

# EMPOWER OVERSIGHT

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*Whistleblowers & Research*



January 24, 2022

VIA ELECTRONIC TRANSMISSION: [OGCFOIAAPPEALS@VA.GOV](mailto:OGCFOIAAPPEALS@VA.GOV)

Office of General Counsel (024)  
Department of Veterans Affairs  
810 Vermont Avenue, NW  
Washington, DC 20420

**RE: Freedom of Information Act Appeal: FOIA Request Number 21-08490-F**

Dear Office of General Counsel:

## Introduction

With respect to Freedom of Information Act (“FOIA”)<sup>1</sup> Request Number 21-08490-F, Empower Oversight Whistleblowers & Research (“Empower Oversight”)<sup>2</sup> appeals the second interim initial decision of the Office of the Executive Secretary (“OSVA”), Department of Veterans Affairs (“VA”), that certain portions of the records requested by Empower Oversight are exempt from disclosure under FOIA Exemptions b(5) and b(7)(E). Empower Oversight respectfully requests that the VA review the OSVA’s exemption claims and correct any errors that are identified.

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<sup>1</sup> The FOIA is codified at 5 U.S.C. § 552.

<sup>2</sup> 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.

## **Background**

### **1. Empower Oversight's FOIA Request**

On August 6, 2021, Empower Oversight submitted to the 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 [Office of Inspector General] ("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 [former] 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.<sup>3</sup>

To add background to, and context for, its August 6<sup>th</sup> 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. 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.

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

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.<sup>4</sup> 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 [Department of Justice's ("DOJ")] 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

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<sup>4</sup> The four months referenced in Empower Oversight's August 6<sup>th</sup> FOIA request were April 2, 2021, to August 6, 2021. It is Empower Oversight's understanding that the VA has yet issue a substantive response Senator Grassley's April 2, 2021 letter to Secretary McDonough. Hence, next week the VA's tactless fourth-month delay will graduate to an intolerable ten-month delay.

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.<sup>5</sup>

## 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 referred Empower Oversight's FOIA request to those offices for processing and response.<sup>6</sup>

On August 23, 2021, the VA-OI&T submitted to Empower Oversight a letter that "updated" its August 16<sup>th</sup> acknowledgment email.<sup>7</sup> The VA-OI&T's August 23<sup>rd</sup> 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 21-08490-F; and that the records that Empower Oversight requested are in the possession of the OSVA and VA-OIG, and thus the VA-OI&T was "redirecting" the request to those offices "for a file search and a direct response."

On August 24, 2021, the OSVA acknowledged receipt of VA-OI&T's referral of Empower Oversight's FOIA request, advised that it would continue to use the 21-08940 tracking number for the request, and sought clarification concerning the fifth item of the request (*i.e.*, "Calendar entries and notes of any meetings between Ms. Bogue and VES/SVA representatives, including Barrett Bogue").<sup>8</sup> Specifically, the OSVA requested a "date time frame for this portion of [Empower Oversight's] request."

By emails dated August 25, 2021, Empower Oversight proposed a "date time frame" of December 1, 2019, through July 20, 2021, for the fifth item of the FOIA request, and the OSVA replied that Empower Oversight's clarification was satisfactory.

On September 7, 2021, the OSVA issued its "first interim" Initial Agency Decision ("IAD") in response to Empower Oversight's August 6<sup>th</sup> FOIA request.<sup>9</sup> The first interim IAD described searches that OSVA had conducted and requested, and rendered a "no records" response to item 6(e) of the request. Further, the OSVA advised:

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<sup>5</sup> See, Exhibit 1, (citations omitted).

<sup>6</sup> VA-OI&T's August 16<sup>th</sup> email is attached as Exhibit 2.

<sup>7</sup> VA-OI&T's August 23<sup>rd</sup> letter is attached as Exhibit 3.

<sup>8</sup> The OSVA's August 24<sup>th</sup> letter is attached as Exhibit 4.

<sup>9</sup> The OSVA's September 7<sup>th</sup> first interim IAD is attached as Exhibit 5.

For this first interim release, a total of 652 pages of responsive records, subsequently Bates (21-08490-F) 000001 through (21-08490-F) 000652, and 1 Excel spreadsheet were reviewed. Records contained in this release are responsive to items 1, 3, and 6(a)-(d) and consist of records from my search conducted on August 24, 2021.<sup>10</sup> I have determined 249 pages and 1 Excel spreadsheet are releasable in their entirety, 330 pages are partially releasable, and 73 pages are withheld in full pursuant to Title 5 U.S.C. §§ 552(b)(3), (b)(5), (b)(6), and (b)(7)(C), FOIA exemptions 3, 5, 6, and 7C.

On September 9, 2021, the OSVA requested that Empower Oversight further clarify the fifth item of its August 6<sup>th</sup> FOIA request. Specifically, the OSVA requested “the names of the VES/SVA representatives that you are requesting aside from Barrett Bogue.”

By email dated September 30, 2021, Empower Oversight provided the OSVA with the names of six VES and nine SVA representatives.

On October 29, 2021, the OSVA issued its second interim IAD.<sup>11</sup> Like the first interim IAD, the second interim IAD described searches that the OSVA had conducted and requested, and advised:

For this second interim release, a total of 1,426 pages of responsive records, subsequently Bates (21-08490-F) 000653 through (21-08490-F) 002078, were reviewed. Records contained in this release are responsive to item 1 and consist of records from my search conducted on October 5, 2021.<sup>12</sup> I have determined 978 pages are releasable in their entirety, 290 pages are partially releasable, and 158 pages are withheld in full pursuant to Title 5 U.S.C. §§ 552(b)(5), (b)(6), and (b)(7)(E), FOIA exemptions 5, 6, and 7E.

### **Numerous Redactions Made by the OSVA Appear to Be Beyond the Scope of What Is Acceptable Under FOIA Exemptions b(5) and b(7)(E)**

As stated above, the OSVA forwarded to Empower Oversight 1,268 pages of records, to relate to the VA’s efforts to respond to Senator Grassley’s April 2, 2021, letter to Secretary McDonough, in connection with its October 29<sup>th</sup> second interim IAD. Of the 1,268 pages, OSVA redacted 290 pages on the basis of FOIA Exemptions b(5), b(6), and b(7)(E).<sup>13</sup>

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<sup>10</sup> The OSVA explained that its August 24, 2021, search was of email mailboxes of Secretary Denis McDonough and Chief of Staff Tanya Bradsher, for the period April 2, 2021, through July 28, 2021, for the key terms “Bogue,” “Grassley,” “21-05571-F,” and “04890714.” See, Exhibit 5.

<sup>11</sup> The OSVA’s October 29<sup>th</sup> second interim IAD is attached as Exhibit 6.

<sup>12</sup> The OSVA explained that its October 5, 2021, search was of the email mailboxes of 20 un-named VA employees, for the key terms “Barrett Bogue,” the 14 names Empower Oversight provided via email on September 30<sup>th</sup>, and “04890714.” See, Exhibit 6. In the latter regard, 04890714 is a tracking number that the VA’s official correspondence tracking system had assigned to Senator Grassley’s April 2, 2021 letter to Secretary McDonough.

<sup>13</sup> Moreover, in addition to the 1,268 pages forwarded to Empower Oversight, the OSVA withheld in full another 158 pages pursuant to FOIA Exemptions b(5), b(6), and b(7)(E).



