

EMPOWER OVERSIGHT

Whistleblowers & Research



December 16, 2021

Via Electronic Transmission: VAOIGFOIA-Appeals@va.gov

Department of Veterans Affairs
Office of Inspector General
Office of Counselor (50C)
810 Vermont Avenue, NW
Washington, DC 20420

RE: Freedom of Information Act Appeal
FOIA Request Number 21-00357

Dear Office of Counselor:

Introduction

With respect to Freedom of Information Act (“FOIA”)¹ Request Number 21-00357, Empower Oversight Whistleblowers & Research (“Empower Oversight”)² appeals the initial determination of the FOIA Staff of the Office of Inspector General of the Department of Veterans Affairs (“VA-OIG”) that certain portions of the records requested by Empower Oversight are exempt from disclosure under FOIA Exemptions b(5) and b(6). Empower Oversight respectfully requests that the VA-OIG review its FOIA Staff’s exemption claims and correct any errors that are identified.

¹ The FOIA is codified at 5 U.S.C. § 552.

² Empower Oversight is a nonpartisan, nonprofit educational organization, which is dedicated to enhancing independent oversight of government and corporate wrongdoing. It works to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and seeks to hold those authorities accountable to act on such reports by, among other means, publishing information concerning the same.

Moreover, based upon the circumstances, it appears that the VA-OIG FOIA Staff either misinterpreted the scope of Empower Oversight's request for records, failed to conduct a search that was reasonably calculated to uncover all relevant documents, or somehow failed to produce all of the responsive, non-exempt records that they located during their records search. In any event, please review of the search performed by the VA-OIG FOIA Staff and the correct any deficiencies.

Background

1. Empower Oversight's FOIA Request

On August 6, 2021, Empower Oversight submitted to the Department of Veterans Affairs ("VA") a FOIA request that is designed to shed light on the VA's compliance with Congressional oversight requests for information concerning important issues of public integrity surrounding the VA's administration of veterans' educational benefits. Specifically, Empower Oversight's FOIA request seeks "All Records Relating to the Following":

1. The Department of Veteran Affairs' receipt of, discussions related to, processing of, and response to Senator Grassley's April 2, 2021 letter to Secretary McDonough and/or his July 20, 2021 letter to Secretary McDonough.
2. Communications between the Department of Veterans Affairs OIG ("VA OIG") and Department employees relating to the VA OIG's "administrative investigation to evaluate the allegations that Ms. Charmain Bogue, Executive Director of VBA's Education Service, may have violated applicable conflict of interest laws or regulations concerning her official duties and her spouse's business interests."
3. Internal communications within the Department (other than [with the] VA OIG), as well as communications between Department employees and any other persons, relating to the VA OIG's investigation referenced above.
4. Any ethics opinion or recusal involving Ms. Bogue, including any related to VES, SVA, and any other entities with which her husband had a financial relationship.
5. Calendar entries and notes of any meetings between Ms. Bogue and VES/SVA representatives, including Barrett Bogue.
6. The alleged proposal to suspend Thomas Murphy for 10 days, including:
 - a. the February 25, 2019 proposal by Principal [Deputy] Under Secretary for Benefits Margarita Devlin,

- b. the March 18, 2019 decision memo by Under Secretary for Benefits Paul Lawrence upholding the proposed suspension;
- c. the April 30, 2019 decision memo summary for Secretary Wilkie from Assistant Secretary Sitterly, relative to the proposed suspension;
- d. all communications relating to Assistant Secretary Sitterly's April 30, 2019 decision memo summary, including the May 7, 2019 approval thereof; and
- e. any resulting letter(s) of admonishment.

7. Communications between Department employees and any Congressional staff, member of the House of Representatives, or Senators, regarding the issues described above.³

As background for its August 6th FOIA request, Empower Oversight advised that:

We write today regarding the appearance of a conflict of interest by Department of Veterans Affairs staff administering our veterans' educational benefits and the Department's refusal to timely comply with related congressional oversight requests.

Through the GI Bill, Americans have long honored our veterans' service by providing them well-earned educational opportunities. As with all large government programs, the administration of these benefits is subject to a vast bureaucratic process—a process that should be free from improper influence, and even the appearance of improper influence.

However, according to whistleblower reports received by Empower Oversight, as well as witness statements and documents reportedly provided to Congress, an official at the Veterans Benefits Administration ("VBA"), Ms. Charmain Bogue, the Executive Director of VBA's Education Service, allegedly failed to recuse herself from VBA activity involving her husband's clients and his employers, Veterans Education Success ("VES") and Student Veterans of America ("SVA").

Four months ago, Senate Judiciary Committee Ranking Member Charles Grassley asked the Department a number of questions about Ms. Bogue's participation in the announcement of an enforcement action advocated by her husband's clients and employers. The enforcement action, announced on March 9, 2020, would have denied veterans access to GI Bill benefits at certain educational institutions.

³ Empower Oversight's August 6th FOIA request is attached as Exhibit 1 (citations omitted).

Months later the Department “backed down” on July 2, 2020 after deciding that no such action was warranted.

However, the announcement had done its damage. Days before the March 9 announcement, a Department official warned others to safeguard advanced notice of the announcement because publicly traded companies operated some of the impacted schools. Yet, market sensitive details were reportedly released during the trading day to VES, one the employers paying Ms. Bogue’s husband, and may have been leaked in the preceding weeks. The leaks appear to have negatively impacted stock prices, and the select few with inside knowledge of the Department’s plans could have profited from that information.

