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CHAPTER 297. PROTECTION OF PRIVACY IN PERSONNEL RECORDS

1. SCOPE

This chapter contains the policy, procedures and instructions applicable to the protection of individual privacy in personnel records in the custody of VA. The procedures contained in this chapter are applicable only to "systems of records" as defined in paragraph 4 below.

2. POLICY

Within the guidelines of part 5 CFR 297, VA will maintain only those personnel records that are relevant and necessary to its mission and that are published in the Federal Register as notices describing all systems of records which it maintains on individuals.

3. REFERENCES

- a. Privacy Act of 1974 (Pub. L. 93-579).
- b. OPM's Guide To Personnel Record Keeping
- c. MP-6, part V, supplement No. 1.5.
- d. OPM's Guide to Processing Personnel Actions
- e. 5 CFR 293, 297 and 5 USC 552

4. DEFINITIONS

a. For the purposes of this paragraph, "personnel record" means any item, collection, or grouping of information that contains a name, identifying number or other identifying particular assigned to an employee, former employee or applicant.

b. "Systems of records" means a group of any records from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual and is under the control of the agency. NOTE: Uncirculated personal notes, papers and records which are created, retained, or discarded at a supervisor's discretion, which are seen by no one else, and over which the agency exercises no control or dominion are not considered agency records within the meaning of the Privacy Act. When any of these notes, papers or records are used to justify a personnel action, they are then to be included in an appropriate system of records, subject to the provisions of this chapter.

5. SAFEGUARDING PERSONNEL RECORDS

a. Responsibility. The Human Resources Management (HRM) Officer shall be responsible for providing protection and accountability and for ensuring accuracy and timeliness of records, including automated records and reports, maintained by the HRM Office. The HRM Officer will assure that employees who have access to personal information receive appropriate training in safeguarding personal privacy. The field station Director, the HRM officer and operating officials are responsible for ensuring the same degree of protection, accountability, accuracy and timeliness for personnel records maintained in operating offices. Records in operating offices are maintained in accordance with the provisions of MP-6, part V, supplement No. 1.5, chapter 2.

b. Physical Security. Personnel records may be maintained or stored only where facilities or conditions are adequate to prevent unauthorized access. Whenever personnel records are not under the personal control of an authorized person they will be stored in a locked metal filing cabinet or secured in a storage system of equivalent or greater physical security. VA Form 4520, Personnel Folder Charge Card, will be inserted in place of the record whenever it is removed from the file. The chargeout card will reflect the date the record was removed and the person to whom it was released. Personnel records include any reports which contain personal information on specified individual employees. This policy also applies to personnel records maintained in operating offices.

6. MAINTENANCE AND USES OF PERSONNEL RECORDS

a. Maintenance of Personnel Records: No personnel record shall be maintained in a record system other than those systems for which notices have been published in the Federal Register either by the Office of Personnel Management or by VA. Those systems relating to employee personnel records are as follows:

(1) Systems of Records Covered by the OPM (Published annually in the Federal Register)

(a) General Personnel Records. Includes the Official Personnel Folder, service and employee record cards, incentive awards files, training files, retirement records, and permanent medical records.

(b) Employee Performance File System Records. Includes annual performance appraisals and supporting documents, performance standards, Individual Development Plans, performance counseling notes, copies of supervisory appraisals used in merit promotion action, and supervisory/managerial extension files.

(c) Records of Adverse Actions and Actions Based on Unacceptable Performance. Includes evidence files related to processing adverse actions and actions based on unacceptable performance. These records include copies of the notice of proposed action, materials relied on by the agency to support the reasons in the notice, replies by the employee, statement of witnesses, hearing notices, reports, and agency decisions.

(d) Executive Branch Public Financial Disclosure Reports and Other Ethics Programs Records. Includes financial information covering assets and liabilities of employee required to file statements by the Ethics in Government Act of 1978.

(e) Recruiting, Examining and Placement Records. Includes the personal qualifications statement, selective placement records, and applicant supply file.

(f) Personnel Research and Test Validation Records. Includes information on education and employment history, test scores, questionnaires and interview data.

(g) Applicant Race, Sex, National Origin, and Disability Status Records. Includes name, Social Security number, date of birth, major field of study, current or former Federal employment status, work and education experiences, and race, sex, national origin, and disability status data.

