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RECORDS PRESERVATION FOR TOBACCO LITIGATION

1. PURPOSE: This Veterans Health Administration (VHA) Directive provides guidance for the preservation of records relating the Federal suit against tobacco manufacturers

2. BACKGROUND

a. The United States has filed suit against various manufacturers of tobacco products to recover money paid by the Federal government for the care and treatment of smoking-related medical conditions and diseases.

b. As a normal part of the litigation, the Federal District Court Judge presiding over this case issued, on October 19, 1999, a First Case Management Order for Initial Scheduling Conference, which directed the parties to the litigation to undertake various actions.

c. In paragraph 7 of the Order, the Court specifically directed that: "Each party shall preserve all documents and other records containing information potentially relevant to the subject matter of this litigation. Each party shall also preserve any physical evidence or potential evidence and shall not conduct any testing that alters the physical evidence without notifying opposing counsel and, unless counsel stipulate to the test, without obtaining the Court's permission to conduct the test."

***NOTE:** The importance of this undertaking and the potential benefit to the United States merit this investment of resources VHA must provide. Compliance with document retention and evidence preservation provisions of the Court's order is mandatory and failure to comply could subject government employees to monetary and other sanctions.*

3. POLICY: It is VHA policy that VHA components are to preserve and not destroy or dispose of any documents or other records, including those recorded or stored electronically, which in any way relate to:

- a. The treatment of smoking-related conditions or diseases;
- b. Research on such diseases or conditions;
- c. Grants or other payments made for research in connection with cigarettes or the tobacco industry;
- d. Payment of benefits for smoking-related conditions;
- e. The provision of tobacco products or facilities to use tobacco products;

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- f. The sale or use of tobacco products, such as invoices showing the amount of tobacco products sold.
- g. Youth smoking;
- h. Nicotine and addiction;
- i. Cigarette design, including attempts to develop or market a potentially safer cigarette;
- j. Contacts between any officials, employees, agents, or servants of the Department of Veterans Affairs (VA), on the one hand, and any officials, employees, agents, or servants of any member of the cigarette-manufacturing industry, the Council for Tobacco Research (or its predecessor, the Tobacco Industry Research Committee), or the Tobacco Institute; and
- k. Any other records that, upon examination, may relate to the use of tobacco products.

4. ACTION

a. All VHA components must ensure that these documents and other records such as X-rays including those recorded or stored electronically, are not unintentionally or intentionally destroyed as part of normal agency records disposition procedures under the Federal Records Act. *NOTE: If, in the course of normal business activities, records in these categories are identified, they are to be catalogued and tracked so that they can be retrieved at a later date, if necessary.*

b. VHA facilities are to prepare a report, due January 4, 2000, directed to the Smoking Coordinator, Office of Public Health and Environmental Hazards (134), VHA Headquarters, through the VISN Director. See Attachment A for a sample format and the extensive information required.

c. Office of Public Health and Environmental Hazards (13) has the responsibility to:

(1) Provide the agency's and each components' retention policy related to how documents are maintained, for how long, and at which locations. Include any formal policy statements, regulations, or other applicable rules. If the agency has a designated record retention officer, identify that individual.

(2) Provide a description of VHA and each components formal or informal retention policies with respect to electronic mail (internal and external). Explain how electronic mail could be retrieved if necessary. Identify the burdens and costs associated with searching the electronic mail systems to identify and retrieve relevant e-mails.

(3) Identify any specific categories of missing materials, i.e., documents that cannot be located even though they should still exist and documents destroyed by accident such as by a fire.

d. The Office of the General Counsel (02) has the responsibility to:

(1) Indicate any privilege the agency intends to claim with respect to general categories of documents.

(2) Identify the agency counsel who will review the documents and create privilege logs, as well as the agency official who will review the documents and file the necessary affidavit asserting the privilege.

(3) Specify any regulations or statutes that may prevent the agency from producing certain documents or categories of information contained in relevant documents.

NOTE: Questions about whether particular records are subject to this order can be referred to the appropriate Regional Counsel or to the Office of the General Counsel at 202-273-6381 or 202-336-8629. If records subject to this order are inadvertently destroyed, the facility should notify the appropriate Regional Counsel and the Office of General Counsel immediately at 202-273-6381 or 202-336-8629.

5. REFERENCES: None.

6. FOLLOW-UP RESPONSIBILITY: The Office of Environmental Medicine (134) is responsible for the contents of this directive.

7. RESCISSION: This VHA Directive expires December 31, 2005.

S/ by Frances Murphy, M.D. for
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Acting Under Secretary for Health

Attachments

Distribution: CO: E-mailed 12/16/99
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ATTACHMENT A

INSTRUCTIONS FOR INDIVIDUALS CONDUCTING RECORDS SEARCHES

The attached sample format, (Att. B) and sample of completed format (Att. C) will assist in complying with the Court's order and the related request for information of the Department of Justice in the litigation filed by the United States against the tobacco industry, United States v. Philip Morris, Inc., et al. The Department of Veterans Affairs (VA) is a participant in this litigation and must assist by complying with this request for identification of documentary material in its possession which relates in anyway to tobacco or smoking. **NOTE:** *VA hopes to recover, through this litigation, some of the substantial sums it has expended in providing health care for smoking-related diseases. Amounts recovered on behalf of VA will be retained within VHA for medical care.*

Facility assistance in obtaining detailed information about these documents and other recorded material is critical. **NOTE:** *Keep in mind the following:*