As set forth in detail below, the OSVA's assertions of FOIA Exemptions b(5) and b(7)(E) exceed, or appear to exceed, the understood parameters of the exemptions, and Empower Oversight respectfully requests that the VA closely review OSVA's claims on the 290 redacted pages, identify all deficiencies, and remedy them.<sup>14</sup>

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

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.<sup>15</sup>

Courts have construed FOIA Exemption b(5) to “exempt those documents, and only those documents, that are normally privileged in the civil discovery context.”<sup>16</sup> 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),<sup>17</sup> the OSVA's October 29<sup>th</sup> second interim IAD states that its reliance on the exemption is limited to deliberative process.<sup>18</sup> Addressing its assertion of Exemption b(5) claims, the OSVA states:

**FOIA Exemption 5** protects interagency 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. Moreover, this exemption permits an agency to withhold material reflecting the thoughts, opinions, and recommendations of federal officials and consultants reviewing an issue. Under the deliberative process privilege and FOIA Exemption 5, OSVA redacts internal government deliberations, thoughts, opinions, recommendations, and proposed solutions from federal employees and consultants reviewing VA programs in their professional capacities, as well as non-final or draft documents. The information contained in the responsive records is both predecisional and deliberative because it reflects preliminary opinions, proposed solutions, and recommendations, which do not reflect VA's final decision. Exposure of premature discussions before a final decision is made could create undue public confusion. The release of the redacted information would negatively impact the ability of federal employees and consultants to openly and frankly consider issues amongst themselves when deliberating, discussing, reviewing,

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<sup>14</sup> Additionally, in light of the issues that Empower Oversight noted—and discusses below—among the 290 redacted pages, Empower Oversight respectfully requests that VA's review of the OSVA's FOIA Exemption b(5) and b(7)(E) claims also include the 158 pages that were withheld in full. The OSVA did not provide a Vaugh index that would have provided Empower Oversight with insight about the senders, recipients, timing, and subjects of the withheld records, or how the FOIA exemptions apply to them, and, thus, enable it meaningfully to identify specific concerns with the withheld records, but the nature of the problems seen among the 290 redacted pages that the OSVA partially released are such that Empower Oversight believes that a more fulsome review of the OSVA's efforts herein is warranted. See, e.g., Pub. Employees for Environmental Responsibility v. Office of Science and Technology, 881 F. Supp. 2d 8, 13 (D.D.C. 2012); Smith v. Department of Labor, 789 F. Supp. 2d 274, 281 (D.D.C. 2011).

<sup>15</sup> 5 U.S.C. § 552(b)(5).

<sup>16</sup> 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).

<sup>17</sup> See, Martin, 819 F.2d at 1185.

<sup>18</sup> See, Exhibit 6.

proposing changes to, and making recommendations on VA programs. The information reveals the thoughts, deliberations, and opinions that, if released, would have a chilling effect on the ability of federal officials and consultants to discuss, opine, recommend or be forthcoming about the agency's issues which require full and frank assessment. Here, the disclosure of the withheld information is likely to compromise the integrity of this deliberative or decision-making process. Moreover, the predecisional character of a document is not altered by the passage of time.<sup>19</sup>

The purpose of the deliberative process privilege is to “prevent injury to the quality of agency decisions.”<sup>20</sup> 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.<sup>21</sup>

To claim the deliberative process privilege with respect to a record, the Circuit Court has held that an agency must show<sup>22</sup> that the record is “predecisional” (*i.e.*, “antecedent to the adoption of agency policy”)<sup>23</sup> and “deliberative” (*i.e.*, “a direct part of the deliberative process in that it makes recommendations and expresses opinions on legal or policy matters”).<sup>24</sup>

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.<sup>25</sup>

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.<sup>26</sup> Accordingly, factual information is typically available in civil discovery and its release is not considered to have a chilling effect on agency deliberations.<sup>27</sup>

Several items that the OSVA redacted purportedly pursuant to FOIA Exemption b(5) are or appear factual in nature, not deliberative. For example, Bates (21-08490-F) 001856 through

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<sup>19</sup> See, Exhibit 6 (citations omitted).

<sup>20</sup> Sears, 421 U.S. at 151.

<sup>21</sup> 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).

<sup>22</sup> Coastal States Gas Corp., 617 F.2d at 866.

<sup>23</sup> See, Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504, 513 (D.C. Cir. 2011).

<sup>24</sup> See, Vaughn v. Rosen, 523 F.2d 1136, 1143 – 1144 (D.C. Cir. 1975).

<sup>25</sup> Coastal States Gas Corp., 617 F.2d at 867.

<sup>26</sup> 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).

<sup>27</sup> 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).



(21-08490-F) 001864 is a draft of a response to Senator Grassley’s April 2, 2021, letter.<sup>28</sup> The draft is constructed as a two-page cover letter with a seven-page enclosure, which is entitled *Department of Veterans Affairs (VA) Responses to Questions from Senator Charles Grassley*. The enclosure recites the text of 12 questions posed by Senator Grassley—several of his questions have subparts—and below each recited question, or subpart of a question, the “VA Response” is set forth. The text of each of these 24 “VA Response(s)” are redacted in its entirety purportedly pursuant to FOIA Exemption b(5), but many of Senator Grassley’s questions are susceptible only to factual answers. For example:

Question 3. Had former Principal Undersecretary Jamie Manker ever been recommended for suspension for accepting gifts as prohibited by law?

Question 6: If the VA is aware that market sensitive information was potentially leaked, has the VA investigated this leak of information?

Question 7: Did the VA Office of General Counsel ever provide a legal opinion with respect to Mrs. Bogue and her involvement with any of her husband’s companies?

Question 10a: If Mrs. Bogue did report her husband on a public financial disclosure form, did she report Mr. Bogue’s employer(s)? If not, why not?

There is no room for opinions, recommendations, or proposed solutions concerning these and other questions included in Senator Grassley’s letter. Principal Undersecretary Manker was recommended for suspension, or he was not; the VA was aware that market sensitive information was leaked or potentially leaked, or it was not; the VA investigated such a leak or it did not; the VA’s Office of General Counsel provided legal opinions to Ms. Bogue about her financial interest (*i.e.*, her husband’s business dealings relative to VA business), or it did not; and Ms. Bogue reported her husband’s financial interests on her financial disclosure report, or she did not. The answers to these and many of the other questions in *Department of Veterans Affairs (VA) Responses to Questions from Senator Charles Grassley* are factual, and thus not protected by FOIA Exemption b(5).

Bates (21-08490-F) 000923 through (21-08490-F) 000924 include an email exchange between an “Executive Writer” and someone else—the names of both parties are redacted purportedly pursuant to FOIA Exemption b(6). At 10:37 AM on April 6, 2021, the latter party responds to the Executive Writer, “Thank you, good info. I will see if I can find a POC for OMI. My computer is restarting [frowny face].” Earlier, at 10:24 AM, the Executive Writer had written “Just got off the phone with OGC and OAWP,” which is followed by a text block that is redacted purportedly pursuant to FOIA Exemption b(5). Unless the getting off of the phone with OGC and OAWP is the “good info” referenced by the unidentified party, it seems highly probable that factual information has been redacted from the Executive Writer’s email. Otherwise, the unidentified party confuses opinions and recommendations with information.

Bates (21-08490-F) 000973 is an email exchange between Michael Hogan, Richard Hipolit, Carrie McVicker, and an a party whose identity is purportedly protect by FOIA

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<sup>28</sup> Bates (21-08490-F) 001856 through (21-08490-F) 001864 is one of multiple copies of the draft letter to Senator Grassley. It, like other items discussed herein, was produced multiple times among the 1,286 pages forwarded by the OSVA. Empower Oversight’s comments concerning Bates (21-08490-F) 001856 through (21-08490-F) 001864, and other records produced multiple times by the OSVA apply equally to each copy. Herein, for ease of comprehension, Empower Oversight will refer to the Bates numbers of a single copy only.

