

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

_____)	
GREG FANIN, on his)	
own behalf and on behalf of all)	
others similarly situated,)	
)	
Plaintiff,)	
)	Case No. _____
v.)	
)	
UNITED STATES DEPARTMENT OF)	
VETERANS AFFAIRS; R. James)	
NICHOLSON, in his Official Capacity as)	
Secretary of Veterans Affairs; and Robert)	
T. HOWARD, in his Official Capacities as)	
Assistant Secretary for Information and)	
Technology and Chief Information)	
Officer for Veterans Affairs,)	
)	
Defendants.)	
_____)	

COMPLAINT

COMES NOW PLAINTIFF, Greg Fanin and in support of his Complaint herein alleges as follows:

Nature of the Action

1. This is an action for declaratory and injunctive relief, money damages, and costs and attorney fees for Defendants' violations of the Privacy Act, 5 U.S.C. § 552a, the Administrative Procedures Act, 5 U.S.C. § 706 *et seq.*, the Federal

Information Security Management Act, 44 U.S.C. §§ 3541-3548, and other laws governing the disclosure and security of personal information possessed by the Executive Branch of the United States Government. Plaintiff represents at least 535,000 individuals whose personal and medical information has been misused and illegally disclosed by Defendants, causing Plaintiff and those similarly situated to suffer emotional trauma, pecuniary loss, and financial harm and placing them at imminent risk of identify theft, destruction of credit, and financial fraud.

JURISDICTION and VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 5 U.S.C. § 552a(g)(1), and 5 U.S.C. §§ 702, 703.

3. Venue is appropriate in this judicial district pursuant to 5 U.S.C. § 552a(g)(5) and 28 U.S.C. § 1391.

PARTIES

4. Plaintiff Greg Fanin is currently a member of the Alabama National Guard at the rank of Staff Sergeant. Mr. Fanin served on active military duty in Iraq in 1990-1991; in Jordan in 2003; in Qatar in 2004; and Iraq in 2006. Mr. Fanin has received medical services at VA hospitals on approximately ten to fifteen occasions since November 2001.

5. Defendant United States Department of Veterans Affairs (“VA”) is an executive department of the United States Government and is an “agency” for

purposes of the Privacy Act, the Administrative Procedures Act, and the Federal Information Security Management Act.

6. Defendant R. James Nicholson is the Secretary of the VA and is the official responsible for the proper execution and administration of all laws administered by the VA for the control, direction, and management of the Department, including the Privacy Act, the Federal Information Management Security Act, and statutes and regulations related to the use, handling, security, and disclosure of information.

7. Defendant Robert T. Howard is Assistant Secretary for Information and Technology and Chief Information Officer for VA. In this role, Mr. Howard is responsible for, among other things, the acquisition and management of information technology systems of the VA and is responsible for overseeing the operation of VA's computer systems and telecommunication networks that support the VA's medical and benefit activities.

STATEMENT OF FACTS

8. On or before January 22, 2007, an unidentified employee of the VA stationed at the Birmingham (Ala.) VA Medical Center reported a portable computer hard drive missing. The hard drive was used to back up information contained on the employee's office computer. The missing hard drive and data storage device or devices contained a copy of a collection or grouping of personal

information pertaining to at least 535,000 persons. The information (“the Personal Information”) contained on the hard drive was individual identifying information including, but not limited to, names and social security numbers. Some of the Personal Information was not encrypted.

9. In addition to the Personal Information, Defendants report that the missing hard drive also contained Medicare billing record information and billing codes for 1.3 million doctors (“the Medical Information”).

10. Defendants did not publicly announce the unlawful disclosure of the Personal Information and the Medical Information until February 2, 2007, when it issued a general press release. *See* www1.va.gov/opa/pressrel/index.cfm. Defendants initially announced that records pertaining to about 48,000 may have been compromised. *Id.* On February 11, 2007, Defendants corrected their initial announcement and issued a press release saying that the missing data files may have included information on over 535,000 individuals. *Id.*

11. Plaintiff has contacted the VA, via the public information line established by the VA for this incident, and was told the VA did not have a complete list of affected individuals, could not determine whether his information had been released, and advised Plaintiff to contact a credit bureau to determine if he was the victim of identity theft or other financial fraud.