Moreover, Senator Grassley’s letter also raised serious questions about several senior VBA officials, including Ms. Bogue’s boss and current Acting Undersecretary of Benefits Thomas Murphy. Mr. Murphy would have been responsible for ensuring that Ms. Bogue complied with ethics requirements and recused herself from any matters involving or otherwise benefiting her husband’s employers. However, according to whistleblower allegations described in the letter, Mr. Murphy has a history of alleged failure to follow controlling ethical standards, having been personally proposed for suspension for accepting gifts from outside stakeholders.

Yet the Department has refused to provide any meaningful response in the four months since receiving these inquiries from the Ranking Member of the Senate Judiciary Committee. Previous administrations have attempted to improperly slow-walk or ignore requests for information from the opposite political party when that party does not constitute a majority in Congress.

To address such concerns, a policy adopted on July 20, 2017 and formally cited by the Justice Department’s Office of Legal Counsel (“OLC”) on February 13, 2019 requires that each Executive Branch agency “respect the rights of all individual Members [of Congress], regardless of party affiliation, to request information about Executive Branch policies and programs” and “use its best efforts to be as timely and responsive as possible in answering such requests.”

Unless the current administration has rescinded the policy referenced by OLC without informing the public, the Department of Veterans Affairs appears to be in violation by essentially ignoring serious questions from the Ranking Member of the Senate Judiciary Committee for four months. That manifestly does not constitute “best efforts,” particularly when some of the questions are relatively simple to answer.

For example, according to new whistleblower information provided to Empower Oversight, the first question in Senator Grassley’s letter should have been an easy one. Senator Grassley asked whether Acting Undersecretary Thomas Murphy was ever recommended for a suspension for improperly accepting gifts. According to the new information, the answer appears to be “yes”—on February 25, 2019. This detail should have been readily accessible in the Department’s files and known to senior Department leadership, yet the Department has failed to provide it to the Senate for four months.

The proposed suspension would have been for 10 days due to an alleged violation of 5 C.F.R. § 2635.202(b)(2) in connection with accepting a NASCAR pass valued in excess of \$500 while the VBA had an ongoing contract with NASCAR and without seeking guidance from a Department ethics official. According to whistleblower disclosures, however, on May 7, 2019, former Secretary Robert Wilkie accepted the recommendation of Assistant Secretary for Human Resources Dan Sitterly to reduce the proposed suspension to a mere admonishment for failure to seek ethics advice.

Assistant Secretary Sitterly allegedly cited the fact that three separate similar instances involving Department executives and NASCAR as evidence that the rules on accepting such gifts must be unclear. Failing to hold senior leadership accountable for following rules on which Department officials receive regular training merely because multiple executives also did so would be an engraved invitation to misconduct.⁴

2. VA’s Response(s) to Empower Oversight’s FOIA Request

By email dated August 16, 2021, the VA’s Office of Information and Technology (“VA-OI&T”):

- Acknowledged receipt of Empower Oversight’s FOIA request;
- Assigned it tracking number 21-08250-F; and
- Advised that the information that Empower Oversight seeks “falls under the purview of” the Veterans Benefits Administration, the Office of Assistant Secretary for Congressional & Legislative Affairs, and the VA-OIG; and that VA-OI&T had thus

⁴ See, Exhibit 1, (citations omitted).

referred Empower Oversight's FOIA request to those offices for processing and response.⁵

On August 23, 2021, the VA-OI&T submitted to Empower Oversight a letter that "updated" its August 16th acknowledgment email.⁶ The VA-OI&T's August 23rd letter advised that the VA received Empower Oversight's FOIA request on August 8, 2021; that VA-OI&T was revising the request's tracking number to 21-08450-F; and that the records that Empower Oversight requested are in the possession of VA's Office of the Executive Secretary and VA-OIG, and thus the VA-OI&T is "redirecting" the request to those offices "for a file search and a direct response."⁷

Also on August 23, 2021, the VA-OIG acknowledged receipt of Empower Oversight's August 6th FOIA request, assigned it tracking number 21-00357-FOIA, and advised that it had received the request on August 16, 2021.⁸ Later, by letter dated September 13, 2021, the VA-OIG notified Empower Oversight that, as a consequence of the existence of "unusual circumstances" as defined by Subsection a(6)(B)(i) of the FOIA,⁹ it was invoking its authority to extend the deadline for rendering a determination under the FOIA by an additional 10 days.¹⁰

By letter dated September 29, 2021, the VA-OIG advised that it was providing redacted copies of records responsive to the first and second items of Empower Oversight's request, *i.e.*:

1. The Department of Veterans Affairs' receipt of, discussions related to, processing of, and response to Senator Grassley's April 2, 2021 letter to Secretary McDonough and/or his July 20, 2021 letter to Secretary McDonough.
2. Communications between the Department of Veterans Affairs OIG ("VA OIG") and Department employees relating to the VA OIG's "administrative investigation to evaluate the allegation that Ms. Charmain Bogue, Executive Director of VBA's Education Service, may have violated applicable conflict of interest laws or regulations concerning her official duties and her spouse's business interests."¹¹

⁵ VA-OI&T's August 16th email is attached as Exhibit 2.

⁶ VA-OI&T's August 23rd letter is attached as Exhibit 3.

⁷ See, Exhibit 3.

⁸ VA-OIG's August 23rd letter is attached as Exhibit 4.

⁹ As justification, the VA-OIG stated that, in order to respond to Empower Oversight's FOIA request, it "needed to coordinate with other agency components." See, Exhibit 5.

¹⁰ VA-OIG's September 13th letter is attached as Exhibit 5.

¹¹ VA-OIG's September 29th letter is attached as Exhibit 6.