Exemption b(6). At 10:13 PM on April 6, 2021, Mr. Hogan addressed an email to the party whose identity is redacted, and the text of the email is redacted purportedly pursuant to FOIA Exemption b(5). Later, at 1:41 PM on April 7, 2021, the un-identify party addressed an email to Mr. Hogan stating “Thank you for this guidance and update. I will work with my leadership and the OCLA Correspondence liaison, copied above to develop a plan of execution and we will give you updates as the come available.” The OSVA does not claim that Mr. Hogan’s guidance is legal—it does not make any attorney-client privilege or attorney work product claims in its second interim IAD—thus a question naturally arises whether there are any factual elements to Mr. Hogan’s “guidance and update.” Further, since the unidentified writer subsequently in her message reuses “update” seemingly to refer to notifications of developments (*i.e.*, facts that occur), the question deserves to be explored.

Bates (21-08490-F) 001110 through (21-08490-F) 001111 include an April 9, 2021, email exchange between Ruthann Parise and Ms. McVicker. Ms. Parise begins “I have reviewed the asks that begins on page 4 and find the following regarding ownership of potential records:”, which is followed by three text blocks that are redacted purportedly pursuant to FOIA Exemption b(5). Record ownership, on its face, appears to be a question of fact, not a policy matter subject to an exchange of views, opinions, recommendations, or proposed solutions.

Similarly, Bates (21-08490-F) 001143 includes another April 9, 2021, email exchange between Ms. Parise and Ms. McVicker. Ms. Parise begins “I just did a search by requests in FOIAXpress and found the following:”, which is followed by two text blocks that are redacted purportedly pursuant to FOIA Exemption b(5). It is unclear from the OSVA’s second interim IAD how information included on FOIAXpress would reflect a deliberation. Presumably, the VA’s responses to prior FOIA requests could contain information that was appropriately redacted pursuant to various FOIA exemptions, but the FOIA requests and responses themselves are not deliberative. They are facts, and they are not protected by FOIA Exemption b(5).

In further regard to the redacted text blocks, where a FOIA exemption may be appropriate within a record, the FOIA requires that segregable portions of such record must be produced.<sup>29</sup> It is unlikely that the above-described text blocks that the OSVA has redacted in their entirety include no segregable factual data. In other words, it is improbable that the text blocks 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 to formulate policy. Even if the text blocks include some recommendations and opinions on legal and policy matters, such recommendations and opinions arise in factual circumstances, and descriptions of such circumstances are often necessary to provide context for the recommendations and opinions. Moreover, such descriptions of fact are not protected by FOIA Exemption b(5).

Accordingly, please review the OSVA’s assertions of FOIA Exemption b(5) to confirm that its redactions are confined to matter that is appropriately characterized as predecisional and deliberative, and that no factual content has been redacted.

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<sup>29</sup> 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”).

## 2. The OSVA Has Claimed FOIA Exemption b(7)(E) Where a Law Enforcement Purpose Is Not Present

The OSVA has redacted portions of various records, *see, e.g.*, Bates (21-08490-F) 000717, 000751, 00753, 000787, 001195 – 96, purportedly pursuant to FOIA Exemption b(7)(E). The cited exemption provides:

This section does not apply to matter that are . . . records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. . . .

Explaining its FOIA Exemption b(7)(E) claims, the OSVA states:

**FOIA Exemption 7(E)** exempts from required disclosure information that “would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” Redacted information includes VA intranet and MS outlook safelinks website addresses containing confidential VA information technology system and security parameters. The release of this information would expose the VA, VA employees, contractors, VA information technology systems, information technology security systems and MS outlook safelinks information technology systems to potential hacking and security liabilities and risks. *Prechtel v. FCC*, 330 F. Supp. 3d 320, 335 (D.D.C. 2018) (protecting agency’s electronic server logs because disclosure “would reveal sensitive information regarding [its] IT architecture, including security measures [it] takes to protect its systems from malicious activity” and would provide a “roadmap” to circumvent agency’s defensive efforts (quoting agency declaration)); *Poitras v. DHS*, 303 F. Supp. 3d 136, 159 (D.D.C. 2018) (withholding “protected internal e-mail addresses, non-public intranet web addresses, and a secure internal e-mail tool” because disclosure would increase risk of unauthorized access to agency’s IT system (quoting agency declaration)); *Levinthal v FEC*, 219 F. Supp. 3d 1, 8-9 (protecting study that assesses vulnerabilities in information technology system because possible security risk exists and disclosure could permit unlawful access to agency system).<sup>30</sup>

Although Empower Oversight agrees that FOIA Exemption b(7)(E) has been held to protect “details concerning information technology security,”<sup>31</sup> the flaw in the OSVA’s reasoning is that

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<sup>30</sup> See, Exhibit 6.

<sup>31</sup> As the DOJ characterizes the concept at page 17, footnote 46, of its *Guide to the Freedom of Information Act: Exemption 7(E)*, which the OSVA reproduces in its entirety in the above-quoted passage of its second interim IAD—without so much as correcting the weird double quotation marks that highlight “roadmap” or providing a full citation for *Levinthal v FEC*. Compare, Exhibit 6 and DOJ, *Guide to the Freedom of Information Act: Exemption 7(E)*, p. 17, ftn. 46 (Posted May 14, 2019), available at <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>.

FOIA Exemption b(7)(E) is not available to it because it is not a law enforcement agency and the records in question were not compiled for law enforcement purposes.

Had the OSVA taken the time to review the cases cited by the DOJ in its guide, it would have noted that the Poitras case emphasizes that the threshold requirement of FOIA Exemption b(7)(E), as with every subsection of FOIA Exemption b(7), is that the allegedly protected records were “compiled for law enforcement purposes.”<sup>32</sup>

When determining whether a record is “compiled for law enforcement purposes,” the Circuit Court has generally distinguished between agencies which have as their principal function the enforcement of criminal law and those agencies which have both law enforcement and administrative functions.<sup>33</sup> For those agencies whose principal function is criminal law enforcement, the Circuit Court has established a “less exacting” standard.<sup>34</sup> But, this less exacting standard is not available to the OSVA because the VA was established to provide material support America’s veterans, not to conduct criminal investigations against them.

By contrast—and laying aside the question whether the OSVA has even a secondary or tertiary law enforcement role—courts have held that an agency whose functions are “mixed” has a higher standard to satisfy; ordinarily, it must demonstrate that the records at issue involved the enforcement of a statute or regulation within its authority and that the records were compiled for law enforcement purposes.<sup>35</sup> Further, the Circuit Court has explained that the standard in “this circuit has long emphasized that the focus is on how and under what circumstances the requested files were compiled” and whether the records relate to anything that can fairly be characterized as an enforcement proceeding, adding that if the activity “is for a possible violation of law, then the inquiry is for law enforcement purposes.”<sup>36</sup> To qualify as law enforcement records, the documents sought must arise out of “investigations which focus directly on specifically alleged illegal acts . . . which could, if proved result in civil or criminal sanctions.”<sup>37</sup>

Here, the records that the OSVA seeks to protect in its second interim IAD do not appear to arise from any sort of investigative activity. Rather, they appear to be more akin to a totally inapplicable administrative purpose, which is merely referenced on the pages that the OSVA has redacted. The OSVA describes the redacted information as “VA intranet and MS outlook safelinks website addresses containing confidential VA information technology system and security parameters,” and does not even allude to an investigative purpose or investigation.<sup>38</sup> Hence, Empower Oversight does not have any idea how the redacted information, which has not been created by a law enforcement agency not compiled for a law enforcement purpose, could possibly qualify for FOIA Exemption b(7)(E)’s protection.

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<sup>32</sup> See, Poitras v. DHS, 303 F. Supp. 3d 136, 153 (D.D.C. 2018).

<sup>33</sup> See, Birch v. USPS, 803 F.2d 1206, 1209 (D.C. Cir. 1986); Pratt v. Webster, 673 F.2d 408, 416 (D.C. Cir. 1982).

<sup>34</sup> See, Pratt, 673 F.2d at 418.

