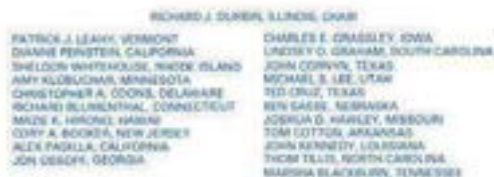


Exhibit A



United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

April 2, 2021

VIA ELECTRONIC TRANSMISSION

Denis McDonough
Secretary
U.S. Department of Veterans Affairs

Dear Secretary McDonough:

According to multiple whistleblowers and witnesses interviewed by my staff, the U.S. Department of Veterans Affairs (VA) appears to be sweeping under the rug a history of conflicts and ethical issues among senior officials at the Veterans Benefits Administration (VBA). These concerns and allegations have been highlighted in both the media as well as in recent court filings, raising numerous challenges as you begin your tenure leading the VA.¹

After reviewing both witness statements and documents provided to my office, I write to you to express concern over allegations of improper contracting practices, whistleblower reprisal, and VA officials allegedly failing to protect internal deliberative information which may have led to individuals trading on non-public information. I also understand that several whistleblowers have disclosed these concerns to the Office of Special Counsel (OSC), as well as the VA Inspector General (VA OIG). In November 2020, the National Legal and Policy Center (NLPC) reported on some of these very issues.² Of specific concern, whistleblowers have alleged that a VBA official has participated in VA business while her husband engaged in employment and consulting arrangements for companies with business before her, including Student Veterans of America (SVA) and Veterans Education Success (VES). In February of 2018, VA ethics lawyers allegedly determined that the VBA senior official, Charmain Bogue, should recuse herself from engaging in

¹ See NLPC Staff, *Are For-Profit College 'Critics' Up to Their Old Tricks?*, NATIONAL LEGAL AND POLICY CENTER (Nov. 4, 2020), <https://nlpc.org/2020/11/04/are-for-profit-college-critics-up-to-their-old-tricks/>; NLPC Staff, *VA Official Charmain Bogue Did Not Disclose Links to Outside Group*, NATIONAL LEGAL AND POLICY CENTER (Nov. 12, 2020), <https://nlpc.org/2020/11/12/va-official-charmain-bogue-did-not-disclose-links-to-outside-group/>; NLPC Staff, *On Tax Return, Group Did Not Disclose Payments to Husband of VA Official*, NATIONAL LEGAL AND POLICY CENTER (Dec. 4, 2020), <https://nlpc.org/2020/12/04/on-tax-return-group-did-not-disclose-payments-to-husband-of-v-a-official/>; Complaint, *Pomares v. United States Department of Veterans Affairs*, Case # 21-cv-00084-H-MSB (S.D. Cal., Jan 15, 2021) (Attached as Exhibit A).

² See NLPC Staff, *Are For-Profit College 'Critics' Up to Their Old Tricks?*, NATIONAL LEGAL AND POLICY CENTER (Nov. 4, 2020), <https://nlpc.org/2020/11/04/are-for-profit-college-critics-up-to-their-old-tricks/>; NLPC Staff, *VA Official Charmain Bogue Did Not Disclose Links to Outside Group*, NATIONAL LEGAL AND POLICY CENTER (Nov. 12, 2020), <https://nlpc.org/2020/11/12/va-official-charmain-bogue-did-not-disclose-links-to-outside-group/>; NLPC Staff, *On Tax Return, Group Did Not Disclose Payments to Husband of VA Official*, NATIONAL LEGAL AND POLICY CENTER (Dec. 4, 2020), <https://nlpc.org/2020/12/04/on-tax-return-group-did-not-disclose-payments-to-husband-of-v-a-official/>.

Secretary McDonough
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April 2, 2021

activity involving her husband's clients and employers, VES and SVA. Chairman Bogue serves as Executive Director of VBA's Education Service, and her husband, Barrett Bogue, serves as a Senior Communication Advisor for VES.³ Although this legal opinion was supposedly provided to Mrs. Bogue, as well as some other VA officials, it is unclear whether she ever did recuse herself, and if she did, when.

Mr. Bogue reportedly runs a consulting firm that has "a contract with VES ... generous enough to allow him to quit his day job and focus on his consulting business full time."⁴ It is further alleged that Mrs. Bogue failed to disclose her husband's place of work and his income on her mandatory ethics paperwork.⁵ Additionally, it appears that VES may have also failed to disclose payments it made to Mr. Bogue for his work.⁶

Whistleblowers further allege that the Bagues are indicative of a broader culture of corruption and cronyism at the VBA, one which is hostile to enforcing basic ethical standards, and punishes those who bring concerns to the forefront. For example, Paul Lawrence, former Undersecretary of Benefits, allegedly recommended three senior officials for suspension who were reported to have improperly, and potentially illegally, accepted gifts from outside stakeholders. However, these suspensions were supposedly overturned by the previous Secretary of the VA. One of the officials, former Principal Undersecretary Jamie Manker, abruptly retired, and another, Tom Murphy, is currently serving as Acting Undersecretary of Benefits.

Of additional concern, according to allegations in a federal Freedom of Information Act (FOIA) lawsuit, is that the VA is currently fighting the release of documents that would further shed light on another controversy surrounding the Bagues.⁷ According to the lawsuit, in January 2020, Mr. Bogue's employer, VES, wrote a letter to Mrs. Bogue, "which sought severe penalties against several for-profit educational institutions, [and] began with this salutation, 'Dear Charmain.'"⁸ Mr. Bogue's employer proposed that Mrs. Bogue and VBA "put four schools and a public company out of business," pushing her "to choke off the schools' income flow" by preventing veterans from using their GI Bill benefits at those institutions.⁹

In a March 3, 2020 email provided to my office, obtained via FOIA, as the VA prepared to publicly announce its intent to grant VES's request, one individual is seen to have cautioned those on the email chain that the information, and pending actions surrounding various schools, needed

³ Veterans Education Service, Who We Are, Barret Bogue, <https://vetsedsuccess.org/who-we-are/barrett-bogue/>.

⁴ NLPC Staff, *Are For-Profit College 'Critics' Up to Their Old Tricks?*, NATIONAL LEGAL AND POLICY CENTER (Nov. 4, 2020), <https://nlpc.org/2020/11/04/are-for-profit-college-critics-up-to-their-old-tricks/>.

⁵ NLPC Staff, *VA Official Charmain Bogue Did Not Disclose Links to Outside Group*, NATIONAL LEGAL AND POLICY CENTER (Nov. 12, 2020), <https://nlpc.org/2020/11/12/va-official-charmain-bogue-did-not-disclose-links-to-outside-group/>.

⁶ NLPC Staff, *On Tax Return, Group Did Not Disclose Payments to Husband of VA Official*, NATIONAL LEGAL AND POLICY CENTER (Dec. 4, 2020), <https://nlpc.org/2020/12/04/on-tax-return-group-did-not-disclose-payments-to-husband-of-v-a-official/>.

⁷ Complaint, *Pomares v. United States Department of Veterans Affairs*, Case # 21-cv-00084-H-MSB (S.D. Cal., Jan 15, 2021) (Attached as Exhibit A).

⁸ *Id.* at 3.

⁹ *Id.* at 3-4.

Secretary McDonough
U.S. Department of Veterans Affairs
April 2, 2021

to be safeguarded.¹⁰ That official cautioned that the VA's impending announcement needed to be kept "close hold" in order to prevent misinformed leaks, general panic, and insider trading."



Unfortunately, the VA appears to have failed to observe that advice, and as the lawsuit alleges, retail investors, without access to this privileged information, were harmed as a result.

According to the complaint, "[o]n March 9, 2020, at 5:59 p.m., after the stock market had closed, the VA issued a press release announcing it was threatening to do exactly what VES had asked it to do ... to choke off the schools' income flow..."¹¹

However, someone appears to have released market sensitive information about the VA's impending announcement during the trading day and may have done so in the months between the January letter and the March 9 announcement as well. At least one recipient of the early heads-up was Mr. Bogue's employer, VES. "The VA gave early notice of its decision to some, including VES. During the trading day at 2:26 p.m. E.T., VES tweeted its own press before the official VA announcement."¹² For that reason, the lawsuit:

...seeks records ... relating to the VA's selective release of nonpublic information during the period from January through March 2020 that adversely affected the stock price of ... a U.S. publicly traded company. During this period, the stock price (ticker symbol: PRDO) fell from \$18.83 to \$7.96, a loss of 58 percent of its price and over \$800 million in market capitalization. By July 2020, the VA had decided it would take no action against CEC but for many investors who sold during the near panic, their losses had already been realized, and for the

¹⁰ Attached as Exhibit B.

¹¹ Complaint, *Pomares v. United States Department of Veterans Affairs*, Case # 21-cv-00084-H-MSB, at 5 (S.D. Cal., Jan 15, 2021) (Attached as Exhibit A).

¹² *Id.* at 6-7.

Secretary McDonough
U.S. Department of Veterans Affairs
April 2, 2021

professional traders, who may have received those tips, their profits had already been banked.¹³

The Senate Judiciary Committee has jurisdiction over FOIA-related matters and an obligation to conduct oversight of FOIA compliance issues. Moreover, the allegations described by whistleblowers and witnesses interviewed by my staff raise broader, serious questions about potential ethics violations and whistleblower reprisal at the VA.

To that end, I respectfully request that you answer the following questions no later than April 16, 2021.

1. Has Acting Undersecretary Tom Murphy ever been recommended for suspension for accepting gifts as prohibited by law?
 - a. If so, was Mr. Murphy ever suspended?
 - b. Was a recommendation for suspension ever overturned? If so, why and by who?
2. Had former Deputy Undersecretary Robert Reynolds ever been recommended for suspension for accepting gifts as prohibited by law?
 - a. If so, was Mr. Reynolds ever suspended?
 - b. Was a recommendation for suspension ever overturned? If so, why and by who?
3. Had former Principal Undersecretary Jamie Manker ever been recommended for suspension for accepting gifts as prohibited by law?
 - a. If so, was Mr. Manker ever suspended?
 - b. Was a recommendation for suspension ever overturned? If so, why and by who?
4. Please provide all records, communications, and memorandums related to the suspensions, or proposed suspensions, of Tom Murphy, Jamie Manker, and Robert Reynolds.
5. What steps does the VA take to protect retail investors by safeguarding market sensitive information regarding potential enforcement announcements related to publicly-traded companies?

¹³ *Id.* at 6-7.

Secretary McDonough
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April 2, 2021

- a. Is it possible these steps failed in this instance? If so, what will VA do to prevent this from happening again in the future?
6. If the VA is aware that market sensitive information was potentially leaked, has the VA investigated this leak of information? Please provide the report of investigation.
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?
 - a. Did the legal opinion recommend Mrs. Bogue recuse herself from any involvement with her husband's companies? If not, why not?
8. Please provide all records relating to any written ethics opinion by VA attorneys regarding Mrs. Bogue's recusal, whether and when this recusal occurred, and all communications regarding Mrs. Bogue's recusal obligations with respect to her husband's companies.
9. Did Mrs. Bogue engage in, participate in, or contribute to VA business with her husband's businesses? If so, why did VA allow Mrs. Bogue to participate?
10. Under current law and regulation, is Mrs. Bogue required to report financial information of her spouse via a public financial disclosure report? If so, did Ms. Bogue list her husband?
 - a. 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?
 - b. If Mrs. Bogue did report her husband on a public financial disclosure form, did she report Mr. Bogue's salary with respect to his work? If not, why not?
 - c. Please provide Mrs. Bogue's public financial disclosure reports dating back five (5) years.
11. If Mrs. Bogue did not report where Mr. Bogue currently works, and if she participated in VA business related to VES, would that constitute a conflict of interest as described by applicable law or regulation?¹⁴ If not, why not?
12. Why has the VA attempted to block FOIA requests seeking information regarding these matters?
 - a. Does the VA plan to comply with FOIA requests in a timely and reasonable manner in order to afford the public greater transparency?

¹⁴ 18 U.S.C. § 208.

Secretary McDonough
U.S. Department of Veterans Affairs
April 2, 2021

Should you have questions, please contact my Committee staff at (202) 224-5225. Thank you for your attention to this important mater.

Sincerely,

A handwritten signature in blue ink that reads "Chuck Grassley". The signature is written in a cursive, flowing style.

Charles E. Grassley

Ranking Member

Committee on the Judiciary

Exhibit A

Gary J. Aguirre (SBN38927)
Aguirre Law, APC
501 W. Broadway, Ste. 800
San Diego, CA 92101
Tel: 619-400-4960
Fax: 619-501-7072
Email: Gary@aguirrelawapc.com
Attorney for Plaintiff Maria A. Pomares

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

'21CV84 H MSB

Case No.: _____

MARIA A. POMARES,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF
VETERANS AFFAIRS,
Defendant.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

28 [university-phoenix-other-colleges-accessing-gi-bill-benefits/](#), last visited Jan. 13, 2021.

1 panic, their losses had already been realized, and for the professional traders, who may
2 have received those tips, their profits had already been banked.

3 6. Plaintiff is informed and believes, and thereon alleges, that the agency
4 decisions and the release of this nonpublic information involved a relationship between a
5 high-level agency official and an individual in the private sector that should have
6 required the agency official to recuse herself pursuant to agency regulations, which she
7 did not do, and that she should have fully disclosed in her Public Financial Disclosure
8 Report, which she also did not do.

9 7. The VA took the action at the prompting of a nonprofit organization with
10 prior and current relationships with market participants who may have profited by the
11 price movement of the public company.

12 8. Plaintiff seeks VA records containing information relating to (i) its decision
13 to make selective releases of nonpublic information, (ii) the identity of those who
14 received the selective releases of the nonpublic information, and (iii) the possible
15 conduits through which this nonpublic information may have flowed to market
16 participants who profited by its use.