The VA-OIG went on to explain that the 16 pages of records that it was producing had been redacted pursuant to FOIA Exemptions b(5) and b(6).¹² Further, the VA-OIG expressly clarified that the grounds for its purported FOIA Exemption b(5) redactions was the deliberative process privilege.¹³

**Based upon the Circumstances, It Appears that the VA-OIG FOIA Staff
Failed to Conduct a Records Search that Was Reasonably
Calculated to Uncover All Relevant Documents**

The legal standard governing the search for records responsive to FOIA requests requires an agency to conduct a search that is “reasonably calculated to uncover all relevant documents.”¹⁴ Courts have found searches to be sufficient when, among other things, they are based on a reasonable interpretation of the scope of the subject matter of the request.¹⁵

It appears unlikely that the VA-OIG FOIA Staff performed an adequate search for records responsive to the first two items of Empower Oversight’s August 6th FOIA request. Despite the broad scope of the two items of Empower Oversight’s request, the VA-OIG FOIA Staff claims to have located only 16 pages of records. Those records relate exclusively to the first half of the first item of Empower Oversight’s request. However, other assertions by the VA-OIG (*e.g.*, assertions about an investigation of Ms. Bogue included in a May 26, 2021, letter to Senator Grassley) strongly suggest the existence of other records that are responsive to the first two items of the request.¹⁶ Thus, either VA-OIG FOIA Staff misunderstood the request, did not devise and execute an adequate search for records, and/or located responsive records that they did not produce. Accordingly, please review the FOIA Staff’s records search.

In response to the first and second items of Empower Oversight’s August 6th FOIA request, *i.e.*, VA-OIG FOIA Number 21-00357, the VA-OIG’s FOIA Staff stated:

We have enclosed redacted copies of the discussion pertaining to item 1 and 2. However, portions of the information have been redacted pursuant to FOIA exemption (b)(5) and (b)(6).¹⁷

¹² See, Exhibit 6.

¹³ See, Exhibit 6.

¹⁴ Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

¹⁵ Larson v. Dep’t of State, 565 F.3d 857, 869 (D.C. Cir. 2009) (affirming the adequacy of a search based on the agency’s reasonable determination regarding records being requested).

¹⁶ Indeed, assuming the accuracy of the VA-OIG’s assertions to Senator Grassley, it is likely that records responsive to the third and fourth items of Empower Oversight’s FOIA request are in the possession of the VA-OIG’s Office of Investigations.

¹⁷ See, Exhibit 6.

In other words, the FOIA Staff advised Empower Oversight that it had located records “pertaining” to both items of Empower Oversight’s request.¹⁸ The VA-OIG FOIA Staff did not state that they were unable to locate records responsive to either of the items.¹⁹

Further, the VA-OIG FOIA Staff advised that “portions” of the responsive records had been “redacted” pursuant to FOIA Exemptions b(5) and b(6).²⁰ They did not state that they had withheld any records in their entirety under b(5), b(6), or any other FOIA Exemption.²¹

Items one and two of Empower Oversight’s August 6th FOIA request seek “All Records Relating to”:

1. The Department of Veterans Affairs’ receipt of, discussions related to, processing of, and response to Senator Grassley’s April 2, 2021 letter to Secretary McDonough and/or his July 20, 2021 letter to Secretary McDonough.
2. Communications between the Department of Veterans Affairs OIG (“VA OIG”) and Department employees relating to the VA OIG’s “administrative investigation to evaluate the allegations that Ms. Charmain Bogue, Executive Director of VBA’s Education Service, may have violated applicable conflict of interest laws or regulations concerning her official duties and her spouse’s business interests.”²²

The VA-OIG produced to Empower Oversight 16 pages of heavily redacted records.²³ These records appear to reflect electronic communications among VA-OIG staff over the course of only three business days (*i.e.*, April 2, 5, and 6, 2021).²⁴ And, although it is impossible to certify from the face of the records (given the extent of their redaction), it appears that the communications relate exclusively to the VA-OIG’s receipt of the April 2, 2021, correspondence from Senator Grassley,²⁵ analysis of (or response to) such correspondence,²⁶ and an internal meeting to discuss such correspondence.²⁷

¹⁸ See, Exhibit 6.

¹⁹ See, Exhibit 6.

²⁰ See, Exhibit 6.

²¹ See, Exhibit 6.

²² See, Exhibit 1 (citations omitted).

²³ The 16 heavily redacted pages produced by the VA-OIG are attached as Exhibit 7.

²⁴ See, Exhibit 7.

²⁵ See *e.g.*, Exhibit, 7, pp. 12 and 16.

²⁶ See, Exhibit, 7, pp. 1 – 2, 5 – 6, and 7 – 8.

²⁷ See, Exhibit, 7, pp. 10 – 11.

1. The Records Produced by the VA-OIG FOIA Staff Do Not Appear to Be Responsive to the Second Item of Empower Oversight's August 6th FOIA Request

In its September 29th response to the first and second items of Empower Oversight's FOIA request, VA-OIG FOIA Number 21-00357, the VA-OIG FOIA Staff claims to be producing documents "pertaining" to Empower Oversight's request for communications between the VA-OIG and the VA relating to the VA-OIG's investigation of allegations that Ms. Bogue may have violated conflict of interest laws and/or regulations that control her official duties that may intersect with her husband's business dealings.²⁸ In contrast, the VA-OIG FOIA Staff does not advise that it was unable to locate records related to the topic.²⁹

Further, although the VA-OIG FOIA Staff advises that it had redacted portions of the records that it was producing pursuant to FOIA Exemptions b(5) and b(6), it does not notify Empower Oversight of the existence of any responsive records that it may have withheld in their entirety.³⁰ In that regard, when an agency withholds responsive records in their entirety, the FOIA requires them to "make a reasonable effort to estimate the volume" of such records and apprise the requester of the estimate.³¹ DOJ has advised that an agency's "volume estimate usually will take the form of numbers of pages of records that are being withheld."³²

Hence, a plain reading of the VA-OIG's September 29th FOIA response indicates that:

- The VA-OIG had compiled communications between the VA-OIG and the VA relating to the VA-OIG's investigation of allegations that Ms. Bogue may have violated conflict of interest provisions;
- The VA-OIG was producing such communications; and
- Although portions of the communications may have been redacted pursuant to purportedly applicable FOIA exemptions, the VA-OIG withheld no responsive records in full.