<sup>35</sup> See, Tax Analysts v. IRS, 294 F.3d 71, 77 (D.C. Cir. 2002); Pratt, 673 F.2d at 418.

<sup>36</sup> See, Jefferson v. DOJ, 284 F.3d 172, 176-77 (D.C. Cir. 2002).

<sup>37</sup> Bartko v. DOJ, 898 F.3d 51, 64 (D.C. Cir. 2018) (quoting, Rural Housing Alliance v. USDA, 498 F.2d 73, 81 (D.C. Cir. 1974)).

<sup>38</sup> See, Exhibit 6.

Accordingly, please review the OSVA's assertions of FOIA Exemption b(7)(E) to confirm that the records that it claims are subject to the exemption were indeed "compiled for law enforcement purposes," identifying the OSVA investigation, if any, in which they were compiled.

### **Conclusion**

For the reasons set forth herein, Empower Oversight respectfully requests that the VA review the OSVA's initial determinations of the applicability of FOIA Exemptions b(5) and b(7)(E), confirm that its determinations are appropriate, 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

# Exhibit 1



# EMPOWER OVERSIGHT

*Whistleblowers & Research*



EMPOWR.us

August 6, 2021

VIA ELECTRONIC TRANSMISSION: [VACOFOIASERVICE@VA.GOV](mailto:vacofoiaservice@va.gov)

FOIA SERVICE

Department of Veterans Affairs  
810 Vermont Avenue, NW  
(005R1C) VACO  
Washington, DC 20420

**RE: RECORDS REGARDING VA'S REFUSAL TO RESPOND TO CONGRESSIONAL  
OVERSIGHT OF CONFLICTS OF INTEREST AND FAILURE TO SAFEGUARD MATERIAL  
NON-PUBLIC INFORMATION**

Dear FOIA Officer:

Empower Oversight Whistleblowers & Research (“Empower Oversight”) is a nonpartisan, nonprofit educational organization dedicated to enhancing independent oversight of government and corporate wrongdoing. We work to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities help to hold those authorities accountable to act on such reports. Empower oversight also publishes information related to waste, fraud, abuse, corruption and misconduct, as well as information regarding whistleblower retaliation against those who report such wrongdoing.

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 (Attachment A), 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.<sup>1</sup> The enforcement action, announced on March 9, 2020, would have denied veterans access to GI Bill benefits at certain educational institutions. Months later the Department “backed down” on July 2, 2020 after deciding that no such action was warranted.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup>

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 (see Attachment B).<sup>8</sup> 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.<sup>9</sup>

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.”<sup>10</sup>

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<sup>1</sup> Letter from Senator Charles Grassley to Secretary Denis McDonough ([Apr 2, 2021](#)) (Attachment A).

<sup>2</sup> “VA backs down from plan to suspend University of Phoenix and other colleges from accessing GI Bill benefits,” *Washington Post* ([Jul 2, 2020](#)).

<sup>3</sup> Letter from Senator Charles Grassley to Secretary Denis McDonough ([Apr 2, 2021](#)) (Attachment A) at 3.

<sup>4</sup> *Id.* at 3-4.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.*

<sup>8</sup> Letter from Senator Charles Grassley to Secretary Denis McDonough ([Jul 20, 2021](#)) (Attachment B).

<sup>9</sup> Letter from Senator Charles Grassley to President Donald J. Trump, ([Jun 7, 2017](#)).

<sup>10</sup> “Requests by Individual Members of Congress for Executive Branch Information” *DOJ Office of Legal Counsel*, 43 Op. O.L.C. \_\_\_ ([Feb 13, 2019](#))(emphasis added).

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<sup>11</sup> 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.<sup>12</sup>

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.

The public has a compelling interest in understanding why the Department is refusing to comply with oversight requests for information from its elected representatives on these important issues of public integrity. They are of significant public importance and impact veterans’ confidence in the Department that is supposed to serve them as they served our country. Transparency from the VBA is the only way to ensure accountability. Accordingly, we are filing this FOIA request to seek the facts.

**Please Provide All Records Relating to the Following:**<sup>13</sup>

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. (Attachments A and B).

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<sup>11</sup> Letter from Senator Charles Grassley to Secretary Denis McDonough ([Apr 2, 2021](#)) (Attachment A) at 4.

<sup>12</sup> Mr. Sitterly has also been the subject of inquiries from Senators Tester and Schatz about his transfer from a political position to a career slot in, ironically, the Office of Accountability and Whistleblower Protection. Letter from Senators Jon Tester and Brian Schatz to Secretary Robert Wilkie ([Dec 3, 2020](#)).

<sup>13</sup> As used herein “record” and “communication” include any disclosure, transfer, or exchange of information or opinion, however made. The term includes letters; telegrams; inter-office communications; memoranda; reports; records; instructions; specifications; notes; notebooks; scrapbooks; diaries; plans; photographs; photocopies; charts; graphs; descriptions; drafts, whether or not they resulted in a final document; minutes of meetings,

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.” (see Attachment B).
3. Internal communications within the Department (other than the with 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 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.

### **Fee Waiver Request**

Empower Oversight requests a waiver of fees associated with processing this request, in keeping with 5 U.S.C. § 552 (a)(4)(A)(iii). The information sought is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government. Empower Oversight is a non-profit educational organization as

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conferences, and telephone or other conversations or communications; recordings; published or unpublished speeches or articles; publications; transcripts of telephone conversations; phone mail; electronic-mail; microfilm; microfiche; tape or disc recordings; and computer print-outs.

defined under Section 501(c)(3) of the Internal Revenue Code and has no commercial interest in making this request.

The public has a significant interest in understanding the Department of Veterans Affairs' response to allegations of conflicts of interests of senior Department personnel. Empower Oversight is committed to government accountability and public integrity and is committed to public disclosure of documents via its website, and by providing these documents to the media for public dissemination. For ease of administration and to conserve resources, we ask that documents be produced in a readily accessible electronic format. In the event our request for a fee waiver is denied or if you have any questions about this request, please contact us immediately.

Thank you for your prompt attention to this important matter.

Cordially,

[/Jason Foster/](#)

Jason Foster  
Founder & President

# Exhibit 2



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Mon, Aug 16, 2021 at 11:20 AM

**From:** VACO FOIA Service Inbox <[vacofoiase@va.gov](mailto:vacofoiase@va.gov)>  
**Date:** August 16, 2021 at 10:54:32 AM EDT  
**To:** [jf@empowr.us](mailto:jf@empowr.us)  
**Cc:** VACO FOIA Service Inbox <[vacofoiase@va.gov](mailto:vacofoiase@va.gov)>, "Price, Chaquonna B." <[Chaquonna.Price@va.gov](mailto:Chaquonna.Price@va.gov)>  
**Subject:** 21- 08250-F FOIA Acknowledgment & Final Response

Good Morning Mr. Foster:

This email is to acknowledge and serve as the final response for your August 9, 2021, Freedom of Information Act (FOIA) request to the Department of Veterans Affairs (VA) in which you are requesting:

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. (Attachments A and B).
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." (see Attachment B).
3. Internal communications within the Department (other than the with 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 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.

The information being requested falls under the purview of the FOIA offices listed below. Your request have been referred for processing and direct response to you.

-

**Veterans Benefit Administration**

VBA Central FOIA office

[810 Vermont Avenue, NW](#)

(20M33) VACO

Washington, DC 20420

[FOIA.VBAC0@va.gov](mailto:FOIA.VBAC0@va.gov)

Phone: 202-461-9516

Fax: 202-632-8925

-

**Office of Assistant Secretary for Congressional & Legislative Affairs**

[810 Vermont Avenue, NW](#)

(009) VACO

Washington, DC 20420

Phone: 202-461-6459

Fax: 202-273-6792

-

**Office of Inspection General**

810 Vermont Avenue, NW

(00SB) VACO

Washington, DC 20420

[vaoigfoia-pa@va.gov](mailto:vaoigfoia-pa@va.gov)

Phone: 202-632-8204

Fax: 202-461-4301

-

This concludes the VACO FOIA Office response to your request.