1. The format is generally self-explanatory, and contains a sample of the completed format to clarify the kinds of information sought (see Att. C). **NOTE:** *To obtain copies of this format in electronic form, send the request to tobacco.issues@mail.va.gov.*
2. Err on the side of over-inclusion. In other words, adopt a broad view of the issue of tobacco and smoking at the VA and what may be relevant to it.
3. This search is not limited to a particular time period. It seeks relevant documents going back as far as 1950. This means documents in storage should also be included (described).
4. Keep in mind that the document identification required is very broad, and includes the relevant subject matter plus other documents that relate to the subject matter. For example, the document may focus on:
 - a. Budget information (relating to smoking cessation programs, construction of designated smoking areas; travel information (e.g., travel for attendance at smoking-related conferences).
 - b. Employee documents (journals, calendars, e-mails) relating to smoking-related work activities, attendance at a meeting regarding a change in the facility smoking policy; other files and documents anywhere in an employee's office area which might relate to smoking or tobacco. **NOTE:** *The preceding are not considered personal files which are exempt from discovery.*
5. Complete the identification of relevant records for the facility and return the completed reports by electronic mail to tobacco.issues@mail.va.gov no later than **January 4, 2000**. To the extent that this effort is not completed by January 4, 2000, provide:
 - a. All completed reports; and

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- b. A narrative explaining what remains to be done and a time frame for accomplishing it.

NOTE: Questions may be forwarded to this e-mail address.

ATTACHMENT B

SAMPLE FORMAT FOR FACILITY REPORT

NOTE: This report is to be prepared in Ariel 10 on 8 ½" x 11" bond paper. It is to contain a table of Contents. Each item will be addressed separately.

1. Identify the Veterans Integrated Services Network (VISN), or other component providing the information:

2. Contact Person Most knowledgeable about Documents

Name:

Address:

Phone:

Fax:

E-mail:

3. Identify Categories of Documents Related to Tobacco, Smoking, Tobacco Industry or Nicotine Addiction. Some possible categories include:

- a. Local policies on smoking and tobacco products (including related labor relations files).
- b. Congressional correspondence.
- c. Patient records and/or claim files.
- d. Research.
- e. Building regulations (e.g., anything related to designated smoking areas including engineering records, etc.).
- f. Contracts
- g. Programs (Smoking Cessation).
- h. Tobacco sales and purchases.
- i. Tobacco product distribution (including Voluntary Service records).
- j. Surveys.

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k. Labor unions and Veteran Service Organization(s) file(s).

l. Any other categories not listed. **NOTE:** *Generally describe the scope of the component's effort to identify documents (to include the individuals responsible for locating the documents; the individual(s) contacted during the course of the search; and the location(s) and database(s) actually searched).*

4. For each separate category of documentary material identified, provide the following information:

- a. Subject matter or category of document.
- b. Type of documents (files, correspondence, studies, etc.).
- c. Quantity (rough amount of shelf feet, inches and/or number of files) and content (a general description.).
- d. Location, and existence of index, if any.
- e. Format (computer files, hard copies, microfiche, etc.).

ATTACHMENT C

SAMPLE COMPLETED FACILITY REPORT

1. Identification of VISN (or other component)

VISN 100

2. Contact Person Most knowledgeable about Files

Name: John Doe
Address: VA Hospital, 1000 Main St., Any Town, 12345
Phone: 800-555-1234
Fax: 800-555-2345
E-Mail: John.Doe@VA.gov

3. Identification of relevant material. Generally describe the scope of the component's efforts to identify documents.

The Chief, Medical Service, Dr. John Doe, was asked by the facility Director to identify relevant documents. Dr. Doe sent an E-mail message to all employees who report to him (add the list of names). Four reported that they knew they had no documents, two reported that they searched their offices and found nothing; and...etc.

4. *NOTE: Information is to be provided for each separate category of documentation material identified. Category 1*

a. Subject Matter or Category of Document

Medical Records

b. Type of Documents

Patient records, correspondence, medical exams, diagnosis

c. Quantity and Content

Approximately 300,000 veterans are served by VISN 100. Individual patient records are collected on each patient (in some instances records on a patient may be found in more than one location). Patient records contain the responses to general inquiries about smoking practices of patients, attendance in smoking cessation programs, and diagnosis potentially related to the use of tobacco. An average patient file is approximately 1 inch thick.

d. Location and Existence of Index, if any

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Records located at individual hospitals and out patient facilities (17 hospitals, 50 Community-based Outpatient Clinics (CBOCs), one vet center). There are both electronic and paper indices.

e. **Format**

Generally patient records are paper files, with some data entered electronically on Veterans Health Information Systems and Technology Architecture (VISTA). Approximately 27 percent of the patient files for VISN100 may be obtained electronically. Files can (or cannot) be sorted electronically to identify patients who are smokers.

4. Category 2

a. **Subject Matter or Category of Document**

Research: Identify each research proposal and award individually Study on Methods for Smoking Cessation

b. **Type of Documents**

Applications, Awards, Studies, Findings. Budget Estimates, Publications etc.

c. **Quantity and Content**

Conducted a study over 3 years on best methods for smoking cessation. Funding for the project was \$1.2 million dollars. \$1.0 million of funding was provided by the Department of Veterans Affairs (VA). Results of study may be found in "Results of Smoking Cessation Programs in VISN 100." Documents related to this study fill three file-cabinet drawers in the offices of the two researchers. There are some related financial documents.

d. **Location**

Copies of the research and publications are on file in the offices of the researchers at the VA Hospital in Any Town. Budget files, applications and grant awards records are also on file at the hospital in the main file room on the seventh floor.

e. **Format**

All research publication materials are in hard copy. There are electronic copies of the abstracts of published reports and an inventory of them. There are indices of the abstracts and reports.

4. Continue from category 3 through all categories