In contrast to this reasonable construction of the VA-OIG's September 29th response, the 16 pages of heavily redacted records that the VA-OIG forwarded to Empower Oversight do not

²⁸ See, Exhibit 6.

²⁹ See, Exhibit 6.

³⁰ See, Exhibit 6.

³¹ See, 5 U.S.C. § 552(a)(6)(F); see also, *Mobley v. DOJ*, 845 F. Supp. 2d 120, 123 – 124 (D.D.C. 2012).

³² See, DOJ, *FOIA Update: FOIA Counselor: Questions & Answers*, Vol. XVIII, No. 2, (January 1, 1997), available at <https://www.justice.gov/oip/blog/foia-update-foia-counselor-questions-answers-1>.

appear to be or relate to communications with the VA about an investigation of Ms. Bogue.³³ Admittedly, the VA-OIG FOIA Staff redacted the 16 pages so heavily that it is impossible to demonstrate that the records do not include communications between the VA-OIG and the VA concerning an investigation of Ms. Bogue's compliance with conflicts of interest standards.³⁴ However, the timing of the records, the parties to the communications reflected by the records, and the subject lines of such communications strongly suggest that they cannot be fairly characterized as communications between the VA-OIG and its parent agency concerning an internal conflicts of interest investigation.

With respect to timing, all of the records were created within three business days of the VA-OIG's receipt of a letter from Senator Grassley on April 2, 2021.³⁵ Weeks later, by letter dated May 26, 2021, the VA-OIG responded to Senator Grassley's April 2, 2021 letter, advising:

We have considered your requests and discussed our analysis with your staff. The Office of Inspector General (OIG) has opened an administrative investigation to evaluate the allegations that Ms. Charmain Bogue, Executive Director of VBA's Education Service, may have violated applicable conflicts of interest laws or regulations concerning her official duties and her spouse's business interests. The scope of this administrative investigation will also include reviewing any legal opinions that were provided to Ms. Bogue regarding the need for her recusal from decisions based on her spouse's business and reviewing Ms. Bogue's financial disclosures. The OIG's work is in progress, and we will notify your office when we have concluded our work.³⁶

Whether the VA-OIG's investigation began before or after the three business-day span of April 2 – 6, 2021, the VA-OIG asserted to Senator Grassley that it was in progress on May 26th. The second item of Empower Oversight's FOIA request is designed to seek communications relative to that investigation.

One would normally expect there to be a stream of communications between the VA-OIG and VA personnel, notifying the parent agency of the existence of the administrative investigation, requesting records, scheduling interviews, requesting and responding to requests

³³ See generally, Exhibit 7.

³⁴ For example, the email from the VA-OIG's Chief Counsel, which the VA-OIG produced three times, is comprised of six paragraphs that are completely redacted. See, Exhibit 7, pp. 1 – 2, 5 – 6, and 7 – 8. Hence, the VA-OIG FOIA Staff necessarily maintain that not a single word the Chief Counsel uttered over the course of his six paragraphs was factual; every utterance was deliberative. For further discussion of the Chief Counsel's email and other contested redactions, see below in the section entitled *Numerous Redactions Made by the VA-OIG FOIA Staff Appear to Be Beyond the Scope of What Is Acceptable Under FOIA Exemptions b(5) and b(6): 1. The VA-OIG FOIA Staff Put Forward FOIA Exemption b(5) to Justify Redacting Information that Normally Would Not Have Been Privileged in Civil Discovery.*

³⁵ See, Exhibit 7.

³⁶ The VA-OIG's May 26, 2021, letter to Senator Grassley is attached as Exhibit 8.

for briefings, etc. It does not seem credible that the basic communications associated with the progress of a thorough administrative investigation could be confined to these three business-days and these 16 pages.

Regarding the parties to the communications reflected by the 16 pages that the VA-OIG produced, with the exception of a single email from Senator Grassley’s office to VA-OIG’s Director of Congressional Relations,³⁷ all of the communications appear to be *internal* discussions among VA-OIG staff exclusively.³⁸ Like with the timing, it’s reasonable to presume that a thorough administrative investigation would involve, among other things, investigative notifications and requests for documents and interviews. In this case, such communications would have to involve VA personnel but, except for a representative of Senator Grassley’s office, all of the communicants included in the 16 pages produced by the VA-OIG are VA-OIG staffers.³⁹

Last, with respect to the subject lines of the communications reflected in the 16 pages, they all relate to the VA-OIG’s receipt of Senator Grassley’s letter. The subject lines include, “Grassley Request,” “Discussion Re: VBA Referral from Grassley,” and “2021-04-02 CEG to VA OIG.”⁴⁰ The latter subject title characterizes the April 2nd email from Senator Grassley’s office forwarding his correspondence to the VA-OIG.⁴¹ It does not seem reasonable that the VA-OIG would continuously cite to the name of a Senator when titling its communications about an internal administrative investigation.