We appreciate your interest in the VA.

Sincerely,

**Chaquonna Price**

**Management Analyst, VA FOIA Service**

**Quality, Performance, and Risk (QPR)**

**Office of Information and Technology (OI&T)**

**811 Vermont Ave NW, Room # 5434**

**Washington, DC 20240**

**Office: 202 632-7233**

**E-Fax: 202-632-7581**

**FOIA Hotline: 877-750-3642**

**QPR's Mission Statement:**

***“To lead a culture of quality and accountability to drive an exceptional Veteran and customer experience.”***

# Exhibit 3



August 23, 2021

Via Email: [jf@empowr.us](mailto:jf@empowr.us)

Jason Foster  
Founder & President  
2615 Columbia Pike  
#445  
Arlington, VA 22204

Re: Freedom of Information Act Tracking Numbers **21-08490-F (originally 21-08250-F)**

Dear Mr. Foster,

This letter serves as an updated acknowledgement receipt of your Freedom of Information Act (FOIA) request to the Department of Veterans Affairs (VA) dated August 6, 2021, in which you requested:

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. (Attachments A and B).
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." (see Attachment B).
3. Internal communications within the Department (other than the with 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 Under Secretary for Benefits Margarita Devlin.

1 IG has its own tracking number. You will be notified by them of its FOIA tracking number





**21-08490-F Foster**

Page 2

- 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.

The FOIA Service received your request on August 8, 2021, and assigned it FOIA tracking numbers **21-08490-F**. Please refer to these numbers when communicating with the VA about this request.

The records you requested are maintained at the Office of the Executive Secretary (OSVA), and Office of Inspector General (OIG)<sup>1</sup>. Therefore, we are redirecting your request to these offices for a file search and a direct response to you. If you wish to know the status of your request, please contact them directly at the following addresses:

Department of Veterans Affairs  
Attention: Richard Ha  
OSVA, (002B) VACO  
810 Vermont Avenue, NW  
Washington, DC 20420  
Email: [osvafoia@va.gov](mailto:osvafoia@va.gov)  
Phone: (202) 461-4857  
Fax: (202) 273-4880

Questions regarding the status of your request, please refer to FOIA number **21-008490-F**, and contact Mr. Ha.

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<sup>1</sup> IG has its own tracking number. You will be notified by them of its FOIA tracking number



**21-08490-F Foster**  
Page 3

Department of Veteran Affairs  
Attention: Ruthlee Gowins-Bellamy  
810 Vermont Avenue, NW  
OIG, (50CI) VACO  
Washington, DC 20420  
Email: [vaoigfoia-pa@va.gov](mailto:vaoigfoia-pa@va.gov)  
Phone: (202) 461- 4412  
Fax: (202) 495-5859

Questions regarding the status of your request, please contact Ms. Gowins-Bellamy.

Please know that due to COVID 19, there may be a delay in responding to your request.

This concludes the FOIA Service's response to your request.

We appreciate your interest in the VA. If you have any questions concerning this letter, you may contact me.

Sincerely,

Chaquonna Price

for

Ms. Doloras Johnson  
Director, VACO FOIA Service  
Quality, Performance, and Risk (QPR)  
Office of Information and Technology (OIT)

# Exhibit 4



DEPARTMENT OF VETERANS AFFAIRS  
Washington DC 20420

August 24, 2021

In Reply Refer To: 001B  
**FOIA Request: 21-08490-F**

Via Email: [jf@empowr.us](mailto:jf@empowr.us)

Empower Oversight  
Attention: Jason Foster  
2615 Columbia Pike, #445  
Arlington, VA 22204

Dear Mr. Foster:

This is to acknowledge receipt of your August 6, 2021, Freedom of Information Act (FOIA) request to the Department of Veterans Affairs (VA), FOIA Service in which you requested a copy of the following:

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. (Attachments A and B).
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." (see Attachment B).
3. Internal communications within the Department (other than the with 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 opinions 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 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."

Your request was received by the VA FOIA Service on August 6, 2021, and assigned FOIA tracking number **21-08490-F**. Please refer to this number when communicating with the VA about this FOIA request.

Your request was referred to and received by the VA Office of the Secretary (OSVA) on August 23, 2021. I am the individual responsible for processing your request for the OSVA and am processing your request under 21-08490-F. The OIG FOIA Office will assign a separate FOIA number to the portion(s) of your request for which they are responsible.

The FOIA provides that agencies are to search for records responsive to FOIA requests that "reasonably describe" the records requested. Further clarification is needed before I can move forward with processing your request. According to our regulations, a request for records "must contain a reasonable description of the records desired so that it may be located with relative ease." Per 38 CFR § 1.554(d), the requester's description of the records sought needs to describe such records in enough detail to allow VA FOIA Officers to locate them with a "reasonable amount of effort." To the extent possible, the requester should include specific information about each record, such as the date, title or name, author recipient and subject matter, building name, etc.

Additional information is required with regards to item 5 of your request in which you are seeking "Calendar entries and notes of any meetings between Ms. Bogue and VES/SVA representatives, including Barrett Bogue." Please provide a date time frame for this portion of your request.

The portion of your request pertaining to item 5 is on hold until such time as I receive your response. Your response to my request for clarification is requested within ten business days, as I cannot task a records search for this portion of your request until I have your response.

Jason Foster  
Page 3  
August 24, 2021

You are also seeking a request for a fee waiver. I have considered your request and explanation and have determined that you meet the requirements for a fee waiver; as such, your request for a fee waiver is approved.

Please contact me directly at [ruthann.parise@va.gov](mailto:ruthann.parise@va.gov) or at [OSVAFOIA@va.gov](mailto:OSVAFOIA@va.gov) with your response to clarification or with any questions that you may have about this request.

Sincerely,

Ruthann Parise  
OSVA FOIA Officer



# Exhibit 5



DEPARTMENT OF VETERANS AFFAIRS  
Washington DC 20420

September 7, 2021

In Reply Refer To: 001B  
**FOIA Request: 21-08490-F**

Via Email: [jf@empowr.us](mailto:jf@empowr.us)

Empower Oversight  
Attention: Jason Foster  
2615 Columbia Pike, #445  
Arlington, VA 22204

Dear Mr. Foster:

This is the first interim Initial Agency Decision (IAD) to your August 6, 2021 Freedom of Information Act (FOIA) request to the Department of Veterans Affairs (VA), FOIA Service in which you requested a copy of the following:

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. (Attachments A and B).
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." (see Attachment B).
3. Internal communications within the Department (other than the with 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 opinions 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 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."

Your request was received by the VA FOIA Service on August 6, 2021, and assigned FOIA tracking number **21-08490-F**. Please refer to this number when communicating with the VA about this FOIA request.

Your request was referred to and received by the VA Office of the Secretary (OSVA) on August 23, 2021.

On August 24, 2021, I acknowledged receipt of your request and sought your clarification to item 5. Specifically, I requested that you provide a date time frame for the calendars that you are seeking.

That same day, August 24, 2021, I conducted two searches of Secretary Denis McDonough's and Chief of Staff Tanya Bradsher's email boxes. The searches were conducted as follows:

Search 1

From (Sender): McDonough OR DRM OR Bradsher  
Sent Date: From Date: 4/2/21  
                  To Date: 7/28/21  
Key Terms: Bogue OR Grassley OR 21-05571-F OR 04890714

Search 2

To (Recipient): McDonough OR DRM OR Bradsher  
Sent Date: From Date: 4/2/21  
                  To Date: 7/28/21  
Key Terms: Bogue OR Grassley OR 21-05571-F OR 04890714

Please know, the "From Date" consists of the date of Senator Grassley's initial letter to the VA. The "To Date" of 7/28/21 was used, as I was previously provided the Secretary's and Chief of Staff's email boxes by the VA Office of Information and Technology (OIT) in order to process other FOIA requests.

