



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

January 24, 2024

The Honorable Denis R. McDonough
Secretary
United States Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420

Re: OSC File No. DI-24-000312
Referral for Investigation—5 U.S.C. § 1213(c)

Dear Secretary McDonough:

I am referring to you for investigation a whistleblower disclosure of a violation of law, rule, or regulation, gross mismanagement, and a substantial and specific danger to public health at the U.S. Department of Veterans Affairs (VA), Veterans Health Administration (VHA), Lt. Colonel Charles Kettles VA Medical Center (Ann Arbor VAMC), Ann Arbor, Michigan. A report of your investigation of these allegations and any related matters is due to the U.S. Office of Special Counsel (OSC) on March 25, 2024.

██████████, a physician and former Chief of the Surgical Critical Care Service at Ann Arbor VAMC, who consented to the release of his name, reported allegations of patient safety concerns and violations of VHA regulations, Joint Commission standards, and statutory requirements. The allegations to be investigated include:

- Violations of VHA Directive 1220 requirements for the facility to have a designation of Inpatient Complex for inpatient invasive procedures;
- Violations of Joint Commission standards regarding documentation of complex or high-risk surgical procedures;
- Violations of the Health Insurance Portability and Accountability Act (HIPAA) caused by discussions of protected health information (PHI) in the public waiting room of the facility;
- Unauthorized access to VA computer systems by physician residents who have not had credentials approved by the VA; and
- Any additional or related allegations of wrongdoing discovered during the investigation of the foregoing allegations.

██████████ alleged multiple instances in which Ann Arbor VAMC failed to meet the criteria necessary to maintain its designation as an Inpatient Complex facility for inpatient invasive procedures. In relevant part, to maintain an Inpatient Complex designation, VHA Directive 1220 requires the facility to have “a formal call schedule for General Surgery and Specialty Service attending physicians” and requires “qualified inpatient coverage in house for all inpatients.” The Directive also mandates “a formal call schedule with 24/7 coverage by attending surgeon physicians, fellows, or residents in surgical discipline training programs, or trained APPs, available on-call within 15 minutes by phone and within 60 minutes on-site.” ██████████ alleged that the facility does not have a formal call schedule for attending surgeons, an adequate mechanism to identify available providers in emergency situations, and lacks the requisite inpatient provider coverage under VHA Directive 1220. According to ██████████, the lack of a formal call schedule has caused confusion among staff members on multiple occasions during emergency situations as to which attending surgeon is available to provide coverage. Further, he alleged that at the time of his resignation in December 2023, the facility still did not have a call schedule for staff members to locate available providers.

In addition, ██████████ alleged that staff members do not adhere to Joint Commission requirements regarding documentation of complex surgical procedures. Specifically, he noted that the Joint Commission requires providers to enter an operative report or a hand-written progress note into a patient’s file immediately after any high-risk surgical procedure. ██████████ alleged that Ann Arbor VAMC staff members routinely fail to comply with this requirement by failing to place operative reports into patient medical records, or complete hand-written progress notes in lieu thereof, immediately following complex procedures. ██████████ reported these alleged violations to the Joint Commission Office of Quality and Patient Safety in August 2023. However, he alleged that immediately following the Joint Commission review in September 2023, and continuing at least until the time of his resignation in December 2023, Ann Arbor VAMC staff members continued to neglect the requirement of including operative reports in patient files or completing hand-written progress notes following complex procedures.

██████████ further alleged that space restrictions at Ann Arbor VAMC have forced staff physicians to discuss PHI with patients in the waiting room of the facility. Specifically, ██████████ alleged that staff members regularly discuss sensitive information such as pre-operative diagnoses, surgery results, disease progression, and other PHI in the public waiting room area of the facility. He alleged that senior facility leadership is aware that the discussion of such PHI in the waiting room occurs frequently and could constitute violations of the Health Insurance Portability and Accountability Act (HIPAA), but he contended that the facility has taken no precautionary measures or implemented any safeguards to mitigate the disclosure of PHI.

Finally, ██████████ alleged that facility leadership, including Deputy Chief of Staff ██████████, has instructed physicians and staff members to use their credentials to log residents into VA computer systems when residents have not yet had their credentials

The Honorable Denis R. McDonough

January 24, 2024

Page 3

approved by the VA. Accordingly, [REDACTED] alleged that this practice has resulted in repeated instances of unauthorized access, or access in excess of authorization, to protected VA hospital computer systems.

Pursuant to my authority under 5 U.S.C. § 1213, I have concluded that there is a substantial likelihood that the information provided to OSC discloses a violation of law, rule, or regulation, gross mismanagement, and a substantial and specific danger to public health. Please note that specific allegations and references to violations of law, rule, or regulation are not intended to be exclusive. If, in the course of your investigation, you discover additional violations, please include your findings on these additional matters in the report to OSC. As previously noted, your agency must conduct an investigation of these matters and produce a report, which must be reviewed and signed by you. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the agency report, along with the whistleblower's comments and any comments or recommendations I may have, to the President and congressional oversight committees and making these documents publicly available.

Additional important requirements and guidance on the agency report are included in the attached Appendix, which can also be accessed at <https://osc.gov/Pages/DOW.aspx>. If your investigators have questions regarding the statutory process or the report required under 5 U.S.C. § 1213, please contact Catherine A. McMullen, Chief, Disclosure Unit, at (202) 804-7088 or cmcmullen@osc.gov for assistance. I am also available for any questions you may have.

Sincerely,



Karen Gorman
Acting Special Counsel

Enclosure

cc: The Honorable Michael J. Missal, Inspector General

APPENDIX

AGENCY REPORTS UNDER 5 U.S.C. § 1213

GUIDANCE ON 1213 REPORT

- OSC requires that your investigators interview the whistleblower at the beginning of the agency investigation when the whistleblower consents to the disclosure of his or her name.
- Should the agency head delegate the authority to review and sign the report, the delegation must be specifically stated and include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5).
- OSC will consider extension requests in 60-day increments when an agency evidences that it is conducting a good faith investigation that will require more time to complete.
- Identify agency employees by position title in the report and attach a key identifying the employees by both name and position. The key identifying employees will be used by OSC in its review and evaluation of the report. OSC will place the report without the employee identification key in its public file.
- Do not include in the report personally identifiable information, such as social security numbers, home addresses and telephone numbers, personal e-mails, dates and places of birth, and personal financial information.
- Include information about actual or projected financial savings as a result of the investigation as well as any policy changes related to the financial savings.
- Reports previously provided to OSC may be reviewed through OSC's public file, which is available here: <https://osc.gov/Pages/Resources-PublicFiles.aspx>. Please refer to our file number in any correspondence on this matter.

RETALIATION AGAINST WHISTLEBLOWERS

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their allegations. The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.

EXCEPTIONS TO PUBLIC FILE REQUIREMENT

OSC will place a copy of the agency report in its public file unless it is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 1219(a).

EVIDENCE OF CRIMINAL CONDUCT

If the agency discovers evidence of a criminal violation during the course of its investigation and refers the evidence to the Attorney General, the agency must notify the Office of Personnel Management and the Office of Management and Budget. 5 U.S.C. § 1213(f). In such cases, the agency must still submit its report to OSC, but OSC must not share the report with the whistleblower or make it publicly available. See 5 U.S.C. §§ 1213(f), 1219(a)(1).