12. The unidentified employee who reported the missing hard drive has been placed on administrative leave by Defendants, and a criminal investigation into the missing hard drive has been opened.

13. Defendants have failed to locate and secure the missing hard drive and have failed to account for its whereabouts, and the whereabouts of the Personal Information and the Medical Information, both before and after it was reported missing.

14. Defendants have been repeatedly informed of recurring, systemic, and fundamental deficiencies in its information security, but failed to effectively respond.

15. Defendants knew, or should have known, that the VA had long-standing security deficiencies that threatened Plaintiffs' privacy rights, but did not ensure correction or mitigation of those deficiencies and were not in compliance with the Privacy Act as well as other federal laws relating to information security at the time of the security breach that caused the missing hard drive. In 2003, a study by the General Accounting Office gave the VA a failing grade for its security practices. In 2006, the United States House of Representative's Committee on Government Reform gave the VA an "F" in its annual report card relating to information security. The Defendants had ample warnings on the security deficiencies, yet Defendants failed to establish appropriate safeguards to ensure the

security and confidentiality of personal information within their control, including the Personal Information and the Medical Information.

16. The unauthorized and unconsented disclosure of an individual's name and Social Security number creates a substantial risk of identify theft and invasion of privacy. An individual's Social Security number is the most useful identifier for retrieving information from public record databases, financial institutions, and credit bureaus. Armed with an individual's name and Social Security number, an identity thief is able to quickly and easily steal an identity, whereas, without such information, the task is difficult, time consuming, and costly.

17. Recent nationwide studies confirm that, on average, victims of identity theft spend hundreds of hours in personal time and hundreds of dollars in personal funds to resolve their resulting credit issues. See www.ftc.org or www.idtheftcenter.org.

18. Defendants are still unable to locate the missing hard drive and with each passing day the chance increases for the Plaintiff and those similarly situated to become victims of identify theft.

CLASS ACTION ALLEGATIONS

19. Plaintiff maintains this action on behalf of himself and all individuals associated with the Personal Information and the Medical Information, as described above.

20. The members of the putative class are so numerous that joinder of individual claims is impracticable. Moreover, there are significant questions of fact and issues of law common to the members of the putative class. The case involves a single missing hard drive. These common issues include whether Defendants failed to establish appropriate administrative, technical, and physical safeguards to ensure the security and confidentiality of the missing hard drive and to protect against known and anticipated threats or hazards to the security and integrity of its contents, whether such failure was willful and intentional, whether the putative class members were adversely affected, and whether they incurred actual damages as result.

21. Plaintiff's claims are typical of the claims of the putative class. Plaintiff and all members of the putative class have been adversely affected and damaged in that their private information has been unlawfully compromised.

22. The proposed class representative will fairly and adequately represent the putative class because he has the class members' interest in mind, his individual claims are co-extensive with and identical to those of the class, and because he is represented by qualified counsel experienced in class action litigation of this nature.

23. A class action in this instance is superior to other available methods for the fair and efficient adjudication of these claims since individual joinder of the

claims of all members of the putative class is impracticable. This action is manageable as a class. Most members of the class are without the financial resources necessary to pursue this matter. Even if some members of the class could afford to litigate their claims separately, such a result would be unduly burdensome to the courts in which the individualized cases would proceed. Individual litigation increases the time and expense of resolving a common dispute concerning Defendants' actions toward an entire group of individuals. Class action procedures allow for far fewer management difficulties in matters of this type and provide the unique benefits of unitary adjudication, economy of scale and comprehensive supervision over the entire controversy by a single court.

24. The putative class should be certified pursuant to Rule 23(b)(1) of the Federal Rules of Civil Procedure because inconsistent or varying adjudications with respect to individual class members would establish incompatible standards of conduct for Defendants to follow.