On August 25, 2021, Mr. Bryan Saddler, of Empower Oversight, clarified item 5 to the time frame of December 1, 2019 through July 20, 2021.

On August 26, 2021, I tasked the VA OIT to provide me with 20 email boxes, of VA employees from various offices, for the timeframe of April 2, 2021 (the date of Senator Grassley's letter) through August 6, 2021 (the date of your FOIA request). I've requested the following key terms be applied to the search: Bogue OR Grassley OR 21-05571-F OR 04890714. Additionally, I

tasked the VA OIT to provide me with the calendar entries and notes of Charmain Bogue for the timeframe of December 1, 2019 through July 20, 2021.

On August 27, 2021, the Veterans Benefits Administration, the VA Office of General Counsel, and the VA Corporate Senior Executive Management Office (CSEMO) were tasked with conducting a search for the portion of your request pertaining to “Any resulting letter(s) of admonishment.” The searches included a search of Mr. Murphy’s electronic official personnel file. That same day, I was advised by all three offices that they were unable to locate records responsive to this portion of your request. As such, I am issuing a “No Records” response to item 6(e) of your request.

For this first interim release, a total of 652 pages of responsive records, subsequently Bates (21-08490-F) 000001 through (21-08490-F) 000652, and 1 Excel spreadsheet were reviewed. Records contained in this release are responsive to items 1, 3, and 6(a)-(d) and consist of records from my search conducted on August 24, 2021. I have determined 249 pages and 1 Excel spreadsheet are releasable in their entirety, 330 pages are partially releasable, and 73 pages are withheld in full pursuant to Title 5 U.S.C. §§ 552(b)(3), (b)(5), (b)(6), and (b)(7)(C), FOIA exemptions 3, 5, 6, and 7C.

**FOIA Exemption 3** permits withholding of records or information if a law specifically exempts the material from disclosure. 5 U.S.C. § 105(b)(2) prohibits the release of any ethics waivers, agreements and public financial disclosure reports of certain government employees under the Ethics in Government Act of 1978.

**FOIA Exemption 5** protects interagency 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. Moreover, this exemption permits an agency to withhold material reflecting the thoughts, opinions, and recommendations of federal officials and consultants reviewing an issue. Under the deliberative process privilege and FOIA Exemption 5, OSVA redacts internal government deliberations, thoughts, opinions, recommendations, and proposed solutions from federal employees and consultants reviewing VA programs in their professional capacities, as well as non-final or draft documents. The information contained in the responsive records is both predecisional and deliberative because it reflects preliminary opinions, proposed solutions, and recommendations, which do not reflect VA’s final decision. Exposure of premature discussions before a final decision is made could create undue public confusion. The release of the redacted information would negatively impact the ability of federal employees and consultants to openly and frankly consider issues amongst themselves when deliberating, discussing, reviewing, proposing changes to, and making recommendations on VA programs. The information reveals the thoughts, deliberations, and opinions that, if released, would have a chilling effect on the ability of federal officials and consultants to discuss, opine, recommend or be forthcoming about the agency’s issues which require full and frank assessment. Here, the disclosure of the withheld information is likely to compromise the integrity of this deliberative or decision-making process. Moreover, the predecisional character of a document is not altered by the passage of time. Bruscino v. BOP, No. 94-1955, 1995 WL 444406 at \*5 (D.D. C. May 15, 1995), aff’d in part, No. 95-5212, 1996 WL 393101 (D.C. Cir. June 24, 1996).

**FOIA Exemption 6** exempts from disclosure of personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public’s right to disclosure against the individual’s right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal

public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test. Specifically, the information being withheld, as indicated on the enclosed documents, under FOIA Exemption 6, consists of names, email addresses, VA usernames, phone numbers, cellular numbers, social security numbers, dates of birth of federal civilian employees and private citizens as well as personal pronouns which if released could reveal the identity of individuals providing statements in a law enforcement record. We do however release the names of VA Senior Executives. Federal civilian employees and private citizens retain a significant privacy interest under certain circumstances, such as in instances where the release of their information could represent a threat to their well-being, harassment, or their ability to function within their sphere of employment. The federal civilian employees and private citizens whose information is at issue have a substantial privacy interest in their personal information. In weighing the private versus the public interest, except names of VA Senior Executives, we find that there is no public interest in knowing the names, email addresses, VA usernames, phone numbers, cellular numbers, social security numbers, dates of birth of federal civilian employees and private citizens as well as personal pronouns which if released could reveal the identity of individuals providing statements in a law enforcement record. The coverage of FOIA Exemption 6 is absolute unless the FOIA requester can demonstrate a countervailing public interest in the requested information by demonstrating that the individual is in a position to provide the requested information to members of the general public and that the information requested contributes significantly to the public's understanding of the activities of the Federal government. Additionally, the requester must demonstrate how the public's need to understand the information significantly outweighs the privacy interest of the person to whom the information pertains. Upon consideration of the records, I have not been able to identify a countervailing public interest of sufficient magnitude to outweigh the privacy interest of the individuals whose names are redacted. The protected information has been redacted and (b)(6) inserted. "Withholding a telephone number or e-mail address, alone, is not sufficient to protect that [privacy] interest; alternate means of contacting and harassing these employees would be readily discoverable on the Internet if this court ordered their names disclosed." Long v. Immigration & Customs Enf't, 2017 U.S. Dist. LEXIS 160719 (D.C. Cir. 2017).

**FOIA Exemption 7(C)** protects law enforcement records if released could reasonably be expected to constitute an unwarranted invasion of personal privacy. It is regularly applied to withhold references to individuals in law enforcement files. For the materials that have been withheld under Exemption 7(C), we have determined that releasing them would constitute an unwarranted invasion of privacy because they identify individuals referenced in law enforcement records and the release of this information would not shed light on an agency's performance of its statutory duties. Redacted information includes names, email addresses, phone numbers, cellular numbers, social security numbers, dates of birth of federal civilian employees and private citizens as well as personal pronouns which if released could reveal the identity of individuals providing statements in a law enforcement record.

The following additional information is provided:

Bates numbered pages (21-08490-F) 000001-000320 are in response to item 1;

Bates numbered pages (21-08490-F) 000321-000347 are in response to item 3; and,

Bates numbered pages (21-08490-F) 000348-000652 are in response to item 6(a)-(d);

Bates numbered pages (21-08490-F) 000115, 000117, 000163, 000531-000547, 000591, 000614-000617, and 000623-000652 have been withheld in full pursuant to FOIA Exemption 5 pre-decisional and/or deliberative process; and,

Bates numbered pages (21-08490-F) 000330-000347 have been withheld in full pursuant to FOIA Exemption 3 and specifically 5 U.S.C. § 105(b)(2).

Remaining releasable records, if any, will be provided on a rolling basis.

The VA FOIA regulations at 38 C.F.R § 1.556(c)(1) provide that FOIA Officers may encounter “unusual circumstances,” where it is not possible to meet the statutory time limits for processing the request. In such cases, the FOIA Officer will extend the 20-business day time limit for 10 more business days. In the case of this request, unusual circumstances consist of the need to search for and collect the requested records from the VA OIT, a component other than the office processing the request. As such, I am exercising the one time 10-business day extension at this time.

