§ 75.113 Data breach.

Consistent with the definition of data breach in §75.112 of this subpart, a data breach occurs under this subpart if there is a loss or theft of, or other unauthorized access to, other than an unauthorized access incidental to the scope of employment, data containing sensitive personal information, in electronic or printed form, that results in the potential compromise of the confidentiality or integrity of the data.

Secretary means the Secretary of Veterans Affairs or designee.

Sensitive personal information, with respect to an individual, means any information about the individual maintained by an agency, including the following:

(1) Education, financial transactions, medical history, and criminal or employment history.

(2) Information that can be used to distinguish or trace the individual's identity, including name, Social Security number, date and place of birth, mother's maiden name, or biometric records.

Unauthorized access incidental to the scope of employment means access, in accordance with VA data security and confidentiality policies and practices, that is a by-product or result of a permitted use of the data, that is inadvertent and cannot reasonably be prevented, and that is limited in nature.

VA means the Department of Veterans Affairs.

(Authority: 38 U.S.C. 501, 5724, 5727)
§ 75.114 Scope of employment, to data containing sensitive personal information, in electronic or printed form, that results in the potential compromise of the confidentiality or integrity of the data, constitutes a data breach. In addition to these circumstances, VA also interprets data breach to include circumstances in which a user misuse sensitive personal information to which he or she has authorized access. The following circumstances do not constitute a data breach and, consequently, are not subject to the provisions of this subpart:

(a) An unauthorized access to data containing sensitive personal information that was determined by the Secretary to be incidental to the scope of employment, such as an inadvertent unauthorized viewing of sensitive personal information by a VA employee or a person acting on behalf of VA.

(b) A loss, theft, or other unauthorized access to data containing sensitive personal information that the Secretary determined to have no possibility of compromising the confidentiality or integrity of the data, such as the inability of compromising the confidentiality or integrity of the data because of encryption or the inadvertent disclosure to another entity that is required to provide the same or a similar level of protection for the data under statutory or regulatory authority.

(Authority: 38 U.S.C. 501, 5724, 5727)

§ 75.114 Accelerated response.

(a) The Secretary, in the exercise of his or her discretion, may provide notice to records subjects of a data breach and/or offer them other credit protection services prior to the completion of a risk analysis if:

(1) The Secretary determines, based on the information available to the agency when it learns of the data breach, that there is an immediate, substantial risk of identity theft of the individuals whose data was the subject of the data breach, and providing timely notice may enable the record subjects to promptly take steps to protect themselves, and/or the offer of other credit protection services will assist in timely mitigation of possible harm to individuals from the data breach; or

(2) Private entities would be required to provide notice under Federal law if they experienced a data breach involving the same or similar information.

(3) In situations described in paragraphs (a)(1) or (a)(2) of this section, the Secretary may provide notice of the breach prior to completion of a risk analysis, and subsequently advise individuals whether the agency will offer additional credit protection services upon completion, and consideration of the results, of the risk analysis, if the Secretary directs that one be completed.

(b) In determining whether to promptly notify individuals and/or offer them other credit protection services under paragraph (a)(1) of this section, the Secretary shall make the decision based upon the totality of the circumstances and information available to the Secretary at the time of the decision, including whether providing notice and offering other credit protection services would be likely to assist record subjects in preventing, or mitigating the results of, identity theft based on the compromised VA sensitive personal information. The Secretary’s exercise of this discretion will be based on good cause, including consideration of the following factors:

(1) The nature and content of the lost, stolen or improperly accessed data, e.g., the data elements involved, such as name, social security number, date of birth;

(2) The ability of an unauthorized party to use the lost, stolen or improperly accessed data, either by itself or with data or applications generally available, to commit identity theft or otherwise misuse the data to the disadvantage of the record subjects, if able to access and use the data;

(3) Ease of logical data access to the lost, stolen or improperly accessed data in light of the degree of protection for the data, e.g., unencrypted, plain text;

(4) Ease of physical access to the lost, stolen or improperly accessed data, e.g., the degree to which the data is readily available to unauthorized access, such as being in a dumpster readily accessible by members of the general public;