17 9. On January 21, 2020, the nonprofit organization Veterans Education Success
18 ("VES") delivered a letter to Charmain Bogue, Executive Director of the Veterans
19 Benefits Administration ("VBA") Education Service in the VA.³ The letter, which sought
20 severe penalties against several for-profit educational institutions, began with this
21 salutation, "Dear Charmain." From this first-name greeting, VES proposed that Director
22 Bogue take action to put four schools and a public company out of business in the letter's
23 first sentence: "We are writing to bring information to your attention troubling
24 complaints alleging misleading advertising and enrollment practices by schools, *making*

25
26 ³ Letter from Aniela Szymanski, VES Sr. Dir. for Legal Affairs & Military Policy to VA
27 Exec. Dir. Charmain Bogue, Veterans Benefits Administration (Jan 21, 2020),
28 <https://vetsedsuccess.org/letter-to-va-regarding-gi-bill-feedback-tool-and-38-usc-3696-compliance/>, last visited Jan. 15, 2021.

those schools ineligible for educational benefits under 38 U.S.C. § 3696 (emphasis added)."⁴

10. VES's letter sought this extraordinary sanction based on evidence it had helped prepare and deliver to the VA: "our staff has gathered evidence that these schools aggressively recruit veterans and other GI Bill beneficiaries, making it especially important that VA take appropriate action to address their behavior."⁵

11. Based on this evidence, YES's letter pushed the VA to choke off the schools' income flow by declaring the schools were ineligible for educational benefits under 38 U.S.C. § 3696.

12. The YES letter also pressed the VA to accept as its own all veterans' purported complaints submitted by YES to the VA regarding for-profit educational institutions and forward all YES generated complaints to law enforcement. To these ends, the YES letter urged the VA to:

- A. Modify its tracking system of veterans' complaints, the GI Bill tool, so it would contain all complaints YES had collected from veterans and submitted to the VA;
- B. Modify its GI Bill tool to reflect student disagreement with the school's response to a VA complaint, similar to the way the U.S. Consumer Financial Protection Bureau reports that information;
- C. Upload all complaints delivered by VESS to the VA "into Consumer Sentinel, which law enforcement relies upon"⁶ in its investigations of for-profit schools; and
- D. Explain why the VA had not reported all 1,189 complaints YES had submitted to it.

III

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

13. On March 9, 2020, at 5:59 p.m., after the stock market had closed, the VA issued a press release announcing it was threatening to do exactly what YES had asked it to do in its January 21, 2020, letter-to choke off the schools' income flow-using similar language to the YES letter and citing the same federal statute.⁷

14. In particular, on March 9, the VA "notified the University of Phoenix [and] Career Education Corporation (Colorado Technical University and American InterContinental University) of the agency's intent to disapprove the enrollment of new GI Bill students at these institutions." ⁸ In particular, the VA took the following actions:

A. "The U.S. Department of Veterans Affairs (VA), acting within its required approval authority under the law limiting certain advertising, sales, and enrollment practices, notified the University of Phoenix, Career Education Corporation (Colorado Technical University, American InterContinental University), Bellevue University and Temple University, March 9, of the agency's intent to disapprove the enrollment of new GI Bill students at these institutions."⁹

B. "After careful review and consideration of findings provided by the Federal Trade Commission and State Attorneys General Offices, VA has concluded there is sufficient evidence to support a finding that these schools have utilized advertising, sales, or enrollment practices that are erroneous, deceptive, or misleading either by actual statement, omission, or intimation against GI Bill beneficiaries, in violation of the law."¹⁰

///

⁷ Press Release, VA, VA intends to suspend enrollment of new GI Bill students at University of Phoenix, Career Education Corporation, Bellevue University and Temple University (Mar 9, 2020), <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5399>, visited Jan. 15, 2021.

15. The VA issued its press release almost two hours after the markets had closed, but the press release was not news to those who sold CEC stock short that day.¹¹ During trading hours on March 9, 2020, the market traded 1.640 million shares of , roughly 370 percent of its daily average volume since the beginning of the year. Traders also sold short 512,000 shares, roughly 350 percent of its average daily short sale volume since the beginning of the year. The price of CEC stock fell from \$18.83 on January 21, 2020, to \$7.96 on March 18, 2020, a fall of 58 percent of its value.

16. The VA gave early notice of its decision to some, including VES. During the trading day at 2:26 p.m. E.T., VES tweeted its own press before the official VA announcement. The VES press release identified CEC and stated the VA had "notified military and veterans service organizations today" of its impending enforcement action.¹²

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¹¹ The Securities and Exchange Commission provides this concise description of a short sale:

A short sale is generally the sale of a stock you do not own (or that you will borrow for delivery). Short sellers believe the price of the stock will fall, or are seeking to hedge against potential price volatility in securities that they own.

If the price of the stock drops, short sellers buy the stock at the lower price and make a profit. If the price of the stock rises, short sellers will incur a loss.

Short sales must be done in compliance with SEC Regulation SHO.

<https://www.sec.gov/investor/pubs/regsho.htm>, last visited Jan. 14, 2021.

¹² Press Release, VES, Veterans Education Success Praises Decision by the Department of Veterans Affairs to Suspend New GI Bill Students from Enrolling at the University of Phoenix, Career Education Corporation Institutions, Bellevue University, and Temple University (March 9, 2020), <https://vetsedsuccess.org/press-release-veterans-education-success-praises-decision-by-the-department-of-veterans-affairs-to-suspend-new-gi-bill-students-from-enrolling-at-the-university-of-phoenix-career-education-corporati/>, last visited Jan. 15, 2021.



17. The VA's selective release of nonpublic information during the trading day shows its lack of understanding how nonpublic information can dramatically move the market. It also suggests the possibility the VA may have released nonpublic information between the arrival of the VES letter on January 21, 2020, and the VA's press release on March 9, 2020. VES also has a history of prior connections with at least one hedge fund that engaged in short selling the stocks of for-profit educational companies.¹³

18. The chart below shows the fall of CEC stock from January 21 to March 18, 2020, is consistent with the VA's selective release of nonpublic information of the impending enforcement proceeding against CEC that found its way to market participants during this period. As the chart illustrates, the price fell from \$18.83 to \$7.96:

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¹³ National Legal and Policy Center, *Are For-Profit College 'Critics' Up to Their Old Tricks?* Nov. 4, 2020, <https://nlpc.org/2020/11/04/are-for-profit-college-critics-up-to-their-old-tricks/>, last visited Jan. 15, 2021.



19. Barrett Bogue, Director Bogue's husband, is VES Senior Communications Advisor.¹⁴ The full extent of his involvement in VES's effort to persuade the VA to implement VES's January 21 letter is unknown and may never be known, given the nature of his relationship with Director Bogue. He clearly supported VES's efforts to get the VA to crackdown on for-profit schools, as he demonstrated on December 18, 2019, when he tweeted an article focused on how the VA was failing to hold for-profit colleges accountable.¹⁵

20. Director Bogue's Public Financial Disclosure Report does not disclose her husband's financial relationships with VES. On the form, Director Bogue disclosed her husband is self-employed through a consulting firm, but did not identify the firm or answer questions about the value of his firm and the amount of his income. She merely

¹⁴ See: <https://vetsedsuccess.org/who-we-are/barrett-bogue/>, last visited Jan. 15, 2021.

¹⁵ Jasper Craven, *Scrutiny of Colleges that Get Billions in GI Bill Money Remains Mired in Bureaucracy*, THE HECHINGER REPORT, Dec. 11, 2019, <https://hechingerreport.org/scrutiny-of-colleges-that-get-billions-in-gi-bill-money-remains-mired-in-bureaucracy/>, last visited Jan. 15, 2021.

disclosed that he is paid a salary and receives an unspecified amount in "consulting fees."¹⁶ The public interest in the release of information and its implications are growing, as a recent series of posts by a national ethics watchdog confirms.¹⁷

21. Plaintiff is informed and believes and thereon alleges that Director Bogue was obligated to recuse herself under 18 U.S.C. § 208 and 5 C.F.R. 2640.101, but failed to do so. Plaintiff is further informed and believes and thereon alleges, that Defendant VA is withholding records relating to Director Bogue's failure to enforce 18 U.S.C. § 208 and 5 C.F.R. 2640.101.

22. Plaintiff is further informed and believes and thereon alleges, that the VA Office of the Inspector General ("OIG") conducted an investigation of Director Bogue's failure to comply with 18 U.S.C. § 208 and 5 C.F.R. 2640.101 and is wrongfully withholding nonexempt agency records relating to that investigation.

23. On January 15, 2021, Defendant VA's OIG delivered a letter to Plaintiff in which it asserted a "Glomar" response and, on that basis, neither admitted nor denied whether any of the following inquiries of investigative records exist:

1. Any OIG inquiry or investigation or audit where Charmain Bogue was the subject.
2. Any OIG inquiry or investigation or audit where Charmain Bogue a witness.
3. Any OIG inquiry or investigation or audit relating to the handling or material nonpublic information.

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¹⁶ National Legal and Policy Center, *VA Official Charmain Bogue Did Not Disclose Links to Outside Group*, Nov. 12, 2020, <https://nlpc.org/2020/11/12/va-official-charmain-bogue-did-not-disclose-links-to-outside-group/>, last visited Jan. 15, 2021.

¹⁷ *Id.*, See also: *supra*, n. 13 and National Legal and Policy Center, *On Tax Return, Group Did Not Disclose Payments to Husband of VA Official*, Dec. 4, 2020, <https://nlpc.org/2020/12/04/on-tax-return-group-did-not-disclose-payments-to-husband-of-va-official/>, last visited Jan. 15, 2021.

Plaintiff is informed and believes, and thereon alleges, that the records requests that are the subject matter of this complaint also sought records which Defendant VA is withholding on the basis of its "Glomar" response. Defendant VA failed to assert a "Glomar" response in any of its communications with Plaintiff in relation to the records sought by this complaint and therefore waived it.

FACTS COMMON TO ALL CAUSES OF ACTION

24. Plaintiff has submitted two FOIA requests to Defendant VA that are the subject of this complaint seeking records relating to the facts alleged in paragraphs 5 through 22.¹⁸ Defendant VA in effect restructured Plaintiffs two FOIA requests into 12 FOIA requests with separate tracking numbers, separate processing by different offices and administrations within the VA, separate appeal processes, and separate dates for exhausting administrative remedies. Plaintiff seeks declaratory and injunctive relief regarding two tracks of the VA's restructured FOIA requests where the administrative remedies have been exhausted. Plaintiff will seek leave of this Court to amend this complaint as necessary to incorporate Plaintiffs claims relating to the other tracks of her FOIA requests as the administrative remedies are exhausted.

FIRST CAUSE OF ACTION

25. On November 9, 2020, pursuant to the applicable provisions of FOIA, Plaintiff submitted a letter¹⁹ to Defendant VA requesting access to and copies of specified documents as follows:

- 1) All emails sent by any of the Designated VA Persons²⁰ to one or more of the following email addresses between December 15, 2019, and March 15, 2020:

- a. Any email address ending with this domain: @eangus.org;

¹⁸ Plaintiff's FOIA requests were submitted on November 9 and 13, 2020. A true and correct copy of said FOIA requests is attached hereto and incorporated herein as Exhibits 1, and 2.

¹⁹ A copy of the request is attached hereto and incorporated herein by reference as Ex. 1.

²⁰ The term "Designated VA Persons" was defined in the letter to include specific officials and staff with the VA. *Id.*, at 3.

- b. Any email address ending with this domain: @evocatillc.com;
 - c. Any email address ending with this domain: @paaresearch.com;
 - d. Any email address ending with this domain: @republicreport.org;
 - e. Any email address ending with this domain: @stripes.com;
 - f. Any email address ending with this domain: @tcf.org;
 - g. Any email address ending with this domain:
@veteranseducationsuccess.org;
 - h. Any email address ending with this domain: @vetsedsuccess.org;
and
 - i. Any email address ending with this domain: @washpost.com.
- 2) All emails received by any of the Designated VA Persons from one or more of the following email addresses between December 15, 2019, and March 15, 2020:
- a. Any email address ending with this domain: @eangus.org;
 - b. Any email address ending with this domain: @evocatillc.com;
 - c. Any email address ending with this domain: @paaresearch.com;
 - d. Any email address ending with this domain: @republicreport.org;
 - e. Any email address ending with this domain: @stripes.com;
 - f. Any email address ending with this domain: @tcf.org;
 - g. Any email address ending with this domain:
@veteranseducationsuccess.org;
 - h. Any email address ending with this domain: @vetsedsuccess.org;
and
 - i. Any email address ending with this domain: @washpost.com.
- 3) All emails sent or received by any of the Designated VA Persons between December 15, 2019, and March 15, 2020, **excluding** VA internal emails, that contain any of the following names in the email address:
- a. Wofford(e.g., Wofford in
carrie.wofford@veteranseducationsuccess.org would make this
email responsive),
 - b. Ang,
 - c. Beynon,
 - d. Bogue,
 - e. Douglas-Gabriel,
 - f. Halperin,
 - g. Saunders,
 - h. Safalow, and
 - i. Shireman.
- 4) All emails sent or received by any of the Designated VA Persons between December 15, 2019, and March 15, 2020, **excluding** VA internal emails, that contain any of the following names anywhere in the email:

- a. Carrie Wofford.
- b. Tanya Ang,
- c. Barrett Bogue,
- d. David Halperin,
- e. Robert Norton,
- f. Michael Saunders,
- g. Bradley Safalow, and
- h. Robert Shireman.

5) All emails sent or received by any of the Designated VA Persons between December 15, 2019, and March 15, 2020, **excluding** VA internal emails, that contain any of the following terms anywhere in the email:

- a. University of Phoenix,
- b. Perdoceo Education,
- c. PRDO,
- d. Career Education,
- e. CECO,
- f. Bellevue University,
- g. Temple University,
- h. Colorado Technical, and
- i. American InterContinental.