Finally, please know the size of the releasable records exceeds that which may be sent in one email. As such, the records are being uploaded to the VA FOIA website under Document Retrieval at [Document Retrieval - Freedom Of Information Act FOIA](#). Please allow up to three days for the records to post. The files are listed by the FOIA tracking number 21-08490-F and will take a few minutes to upload once selected and the password is input. Once accessed, please download the files to your computer as the records will only be posted for ten calendar days before being removed. The password to the file is h4rBst6FXWE

### **FOIA Mediation**

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. Under the provisions of the FOIA Improvement Act of 2016, the following contact information is provided to assist FOIA requesters in resolving disputes:

### **VA Central Office FOIA Public Liaison:**

Name: Doloras Johnson

Email Address: [vacofoiaservice@va.gov](mailto:vacofoiaservice@va.gov)

### **Office of Government Information Services (OGIS)**

Email Address: [ogis@nara.gov](mailto:ogis@nara.gov)

Fax: 202-741-5769

Mailing address:

National Archives and Records Administration

8601 Adelphi Road

College Park, MD 20740-6001

### **FOIA Appeal**

Please be advised that should you desire to do so; you may appeal the determination made in this response to:

Office of General Counsel (024)  
Department of Veterans Affairs

Jason Foster  
Page 6  
September 7, 2021

810 Vermont Avenue, NW  
Washington, DC 20420

If you should choose to file an appeal, please include a copy of this letter with your written appeal and clearly indicate the basis for your disagreement with the determination set forth in this response. Please be advised that in accordance with VA's implementing FOIA regulations at 38 C.F.R. § 1.559, your appeal must be postmarked no later than ninety (90) days of the date of this letter.

Sincerely,

Ruthann Parise  
OSVA FOIA Officer

Enclosure: 579 pages and 1 Excel spreadsheet, 1st interim releasable records

# Exhibit 6





DEPARTMENT OF VETERANS AFFAIRS  
Washington DC 20420

October 29, 2021

In Reply Refer To: 001B  
**FOIA Request: 21-08490-F**

Via Email: [jf@empowr.us](mailto:jf@empowr.us)

Empower Oversight  
Attention: Jason Foster  
2615 Columbia Pike, #445  
Arlington, VA 22204

Dear Mr. Foster:

This is the second interim Initial Agency Decision (IAD) to your August 6, 2021 Freedom of Information Act (FOIA) request to the Department of Veterans Affairs (VA), FOIA Service in which you requested a copy of the following:

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. (Attachments A and B).
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." (see Attachment B).
3. Internal communications within the Department (other than the with 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 opinions 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 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."

Your request was received by the VA FOIA Service on August 6, 2021, and assigned FOIA tracking number **21-08490-F**. Please refer to this number when communicating with the VA about this FOIA request.

Your request was referred to and received by the VA Office of the Secretary (OSVA) on August 23, 2021.

On August 24, 2021, I acknowledged receipt of your request and sought your clarification to item 5. Specifically, I requested that you provide a date time frame for the calendars that you are seeking.

That same day, August 24, 2021, I conducted two searches of Secretary Denis McDonough's and Chief of Staff Tanya Bradsher's email boxes. The searches were conducted as follows:

Search 1

From (Sender): McDonough OR DRM OR Bradsher  
Sent Date: From Date: 4/2/21  
                  To Date: 7/28/21  
Key Terms: Bogue OR Grassley OR 21-05571-F OR 04890714

Search 2

To (Recipient): McDonough OR DRM OR Bradsher  
Sent Date: From Date: 4/2/21  
                  To Date: 7/28/21  
Key Terms: Bogue OR Grassley OR 21-05571-F OR 04890714

Please know, the "From Date" consists of the date of Senator Grassley's initial letter to the VA. The "To Date" of 7/28/21 was used, as I was previously provided the Secretary's and Chief of Staff's email boxes by the VA Office of Information and Technology (OIT) in order to process other FOIA requests.

On August 25, 2021, Mr. Bryan Saddler, of Empower Oversight, clarified item 5 to the time frame of December 1, 2019 through July 20, 2021.

On August 26, 2021, I tasked the VA OIT to provide me with 20 email boxes, of VA employees from various offices, for the timeframe of April 2, 2021 (the date of Senator Grassley's letter) through August 6, 2021 (the date of your FOIA request). I've requested the following key terms be applied to the search: Bogue OR Grassley OR 21-05571-F OR 04890714. Additionally, I

tasked the VA OIT to provide me with the calendar entries and notes of Charmain Bogue for the timeframe of December 1, 2019 through July 20, 2021.

On August 27, 2021, the Veterans Benefits Administration, the VA Office of General Counsel, and the VA Corporate Senior Executive Management Office (CSEMO) were tasked with conducting a search for the portion of your request pertaining to "Any resulting letter(s) of admonishment." The searches included a search of Mr. Murphy's electronic official personnel file. That same day, I was advised by all three offices that they were unable to locate records responsive to this portion of your request. As such, I am issuing a "No Records" response to item 6(e) of your request.

On September 7, 2021, for our first interim response, 249 pages and 1 Excel spreadsheet were released in their entirety, 330 pages were partially released, and 73 pages were withheld in full. The pages were Bates numbered (21-08490-F) 000001 through (21-08490-F) 000652.

On September 8, 2021, I sent a letter correcting an error discovered on page four of my September 7, 2021 first interim response. The corrected letter advised that Bates numbered pages (21-08490-F) 000321-000347 were in response to item 4 of your request vice item 3.

That same day, September 8, 2021, I received 23 pst files of 20 VA employee mailboxes and the calendars pertaining to Charmain Bogue.

On September 9, 2021, I sent a request for clarification to Mr. Bryan Saddler of your organization and requested that clarification to item 5 of your request. Specifically, I requested that you provide the names of the VES/SVA representatives that you are requesting aside from Barret Bogue.

On September 15, 2021, after multiple attempts at uploading the pst files, I requested the OI&T further reduce the size of three of the files. That same day, OI&T reduced the files size of the three files into 20 additional pst files.

On September 30, 2021, I received Mr. Saddler's response to my September 9, 2021, clarification. Item 5 has been clarified as follows:

VES

Carrie Wofford  
Robert F Norton or Bob Norton  
Tom Tarantino  
Walter Ochinko  
Michael Saunders  
Tanya Ang

SVA

Jarod Lyon  
William "will" Hubbard  
Lauren Augustine  
James Schmeling  
Chris Cate  
Rachel Norman  
Dan Standage

Jason Foster  
Page 4  
October 29, 2021

Fred Wellman  
Rory Borsius”

On October 5, 2021, I requested the OI&T conduct a further search of item 5 of your request. I requested the search be conducted using the following key terms:

Barrett Bogue  
VES  
Carrie Wofford  
Robert F Norton or Bob Norton  
Tom Tarantino  
Walter Ochinko  
Michael Saunders  
Tanya Ang  
SVA  
Jarod Lyon  
William “will” Hubbard  
Lauren Augustine  
James Schmeling  
Chris Cate  
Rachel Norman  
Dan Standage  
Fred Wellman  
Rory Brosius

That same day, October 5, 2021, I conducted a key term search of the 20 mailboxes provided by the OI&T. The key term search was limited to 04890714, the case number assigned to Senator Grassley’s request in the VA Integrated Enterprise Workflow Solution (VIEWS). The VIEWS is the official correspondence tracking system utilized by the VA.

For this second interim release, a total of 1,426 pages of responsive records, subsequently Bates (21-08490-F) 000653 through (21-08490-F) 002078, were reviewed. Records contained in this release are responsive to item 1 and consist of records from my search conducted on October 5, 2021. I have determined 978 pages are releasable in their entirety, 290 pages are partially releasable, and 158 pages are withheld in full pursuant to Title 5 U.S.C. §§ 552(b)(5), (b)(6), and (b)(7)(E), FOIA exemptions 5, 6, and 7E.