Thus, the circumstances beg the question whether the VA-OIG FOIA Staff intended to—but failed to:

- Withhold a group of records in full pursuant to FOIA Exemptions b(5) and/or b(6);⁴² or
- Produce records in addition to the 16 heavily redacted pages that were produced.

Either way, it appears that the VA-OIG FOIA Staff’s response to Empower Oversight was in error and should be reviewed and remedied.

³⁷ See, Exhibit 7, p. 16.

³⁸ See, Exhibit 7, pp. 1 – 15.

³⁹ See, Exhibit 7.

⁴⁰ See, Exhibit 7.

⁴¹ See, Exhibit 7, p. 16.

⁴² Another possibility is that VA-OIG FOIA Staff intended to—but failed to—make a “no records” response concerning the second item of Empower Oversight’s August 6th FOIA request. However, this alternative construction is much less likely given VA-OIG’s May 26th assertion to Senator Grassley that it had opened an administrative investigation, and such investigation naturally should have generated communications between the VA-OIG and the VA. (See, Exhibit 8.)

2. The Records Produced by the VA-OIG FOIA Staff Do Not Appear to Encompass the Full Scope of the First Item of Empower Oversight's August 6th FOIA Request

As stated above, the first item of Empower Oversight's August 6th FOIA request seeks "All Records Relating to . . . The Department of Veteran Affairs' receipt of, discussions related to, processing of, and response to Senator Grassley's April 2, 2021 letter to Secretary McDonough and/or his July 20, 2021 letter to Secretary McDonough."⁴³ Whereas the VA-OIG's September 29th response to Empower Oversight's FOIA request, VA-OIG FOIA Number 2021-00357, purports to respond to the first item of Empower Oversight's request, the VA-OIG FOIA Staff produced 16 pages of heavily redacted pages of communications that were originated on three business days: April 2, 5, and 6, 2021.⁴⁴ Further, on May 26, 2021, approximately 54 days after the VA-OIG received a copy of Senator Grassley's April 2nd letter, it dispatched a response to his request for an investigation.⁴⁵

Given that none of the VA-OIG's three business days worth of records were created fewer than 50 days prior to the VA-OIG's May 26th response to Senator Grassley's April 2nd letter to VA Secretary McDonough, a reasonable construction of the VA-OIG's September 29th response to the first item of VA-OIG FOIA Number 20221-00357 is that all of the records in its possession that relate to the "receipt of, discussions related to, processing of, and response to" Senator Grassley's correspondence were created on or before April 6th. In other words, the plain language of the VA-OIG's September 29th FOIA response provides that it originated no records relating to its consideration of, and response to, Senator Grassley's two letters after April 6, 2021.⁴⁶

Of course, that assertion is not credible. The extent of redactions of the 16 pages prevents Empower Oversight from refuting that those pages could, in theory, constitute all the records related to the drafting of the May 26th response to Senator Grassley as well as the records necessary to support its assertion to the Senator that the VA-OIG had commenced an investigation of Ms. Bogue. However, that possibility is simply not plausible. Why would the VA-OIG complete its consideration of, and response to, Senator Grassley's letter by April 6, 2021, and then wait another month-and-a-half before sending its response on May 26, 2021? And, how would it do so without creating any more records responsive to Empower Oversight's

⁴³ See, Exhibit 1.

⁴⁴ See, Exhibit 6.

⁴⁵ See, Exhibit 7, p. 16, and Exhibit 8.

⁴⁶ An alternative interpretation is that the VA-OIG no longer possesses other records related to its consideration of, and response to, Senator Grassley's April 2nd letter that it originated between April 6, 2021, and May 26, 2021. However, such an alternative interpretation appears infeasible because it naturally invokes questions related to the VA-OIG's compliance with the Federal Records Act and IT security requirements.

request during that time (*e.g.*, records associated with the initiation of the investigation of Ms. Bogue that would be responsive to the second item of Empower Oversight’s FOIA request)?

Moreover, given that the records that the VA-OIG produced were originated on the three business days ending on April 6, 2021, the obvious conclusion from the VA-OIG’s September 29th response to VA-OIG FOIA Number 20221-00357 is that VA-OIG asserts that it has no records related to the “receipt of, discussions related to, processing of, and response to” Senator Grassley’s July 20th letter to VA Secretary McDonough. In that regard, it is inconceivable that records created on April 2, 5, and 6, of 2021, could relate to the receipt of, and response to, correspondence that could not have been sent to the VA-OIG for another three-and-a-half months.

Accordingly, please review the VA-OIG FOIA Staff’s records search to ensure that they produced all records relating to the VA-OIG’s “receipt of, discussions related to, processing of, and response to Senator Grassley’s” letters dated April 2nd and July 20th; and the VA-OIG’s communications with the VA regarding the investigation of Ms. Bogue.

Numerous Redactions Made by the VA-OIG Staff Appear to Be Beyond the Scope of What Is Acceptable Under FOIA Exemptions b(5) and b(6)

As stated above, along with its September 29th letter responding to Empower Oversight’s August 6th FOIA request, the VA-OIG forwarded to Empower Oversight 16 pages of heavily redacted records, which appear to be copies of electronic communications among VA-OIG staff over the course of three business days (*i.e.*, April 2, 5, and 6, 2021).⁴⁷ The VA-OIG FOIA Staff explained that the 16 pages of records had been redacted pursuant to FOIA Exemptions b(5) and b(6).⁴⁸ Further, with respect to its redactions pursuant to FOIA Exemption b(5), they expressly clarified that the grounds for their redactions were confined to the deliberative process privilege.⁴⁹

As set forth in detail below, the VA-OIG FOIA Staff’s assertions of FOIA Exemptions b(5) and b(6) exceed, or appear to exceed, the understood parameters of the exemptions, and the VA-OIG should closely review the claims of its FOIA Staff and remedy all deficiencies.