(h) Confidential Statements of Employment and Financial Interests. Includes employment and financial interest statements.

(2) Systems of Records Covered by VA

(a) Applicants for Employment Under Title 38, United States Code. Includes information on education, training, employment history and appraisals of past performance.

(b) Employee Health Unit and Dispensary Record. Includes employee health record, daily reports of employees' emergency treatment and employees' injuries.

(c) Management Personnel Inventory. Includes data on service history, skills, qualifications, education, training, awards, performance evaluations and mobility. (Central Office only.)

(d) Individuals Serving on a Fee Basis or Without Compensation (Consultants, Attendings, Others) Personnel Records. Includes copies of applications, appointment letters and other documents and papers maintained in connection with these appointments.

(e) Employee Unfair Labor Practice Charges and Complaints, Negotiated Agreement Grievances and Arbitrations. Includes material pertinent to proceedings, needed for processing charges, complaints, grievances and arbitrations. (NOTE: Only where these files are retrieved by the name of the individual or by some identifying number or other identifier assigned to the individuals are the provisions of the Privacy Act of 1974 applied.)

(f) Grievance Records. Includes all documents relating to a grievance field under MP-5, part I, chapter 771 and MP-5, part II, chapter 8 or replacement.

(g) VA Employee Counseling Services Program Records. Includes documents related to employee visits to counselors, diagnosis, recommended treatment, prognosis and other notes or records of discussions held by a program counselor with employees, family members, or supervisors. May also include treatment documentation from Federal, State, local government,

private agencies, or institutions which have agreements with VA to provide employee counseling services. Stations will assure that other personnel records which they need are kept either as part of an approved system or maintained in such manner as not to constitute a system of records as defined above. For example notices of separation for probationers, which may not be filed as permanent records in the Official Personnel Folder, but must be retained in order to provide evidence that procedural requirements are met, should be retained in a chronological file so as not to constitute a system of records.

b. Uses of Information. Individuals who are asked to provide personal information will be informed of the authority which authorizes the solicitation, the reasons of requesting the information, how it may be used, and what the effects, if any, of not providing the information will be.

c. Disposal Procedures. The disposal and destruction of personnel records shall be in accordance with existing VA disposal schedules.

7. ACCESS TO RECORDS

a. General. Access to personnel records is limited to:

(1) VA operating and administrative officials when required by their official responsibilities and duties. These officials include EEO investigators and members of promotion panels;

(2) A person to whom the personnel record pertains;

(3) His or her representative designated in writing (VA Form 5571, Authorization To Disclose a Record in the Presence of a Third Party, may be used for this purpose). Reasonable identification of individuals requesting access, consistent with the nature of the record being disclosed, shall be required.

b. Employee's Access to Records. An employee or an employee's representative, designated in writing, may have access to his or her Official Personnel Folder and other personnel records, except as specified in 5 CFR 297 in the presence of an HRM office employee, and may have a copy made of all or any portion thereof.

c. Former Employee's Access to Records. If an Official Personnel Folder has been retired to the National Personnel Records Center (Civilian), the former employee will be referred to the OPM office nearest to the requester's residence. In the case of a written request that contains sufficient identifying data, the request will be forwarded to the OPM and the former employee so informed. FL 70-17, Acknowledgment of Request Under the Privacy Act, may be used for this purpose. If the request does not contain the necessary personal data needed by the OPM to locate the folder, the request will be returned to the individual with an explanation of what additional information is required by the OPM to process the request and the address of the nearest OPM office.

8. REQUESTS FOR CORRECTION OR AMENDMENT

a. An employee who believes the contents of a record pertaining to him or her to be inaccurate, irrelevant or incomplete may request a correction or amendment of the record. The request will be directed to the systems manager of the record as published in the system of records notice in the Federal Register and contain the information outlined in 5 CFR 297.208. The employee must then be informed within 10 working days that the record has been corrected or amended in accordance with the request, or if the request is denied, that it has been denied and

(1) The name of the systems manager who is responsible for the denial (NOTE: In the case of general personnel records of an active employee, this would be the HRM officer of the station maintaining the record);

(2) The date of the denial;

