowing that I do not accept the bases for these redactions. Finally, the VA OIG has not made a good-faith to produce the original-source audio recordings of transcripts with portions that the VA OIG marked as “inaudible.”

For all the reasons herein, the VA OIG is not in full compliance with the Committee’s subpoena dated April 29, 2015. Accordingly, please produce all documents and communications responsive to the subpoena as soon as possible but no later than 5:00 pm. on July 21, 2015. As a final attempt to resolve all ambiguity surrounding the VA OIG’s response to the Committee’s subpoena, I will accept the following information and material by 5:00 pm. on July 21, 2015:

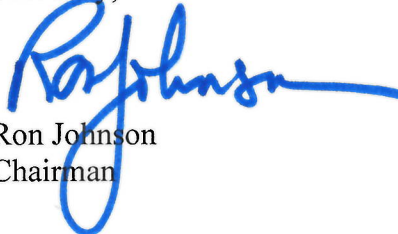
- All original-source audio recordings of interviews conducted by the Department of Veterans Affairs Office of Inspector General during its health care inspection of the Tomah VAMC; and
- A privilege log—containing all the information required in the instructions accompanying the subpoena<sup>55</sup>—and a memorandum of points and authorities supporting the VA OIG’s assertions of privilege or a basis for withholding information, including but not limited to the deliberative process and attorney-client privileges.

At that time, I will consider all applicable information to evaluate the VA OIG’s assertion of privilege, and the VA OIG’s overall compliance with the Committee’s subpoena.

I am hopeful that you will provide effective leadership to the VA OIG and new direction toward full and unfettered cooperation with the Committee’s investigation. If, however, the VA OIG continues its current path of noncompliance and obstruction, you should know that the Committee will be forced to resort to alternative means to enforce its right to the production and possession of all subpoenaed material.

Thank you for your attention to this important matter.

Sincerely,



Ron Johnson  
Chairman

cc: The Honorable Thomas R. Carper  
Ranking Member

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<sup>55</sup> See Subpoena instructions, *supra* note 3, ¶ A.14.