1. The VA-OIG FOIA Staff Put Forward FOIA Exemption b(5) to Justify Redacting Information that Normally Would Not Have Been Privileged in Civil Discovery

⁴⁷ See generally, Exhibit 7.

⁴⁸ See, Exhibit 6.

⁴⁹ See, Exhibit 6.

Subsection b(5) of the FOIA provides that the FOIA “does not apply to matters that are”:

inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.⁵⁰

Courts have construed FOIA Exemption b(5) to “exempt those documents, and only those documents, that are normally privileged in the civil discovery context.”⁵¹ Although the United States Circuit Court of Appeals for the District of Columbia Circuit (“Circuit Court”) has held that “all civil discovery rules” are incorporated into FOIA Exemption b(5),⁵² the VA-OIG’s September 29th response to VA-OIG FOIA Number 2021-00357 states that the VA-OIG’s reliance on the exemption is limited to deliberative process.⁵³

The purpose of the deliberative process privilege is to “prevent injury to the quality of agency decisions.”⁵⁴ In this setting, the Circuit Court has explained that “quality” encompasses encouraging frank discussions during policy making, preventing advance disclosure of decisions, and protecting against public confusion that may result from disclosure of reasons or rationales that were not in fact the grounds for agency decisions.⁵⁵

To claim the deliberative process privilege with respect to a record, the Circuit Court has held that an agency must show⁵⁶ that the record is “predecisional” (*i.e.*, “antecedent to the adoption of agency policy”)⁵⁷ and “deliberative” (*i.e.*, “a direct part of the deliberative process in that it makes recommendations and expresses opinions on legal or policy matters”).⁵⁸

⁵⁰ 5 U.S.C. § 552(b)(5).

⁵¹ NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); *see also*, Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C. Cir. 1987).

⁵² *See*, Martin, 819 F.2d at 1185.

⁵³ *See*, Exhibit 6.

⁵⁴ Sears, 421 U.S. at 151.

⁵⁵ *See*, Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States Gas Corp. v. DOE, 617 F.2d 854, 866 (D.C. Cir. 1980); Jordan v. DOJ, 591 F.2d 753, 772 – 773 (D.C. Cir. 1978).

⁵⁶ Coastal States Gas Corp., 617 F.2d at 866.

⁵⁷ *See*, Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504, 513 (D.C. Cir. 2011).

⁵⁸ *See*, Vaughn v. Rosen, 523 F.2d 1136, 1143 – 1144 (D.C. Cir. 1975).

To be “deliberative,” a record must reflect[] the give-and-take of the consultative process,” either by assessing the merits of a particular viewpoint, or by articulating the process used by the agency to formulate policy.⁵⁹

Factual information, on the other hand, is not covered by the deliberative process privilege because the release of factual information does not expose the deliberations or opinions of agency personnel.⁶⁰ Accordingly, factual information is typically available in civil discovery and its release is not considered to have a chilling effect on agency deliberations.⁶¹

Several items that the VA-OIG FOIA Staff redacted purportedly pursuant to FOIA Exemption b(5) are clearly factual in nature, not deliberative. In six instances the VA-OIG FOIA staff claim that a “Document ID” number and the title(s) of one or more “Attachments” is protected by deliberative process.⁶² It is unreasonable on its face to characterize document numbers and attachment titles⁶³ as “recommendations and express[ion]s opinions on legal or policy matters,” assessments of the merits of a particular viewpoint, or articulations of the process used by the VA-OIG to formulate policy. They obviously are not these things: they are factual data, which is not protected by the deliberative process privilege.⁶⁴

Additionally, the VA-OIG FOIA Staff redacted entire passages of text purportedly pursuant to FOIA Exemption b(5).⁶⁵ Again, Empower Oversight cannot see behind the VA-OIG FOIA Staff’s redactions, and thus, cannot definitively refute the legitimacy of their claims, but given their baseless assertions of privilege with respect to the document numbers and attachment titles, a review by the VA-OIG is warranted.

In further regard to the redacted text passages, where a FOIA exemption may be appropriate within a record, the FOIA requires that segregable portions of such record must be

⁵⁹ Coastal States Gas Corp., 617 F.2d at 867.

⁶⁰ Coastal States Gas Corp., 617 F.2d at 867; *see also*, McGrady v. Mabus, 635 F. Supp. 2d 6, 18 – 21 (D.D.C. 2009) (distinguishing between draft letters and memoranda that may be deliberative and data used during a decision making process, *e.g.*, key personnel data and evaluation summaries used in promotion decisions, which contain only factual material and are not deliberative).

⁶¹ *See*, EPA v. Mink, 410 U.S. 73, 87 – 88 (1973); *see also*, Montrose Chem. Corp. v. Train, 491 F.2d 63, 66 (D.C. Cir. 1974) (holding that release of factual material would not be “injurious” to decision making process).

⁶² *See*, Exhibit 7, pp. 1, 5, 7, 9, 12, and 15.