(3) The reason(s) for the denial as contained in 5 CFR 297; and

(4) The procedures for review of the denial by the Assistant Director for Agency Compliance and Evaluation, Office of Personnel Management, 1900 E Street, NW., Washington, DC 20415, for Governmentwide records under the jurisdiction of OPM, listed in subparagraph 6a(1) above, or by the Secretary of Veterans Affairs for personnel records under the jurisdiction of VA listed in subparagraph 6a(2) above. FL 70-18, Reply to Request Under the Privacy Act, may be used to inform the employee that the request for correction or amendment has been approved. If the request pertains to personnel records under the jurisdiction of VA, FL 70-20, Notification of Initial Refusal to Amend a Record, may be used to inform the employee of a denial.

b. In the event that the reviewing official also refuses to amend the record in accordance with the request, the employee will be advised (1) of the reason for the refusal; (2) of the employee's right to file a concise statement setting forth the reasons for disagreement and the procedures for filing such a statement; (3) that the statement, when filed, will be made available to anyone to whom the record is disclosed (and prior recipients of the record, if known) along with a brief statement by VA or OPM summarizing its reasons for refusing to amend the record if VA or OPM elects to file such a statement; and (4) of the right to seek judicial review of the refusal to amend the record.

c. When a record is corrected or amended, all previous recipients of that portion of the record will be notified of the corrected or amended portion to the extent that it is relevant to the recipients uses FL 60-19, Notification to Other Person or Agency of Amendment to a Record, may be used for this purpose.

9. DISCLOSURE OF PERSONNEL RECORDS

a. Policy. No information from personnel records, including those maintained by operating offices, may be released outside VA except as approved by the HRM officer or facility Director.

b. Written Consent. Except as provided by section 297.503 of OPM's Regulations, express written consent of the individual to whom the personnel record pertains will be obtained before any personal information may be disclosed. FL 70-21, Request for Individual's Consent To Disclose Records, may be used to the request consent.

c. Accounting for Disclosures. A written accounting will be maintained for all disclosures of personnel records except for official use within VA, or if required by the Freedom of Information Act. VA Form 70-5572, Accounting of Records/Information Disclosure Under Privacy Act, will be used for this purpose. The record shall include the date, nature and purpose of each disclosure, and the name and address of the person to whom the disclosure was made. This form will be retained by the HRM office for the life of the record or for 5 years after the disclosure was made, whichever is longer. The forms will be filed alphabetically within each calendar year. An accounting is not required for a disclosure for a routine use, as published in the Federal Register, if the disclosure can be reconstructed upon request of the employee. Records of disclosure will be made available to the employee, upon request, except for disclosure under 5 U.S.C. 522a(b)(7).

d. State Licensing Boards

(1) It is the policy of VA to cooperate with a State licensing board officially inquiring into the professional performance history of former VA personnel who are under the jurisdiction of that State board. Moreover, under special circumstances, it is also the policy of VA to notify a State licensing board of jurisdiction that a terminated health care professional has significantly failed to conform to generally accepted standards of clinical professional practice. In order to avoid any conflict with these disclosure policies, VA officials are not authorized to enter into any written or oral agreements which would prohibit or restrict the release of information to a State licensing board.

NOTE: The terms "terminated employee" or, "terminated health care professional employee" refer to any former employees whose employment required the maintenance of a current license or registration and whose professional clinical practice so significantly failed to conform to generally accepted standards of clinical professional practice as to raise reasonable concern for the safety of private sector patients. This VA disclosure policy applies to any former VA clinical professional, including one who has been discharged, separated, or terminated by VA, or, who has resigned or retired.

(2) Generally, most of the professional performance history on a terminated VA health care professional employee is contained in the Professional Standards Board Action Folder. This personnel record is considered to be a part of VA Privacy Act system of records entitled "29VA11, Physician, Dentist, and Supervisory Nurse Professional Standards Board Action File-VA" (see MP-1, Pt. II, Ch. 21, App. B). Other professional performance history on various terminated VA health care professional employees may be included in general personnel records systems such as the Official Personnel Folder. Thus, notwithstanding the above-stated policies of cooperation with State licensing boards, any disclosures of information from personnel records

without the prior written consent of the terminated employee must be consistent with the provisions of the Privacy Act of 1974 and in compliance with any other laws which may statutorily restrict the disclosure of various information.

(3) The following guidance is provided regarding the release of information.