6) All emails sent or received by any of the Designated VA Persons between March 8 and March 10, 2020, **including** VA internal emails, that contain any of the following phrases in the subject line:

- a. VA intends to suspend enrollment,
- b. Any Background/TPs on this available?
- c. Talking Points on Suspension Actions,
- d. Suspension Action for Five GI Bill Approved Schools, and
- e. Talking Points on Suspension Action for Five GI Bill Approved Schools.

26. On November 10, 2020, Plaintiff received a letter from the VA acknowledging the receipt of her FOIA request. A true and correct copy of the said acknowledgment letter is attached hereto and incorporated by reference as Exhibit 3. The VA's November 10 letter assigned five different FOIA Tracking numbers to Plaintiffs requests.

27. On November 11, 2020, Plaintiffs counsel contacted the VA FOIA Office offering to clarify any issues relating to the November 9 Plaintiffs FOIA request to facilitate its processing as follows:

1 First, the request was drafted so the searches could be conducted
2 electronically. I would estimate the electronic searches could be conducted in
3 an hour or less. That will give you the number of hits.

4 Second, the requests seek emails with various organizations which are
5 unlikely to be subject to exemptions. In particular, they seek communications
6 with the media and non-governmental organizations.

7 Third, I would like to discuss any problems you see that could delay the early
8 release of the records sought.

9 A true and correct copy of this email is attached hereto and incorporated by reference as
10 Exhibit 4.

11 28. On November 13, 2020, Plaintiffs counsel was contacted by a different
12 FOIA specialist who was "taking the lead" on Plaintiffs November 9 FOIA request,
13 because it had "been assigned to multiple VA FOIA directorates." In this way, the lead
14 FOIA specialist explained, if any of the FOIA officers processing the requests needed
15 clarification, they "will submit their request to me. I have requested they provide me a
16 response by close of business on Monday, November 16, 2020 so that I may send you one
17 request for clarification for the group on Tuesday, November 17, 2020." The lead FOIA
18 specialist further explained that "each FOIA Officer will process the portion of the request
19 pertaining to their directorate and will provide a response directly to you." A true and
20 correct copy of said email is attached hereto and incorporated by reference as Exhibit 5.

21 29. On November 17, the lead FOIA specialist and Plaintiffs counsel
22 exchanged emails for the purpose of clarifying Plaintiffs FOIA requests. After the
23 requests were clarified to the satisfaction of the lead FOIA specialist, she forwarded the
24 clarifications to the FOIA officers in the different administrations working on Plaintiffs
25 FOIA request. The email also clarified the Veterans Benefits Administration ("VBA")
26 was "processing the request under FOIA tracking numbers 21-00931-F and 21-00956-F."
27 A true and correct copy of this email chain is attached hereto and incorporated herein as
28 Exhibit 6.

///

30. On November 17, 2020, Plaintiff received a letter via email from the VBA, which once again acknowledged receipt of her FOIA request and assigned it tracking number 21-00931-F. A true and correct copy of said letter is attached hereto and incorporated by reference as Exhibit 7.

31. On November 27, 2020, Plaintiffs counsel received an email from the VBA's FOIA specialist extending the response time 20 business days and setting the date for the VBA FOIA Office to issue a response as January 6, 2021. A true and correct copy of said email is attached hereto and incorporated by reference as Exhibit 8 at 30.

32. On November 30, 2020, Plaintiffs counsel responded to the VBA's FOIA specialist November 27 email pointing out the extension failed "to comply with at least two terms of 5 USC§ 552(a)(6)(B)." A true and correct copy of said email is attached hereto and incorporated by reference as Exhibit 8 at 29-30.

33. On the same day, November 30, 2020, the VBA FOIA specialist replied reiterating Plaintiff would have a response by January 6, 2021, and offering to discuss with Plaintiffs counsel the extension. A true and correct copy of said email is attached hereto and incorporated by reference as Exhibit 8 at 29.

34. After several email exchanges on November 30, the VBA FOIA specialist and Plaintiffs counsel held a conference call which Plaintiffs counsel confirmed in his email of December 1, 2020, as follows: the VBA FOIA specialist agreed to provide an update on December 2, 2020, regarding (1) when the VBA's Office of Information Technology ("OIT") would provide the search results to the FOIA specialist and (2) how many pages had to be reviewed. A true and correct copy of said email is attached hereto and incorporated by reference as the bottom email in Exhibit 9 at 35-36.

35. On December 2, 2020, the VBA FOIA specialist informed Plaintiffs counsel the OIT was working on the ticket and "it should be resolved in a matter of a few days." A true and correct copy of said email is attached hereto and incorporated by reference as the second email from the bottom in Exhibit 9 at 35.

36. On December 11, 2020, Plaintiffs counsel confirmed with his email the conference call he held the day before with the VBA FOIA specialist. During the conversation, Plaintiffs counsel was informed the FOIA request had been transferred to "tier 3... because it involves upper or senior management, which will delay the release of these records." Plaintiffs counsel stated his position as follows:

As you know, I disagreed with any extension of time for this request, since it involves an electronic search of records that did not appear to be subject to any exemption. I also understand you have nearly completed your review, so there should be little justification for delay, absent the late decision to transfer this matter to Tier 3.

Plaintiffs counsel requested further information. Specifically:

1. Is there any internal rule or regulation (CFR) that defines, states, or discusses the different tier? For example, what is the guidance for deciding what is tier 2 versus tier 3?
2. Is there any internal rule or regulation (CFR) that expand the period to respond to a FOIA request when the agency transfers a request to a new tier?
3. What is the definition and rule or regulation applied in determining that Ms. Bogue is at a sufficient high level of management within the VBA that this request should now be transferred to Tier 3?

A true and correct copy of this email is attached hereto and incorporated by reference as Exhibit 9, at 34.

37. On December 15, 2020, since the VBA FOIA specialist had not responded, Plaintiffs counsel followed up with an email. On the same date, December 15, the VBA FOIA specialist informed Plaintiffs counsel the request was being reviewed by the Office of General Counsel (OGC). The email continued:

Once I receive feedback from OGC, I'm hopeful that a disclosure will be made this week. Secondly, I have reviewed your questions below concerning IT processes. I have contacted the Chief of VBACO Desktop Support Services for question #1 This request is being reviewed by OGC because the subject matter is of interest of senior leadership and, as such, has been designated as

1 a Substantial Interest (SI) request. Prior to issuing a disclosure determination,
2 OGC must review it before its release. This is an agency policy.

3 A true and correct copy of this email is attached hereto and incorporated by reference as
4 Exhibit 9, at 33.

5 38. Defendant VA's time for responding to restructured FOIA request 21-
6 00931-F has expired for each of the following reasons:

- 7 A. Defendant VA knew the grounds for its designation of this request as a
8 Substantial Interest request from the date of its receipt of Plaintiff's November
9 9, 2020, request and thus Defendant VA was dilatory in making said
10 designation;
- 11 B. Defendant VA failed to comply with 38 C.F.R. § 1.556 in its processing of this
12 request; and
- 13 C. All conceivable time periods have expired for Defendant VA to comply with
14 this request under FOIA and 38 § C.F.R. § 1.556.

15 **SECOND CAUSE OF ACTION**

16 39. On November 13, 2020, pursuant to the applicable provisions of FOIA,
17 Plaintiff submitted her FOIA request to Defendant VA's (1) FOIA Office, (2) Office of
18 the General Counsel, (3) Veterans Benefits Administration and (4) Office of Information
19 Technology by email and first-class mail. Plaintiff requested access to and copies of
20 specified documents as follows:

- 21 1) All FOIA requests received by the VA or any of its Administrations,
22 Offices, and Centers that contain the following name: Charmain Bogue.
- 23 2) All FOIA requests received by the VA or any of its Administrations,
24 Offices, and Centers that contain any of the following terms:
25 a) University of Phoenix,
26 b) Perdoceo,
27 c) Bellevue University,
28 d) Temple University,
e) Colorado Technical,

1 f) American Intercontinental, and
2 g) Career Education.

3 3) All records released in electronic format in response to any of the FOIA
4 requests identified in response to requests 1 and 2 above pursuant to 5
5 **USES** § 552(a)(2)(D)(i).

6 A true and correct copy of the Plaintiffs FOIA request is attached hereto and
7 incorporated by reference as Exhibit 2.

8 40. On November 18, the VA FOIA Service assigned Plaintiffs request to the
9 appropriate offices for processing. Each office assigned a different tracking number to the
10 request, but the letter did not specify what tracking number the OIG had assigned to the
11 FOIA request. A true and correct copy of the November 18, 2020, letter is attached
12 hereto and incorporated by reference as Exhibit 10.

13 41. On December 8, 2020, Plaintiff received a letter via email from the VA's
14 Office of the Inspector General ("OIG"). The letter stated the VA OIG had assigned
15 tracking number 21-00078-FOIA to Plaintiffs FOIA request and a search of VA OIG
16 records had yielded no responsive results. The letter also informed Plaintiff of her right to
17 appeal the determination to the OIG's Office of Counselor. A true and correct copy of
18 the VA OIG's letter is attached hereto and incorporated by reference as Exhibit 11.

19 42. On December 10, 2020, Plaintiff, through her counsel, appealed the OIG's
20 determination. A true and correct copy of the Plaintiffs appeal is attached hereto and
21 incorporated by reference as Exhibit 12.

22 43. On December 17, 2020, the VA OIG responded to Plaintiffs appeal finding
23 "the VA OIG FOIA Office did not conduct an adequate search and" remanded "the FOIA
24 file to that office to conduct a new search" and provide a final response. A true and
25 correct copy of the letter remanding Plaintiffs request to the VA OIG FOIA Office is
26 attached hereto and incorporated by reference as Exhibit 13.

27 44. On December 23, 2020, the VA OIG informed Plaintiff it had "conducted
28 another search extending the search period from FY 2014 to" the present which had
yielded 11 pages of records released with the letter. The released records were redacted

under Exemption 6. The letter also informed Plaintiff of her right to appeal the determination to the OIG's Office of Counselor. A true and correct copy of the VA OIG's letter is attached hereto and incorporated by reference as Exhibit 14.

45. On December 24, 2020, Plaintiff, through her counsel, appealed the OIG's determination. A true and correct copy of Plaintiff's appeal is attached hereto and incorporated by reference as Exhibit 15.

46. On December 28, 2020, the VA OIG denied the appeal finding the response was proper. The OIG's letter advised Plaintiff of her right to file a complaint with the U.S. District Court. A true and correct copy of the OIG's appeal denial is attached hereto and incorporated by reference as Exhibit 16.

PLAINTIFF'S CLAIM FOR RELIEF: VIOLATIONS OF FOIA

47. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

48. Plaintiff is entitled by law to access the records requested under the FOIA.

49. Defendant VA is in violation of the FOIA, 5 U.S.C. § 552, by failing to fully and lawfully comply with Plaintiff's November 9 and November 13, 2020, requests for records (Exhibits 1 and 2), as specified in paragraphs 25 and 39 above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the Court:

A. Declare that Defendant VA has violated the FOIA by failing to satisfy Plaintiff's November 9 and November 13, 2020, requests for records as specified in paragraphs 25 and 39 above;

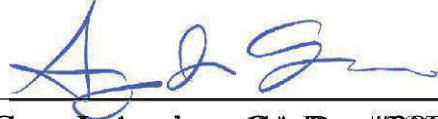
B. Order Defendant VA to immediately search for and release all records responsive to Plaintiff's November 9 and November 13, 2020, requests for records as specified in paragraphs 25 and 39 above;

C. Award Plaintiff her costs and reasonable attorney's fees and litigation costs in this action; and

///

1 D. Grant such other and further relief as the Court may deem just and proper.

2 DATED: January 15, 2021

3
4 

5 Gary J. Aguirre, CA Bar #38927

6 Aguirre Law, A.P.C.

7 501 W Broadway, Ste 800

8 San Diego, CA 92101

9 Telephone: 619-400-4960

10 Facsimile: 619-501-7072

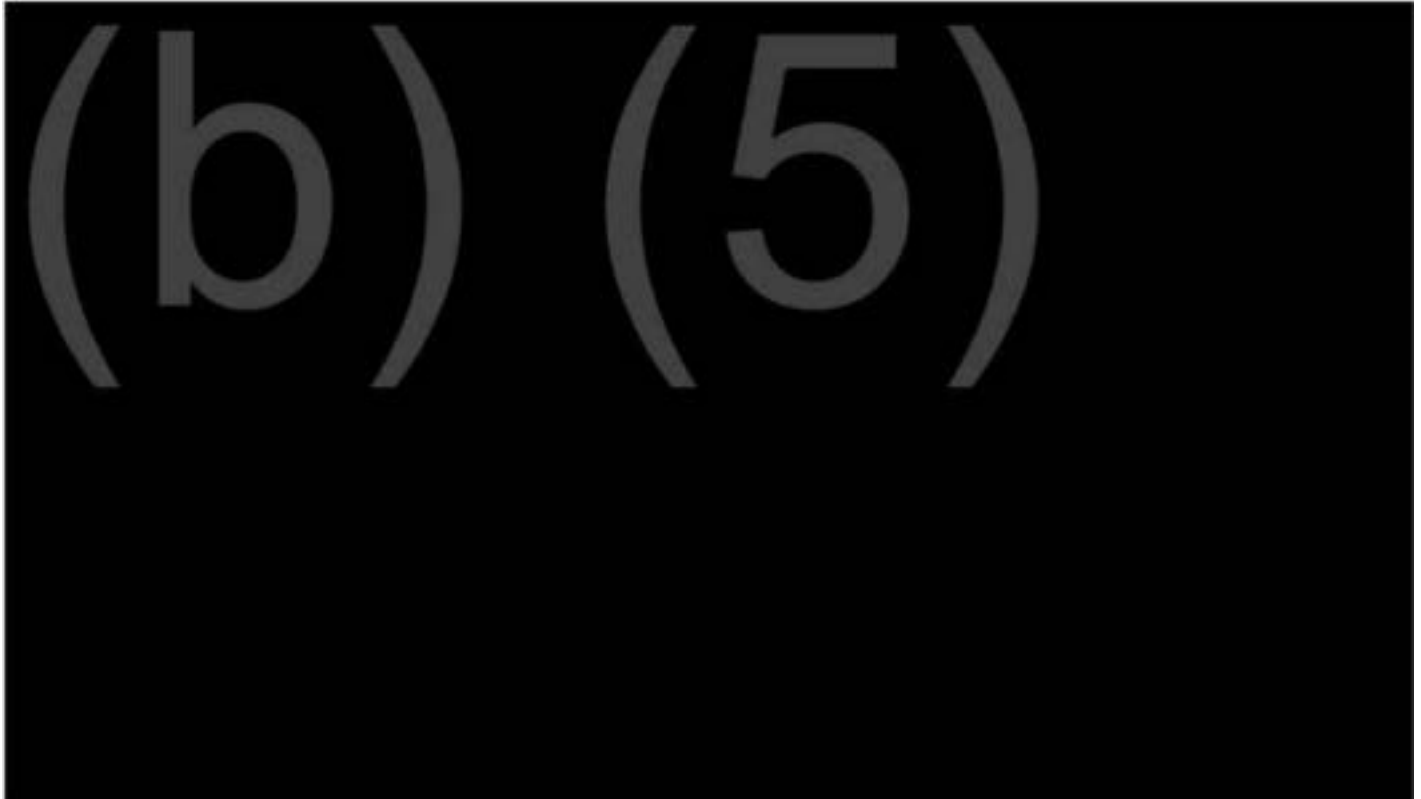
11 Attorney for Plaintiff Maria A. Pomares