⁶³ Empower Oversight recognizes that, as an alternative, the VA-OIG FOIA Staff could have been trying to convey that they were withholding the attachment(s) itself(themselves) purportedly pursuant to FOIA Exemption b(5), as opposed to redacting the title of the attachment. However, this alternative would be in error also because such an approach would not be a proper method to advise a FOIA requester that a record had been withheld in its entirety. First, as would be in this case, such an approach could confuse the requester concerning whether a document that has been produced has been redacted, or whether a document that was not produced has been withheld. Second, it fails to satisfy an agency’s responsibility to apprise requesters of the estimated volume of records that have been withheld. *See*, 5 U.S.C. § 552(a)(6)(F); *see also*, Mobley, 845 F. Supp. 2d at 123 – 124.

⁶⁴ Indeed, in one instance the VA-OIG FOIA Staff appears to concede that a “Document ID” is not deliberative, by disclosing such ID number. (*See*, Exhibit 7, p. 4.)

⁶⁵ *See*, Exhibit 7, pp. 1 – 2, 5 – 6, 7 – 8, 10, 11, and 13.

produced.⁶⁶ For example, it is unlikely that the six consecutive paragraphs that are redacted in their entirety three times at pages 1 – 2, 5 – 6, and 7 – 8 of Exhibit 7 include no segregable factual data. In other words, it is improbable that such consecutive paragraphs are comprised of nothing but “recommendations and express[ion]s opinions on legal or policy matters,” assessments of the merits of a particular viewpoint, and articulations of the process used by the VA-OIG to formulate policy. Recommendations and opinions on legal and policy matters inevitably arise in factual circumstances, and a description of such circumstances is often necessary to provide context for the recommendations and opinions. Hence, redacting Chief Counsel Wilber’s six consecutive paragraphs in their entirety presupposes that the entirety of his text excludes the underlying context of his recommendations and opinions.

Accordingly, please review the VA-OIG FOIA Staff’s assertions of FOIA Exemption b(5) to confirm that their redactions are confined to matter that is appropriately characterized as predecisional and deliberative.

2. The VA-OIG FOIA Staff Asserted FOIA Exemption b(6) in Circumstances that Do Not Involve Personal Privacy Interests and Are in Conflict with the Public Interest in Ensuring the Integrity of the VA’s Operations

Subsection b(6) of the FOIA provides that the FOIA “does not apply to matters that are ... personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”⁶⁷ Courts have found that the plain language of FOIA Exemption b(6) requires agencies to engage in a four-step analysis of records that are potentially responsive to a FOIA request; agencies must:

1. Determine whether a record at issue constitutes a personnel, medical, or “similar” file;
2. Determine whether there is a significant privacy interest invoked by information in such records;
3. Evaluate the requester’s asserted FOIA public interest in disclosure of the records that include information that invoke a privacy interest; and
4. Balance competing interests to determine whether disclosure of the records “would constitute a clearly unwarranted invasion of personal privacy,” if there is a FOIA public

⁶⁶ 5 U.S.C. § 552(b) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection”).

⁶⁷ 5 U.S.C. § 552(b)(6).

interest in disclosure of records that include information that invokes a significant privacy interest.⁶⁸

Among the 16 pages that the VA-OIG produced in response to VA-OIG FOIA Number 2021-00357 are numerous redactions that were made purportedly pursuant to FOIA Exemption b(6).⁶⁹ The redactions include the names of government officials,⁷⁰ official email addresses of government officials,⁷¹ and passages of text.⁷²

It goes without saying that Empower Oversight cannot look behind the redactions of text on pages 13 and 14 of Exhibit 7, and so it has no way to confirm or refute the VA-OIG FOIA Staff's claims that the passages invoke significant privacy interests, and that those privacy interests outweigh the public interest in the VA's and VA-OIG's operations. On the other hand, there is no, or a weakened, privacy interest in the names and official email addresses of government officials, and the VA-OIG FOIA Staff's untenable extensions of FOIA Exemption b(6) that are discussed below argue in favor of a comprehensive review of all of their b(6) claims.

According to an Office of Personnel Management ("OPM") regulation, the names, titles, grades, salaries, duty stations, and position descriptions of officials of the United States government is public information.⁷³ Accordingly, the names of government officials generally are not protected under FOIA Exemption b(6).⁷⁴

The status of contact information of government officials is less clear cut. Various courts have reached differing conclusions regarding the protection of official email addresses under FOIA Exemption b(6).⁷⁵ However, in reaching their differing opinions, courts have evinced a common expectation that agencies need to make a showing regarding the subject officials' positions, the substance of the underlying agency action, and the nature of the record in question in order to support an exemption claim.⁷⁶ The import of this information is to demonstrate how

⁶⁸ See, Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1229 (D.C. Cir. 2008); NARA v. Favish, 541 U.S. 157, 172 (2004); Wash. Post Co. v. HHS, 690 F.2d 252, 261 (D.C. Cir. 1982).

⁶⁹ See generally, Exhibit 7.

⁷⁰ See, Exhibit 7, pp. 1, 5, 7, 9, 10, and 11 – 15.

⁷¹ See, Exhibit 7, pp. 1 – 2, and 5 – 16.

⁷² See, Exhibit 7, pp. 13 – 14.

⁷³ 5 C.F.R. § 293.311(a).

⁷⁴ See, Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (noting that Justice Department paralegals' names and work numbers "are already publicly available from" OPM), *appeal dismissed voluntarily*, No. 06-5055, 2006 WL 1214937 (D.C. Cir. April 28, 2006).

⁷⁵ Compare, Pinson v. DOJ, 313 F. Supp. 3d 88, 112 (D.D.C. 2018); Leadership Conference on Civil Rights, 404 F. Supp. 2d at 257.