25. The putative class should be certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure because Defendants have acted on grounds generally applicable to the putative class thereby making final injunctive relief and corresponding declaratory relief appropriate with respect to the claims raised by the class.

26. The putative class should be certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure because questions of law and fact common to class members will predominate over questions affecting individual members and a class action is superior to other methods for fairly and efficiently adjudicating the controversy and causes of actions described in the Complaint.

FIRST CLAIM FOR RELIEF

Violation of the Privacy Act

27. Plaintiff reasserts the allegations set forth in Paragraphs 1 through 26 above and incorporates them by reference into this First Claim for Relief.

28. The Personal Information and the Medical Information are groups of records previously under the control of the VA 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.

29. Defendants have committed and continue to commit multiple violations of the Privacy Act, 5 U.S.C. § 552a, with respect to the Personal Information and the Medical Information. Such violations include, but are not limited to: 1) disclosing the Personal Information and the Medical Information without the prior written consent of the individuals to which the information pertains; 2) failing to establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in

maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to the Privacy Act and the penalties for noncompliance; and 3) failing to establish appropriate administrative, technical and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained.

30. Defendants' violations of the Privacy Act were improper, unlawful, willful, intentional, and done with flagrant disregard for the rights of Plaintiff and those similarly situated.

31. Defendants' unlawful disclosure and misuse of the Personal Information and the Medical Information occurred (1) through VA employees improper access and removal of data files containing the Personal Information and the Medical Information; (2) through the transfer by VA personnel of the Personal Information and Medical Information to external and unprotected disks and/or laptop computers; (3) through the alleged incompetence by a VA employee or theft of these disks and/or laptop computers by a third party or parties, whose identities may never be known; and (4) through Defendants' failure to institute and enforce

procedures and safeguards mandated by law for the protection the Personal Information and the Medical Information.

32. After learning of the foregoing unauthorized disclosures and violations, Defendants were intentional in failing to provide prompt and accurate notification of the disclosures to the affected individuals despite knowledge of the substantial risk of serious harm to the personal and financial security of the affected individuals as a result of the disclosures.

33. Each of Defendants' Privacy Act violations caused Plaintiff and those similarly situated adverse effects, including, but not limited to, embarrassment, inconvenience, unfairness, mental distress, emotional trauma, pecuniary damages, and the threat of current and future substantial harm from identity theft.

34. Plaintiffs have suffered actual damages as a result of Defendants' Privacy Act violations. Defendants' unauthorized disclosure of the Personal Information and the Medical Information, in particular individuals' names linked to their Social Security number, has caused Plaintiffs to suffer emotional trauma, pecuniary loss, and financial harm and placed them at imminent risk of identify theft, destruction of credit, corruption of their credit files, financial fraud, and/or plundering of bank accounts and retirement funds, and will continue to do so until remedied by Defendants.

35. Defendants' unauthorized and unconsented disclosures of the Personal Information and the Medical Information create the imminent and substantial risk of identity theft to which Plaintiff and those similarly situated have been exposed is the direct result of Defendants' failure to: (1) establish appropriate administrative, technical and physical safeguards to ensure the security and confidentiality of records; (2) to protect against any anticipated threats or hazards to the security and integrity of these records; and (3) to promptly take reasonable measures to correct the disclosures, including but not limited to, providing affected veterans with prompt and accurate notice of the disclosures.

36. The real threat of identify theft and similar adverse effects of VA's illegal actions and inactions under the Privacy Act requires affirmative actions by Plaintiff and those similarly situated to recover peace of mind, emotional stability, and personal security including, but not limited to, frequently obtaining and reviewing credit reports, bank statements, and other similar information, obtaining credit watch services, and closing financial accounts. Plaintiff and those similarly situated have, and will continue to, suffer actual damages for the foreseeable future.

37. Plaintiff and those similarly situated are entitled to monetary relief, declaratory and injunctive relief, and the costs of this action together with reasonable attorney fees.