(a) The Privacy Act permits VA to disclose information from personnel records without the prior written consent of the terminated employee when the head or an official of another agency or instrumentality of any governmental jurisdiction within or under the control of the United States and authorized by law to conduct civil or criminal law enforcement activities makes a written request to VA for the information in personnel records in the possession of VA and identifies the law enforcement activity for which the record is sought. 5 U.S.C. 522a(b)(7); 38 CFR 1.576(b)(7). A State licensing board qualifies as such a law enforcement instrumentality within the meaning of 5 U.S.C. 552a(b)(7). Accordingly, upon receipt of a written request for information regarding a terminated VA employee by the head or a supervisory official of a State licensing board which specifies the reasons for which the information is sought, VA shall, unless otherwise directed by VA Central Office, comply with such requests as expeditiously as possible.

(b) There may be circumstances when VA has personnel record information concerning a terminated VA health care professional which indicates that the termination was based on a significant failure to conform to generally accepted standards of clinical professional practice. VA may disclose this information to a State licensing board of jurisdiction even without a written request from the board relevant to this failure. Such disclosure is authorized under the Privacy Act by means of a "routine use." A "routine use" publicly identifies in the Federal Register those situations when agency personnel may disclose a record from a record system without the written consent of the individual to whom the record pertains. 5 U.S.C. 522a(b)(3). In the system of records, 29VA11, the system contains two routine uses, numbers 1 and 3, which permit the disclosure of information from the record to: (1) a State licensing board if the records indicate a potential civil or criminal violation of law; or (3) in those instances when the information is relevant to a State licensing board decision concerning the issuance of a license or registration. In the system of records covering general personnel records, OPM/GOVT-1, the system contains two routine uses, k and l, which permit the disclosure of information from the Official Personnel Folder to a State licensing board for the same reasons identified above.

(c) Information to be released to a State licensing board under the routine use provision will be limited to the individual's name, other identifying date (i.e., date of birth, license number, Social Security number), duty location, home address, and a general summary of the reasons why the agency terminated the employee, such as "the agency terminated Dr. X based on a significant failure to conform to generally accepted standards of clinical practice." Any further disclosures will be made with the written consent of the individual or pursuant to another authority, such as 5 U.S.C. 552a(b)(7).

(d) The Privacy Act and the due process clause of the United States Constitution require that the information disclosed to the State licensing board be reasonably accurate, timely, complete and relevant. U.S. Constitution amend. V, section 1; 5 U.S.C. 552a(e)(5) and (6). Therefore,

before the Director of the health care facility involved discloses any information to a State licensing board, reasonable steps should be taken to ensure that the information to be released is reasonably accurate, timely, complete and relevant.

(e) Personnel records may contain information concerning the medical treatment of veterans or other personal information relating to a veteran or dependent. Prior to release of information from personnel records to a State licensing board, VA must delete any information which is subject to the confidentiality provisions of 38 U.S.C. 5701(f), 7332; and 38 CFR 1.500, et seq. Specifically, identifying information (i.e., name and address) about a veteran or dependent, and identifying information relating to drug, alcohol, or sickle cell anemia treatment may not be disclosed to a State licensing board absent the specific written consent of the individual to whom the information pertains.

(f) A disclosure to a State licensing board is to be made by the Director of the health care facility involved. Disclosure to a State licensing board in the absence of a request from the State licensing board will be made only after approval for such disclosure has been obtained by the Director from the Deputy Under Secretary for Health and the Medical Inspector (10A6). Consultation with either of these officials may be sought prior to disclosure to a State licensing board, pursuant to an official request from the State licensing board, but is not required.

(g) The Privacy Act Officer at each facility will be responsible for ascertaining that the provisions of the Privacy Act are met and that all VA confidentiality statutes are complied with including the drug and alcohol treatment program regulations as they pertain to veterans and employees.

(h) Should the Director or Privacy Act Officer have questions regarding the appropriateness of a disclosure of information to a State licensing board, the Regional Counsel should be consulted.

10. FEES

VA will provide a copy of a record free of charge to an individual. Normally, this is accomplished when the record is created (e.g., SF's 50B, letters of reprimand, SF's 2809, grievance and complaint files, etc.). Requests from individuals for copies of records, not previously furnished, will be provided free of charge. Fees will be assessed for additional copies of records, previously furnished to individuals, in accordance with MP-1, part II, chapter 21.