Exhibit B

From: (b) (6) [REDACTED] VHA/BUFF
To: (b) (6) [REDACTED]
Cc: (b) (6) [REDACTED] Mallia, Donna P.
Subject: RE: 3696 Actions University of Phoenix
Date: Wednesday, March 4, 2020 8:19:39 AM

Good Morning

While I understand the sensitivity of the matter, we need to ensure the folks who are to take action, based on this letter, are informed of the process. The letter notes the following:



Just want to ensure the RPOs are prepared to address the issue appropriately.

Thanks- [REDACTED]

From: (b) (6) [REDACTED] (b) (6) [REDACTED].gov>
Sent: Tuesday, March 3, 2020 4:36 PM
To: FF (b) (6) [REDACTED]@va.gov>
Cc: (VACO <(b) (6) [REDACTED]@va.gov >
Subject: RE: 3 696 Actions University of Phoenix



The calls will be set up after the decisions and actions involving the various schools have been publicly announced. Since some of the schools are owned by publicly

traded corporations, and because the actions will potentially impact thousands of GI Bill beneficiaries, we're keeping the information "close hold" in order to prevent misinformed leaks, general panic, and insider trading.

(b) (6)

Deputy Director, Program Management
Education Service

From:

Sent: Tuesday, March 3, 2020 9:42 AM

To: VBAVACO

.a.gQY>

Cc: Bogue, Charmain, VBAVACO

@va.gov>; Mallia, Donna P.

(b) (6) @va.gov>

Subject: FW: 3696 Actions University of Phoenix

Importance: High

Good Morning- I understand that you are planning on establishing recurring calls with the field on this issue. Any idea when they will begin? We want to make sure we are prepared for school responses.

Thanks!

From : Mallia, Donna P. @va.gov>

Sent: Monday, March 2, 2020 3:48 PM

To: VBABUFF

@va.gov>

Subject: 3696 Actions University of Phoenix

Importance: High

FYSA

From: VBAVACO a.gov>

Sent: Monday, February 24, 2020 3:27 PM

To: Mcdellan, Jason, VBAMUSK

; Marsh, Mitzi A. VBASTL

(b) (6) @va.gov> Mallia, Donna P.

Cc: (b) (6) VBAVACO

a.gov>; VBAVACO

(b) (6) va.gov>

Subject: 3696 action(s) University of Phoenix

Importance: High

Good Afternoon

The purpose of this message is to provide attached details regarding University of Phoenix.

Education Service has received evidence in support of allegations of false and misleading advertising or enrollment practices by University of Phoenix, in violation of 38 U.S.C. § 3696. Based on current VA regulations (38 CFR § 21.4210(d)), the Director(s) of the Regional Processing Office(s) of jurisdiction provide formal notification of any decision(s) to suspend payments or disapprove all further enrollment or reenrollments of beneficiaries at schools believed to have employed such practices and refer the case(s) to the committee(s) on educational allowance.

YR

(b) (6)

Team Chief, Integrity & Protection Branch
Oversight & Accountability

Exhibit B

VA



U.S. Department
of Veterans Affairs

Inspector General
Washington DC 20420

May 26, 2021

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Senator Grassley:

I am writing in response to your April 2, 2021 letter regarding allegations related to the Veterans Benefits Administration (VBA) and specifically allegations of ethical violations and other misconduct by VBA leadership.

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

For the reasons summarized below, at this time we will not be reviewing the other matters raised in your letter:

- **Mitigation of Disciplinary Penalties for Certain Senior VA Officials.** Your letter requested that the OIG review and report on the reasons why VA allegedly mitigated penalties recommended in disciplinary actions of specific senior-level VBA employees. VA's Office of Accountability and Whistleblower Protection (OAWP) investigated the matters referenced by your letter. The OAWP makes recommendations relating to discipline and it tracks the information that your letter requests. The OIG will defer to OAWP's response to the corresponding request in your letter to VA Secretary McDonough.
- **Potential Disclosure of Material Non-Public Information Concerning Certain Education Institutions.** Since you have separately requested the U.S. Securities and Exchange Commission (SEC) to investigate this matter and the VA OIG has limited authority to compel testimony, we will defer to the SEC. If we uncover information relevant to this potential violation during our review, we will refer that information to the SEC for review.

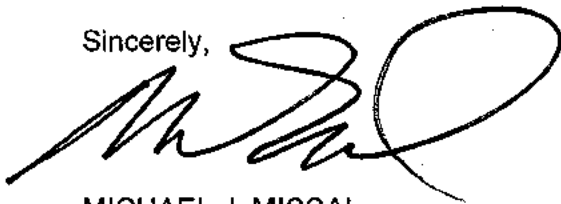
Page 2

The Honorable Charles Grassley

- ***Financial Disclosures of VA Employees.*** Your letter asked the OIG to review VA employees' compliance with financial disclosure requirements. The allegations presented relate to one individual's disclosures and, even if true, do not appear to suggest the existence of a broad process failure affecting the nearly 700 VA employees who file public financial disclosures every year. Although the OIG may reconsider initiating a broader review at a future time, we note that the Office of Government Ethics has primary authority in this area and is better positioned to evaluate VA's financial disclosure process, especially as it pertains to an individual's compliance with disclosure requirements.
- ***Compliance with Freedom of Information Act (FOIA) Requests.*** The specific FOIA requests mentioned in your letter are the subject of pending litigation. The OIG generally does not investigate matters under litigation if the issue can be resolved by the decision-maker. In this instance, the court's determination will provide the requestor with any appropriate relief and address your question as to whether VA is failing to comply with FOIA requests.
- ***Anonymous Allegations of Reprisal.*** Your letter raises non-specific allegations of reprisal by individuals who provided unspecified information to your office. The OIG lacks the authority to provide redress for reprisals. For current and former VA employees seeking relief from instances of reprisal, VA's OAWP or the U.S. Office of Special Counsel are the most appropriate offices to review those allegations.

We appreciate the opportunity to consider these matters and thank you for your interest in the OIG.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael J. Missal', with a large, stylized loop at the end.

MICHAEL J. MISSAL

Exhibit C

RICHARD J. DURBIN, ILLINOIS, CHAIR

PATRICK J. LEAHY, VERMONT	CHARLES E. GRASSLEY, IOWA
DIANNE FEINSTEIN, CALIFORNIA	LYNDEE D. GRAHAM, SOUTH CAROLINA
SHeldon WHITEHOUSE, RHODE ISLAND	JOHN CORNYN, TEXAS
AMY KLOBUCHAR, MINNESOTA	MICHAEL S. LEE, UTAH
CHRISTOPHER A. COONS, DELAWARE	TED CRUZ, TEXAS
RICHARD BLUMENTHAL, CONNECTICUT	BEN RANNEY, NEBRASKA
MAZIE HIRONO, HAWAII	JOHN R. MANLY, MISSOURI
CORY A. BOOKER, NEW JERSEY	TOM COTTON, ARKANSAS
ALEX PADILLA, CALIFORNIA	JOHN KENNEDY, LOUISIANA
JOHN OSSIEFF, GEORGIA	THOM TILLIS, NORTH CAROLINA
	MARSHA BLACKBURN, TENNESSEE

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

July 20, 2021

VIA ELECTRONIC TRANSMISSION

Denis McDonough

Secretary

U.S. Department of Veterans Affairs

Dear Secretary McDonough:

I write to you again today to express my disappointment in the U.S. Department of Veterans Affairs' (VA) failure to timely respond to my April 2, 2021 letter, which raised several concerns about ongoing issues at your department. As you'll recall, these issues include, but are not limited to, potential whistleblower reprisal, conflicts of interest among senior-level employees, and potential leaking of market-sensitive information that may have affected retail investors and financial markets.¹

Upon receiving the very same documents that I provided to your office, the VA Inspector General (VA OIG) has initiated an investigation into whether the VA Executive Director of the Veterans Benefits Administrations Education Service, Charmain Bogue, violated conflicts of interest or ethics law and regulation by failing to conflict herself off of dealings with her husband's companies.² Further, VA OIG is investigating whether any potential legal opinion existed at VA that recommended her recusal from doing business with her husband's companies. In my April 2, 2021 letter, I requested any legal opinions, should any exist, surrounding Mrs. Bogue's involvement with her spouses businesses.³ Unfortunately your office has not provided the requested records or answered whether Mrs. Bogue engaged in these alleged activities.

The Securities and Exchange Commissions (SEC) also responded to my inquiry. In a July 1, 2021 letter to my office, the SEC stated that it is carefully considering the information provided to their office to ensure that there is compliance with both statute and regulation.⁴ As you'll recall, my April 2, 2021 letter sought information as to what VA does to protect market-sensitive information from improper disclosure by VA personnel. Your office has yet to respond as to whether your employees adequately adhere to applicable law and regulation. Certainly the

¹ See Letter from Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary, to Mr. Denis McDonough, Sec'y U.S. Dep't of Veterans Affairs (Apr. 2, 2021), https://www.grassley.senate.gov/imo/media/doc/grassley_to_dept.ofveteransaffairsvbaethicsmarketinfoleaks.pdf.

² Attached as Exhibit A.

³ See Letter from Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary, to Mr. Denis McDonough, Sec'y U.S. Dep't of Veterans Affairs (Apr. 2, 2021), https://www.grassley.senate.gov/imo/media/doc/grassley_to_dept.ofveteransaffairsvbaethicsmarketinfoleaks.pdf.

⁴ Attached as Exhibit B.

Secretary McDonough
U.S. Department of Veterans Affairs
July 20, 2021

Congress has a sufficient interest in whether government employees are potentially monetizing non-public information for their own financial benefit or that of their cronies.

It is deeply troubling that VA is the sole agency to not respond to my inquiry, especially given the seriousness of the allegations. My staff has attempted, on several occasions, to work with your office to find a mutually agreeable solution– including accepting answers to my questions on a rolling basis – to no avail.⁵

To that end, I request that you respond to my initial inquiry, and answer the additional follow-up questions based on information received from other entities, no later than July 30, 2021.

1. Has VA sought guidance from the Office of Government Ethics with respect to educating the VA workforce on the importance of safeguarding potentially market-sensitive information? If not, why not?
2. Does VA have a policy regarding the necessity for employee's to protect potentially market-sensitive, nonpublic information from being released? If so, please provide this policy. If not, why not?

I trust that VA is not seeking to obstruct a congressional investigation in any way by intentionally being unresponsive to my questions. Contact my Committee staff at (202) 224-5225 should you have any questions. Thank you for your attention to this important mater.

Sincerely,



Charles E. Grassley

Ranking Member

Committee on the Judiciary

⁵ Email communications on file with Committee.

Exhibit A



Inspector General
Washington DC 20420

May 26, 2021

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Senator Grassley:

I am writing in response to your April 2, 2021 letter regarding allegations related to the Veterans Benefits Administration (VBA) and specifically allegations of ethical violations and other misconduct by VBA leadership.

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

For the reasons summarized below, at this time we will not be reviewing the other matters raised in your letter:

- ***Mitigation of Disciplinary Penalties for Certain Senior VA Officials.*** Your letter requested that the OIG review and report on the reasons why VA allegedly mitigated penalties recommended in disciplinary actions of specific senior-level VBA employees. VA's Office of Accountability and Whistleblower Protection (OAWP) investigated the matters referenced by your letter. The OAWP makes recommendations relating to discipline and it tracks the information that your letter requests. The OIG will defer to OAWP's response to the corresponding request in your letter to VA Secretary McDonough.
- ***Potential Disclosure of Material Non-Public Information Concerning Certain Education Institutions.*** Since you have separately requested the U.S. Securities and Exchange Commission (SEC) to investigate this matter and the VA OIG has limited authority to compel testimony, we will defer to the SEC. If we uncover information relevant to this potential violation during our review, we will refer that information to the SEC for review.