SECOND CLAIM FOR RELIEF

Violation of the Administrative Procedures Act

38. Plaintiff reasserts the allegations set forth in Paragraphs 1 through 37 above and incorporates them by reference into this Second Claim for Relief.

39. Defendants possess and control personal and medical information of Plaintiff and millions of other veterans and citizens. Defendants have repeatedly demonstrated an inability or unwillingness to implement, or callous disregard for, fundamental procedures to provide minimally acceptable safeguards for the personal and private information in its possession.

40. Defendant Nicholson and Defendant Howard are responsible in their official capacity for safeguarding citizen's private information under VA control pursuant to applicable laws, including the Privacy Act, the Administrative Procedures Act, and the Federal Information Security Management Act, but have been unable or unwilling to require compliance with those laws.

41. Defendants' actions and inactions in disclosing without consent and failing to safeguard and secure the Personal Information and the Medical Information are arbitrary, capricious and otherwise not in accordance with law, including in particular the Privacy Act, 5 U.S.C. § 552a, the Federal Information Security Management Act, 44 U.S.C. §§ 3541-3548, the Trade Secrets Act, 28 U.S.C. § 1905, and regulations and guidelines issued thereunder.

42. Plaintiff and those similarly situated suffered, and continue to suffer, harm as a result of Defendants' actions and from actions improperly withheld or unreasonably delayed.

43. Plaintiff and those similarly situated are entitled to monetary relief, declaratory and injunctive relief, and the costs of this action together with reasonable attorney fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and all others similarly situated, pray that the Court grant the following relief:

- (1) Declare that Defendants' acts and omissions constitute a willful and intentional failure to establish appropriate safeguards to ensure the security and privacy of the Personal Information and the Medical Information to protect against known and anticipated threats or hazards to the security and integrity of these records in violation of the Privacy Act and the Administrative Procedure Act;
- (2) That this Court order injunctive relief enjoining, prohibiting, and preventing Defendants from continuing to operate without appropriate safeguards to ensure the security and privacy of the Personal Information and the Medical Information and similar information and

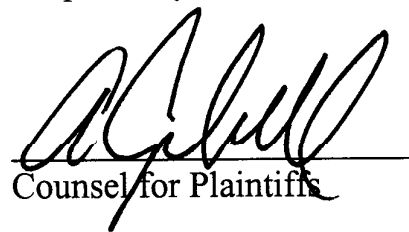
to protect against anticipated threats or hazards to the security and integrity of these records;

- (3) That this Court permanently enjoin Defendant VA, its officers, agents, employees, and those acting for and with them, from accessing, viewing, handling, disclosing, or in any way transferring any record or system of records subject to Privacy Act requirements at the Birmingham (Ala.) VA Medical Center until an independent panel of experts finds that adequate information security has been established and implemented by VA, unless such activity is explicitly allowed by Court order and under supervision of persons independent of VA, such supervision to be at VA expense;
- (4) That this Court enjoin Defendant VA, its officers, agents, employees, and those acting for and with them from removing any device capable of storing, containing, or transferring any record or system of records, including, but not limited to, laptop computers, portable hard drives, memory stick or similar devices, and "iPods" and similar devices, from property under VA's supervision and control at the Birmingham (Ala.) VA Medical Center until and unless VA demonstrates that adequate information security has been established to the Court's satisfaction;

- (5) That this Court grant to Plaintiff and the Class judgment against Defendant VA for damages in an amount no less than \$1,000.00 for each individual who was adversely affected by Defendants' Privacy Act violations;
- (6) That this Court grant to Plaintiffs' their costs and reasonable attorneys' fees; and
- (7) That this Court grant such additional relief as the Court deems proper and just.

Dated: February 15, 2007

Respectfully submitted,




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JURY DEMAND

Plaintiff hereby requests trial by struck jury in this cause of action.



OF COUNSEL

PLEASE SERVE THE FOLLOWING DEFENDANTS BY CERTIFIED MAIL:

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