**FOIA Exemption 5** protects interagency 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. Moreover, this exemption permits an agency to withhold material reflecting the thoughts, opinions, and recommendations of federal officials and consultants reviewing an issue. Under the deliberative process privilege and FOIA Exemption 5, OSVA redacts internal government deliberations, thoughts, opinions, recommendations, and proposed solutions from federal employees and consultants reviewing VA programs in their professional capacities, as well as non-final or draft documents. The information contained in the responsive records is both predecisional and deliberative because it reflects preliminary opinions, proposed solutions, and recommendations, which do not reflect VA’s final decision. Exposure of premature discussions before a final decision is made could create undue public confusion. The release of the redacted information would negatively impact the ability of federal employees and consultants to openly and frankly consider issues amongst themselves when deliberating, discussing, reviewing, proposing

changes to, and making recommendations on VA programs. The information reveals the thoughts, deliberations, and opinions that, if released, would have a chilling effect on the ability of federal officials and consultants to discuss, opine, recommend or be forthcoming about the agency's issues which require full and frank assessment. Here, the disclosure of the withheld information is likely to compromise the integrity of this deliberative or decision-making process. Moreover, the predecisional character of a document is not altered by the passage of time. Bruscino v. BOP, No. 94-1955, 1995 WL 444406 at \*5 (D.D. C. May 15, 1995), aff'd in part, No. 95-5212, 1996 WL 393101 (D.C. Cir. June 24, 1996).

**FOIA Exemption 6** exempts from disclosure of personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test. Specifically, the information being withheld, as indicated on the enclosed documents, under FOIA Exemption 6, consists of names, email addresses, VA usernames, phone numbers, cellular numbers, social security numbers, dates of birth of federal civilian employees and private citizens as well as personal pronouns which if released could reveal the identity of individuals providing statements in a law enforcement record. We do however release the names of VA Senior Executives. Federal civilian employees and private citizens retain a significant privacy interest under certain circumstances, such as in instances where the release of their information could represent a threat to their well-being, harassment, or their ability to function within their sphere of employment. The federal civilian employees and private citizens whose information is at issue have a substantial privacy interest in their personal information. In weighing the private versus the public interest, except names of VA Senior Executives, we find that there is no public interest in knowing the names, email addresses, VA usernames, phone numbers, cellular numbers, social security numbers, dates of birth of federal civilian employees and private citizens as well as personal pronouns which if released could reveal the identity of individuals providing statements in a law enforcement record. The coverage of FOIA Exemption 6 is absolute unless the FOIA requester can demonstrate a countervailing public interest in the requested information by demonstrating that the individual is in a position to provide the requested information to members of the general public and that the information requested contributes significantly to the public's understanding of the activities of the Federal government. Additionally, the requester must demonstrate how the public's need to understand the information significantly outweighs the privacy interest of the person to whom the information pertains. Upon consideration of the records, I have not been able to identify a countervailing public interest of sufficient magnitude to outweigh the privacy interest of the individuals whose names are redacted. The protected information has been redacted and (b)(6) inserted. "Withholding a telephone number or e-mail address, alone, is not sufficient to protect that [privacy] interest; alternate means of contacting and harassing these employees would be readily discoverable on the Internet if this court ordered their names disclosed." Long v. Immigration & Customs Enf't, 2017 U.S. Dist. LEXIS 160719 (D.C. Cir. 2017).

**FOIA Exemption 7(E)** exempts from required disclosure information that "would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." Redacted information includes VA intranet and MS outlook safelinks website addresses containing confidential VA information technology system and security parameters. The release of this information would expose the

VA, VA employees, contractors, VA information technology systems, information technology security systems and MS outlook safelinks information technology systems to potential hacking and security liabilities and risks. Prechtel v. FCC, 330 F. Supp. 3d 320, 335 (D.D.C. 2018) (protecting agency's electronic server logs because disclosure "would reveal sensitive information regarding [its] IT architecture, including security measures [it] takes to protect its systems from malicious activity" and would provide a ""roadmap"" to circumvent agency's defensive efforts (quoting agency declaration)); Poitras v. DHS, 303 F. Supp. 3d 136, 159 (D.D.C. 2018) (withholding "protected internal e-mail addresses, non-public intranet web addresses, and a secure internal e-mail tool" because disclosure would increase risk of unauthorized access to agency's IT system (quoting agency declaration)); Levinthal v FEC, 219 F. Supp. 3d 1, 8-9 (protecting study that assesses vulnerabilities in information technology system because possible security risk exists and disclosure could permit unlawful access to agency system).

The following additional information is provided regarding records withheld in full:

Bates numbered pages (21-08490-F) 000719, 000752, 000785, 000888, 000963, and 001917 have been withheld pursuant to FOIA Exemption 5 pre-decisional and/or deliberative process and FOIA Exemption 6; and,

Bates numbered pages (21-08490-F) 001191, 001493-001500, 001503-001510, 001512-001518, 001525-001531, 001535-001541, 001549-001555, 001558-001564, 001573-001579, 001591-001586, 001594-001595, 001597-001599, 001606-001607, 001639-001646, 001648-001650, 001687-001697, 001703-001709, 001713-001719, 001725-001731, 001780-001791, 001793-001801, 001835-001846, 001865, 001918-001919, and 001922 have been withheld pursuant to FOIA Exemption 5 pre-decisional and/or deliberative process.

Remaining releasable records, if any, will be provided on a rolling basis.

The VA FOIA regulations at 38 C.F.R § 1.556(c)(1) provide that FOIA Officers may encounter "unusual circumstances," where it is not possible to meet the statutory time limits for processing the request. In such cases, the FOIA Officer will extend the 20-business day time limit for 10 more business days. In the case of this request, unusual circumstances consist of the need to search for and collect the requested records from the VA OIT, a component other than the office processing the request. As such, I am exercising the one time 10-business day extension at this time.

Finally, please know the size of the releasable records exceeds that which may be sent in one email. As such, the records are being uploaded to the VA FOIA website under Document Retrieval at [Document Retrieval - Freedom Of Information Act FOIA](#). Please allow up to three days for the records to post. The file is listed in Document Retrieval as 21-08490-F 2<sup>nd</sup> Interim and will take a few minutes to upload once selected and the password is input. Once accessed, please download the files to your computer as the records will only be posted for ten calendar days before being removed. The password to the file is h4rBst6FXWE

### **FOIA Mediation**

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not

Jason Foster  
Page 7  
October 29, 2021

affect your right to pursue litigation. Under the provisions of the FOIA Improvement Act of 2016, the following contact information is provided to assist FOIA requesters in resolving disputes:

**VA Central Office FOIA Public Liaison:**

Email Address: [vacofoiservice@va.gov](mailto:vacofoiservice@va.gov)

Phone: (877) 750-3642

Fax: (202) 632-7581

Mailing address:

Department of Veterans Affairs

VA FOIA Public Liaison (005R1C)

810 Vermont Avenue, NW

Washington, DC 20420

**Office of Government Information Services (OGIS)**

Email Address: [ogis@nara.gov](mailto:ogis@nara.gov)

Fax: 202-741-5769

Mailing address:

National Archives and Records Administration

8601 Adelphi Road

College Park, MD 20740-6001

**FOIA Appeal**

Please be advised that should you desire to do so; you may appeal the determination made in this response to:

Office of General Counsel (024)  
Department of Veterans Affairs  
810 Vermont Avenue, NW  
Washington, DC 20420

If you should choose to file an appeal, please include a copy of this letter with your written appeal and clearly indicate the basis for your disagreement with the determination set forth in this response. Please be advised that in accordance with VA's implementing FOIA regulations at 38 C.F.R. § 1.559, your appeal must be postmarked no later than ninety (90) days of the date of this letter.

Sincerely,

Ruthann Parise  
OSVA FOIA Officer

Enclosure: 1,268 pages, 2nd interim releasable records