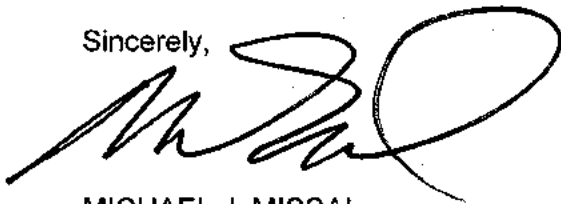
Page 2

The Honorable Charles Grassley

- **Financial Disclosures of VA Employees.** Your letter asked the OIG to review VA employees' compliance with financial disclosure requirements. The allegations presented relate to one individual's disclosures and, even if true, do not appear to suggest the existence of a broad process failure affecting the nearly 700 VA employees who file public financial disclosures every year. Although the OIG may reconsider initiating a broader review at a future time, we note that the Office of Government Ethics has primary authority in this area and is better positioned to evaluate VA's financial disclosure process, especially as it pertains to an individual's compliance with disclosure requirements.
- **Compliance with Freedom of Information Act (FOIA) Requests.** The specific FOIA requests mentioned in your letter are the subject of pending litigation. The OIG generally does not investigate matters under litigation if the issue can be resolved by the decision-maker. In this instance, the court's determination will provide the requestor with any appropriate relief and address your question as to whether VA is failing to comply with FOIA requests.
- **Anonymous Allegations of Reprisal.** Your letter raises non-specific allegations of reprisal by individuals who provided unspecified information to your office. The OIG lacks the authority to provide redress for reprisals. For current and former VA employees seeking relief from instances of reprisal, VA's OAWP or the U.S. Office of Special Counsel are the most appropriate offices to review those allegations.

We appreciate the opportunity to consider these matters and thank you for your interest in the OIG.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael J. Missal', with a large, stylized loop at the end.

MICHAEL J. MISSAL

Exhibit B



OFFICE OF THE CHAIR

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

July 1, 2021

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, DC 20510

Dear Senator Grassley:

Thank you for your April 2, 2021, letter to Acting Chair Lee concerning the alleged disclosure of market-sensitive information by individuals at the Department of Veterans Affairs and the potential impact of such alleged disclosure on the stock price of a U.S. publicly traded company. I appreciate the information and the thoughtful questions you have raised. We take every allegation of abusive trading based on nonpublic information very seriously.

Please find below my responses to your specific questions.

Question 1: Has the SEC received complaints regarding the above fact pattern? Is the SEC otherwise aware of the above fact pattern?

- a. Has the SEC opened an investigation into the above claims?***
- b. If not, why not? Does the SEC plan to open an investigation into these claims?***

As a matter of policy, the SEC conducts investigations on a confidential basis and generally does not acknowledge the existence or non-existence of any investigation unless and until charges are filed. We do so in order to protect the integrity of our investigations, safeguard the privacy of witnesses, and avoid damaging the reputation of persons who may not be charged. Accordingly, I cannot comment specifically on the matter raised in your letter, but I assure you that the Commission's staff will consider carefully the information included in your correspondence in connection with our statutory and regulatory responsibilities.

Question 2: What policies and procedures does the SEC have in place to identify and investigate potentially improper trading by government employees, and their potential access to information that could shift financial markets?

Insider trading has long been a core component of the Commission's Enforcement agenda, and the Commission is committed to building and maintaining the resources necessary to protect the market from this harmful practice. Enforcement staff, including market and trading

The Honorable Charles E. Grassley

Page 2

specialists with industry experience, have developed proprietary tools to conduct market surveillance and gather and analyze trading data to uncover suspicious market activity.¹ These tools enable the staff to detect abusive trading practices, including insider trading, by both entities and individuals.²

Question 3: Does the SEC take a proactive stance on briefing and distributing guidance to federal agencies on the importance and necessity of protecting information that could affect financial markets? If so, what does the SEC do with respect to proactive measures?

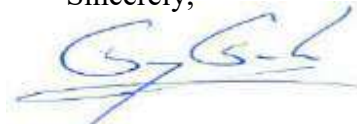
The Office of Government Ethics (OGE) provides guidance and leadership to all federal agencies in order to prevent conflicts of interest by government employees, including conflicts related to the misuse of nonpublic information and the misuse of position. The SEC does not provide guidance to other federal agencies regarding the protection of nonpublic information.

Question 4: What tools does the SEC employ to educate and inform the federal workforce on the necessity to protect information that may have effects on financial markets? Has the SEC ever briefed the VA on the necessity to protect this type of information?

OGE directs that each federal agency establish its own ethics program, including an ethics office responsible for educating, training, and informing its workforce about Executive branch ethics rules and regulations, including the prohibition on the misuse of nonpublic information. As such, the SEC has not briefed the VA on these requirements.

Thank you again for your letter. Please do not hesitate to contact me at (202) 551-2100, or have a member of your staff contact Kevin Burris, Director of the Office of Legislative and Intergovernmental Affairs, at (202) 551-2010 if you have any additional concerns or comments.

Sincerely,



Gary Gensler
Chair

¹ Division of Enforcement, 2018 Annual Report at 3, available at <https://www.sec.gov/files/enforcement-annual-report-2018.pdf>.

² Division of Enforcement, 2020 Annual Report at 14, available at <https://www.sec.gov/files/enforcement-annual-report-2020.pdf>.

Exhibit D



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

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 OIT'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,

Jason Foster
Page 2
August 24, 2021

- 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 or at OSVAFOIA@va.gov with your response to clarification or with any questions that you may have about this request.

Sincerely,

Ruthann Parise
941640
Ruthann Parise
OSVA FOIA Officer

Digitally signed by Ruthann
Parise 941640
Date: 2021.08.24 16:06:13
-04'00'

Exhibit E



**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

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 OIT'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).
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Page 2
October 29, 2021

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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
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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

Jason Foster
Page 3
October 29, 2021

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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

Jason Foster
 Page 5
 October 29, 2021

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

Jason Foster
Page 6
October 29, 2021

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 2nd 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: vafoiaservice@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
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 941640

Ruthann Parise
OSVA FOIA Officer

Digitally signed by
Ruthann Parise 941640
Date: 2021.10.29 13:25:20
-04'00'

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

Exhibit F



Bryan Saddler <bsaddler@empowr.us>

21-08490-F 4th Interim

1 message

Parise, Ruthann <Ruthann.Parise@va.gov>
To: Jason Foster <jf@empowr.us>
Cc: Bryan Saddler <bsaddler@empowr.us>

Tue, Jan 11, 2022 at 6:35 PM

Good Evening Mr. Foster,

I wanted to provide you with a status update regarding the 4th interim. I just finished conducted the next key term search and have moved the records over to the review log so that I can review for release.

Please know, I am working on this simultaneously with FOIA litigations; as such, it is taking a bit longer than originally anticipated. I apologize for the delay.

Respectfully,

Ruthann Parise

OSVA FOIA/Privacy Officer

Office of the Executive Secretary

Office of the Secretary, U.S. Dept. of Veterans Affairs (OSVA)

ruthann.parise@va.gov

Phone: (202) 461-4866

iPhone: (202) 306-3112

This message and attachments, if any, are For Official Use Only, not to be shared outside intended parties, and may be exempt from disclosure pursuant to 5 U.S.C. § 552. If you received this message and attachments, if any, in error, you must inform the FOIA Officer and destroy them immediately.

Exhibit G



Bryan Saddler <bsaddler@empowr.us>

FOIA 21-08490-F 4th Interim

Parise, Ruthann <Ruthann.Parise@va.gov>
To: Jason Foster <jf@empowr.us>
Cc: Bryan Saddler <bsaddler@empowr.us>

Thu, Mar 10, 2022 at 4:16 PM

Good Afternoon Mr. Foster,

I hope this email finds you well.

Please know, today, I submitted the 21-08490-F 4th Interim for final review. As previously mentioned because this is considered a Substantial Interest request, the request must go through additional review. Unfortunately, I do not have an estimated date as I do not know how many cases are ahead of this one since the review is outside of my office.

Respectfully,

Ruthann Parise

OSVA FOIA/Privacy Officer

Office of the Executive Secretary

Office of the Secretary, U.S. Dept. of Veterans Affairs (OSVA)

ruthann.parise@va.gov

Phone: (202) 461-4866

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Exhibit H



DEPARTMENT OF VETERANS AFFAIRS
Washington DC 20420

April 13, 2022

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

Via Email: jf@empowr.us

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

Dear Mr. Foster:

This is the fourth 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).
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Page 2
April 13, 2022

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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.

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Jason Foster
Page 3
April 13, 2022

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Dan Standage

Jason Foster
Page 4
April 13, 2022

Fred Wellman
Rory Borsius"

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SVA
Jarod Lyon
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Lauren Augustine
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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.

On October 29, 2021, for our second interim response, 978 pages were released in their entirety, 290 pages were partially released, and 158 pages were withheld in full. The pages were Bates numbered (21-08490-F) 000653 through (21-08490-F) 002078.

That same day, October 29, 2021, I conducted a key term search of the 20 mailboxes provided by the OI&T. The key term search was limited to 22-05571-F, the case number utilized in FOIAXpress, the official FOIA processing system utilized by the VA for processing FOIA requests. While Senator Grassley's request was not a FOIA request, records were uploaded to FOIAXpress in order to review and redact the records.

On December 23, 2021, for our third interim response, 6 pages were released in their entirety and 11 pages were partially released. The pages were Bates numbered (21-08490-F) 002079 through (21-08490-F) 002095.

On January 11, 2022, I conducted a key term search of the 20 mailboxes provided by the OI&T. The key term search was limited to Grassley. Attempts were made to exclude records that were previously processed and released under any of the prior key terms.

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For this fourth interim release, a total of 1,313 pages of responsive records, subsequently Bates (21-08490-F) 002096 through (21-08490-F) 003408, were reviewed. Records contained in this release are responsive to items 1-3 and 7 and consist of records from my search conducted on January 11, 2022. I have determined 596 pages are releasable in their entirety, 643 pages are partially releasable, and 74 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, phone numbers and email addresses of federal civilian employees. We do however release the names of VA Senior Executives and individuals whose names are in the public domain. 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

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numbers of federal civilian employees and private citizens 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).

Additionally, 5 U.S.C. § 552(b)(5) exempts from required disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Under the attorney-client and work product privileges, the VA redacts portions of records, emails, and communications between VA employees and attorneys relating to federal lawsuits against the VA. The release of this information would impede the ability of VA employees and attorneys to speak openly and frankly about legal issues concerning lawsuits against the VA. The release of this information would also compromise the VA's legal positions for its lawsuits.

FOIA Exemption 7C exempts from required disclosure law enforcement information the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Redacted information includes names, email addresses, titles, and phone numbers of VA law enforcement employees. The release of this information would risk impersonation of law enforcement personnel and jeopardize the health and safety of not only law enforcement personnel, but those persons they are charged with protecting.

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

Bates numbered pages (21-08490-F) 002679-002696, 002718-002735, and 002833-002850 have been withheld pursuant to FOIA Exemption 3 and specifically to 5 U.S.C. § 105(b)(2);

Bates numbered pages (21-08490-F) 002171, 002801, 002810, and 002818 have been withheld pursuant to FOIA Exemption 5; and,

Bates numbered pages (21-08490-F) 002697-002702, 002706-002711, 002713, and 002715-002717 have been withheld pursuant to FOIA Exemption 5 and FOIA Exemption 6.

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

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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 have been uploaded to the VA FOIA website under Document Retrieval at [Document Retrieval - Freedom Of Information Act FOIA](#). Please know, the file is listed in Document Retrieval as 21-08490-F 1 and 21-08490-F 2 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:

Email Address: vacofoiaservice@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

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

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April 13, 2022

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 941640

Ruthann Parise
OSVA FOIA Officer

Digitally signed by Ruthann
Parise 941640
Date: 2022.04.13 13:24:50
-04'00'

Enclosure: 1,239 pages, 4th interim releasable records

Exhibit I



DEPARTMENT OF VETERANS AFFAIRS
Washington DC 20420

April 20, 2022

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

Via Email: jf@empowr.us

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

Dear Mr. Foster:

This is the fifth 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 OIT'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;

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- 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

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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

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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.

On October 29, 2021, for our second interim response, 978 pages were released in their entirety, 290 pages were partially released, and 158 pages were withheld in full. The pages were Bates numbered (21-08490-F) 000653 through (21-08490-F) 002078.

That same day, October 29, 2021, I conducted a key term search of the 20 mailboxes provided by the OI&T. The key term search was limited to 22-05571-F, the case number utilized in FOIAXpress, the official FOIA processing system utilized by the VA for processing FOIA requests. While Senator Grassley's request was not a FOIA request, records were uploaded to FOIAXpress in order to review and redact the records.

On December 23, 2021, for our third interim response, 6 pages were released in their entirety and 11 pages were partially released. The pages were Bates numbered (21-08490-F) 002079 through (21-08490-F) 002095.

On January 11, 2022, I conducted a key term search of the 20 mailboxes provided by the OI&T. The key term search was limited to Grassley. Attempts were made to exclude records that were previously processed and released under any of the prior key terms.

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April 20, 2022

On March 22, 2022, I conducted a key term search of the 20 mailboxes provided by the OI&T. The key term search was limited to Bogue. Attempts were made to exclude records that were previously processed and released under any of the prior key terms.

On April 6, 2022, I conducted five key term searches within the daily calendar of Charmain Bogue's calendars provided by the OI&T and reviewed as daily calendars. The searches were conducted as follows:

Search 1:

Key terms: Wofford OR Norton OR Tarantino OR Ochinko OR Saunders OR Ang OR Bogue

Search 2:

Key terms: Lyon OR Hubbard OR Augustine OR Schmeling OR Cate OR Norman OR Standage OR Wellman OR Broisius

Search 3:

Key terms: VES OR SVA

Search 4:

Key terms: "Veterans Education Success"

Search 5:

Key terms: "Student Veterans of America"

On April 7, 2022, I conducted a key term search of Charmain Bogue's calendar invitations/notes/attachments provided by the OI&T and uploaded in EDR. The search was conducted as follows:

Search:

Key terms: Barrett OR Wofford OR Norton OR Tarantino OR Ochinko OR Saunders OR Ang OR Lyon OR Hubbard OR Augsutine OR Schmeling OR Cate OR Norman OR Standage OR Wellman OR Broisius OR VES OR SVA OR "Veterans Education Success" OR "Student Veterans of America"

On April 13, 2022, for our fourth interim response, 596 pages were released in their entirety, 643 pages were partially released, and 74 pages were withheld in full. The pages were Bates numbered (21-08490-F) 002096 through (21-08490-F) 003408.