⁷⁶ See, Sai v. TSA, 315 F.Supp. 3d 218, 262 (D.D.C. 2018) (finding the defendant had not met its burden of showing a substantial privacy interest in contact information withheld pursuant to FOIA Exemption b(6) because it had "offered little more than conclusory assertions applicable to each redaction, without regard to the position held by the relevant employee, the role played by that employee, the substance of the

disclosure impacts the privacy of individuals, *i.e.*, how disclosure could subject them to annoyance, embarrassment, harassment, or retaliation.⁷⁷

In support of their redactions of the 16 pages purportedly pursuant to FOIA Exemption b(6), the VA-FOIA staff state:

FOIA Exemption 6, [5 U.S.C. § 552 (b)(6)], allows the withholding of all information which, if disclosed, would constitute a clearly unwarranted invasion of an individual's personal privacy. Specifically, names, job titles and other information which could reveal the identity of individuals mentioned in the records have been withheld. We do not find any public interest that outweighs the privacy interests of the individuals.⁷⁸

In other words, the VA-FOIA staff justify their redactions on the grounds that releasing the government officials' email addresses, *i.e.*, "other information," "could reveal" their identities. This rationale may be acceptable in connection with an investigative report concerning the actions of low-level government officials, but in this case it is problematic on several levels. First, as stated above, the names and titles—key identifiers—of government officials are public information according an OPM regulation.⁷⁹ Second, in many cases, the VA-OIG FOIA Staff disclosed the names of the government officials whose email addresses they redacted.⁸⁰ And, third, in the September 29, 2021, response to VA-OIG FOIA Number 2021-00357, the VA-OIG FOIA Staff failed to provide any information—even self-serving, conclusory statements—regarding the positions of the officials to whom the email addresses belong, the substance of the underlying agency action, the nature of the records in question, or how the disclosure of the email addresses of government officials who organized and participated in a conference call to discuss congressional correspondence could subject them to annoyance, embarrassment, harassment, or retaliation. Thus, they did not adduce adequate support for their claim that FOIA Exemption b(6) is applicable.⁸¹

underlying agency action, or the nature of the agency record at issue"); and Kleinert v. BLM, 132 F. Supp. 3d 79, 96 (D.D.C. 2015) (finding that the defendant did not meet its burden to support the use of FOIA Exemption b(6) to withhold email addresses because "[t]he disclosure of names and addresses is not inherently and always a significant threat to the privacy of those listed; whether it is a significant or a de minimis threat depends upon the characteristic(s) revealed . . . and the consequences likely to ensue" (quoting Nat'l Ass'n of Retired Fed. Emps. v. Horner, 879 F.2d 873, 877 (D.C. Cir. 1989))).

⁷⁷ Sai, 315 F.Supp. 3d at 262 – 263; Kleinert, 132 F. Supp. 3d at 96 – 97.

⁷⁸ See, Exhibit 6, p. 2 (emphasis added).

⁷⁹ 5 C.F.R. § 293.311(a).

⁸⁰ See, *e.g.*, Exhibit 7, pp. 2 – 3, 6, and 8.

⁸¹ See, *e.g.*, Sai, 315 F.Supp. 3d at 262; Kleinert, 132 F. Supp. 3d at 96.

In contrast to the weak or non-existent privacy interests attached to the names and official email addresses of government employees, there is a strong public interest in the VA's compliance with legitimate requests for information from oversight authorities, such as duly elected United States Senators, the VA-OIG's efforts to investigate allegations of conflicts of interest (*e.g.*, possible promotion of personal financial interests) by the Executive Director of VBA's Education Service, and the accuracy of the VA-OIG's May 26th assertions to Senator Grassley.

The "public interest" championed by the FOIA is to inform the public about "an agency's performance of its statutory duties."⁸² Such information is "a structural necessity in a real democracy" and "should not be dismissed."⁸³ Here, the public has a clear and unmitigated right to know whether the VA complied with its responsibility to respond to Senator Grassley's April 2nd and July 20th oversight letters, as well as the progress and results of the VA-OIG's investigation of allegations of potential conflicts of interest by the Executive Director of VBA's Education Service.

Hence, please review the VA-OIG FOIA Staff's assertions of FOIA Exemption b(6) to confirm that their redactions actually protect the personal privacy of individuals and that any such privacy interest is not outweighed by the strong public interest in the VA's and the VA-OIG's operations.

Conclusion

For the reasons set forth herein, Empower Oversight respectfully requests that the VA-OIG review the records search performed by the VA-OIG FOIA Staff to confirm whether it was reasonably calculated to uncover all relevant documents, and correct any deficiencies that are identified. Additionally, Empower Oversight requests that the VA-OIG review and confirm that the VA-OIG FOIA Staff's initial determinations that document IDs and attachment titles⁸⁴ are protected by FOIA Exemption b(5); that the six paragraphs of text in Chief Counsel Wilber's email⁸⁵ and other text passages⁸⁶ are protected in their entirety by FOIA Exemption b(5); and that the names and official email addresses of government officials, as well as text passages⁸⁷ are

⁸² *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

⁸³ *NARA*, 541 U.S. at 172.

⁸⁴ See, Exhibit 7, pp. 1, 5, 7, 9, 12, and 15.

⁸⁵ See, Exhibit 7, pp. pp. 1 – 2, 5 – 6, and 7 – 8.

⁸⁶ See, Exhibit 7, pp. 1, 10, 11, and 13.

⁸⁷ See, Exhibit 7, pp. 1 – 2 and 5 – 16.

protected by FOIA Exemption b(6) under the circumstances of this matter, and—if they are not—produce the non-exempt records or portions thereof.

Thank you for your time and consideration. Please don't hesitate to contact me with any questions.

Cordially,

[/Jason Foster/](#)

Jason Foster
Founder & President