For this fifth interim release, a total of 503 pages of responsive records, subsequently Bates (21-08490-F) 003409 through (21-08490-F) 003911, were reviewed. Records contained in this release are responsive to items 1, 2, 3, 4, and 5 and consist of records from my searches conducted on March 22, 2022, April 6, 2022, and April 7, 2022. I have determined 388 pages

Jason Foster
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April 20, 2022

are releasable in their entirety, 111 pages are partially releasable, and 4 pages are withheld in full pursuant to Title 5 U.S.C. §§ 552(b)(5), (b)(6), and (b)(7)(C), FOIA exemptions 5, 6, and 7C.

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).

Additionally, exemption 5 protects from disclosure under the attorney-client privilege. Courts have found that attorney-client privilege "encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts," as well as "communications between attorneys that reflect client-supplied information." *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005). In this case, "the agency is the 'client' and the agency's lawyers are the 'attorneys' for the purposes of attorney-client privilege." *Judicial Watch, Inc. v. United States Dep't of the Treasury*, 796 F. Supp. 2d 13, 22 (D.D.C. 2011). Portions of emails requesting and reflecting legal advice from OGC attorneys have been withheld under the attorney-client privilege.

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 and email addresses of federal civilian employees. We do however release the names of VA Senior Executives and individuals whose names are in the public domain. 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,

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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) exempts from required disclosure law enforcement information the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Redacted information includes names, email addresses, titles, and phone numbers of VA law enforcement employees, as well as contractor-customer portal website addresses containing such personal information. The release of this information would risk impersonation of law enforcement personnel and jeopardize the health and safety of not only law enforcement personnel, but those persons they are charged with protecting.

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

Bates numbered pages (21-08490-F) 003429-003431 have been withheld pursuant to FOIA Exemption 5; and,

Bates numbered page (21-08490-F) 003835 has been withheld pursuant to FOIA Exemptions 5, 6, and 7C.

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 5th 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

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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:

Email Address: vacofoiaservice@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

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 941640

Digitally signed by Ruthann Parise
941640
Date: 2022.04.20 10:55:58 -04'00'

Ruthann Parise
OSVA FOIA Officer

Enclosure: 499 pages, 5th interim releasable records

Exhibit J



January 24, 2022

VIA ELECTRONIC TRANSMISSION: 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")¹ Request Number 21-08490-F, Empower Oversight Whistleblowers & Research ("Empower Oversight")² 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.

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

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

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.³

To add background to, and context for, its August 6th FOIA request, Empower Oversight advised that:

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

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

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

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

³ Empower Oversight's August 6th 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.⁴ 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

⁴ The four months referenced in Empower Oversight's August 6th 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.⁵

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.⁶

On August 23, 2021, the VA-OI&T submitted to Empower Oversight a letter that "updated" its August 16th acknowledgment email.⁷ The VA-OI&T's August 23rd letter advised that the VA received Empower Oversight's FOIA request on August 8, 2021; that VA-OI&T was revising the request's tracking number to 21-08490-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").⁸ 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 6th FOIA request.⁹ 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:

⁵ See, Exhibit 1, (citations omitted).

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

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

⁸ The OSVA's August 24th letter is attached as Exhibit 4.

⁹ The OSVA's September 7th 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, 2021.¹⁰ 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 6th 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.¹¹ 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, 2021.¹² 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)(3), (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 29th 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).¹³

¹⁰ 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.

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

¹² 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 30th, 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.

¹³ 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.¹⁴

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.¹⁵

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

¹⁴ 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).

¹⁵ 5 U.S.C. § 552(b)(5).

¹⁶ 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).

¹⁷ See, Martin, 819 F.2d at 1185.

¹⁸ 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.¹⁹

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

To claim the deliberative process privilege with respect to a record, the Circuit Court has held that an agency must show²² that the record is “predecisional” (*i.e.*, “antecedent to the adoption of agency policy”)²³ and “deliberative” (*i.e.*, “a direct part of the deliberative process in that it makes recommendations and expresses opinions on legal or policy matters”).²⁴

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.²⁵

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

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

¹⁹ See, Exhibit 6 (citations omitted).

²⁰ Sears, 421 U.S. at 151.

²¹ 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).

²² Coastal States Gas Corp., 617 F.2d at 866.

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

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

²⁵ Coastal States Gas Corp., 617 F.2d at 867.

²⁶ Coastal States Gas Corp., 617 F.2d at 867; see also, McGrady v. Mabius, 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).

²⁷ 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.²⁸ 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

²⁸ 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.²⁹ 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.

²⁹ 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)); *Poitrass 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).³⁰

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

³⁰ See, Exhibit 6.

³¹ 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, fn. 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.”³²

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.³³ For those agencies whose principal function is criminal law enforcement, the Circuit Court has established a “less exacting” standard.³⁴ 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.³⁵ 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.”³⁶ 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.”³⁷

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.³⁸ 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.

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

³³ 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).

³⁴ See, Pratt, 673 F.2d at 418.

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

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

³⁷ 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)).

³⁸ 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



August 6, 2021

VIA ELECTRONIC TRANSMISSION: 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.¹ 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.²

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.³ 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.⁴ 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.⁵

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.⁶ 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.⁷

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).⁸ 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.⁹

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.”¹⁰

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

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

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

⁴ *Id.* at 3-4.

⁵ *Id.*

⁶ *Id.* at 2.

⁷ *Id.*

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

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

¹⁰ “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 gifts¹¹ 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.¹²

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:¹³

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).

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

¹² 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](#)).

¹³ 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

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

Mon, Aug 16, 2021 at 11:20 AM

From: VACO FOIA Service Inbox <vacofoiase@va.gov>
Date: August 16, 2021 at 10:54:32 AM EDT
To: jf@empowr.us
Cc: VACO FOIA Service Inbox <vacofoiase@va.gov>, "Price, Chaquonna B." <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

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

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



U. S Department of Veteran Affairs

810 Vermont Ave NW
Washington DC 20420
www.va.gov

August 23, 2021

Via Email: 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



U. S Department of Veteran Affairs

810 Vermont Ave NW
Washington DC 20420
www.va.gov

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)¹. 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
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.

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



U. S Department of Veteran Affairs

810 Vermont Ave NW
Washington DC 20420
www.va.gov

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
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

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 OIT'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,

Jason Foster
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August 24, 2021

- 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 or at 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

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;

Jason Foster
Page 2
September 7, 2021

- 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

Jason Foster
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September 7, 2021

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

Jason Foster
 Page 4
 September 7, 2021

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);

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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

Office of Government Information Services (OGIS)

Email Address: 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

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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

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;

Jason Foster
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- 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

Jason Foster
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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

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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

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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

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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 2nd 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
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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: vafoiaservice@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
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

Exhibit K

Sent: Thu, 20 May 2021 19:56:14 +0000
To: (b)(6)
Cc: McVicker, Carrie A.; (b)(6)
Subject: OSVA Approval Package for VIEWS 4890714
Attachments: Tab 1 4890714 Grassley Transmittal Letter.docx, Tab 2 4890714 Enclosure.docx, Tab 3 4890714 Information about Attachments.docx, Tab 4 04890714 - Incoming Letter.pdf, 4890714 VA Form 0907.pdf
Importance: High

(b)(6)

Attached for your review is the OSVA approval package for VIEWS 4890714/Grassley which includes the following:

- Tab 1 Transmittal Response
- Tab 2 Enclosure
- Tab 3 Information about Enclosure (this document will appended to the attachments. The language in this document was originally in the transmittal letter but COSVA thought this information should not be in the letter that SECVA signs. Per Gina's guidance, I made it a separate document)
 - The attachments are not included in this email because of the size of the files. All the attachments total about 600 pages. All of the documents have been printed out and were provided to you today in a folder.
- Tab 4 -Incoming Letter
- VA Form 0907



THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Grassley:

This is a follow-up to the April 6, 2021, Department of Veterans Affairs (VA) interim response to your April 2, 2021, letter about conflicts and ethical issues among senior officials at the Veterans Benefits Administration (VBA). I appreciate this opportunity to respond.

As stated in the interim response, VA takes this matter very seriously. The free flow of information, especially information that identifies malfeasance, underperformance or abuse is critical to strong agency performance and since arriving at VA, I have taken several opportunities to communicate that to all employees and underscore it to our accountability partners at VA. One such partner is the VA Office of Accountability and Whistleblower Protection (OAWP), which is charged to, among other responsibilities, investigate allegations of VA senior leader misconduct and poor performance.

In this case, not only is this matter the subject of an active investigation by OAWP, it is also being investigated by the VA Office of Inspector General. As for the specific questions raised in your letter, enclosed are enumerated responses to each question, and attached thereto are copies of the documents you requested that are releasable to you under the Freedom of Information Act (FOIA)

Although the President's nominee for head of OAWP will have her hearing later this month, and we eagerly await her confirmation, I want to assure you that if there has been any misconduct by a VA senior official, OAWP and OIG will identify it and, if warranted, the VA senior official will be held appropriately accountable.

In closing, thank you for your patience with the length of time it has taken to respond, and I trust this information is helpful to you.

Sincerely,

Denis McDonough

Enclosure

Enclosure

**Department of Veterans of Affairs (VA) Responses to Questions from
Senator Charles Grassley**

Question 1: Has Acting Undersecretary Tom Murphy ever been recommended for suspension for accepting gifts as prohibited by law?

VA Response: (b)(5)

(b)(5)

Question 1a: If so, was Mr. Murphy ever suspended?

VA Response: (b)(5)

(b)(5)

Question 1b: Was a recommendation for suspension ever overturned? If so, why and by who?

VA Response: (b)(5)

(b)(5)

Question 2: Had former Deputy Undersecretary Robert Reynolds ever been recommended for suspension for accepting gifts as prohibited by law?

VA Response: (b)(5)

(b)(5)

Question 2a. If so, was Mr. Reynolds ever suspended?

VA Response: (b)(5)

(b)(5)

Enclosure

(b)(5)

Question 2b. Was a recommendation for suspension ever overturned? If so, why and by who?

VA Response: (b)(5)

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

VA Response: (b)(5)

(b)(5)

Question 3a. If so, was Mr. Manker ever suspended?

VA Response: (b)(5)

(b)(5)

Question 3b. Was a recommendation for suspension ever overturned? If so, why and by who?

VA Response: (b)(5)

Question 4. Please provide all records, communications, and memorandums related to the suspensions, or proposed suspensions, of Tom Murphy, Jamie Manker, and Robert Reynolds.

VA Response: (b)(5)

Enclosure

Question 5: What steps does the VA take to protect retail investors by safeguarding market sensitive information regarding potential enforcement announcements related to publicly-traded companies?

VA Response: (b)(5)

(b)(5)

Question 5a: Is it possible these steps failed in this instance? If so, what will VA do to prevent this from happening again in the future?

VA Response: (b)(5)

(b)(5)

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

VA Response: (b)(5)

(b)(5)

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?

VA Response: (b)(5)

(b)(5)

Enclosure

Question 7a: Did the legal opinion recommend Mrs. Bogue recuse herself from any involvement with? If not, why not?

VA Response: (b)(5)

(b)(5)

Question 8: Please provide all records relating to any written ethics opinion by VA attorneys regarding Mrs. Bogue's recusal, whether and when this recusal occurred, and all communications regarding Mrs. Bogue's recusal obligations with respect to her husband's companies.

VA Response: (b)(5)

Question 9: Did Mrs. Bogue engage in, participate in, or contribute to VA business with her husband's business? If so, why did VA allow Mrs. Bogue to participate?

VA Response: (b)(5)

(b)(5)

Question 10: Under current law and regulation, is Mrs. Bogue required to report financial information of her spouse via a public financial disclosure report? If so, did Mrs. Bogue list her husband?

VA Response: (b)(5)

(b)(5)

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?

VA Response: (b)(5)

(b)(5)

Enclosure

Question 10b: If Mrs. Bogue did report her husband on a public financial disclosure form, did she report Mr. Bogue's salary with respect to his work? If not, why not?

VA Response: (b)(5)

(b)(5)

Question 10c: Please provide Mrs. Bogue's financial reports dating back five (5) years.

VA Response: (b)(5)

(b)(5)

Question 11: If Mrs. Bogue did not report where Mr. Bogue currently works, and if she participated in VA business related to VES, would that constitute a conflict of interest as described by applicable law or regulation? If not, why not?

VA Response: (b)(5)

(b)(5)

Question 12: Why has the VA attempted to block FOIA requests seeking information regarding these matters?

Enclosure

VA Response:

(b)(5)

(b)(5)

Question 12a: Does the VA plan to comply with FOIA requests in a timely and reasonable manner in order to afford the public greater transparency?

VA Response:

(b)(5)

(b)(5)

Department of Veterans Affairs

Enclosure

May 2021

Exhibit L



U.S. Department of Veterans Affairs
Office of General Counsel
Information and Administrative Law Group

810 Vermont Avenue NW
Washington DC 20420
www.va.gov/ogc

In Reply Refer To: 024K
OGC Case #: 158036
FOIA Request #: 21-08490-F

April 18, 2022

Jason Foster
Empower Oversight
jf@empowr.us

Dear Mr. Foster:

This is the final agency decision issued under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, in response to your appeal from the second interim initial agency decision issued by the Department of Veterans Affairs (VA) Office of the Executive Secretary (OSVA). For the reasons outlined below, your appeal is granted in part and denied in part.

Procedural History

Initial request On August 6, 2021, you provided background information and submitted a FOIA request for 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 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.

You included two attachments. Attachment A is a letter dated April 2, 2021, from Senator Grassley to Secretary McDonough. Attachment B is a letter dated July 20, 2021, from Senator Grassley to Secretary McDonough. You also requested a fee waiver and stated that Empower Oversight is a non-profit educational organization.

On August 16, 2021, Management Analyst Chaquanna Price acknowledged your request, assigning it tracking number 21-08250-F, and notified you that the information you requested fell under the purview of three other FOIA offices: Veterans Benefit Administration (VBA), Office of Assistant Secretary for Congressional & Legislative Affairs, and Office of Inspection General. Ms. Price stated that your request had been referred to the aforementioned offices for processing and direct response to you, thus concluding the VACO FOIA Office's response.

On August 23, 2021, Ms. Price issued another acknowledgement letter, assigning your request tracking number 21-08490-F, and notifying you that your request had been referred to the Office of the Executive Secretary (OSVA). Ms. Price also noted that your request had been referred to the Office of Inspector General, who would provide a separate tracking number.

On August 24, 2021, OSVA FOIA Officer Ruthann Parise acknowledged your request and granted your request for a fee waiver. Ms. Parise also requested further clarification regarding item #5 of your request, such as the time frame for your request.

On August 25, 2021, Mr. Bryan Saddler provided clarification regarding item #5, proposing the time frame of December 1, 2019 through July 20, 2021.

Fees VA's FOIA regulations require each request to be characterized under 38 C.F.R. § 1.561(c) and fees to be estimated and charged, when applicable. Your request was characterized as an "Educational or Non-Commercial" requester, which means that you are not required to pay search or review fees. You have not been charged any fees for the processing of this request.

First Interim Initial Agency Decision (IAD) On September 7, 2021, Ms. Parise issued her first interim IAD, notifying you that responsive records had been located. She identified 652 pages of records and 1 Excel spreadsheet as responsive to items # 1, 3, and 6(a)-(d) of your request. She determined that 249 pages and 1 Excel spreadsheet were releasable in full, 330 pages were partially releasable, and 73 pages were withheld in full pursuant to FOIA Exemptions 3, 5, 6, and 7(C). Ms. Parise stated that remaining releasable records, if any, would be provided on a rolling basis. She also provided the appropriate appeal, mediation, and public liaison rights.

On September 8, 2021, Ms. Parise issued a correction to the IAD, noting that Bates numbered pages 000321-000347 were in response to item #4 of your request as opposed to item #3.

On September 9, 2021, Ms. Parise requested further clarification regarding item #5 of your request. She asked for the names of the VES/SVA representatives that you are requesting aside from Barrett Bogue. On September 30, 2021, Mr. Saddler provided a list of names.

Search For the second interim IAD, Ms. Parise searched the files of 20 VA employee mailboxes and calendars pertaining to Charmain Bogue, provided to her by the Office of Information and Technology (OI&T). She used the search term 04890714, which was the case number assigned to Senator Grassley's request in VA's official correspondence tracking system.

Second Interim IAD On October 29, 2021, Ms. Parise issued a second interim IAD, notifying you that responsive records had been located. She identified 1,426 pages of records responsive to your request item #1. She determined that 978 pages were releasable in full, 290 pages were partially releasable, and 158 pages were withheld in full pursuant to FOIA Exemptions 5, 6, and 7(E). Ms. Parise explained that the information withheld pursuant to Exemption 5 reflected the deliberative process of the agency. She also withheld names (except for VA Senior Executives), email addresses, VA usernames, phone numbers, cellular numbers, social security numbers, dates of birth, and personal pronouns under Exemption 6. Ms. Parise also explained that she withheld VA intranet and MS Outlook safelink website addresses containing confidential VA information technology system and

security parameters pursuant to Exemption 7(E). You were also provided with the appropriate appeal, mediation, and public liaison rights.

Responsive Records The responsive records disclosed to you consisted of emails, meeting invitations, and their attachments.

Appeal On January 24, 2022, you appealed the second interim IAD. You wrote that OSVA's assertions of Exemptions 5 and 7(E) "exceed, or appear to exceed, the understood parameters of the exemptions."

Regarding the applicability of Exemption 5, you wrote that "factual information, on the other hand, is not covered by the deliberative process privilege" and pointed to certain instances in which you believed factual information had been improperly redacted under Exemption 5. For example, you referenced Bates 001856-001864, in which draft responses to Senator Grassley's questions are redacted. You stated that many of the questions "are susceptible only to factual answers" and there is "no room for opinions, recommendations, or proposed solutions concerning these and other questions included in Senator Grassley's letter." You provided several other examples of text blocks that you believed to be facts and "not protected" by Exemption 5. You also wrote that it is "unlikely that the above-described text blocks that the OSVA has redacted in their entirety include no segregable factual data."

Regarding the applicability of Exemption 7(E), you wrote, "the flaw in the OSVA's reasoning is that FOIA Exemption b7(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."

Relevant Law We have thoroughly reviewed your appeal under the provisions of the FOIA, which provides that federal agencies must disclose records requested unless they may be withheld in accordance with one or more of nine statutory exemptions. 5 U.S.C. § 552(b).

Analysis

Your appeal is limited to the applicability of Exemptions 5 and 7(E); therefore, we will not address the redactions made pursuant to Exemption 6.

FOIA Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 encompasses the deliberative process privilege, the general purpose of which is to "prevent injury to the quality of agency decisions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). Three policy purposes have been held to constitute the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they

are adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982). The deliberative process privilege is designed to protect the "decision making processes of government agencies." *Sears*, 421 U.S. at 150. The privilege operates "to encourage candor, which improves agency decisionmaking, the privilege blunts the chilling effect that accompanies the prospect of disclosure." *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S. ___, 141 S. Ct. 777, 785 (2021). Thus, the privilege protects not merely documents, but the integrity of the deliberative process itself where the exposure of that process would result in harm.

First, we note that the records at issue are intra-agency communications and therefore meet the threshold criteria of Exemption 5. Furthermore, the responsive documents represent material assembled by employees for agency consideration; the information gathered represents relevant considerations in the agency's review of its response to Senator Grassley's letter and include the thoughts and opinions of agency employees. The material includes drafts of documents prepared to inform officials; it also reflects various factors considered by the agency during its deliberations, that may or may not represent the bases for agency conclusions. The withheld information does not contain an official final agency decision but rather reveals the deliberative process itself as employees considered the agency's course of action. Release of this information could undercut employees' willingness to engage in assessments of a situation or provide forthright opinions on matters under review, thus affecting the agency's ability to obtain open and frank communication regarding agency issues. Significantly, releasing this information would undermine the agency's deliberative process itself; the agency relies on its ability to fully evaluate a course of action knowing that the process itself is protected. The premature release of information could result in public misunderstanding or confusion as to the bases for the agency's decision and could harm the overall review process in which agencies must continually engage. In view of the foregoing, we affirm the withholding of the information under Exemption 5.

In your appeal, you raised the concern that at least some of the Exemption 5 redactions were of factual material and thus, in your opinion, not protected by Exemption 5. We have reviewed each of the specific examples you listed and find that they contain thoughts and opinions of agency employees and do not contain segregable factual information. For example, you specifically referred to draft responses to Senator Grassley's letter, Bates 001856-001864, and argued that because the questions "are susceptible only to factual answers," there is "no room for opinions, recommendations, or proposed solutions" in response. However, those redactions concern *draft* responses in which agency officials are deliberating on how to respond; the very type of documents that Exemption 5 protects. See *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 465 (D.C. Cir. 2014) (finding draft exempt in its entirety under Exemption 5 because in creating draft, selection of facts thought to be relevant was part of deliberative process); *Skull Valley Band of Goshute Indians v.*

Kemphorne, No. 04-339, 2007 U.S. Dist. LEXIS 21079, at *46 (D.D.C. Mar. 26, 2007) (noting that “the drafting process is itself deliberative in nature”). Furthermore, factual material that “is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government’s deliberations” is protected from disclosure. *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) (“It has long been a rule in this Circuit that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions.”). In another example, you referenced an email exchange, Bates 000923-000924, regarding “good info” that you believe contains redacted factual information. However, we reviewed the redacted information and confirm that the redactions contain the opinions and advice of OAWP and OGC employees.

While we find that the Exemption 5 redactions are protected by the deliberative process privilege, we also find that guidance from OGC attorneys pertaining to information law are additionally protected from disclosure under the attorney-client privilege. Courts have found that attorney-client privilege “encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts,” as well as “communications between attorneys that reflect client-supplied information.” *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005). In this case, “the agency is the ‘client’ and the agency’s lawyers are the ‘attorneys’ for the purposes of attorney-client privilege.” *Judicial Watch, Inc. v. United States Dep’t of the Treasury*, 796 F. Supp. 2d 13, 33 (D.D.C. 2011). We find that the following documents reflect legal advice from OGC attorneys and are protected by attorney-client privilege:

Bates No.	Privilege Description
000924 000927	Internal VA staff email summarizing legal advice from OGC attorney regarding information disclosure.
001472 001543 001566-001567	Email from Michael Hogan (Deputy General Counsel) to VA staff, reflecting legal advice from Robert Fleck (Chief Counsel, Procurement Law Group) regarding information disclosure.
001488	Email from Robert Fleck (Chief Counsel, Procurement Law Group) to Michael Hogan (Deputy General Counsel) and Michael Hughes (Chief Counsel, District Contracting National Practice Group), reflecting legal advice regarding information disclosure.
001519	Email from Michael Hogan (Deputy General Counsel) to Ruthann Parise (FOIA Officer, Office of the Secretary) providing legal advice regarding information disclosure.
001522	Email requesting and reflecting legal advice from OGC attorney regarding information disclosure.
001601	Email from OGC attorney reflecting legal advice regarding applicability of FOIA exemptions.
001924-001925	Emails requesting and reflecting legal advice from OGC attorney regarding information disclosure.

Turning to the Exemption 7(E) redactions, we find that the redactions were not appropriate. Exemption 7(E) permits agencies to withhold information that “would disclose techniques and procedures for law enforcement investigations or purposes . . . if such disclosure could reasonably be expected to risk circumvention of the law.”

In your appeal, you argue that VA cannot use Exemption 7(E) because the agency “is not a law enforcement agency.” You wrote that the D.C. 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.” You note that the Circuit Court “has established a ‘less exacting’ standard” for agencies whose principal function is criminal law enforcement, but this standard is unavailable to OSVA because the VA “was established to provide material support [sic] America’s veterans, not to conduct criminal investigations against them.”

While it is true that VA’s principal function is not law enforcement, and the “less exacting” standard would therefore not apply, the VA may still invoke the use of Exemption 7. However, an agency whose functions are mixed, such as the VA, needs to meet a higher standard to show that the records were compiled for law enforcement purposes. We do not find that the emails in which the Exemption 7(E) redactions appear were compiled for law enforcement purposes. While some system information may meet the criteria for enforcement of civil and criminal law under Exemption 7(E), this particular information does not meet that standard.

Enclosed please find the relevant 34 pages with the 7(E) redactions removed: Bates numbers 000718, 000751, 000754, 000787, 001195-001196, 001197, 001371, 001405, 001406-001407, 001608, 001651-001652, 001654, 001699, 001701-001702, 001711, 001721, 001737, 001740, 001743, 001746, 001748 (marked as Exemption 5), 001802-001803, 001849 (marked as Exemption 5), 001853 (marked as Exemption 7(C)), 001899, 001907, 001926, 002070, and 002074.

Conclusion Based upon the foregoing, your appeal of the Exemption 7(E) redactions is granted. Your appeal of the Exemption 5 redactions is denied.

Mediation and Appeal Rights This final agency decision concludes the administrative processing of your appeal.

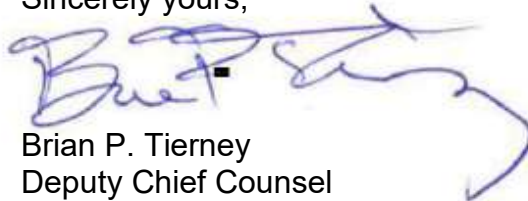
As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services. Similarly, as part of the FOIA Improvement Act of 2016, VA established a FOIA Public Liaison to offer mediation services. Both OGIS and the VA Public Liaison will assist in resolving disputes between FOIA requesters and VA as a non-exclusive alternative to litigation. Using OGIS or the VA FOIA Public Liaison does not affect your right to pursue litigation. You may contact OGIS or the VA Public Liaison in any of the following ways:

Office of Government Information Services E-mail: ogis@nara.gov
National Archives and Records Administration Telephone: 202-741-5770
Room 2510 Facsimile: 202-741-5769
8601 Adelphi Road Toll-free: 1-877-684-6448
College Park, MD 20740-6001

VA FOIA Public Liaison E-mail: vacofoiaservice@va.gov
James Killens, III Telephone: 1-877-750-3642
VA FOIA Service Facsimile: 202-632-7581
810 Vermont Avenue, NW (005R1C)
Washington, DC 20420

With respect to any information denied to you by this final agency decision, the FOIA requires us to advise you that if you believe the Department erred in this decision, you have the right to file a complaint in an appropriate United States District Court.

Sincerely yours,



Brian P. Tierney
Deputy Chief Counsel
Information & Administrative Law Group

CC: Ruthann Parise, FOIA Officer, OSVA
James Killens III, VA FOIA Public Liaison

Enclosure: 34 pages

Exhibit M



December 16, 2021

Via Electronic Transmission: VAOIGFOIA-Appeals@va.gov

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

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

Dear Office of Counselor:

Introduction

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

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

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

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

Background

1. Empower Oversight's FOIA Request

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴ See, Exhibit 1, (citations omitted).

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

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

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

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

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

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

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

⁷ See, Exhibit 3.

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

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

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

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

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

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

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

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

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

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

¹² See, Exhibit 6.

¹³ See, Exhibit 6.

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

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

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

¹⁷ See, Exhibit 6.

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

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

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

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

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

¹⁸ See, Exhibit 6.

¹⁹ See, Exhibit 6.

²⁰ See, Exhibit 6.

²¹ See, Exhibit 6.

²² See, Exhibit 1 (citations omitted).

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

²⁴ See, Exhibit 7.

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

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

²⁷ See, Exhibit, 7, pp. 10 – 11.

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

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

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

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

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

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

²⁸ See, Exhibit 6.

²⁹ See, Exhibit 6.

³⁰ See, Exhibit 6.

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

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

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

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

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

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

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

³³ See generally, Exhibit 7.

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

³⁵ See, Exhibit 7.

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

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

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

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

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

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

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

³⁷ See, Exhibit 7, p. 16.

³⁸ See, Exhibit 7, pp. 1 – 15.

³⁹ See, Exhibit 7.

⁴⁰ See, Exhibit 7.

⁴¹ See, Exhibit 7, p. 16.

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

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

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

Given that none of the VA-OIG's three business days worth of records were created fewer than 50 days prior to the VA-OIG's May 26th response to Senator Grassley's April 2nd letter to VA Secretary McDonough, a reasonable construction of the VA-OIG's September 29th response to the first item of VA-OIG FOIA Number 2021-00357 is that all of the records in its possession that relate to the "receipt of, discussions related to, processing of, and response to" Senator Grassley's correspondence were created on or before April 6th. In other words, the plain language of the VA-OIG's September 29th FOIA response provides that it originated no records relating to its consideration of, and response to, Senator Grassley's two letters after April 6, 2021.⁴⁶

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

⁴³ See, Exhibit 1.

⁴⁴ See, Exhibit 6.

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

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

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

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

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

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

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

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

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

⁴⁷ See generally, Exhibit 7.

⁴⁸ See, Exhibit 6.

⁴⁹ See, Exhibit 6.

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

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

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

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

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

⁵⁰ 5 U.S.C. § 552(b)(5).

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

⁵² *See*, Martin, 819 F.2d at 1185.

⁵³ *See*, Exhibit 6.

⁵⁴ Sears, 421 U.S. at 151.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶⁷ 5 U.S.C. § 552(b)(6).

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

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

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

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

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

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

⁶⁹ See generally, Exhibit 7.

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

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

⁷² See, Exhibit 7, pp. 13 – 14.

⁷³ 5 C.F.R. § 293.311(a).

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

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

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

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

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

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

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

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

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

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

⁷⁹ 5 C.F.R. § 293.311(a).

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

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

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

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

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

Conclusion

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

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

⁸³ NARA, 541 U.S. at 172.

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

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

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

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

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

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

Cordially,

/Jason Foster/

Jason Foster
Founder & President

Exhibit 1

August 6, 2021

VIA ELECTRONIC TRANSMISSION: 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.¹ 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.²

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.³ 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.⁴ 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.⁵

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.⁶ 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.⁷

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).⁸ 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.⁹

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."¹⁰

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

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

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

⁴ *Id* at 3-4.

⁵ *Id*.

⁶ *Id* at 2.

⁷ *Id*.

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

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

¹⁰ "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 gifts¹¹ 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.¹²

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:¹³

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).

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

¹² 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](#)).

¹³ 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

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



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

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

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

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)¹. 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
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.

¹ 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
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
Office of Inspector General
Washington, DC 20420**

August 23, 2021

Jason Foster
Empower Oversight
2615 Columbia Pike, #445
Arlington, VA 22204
Sent via email to: jf@empower.us

Dear Mr. Foster:

This letter acknowledges receipt of your Freedom of Information Act (FOIA) request dated August 6, 2021, in which you asked for a copy of VA OIG records as follows: 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. Portion of your request was referred to this Release of Information Office for processing and direct response to you. We will be reviewing number 2 of your request as it is listed above.

As we advise all requesters, for records protected by a confidentiality statute, regulations (see 38 C.F.R. § 1.554) require the FOIA requester's handwritten signature. For confidential records about another person, the same regulations require proof the requester is authorized to obtain the records. If your request does not satisfy these requirements, it will be denied as it pertains to such records or portions thereof.

We assigned FOIA Tracking Number 21-00357-FOIA to your request. Please refer to this number whenever communicating with VA OIG about your request.

We received your request on August 16, 2021. We are processing your request and our response will be forthcoming.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ruthlee G. Bellamy".

Ruthlee G. Bellamy
Supervisory Government Information Specialist
VA OIG Release of Information Office (50CI)

Exhibit 5



**Department of Veterans Affairs
Office of Inspector General
Washington, DC 20420**

September 13, 2021

Jason Foster
Empower Oversight 2615 Columbia Pike, #445
Arlington, VA 22204
Ent via email to: jf@empowr.us

Dear Mr. Foster:

This is in response to your Freedom of Information Act (FOIA) request dated August 6, 2021 in which you asked for a copy of the "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." Your request was received in this office on August 16, 2021.

We have assigned FOIA Tracking Number 21-00357-FOIA to your request. Please refer to it whenever communicating with VA about your request.

In order to respond to your request, we needed to coordinate with other agency components. Consequently, your request cannot be processed within the time limit specified by the FOIA, at 5 U.S.C. § 552(a)(6)(A)(i), i.e., within 20 days (excepting Saturdays, Sundays, and legal public holidays).

The FOIA allows that under this circumstance, we may extend the time limit by an additional 10 days (excepting Saturdays, Sundays, and legal public holidays). This is notification that we are invoking 5 U.S.C. § 552(a)(6)(B)(i) for the additional 10 days (excepting Saturdays, Sundays, and legal public holidays).

You may appeal the determination made in this response to: Department of Veterans Affairs, Office of Inspector General, Office of Counselor (50C), 810 Vermont Avenue NW, Washington, DC 20420, or by email to: VAOIGFOIA-Appeals@va.gov, or by fax to: (202) 495-5867. If you should choose to make an appeal, your appeal must be sent no later than ninety (90) calendar days after the date of this letter. Your appeal must include the assigned FOIA Tracking Number and any reason(s) why you believe the

response was in error. If you choose to appeal only a portion of the determination, you must specify which part of the determination you are appealing. The appeal should include a copy of the request and VA's response. The appeal should be marked, or subject-titled, "Freedom of Information Act Appeal."

Sincerely,



Ruthlee G. Bellamy
Supervisory Government Information Specialist
VA OIG Release of Information Office

Exhibit 6



**Department of Veterans Affairs
Office of Inspector General
Washington, DC 20420**

September 29, 2021

Jason Foster
Founder and President of Empower Oversight
2615 Columbia Pike, #445
Arlington, VA 22204
Sent via email: jf@empowr.us

Dear Mr. Foster:

This is in response to your Freedom of Information Act (FOIA) request dated August 6, 2021 in which you asked for 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 allegation that Ms. Charmain Bogue, Executive Director of VBA's Education Service, may have violated applicable conflict of interest laws or regulations concerning her official duties and her spouse's business interests." (see Attachment B)

Your request was referred to this Information Release Office from VACO FOIA Service to conduct a search relating to the above items in the request. The request was received in this office on August 16, 2021 and we assigned FOIA Tracking Number 21-00357-FOIA. Please refer to it whenever communicating with VA OIG about this request.

We have enclosed redacted copies of the discussion pertaining to item 1 and 2. However, portions of the information have been redacted pursuant to FOIA exemption (b)(5) and (b)(6). An explanation of each exemptions is below:

FOIA Exemption 5, [5 U.S.C. § 552 (b)(5)], protects from disclosure "inter-agency or intra-agency memorandums or information which would not be available by law to a party other than an agency in litigation with the agency." Courts have interpreted Exemption 5 to exempt records that are normally privileged in the civil discovery context. The three primary, most frequently invoked privileges that have been held to be incorporated into Exemption 5 are the deliberative process privilege (referred to by some courts as "executive privilege"), the attorney work-product privilege, and the attorney-client privilege. We are invoking **"the deliberative process privilege"**, the purpose of which is

to "prevent injury to the quality of agency decisions." Specifically, three policy purposes consistently have been held to constitute the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.

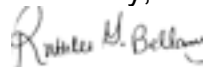
FOIA Exemption 6, [5 U.S.C. § 552 (b)(6)], allows the withholding of all information which, if disclosed, would constitute a clearly unwarranted invasion of an individual's personal privacy. Specifically, names, job titles and other information which could reveal the identity of individuals mentioned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

Further, we did not enclose a copy of the VA Inspector's General response dated May 26, 2021 to the Senator Grassley's April 2, 2021 letter to Secretary McDonough, since it has already been published on the Senator's website. An unredacted copy can be obtained [here](#).

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may appeal the determination made in this response to: Department of Veterans Affairs, Office of Inspector General, Office of Counselor (50C), 810 Vermont Avenue NW, Washington, DC 20420, or by email to: VAOIGFOIA-Appeals@va.gov, or by fax to: (202) 495-5867. If you should choose to make an appeal, your appeal must be sent no later than ninety (90) calendar days after the date of this letter. Your appeal must include the assigned FOIA Tracking Number and any reason(s) why you believe the response was in error. If you choose to appeal only a portion of the determination, you must specify which part of the determination you are appealing. The appeal should include a copy of the request and VA's response. The appeal should be marked, or subject-titled, "Freedom of Information Act Appeal."

Sincerely,



Ruthlee G. Bellamy
Supervisory Government Information Specialist
VA OIG Release of Information Office

Enclosures

Exhibit 7

Document ID (b)(5)

From: Gromek, Catherine A. (OIG)
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 e5 (b)(6)>
 Cc:
 Bcc:
 Subject: RE: Grassley Request
 Date: Tue Apr 06 2021 21:51:52 EDT
 Attachments: (b)(5)

(b)(5)

From: (b)(6) (OIG) <(b)(6)@va.gov>
 Sent: Tuesday, April 6, 2021 2:46 PM
 To: Wilber, Chris (OIG) <(b)(6)@va.gov>; Mitchell, Jamie (OIG) <(b)(6)@va.gov>;
 Fredrikson, Roy (OIG) <(b)(6)@va.gov>; Gromek, Catherine A. (OIG) <(b)(6)@va.gov>
 Subject: Re: Grassley Request

Thanks Chris!

Get Outlook for iOS

From: Wilber, Chris (OIG) <(b)(6)@va.gov>
 Sent: Tuesday, April 6, 2021 1:16:17 PM
 To: Smith, Katherine (OIG) <(b)(6)@va.gov>; Mitchell, Jamie (OIG) <(b)(6)@va.gov>; Fredrikson, Roy (OIG) <(b)(6)@va.gov>; Gromek, Catherine A. (OIG) <(b)(6)@va.gov>
 Subject: Grassley Request

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

Christopher A. Wilber

Counselor to the Inspector General

U.S. Department of Veterans Affairs

810 Vermont Avenue NW
Washington, DC 20420

E-mail: (b)(6)

Phone: (202) 468-1234 (b)(6)

Mobile: (202) 534-1234 (b)(6)

Webpage: www.va.gov/oig

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Document ID: 0.7.2866.6650-000001

Owner: Gromek, Catherine A. (OIG) </o=exchangelabs/ou=exchange administrative group (fydibohf23spdl)/cn=recipients/cn=497f23ac564a4726bc23ca37fdd58e1d-gromek, cat>

Filename: image001.png

Last Modified: Tue Apr 06 21:51:52 EDT 2021

Document ID: (b)(5)

From: (b)(6) (OIG)
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 8e1 (b)(6)>
 Cc:
 Bcc:
 Subject: Re: Grassley Request
 Date: Tue Apr 06 2021 14:46:28 EDT
 Attachments: (b)(5)

Thanks Chris!

Get Outlook for iOS

From: Wilber, Chris (OIG) <(b)(6)@va.gov>
 Sent: Tuesday, April 6, 2021 1:16:17 PM
 To: (b)(6) (OIG) <(b)(6)@va.gov>; Mitchell, Jamie (OIG) <(b)(6)@va.gov>; Fredrikson, Roy (OIG) <(b)(6)@va.gov>; Gromek, Catherine A. (OIG) <(b)(6)@va.gov>
 Subject: Grassley Request

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

Christopher A. Wilber

Counselor to the Inspector General

U.S. Department of Veterans Affairs

810 Vermont Avenue NW
Washington, DC 20420

E-mail: (b)(6)@va.gov

Phone: (202) 461-(b)(6)

Mobile: (202) 534-(b)(6)

Webpage: www.va.gov/oig

This e-mail message and all attachments may contain confidential information intended solely for the addressee(s). If the reader of this message is not the intended recipient, you are hereby notified that any reading, dissemination, distribution, copying, forwarding or other use of this message or its attachments is strictly prohibited. If you received this message in error, please notify the sender immediately and delete this message and all copies and backups thereof.

Document ID (b)(5)

From: Wilber, Chris (OIG)
</o=exchangelabs/ou=exchange administrative group
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Cc:
Bcc:
Subject: Grassley Request
Date: Tue Apr 06 2021 13:16:17 EDT
Attachments: (b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

Christopher A. Wilber
Counselor to the Inspector General
U.S. Department of Veterans Affairs
810 Vermont Avenue NW
Washington, DC 20420

E-mail:

(b)(6)

va.gov

Phone: (202) 468-

(b)(6)

Mobile: (202) 512-

(b)(6)

Webpage: www.va.gov/oig

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Document ID (b)(5)

From: (b)(6) (OIG)
 </o=exchangelabs/ou=exchange administrative group
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To: Mitchell, Jamie (OIG)
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Cc:
 Bcc:
 Subject: RE: Discussion Re: VBA Referral from Grassley
 Date: Tue Apr 06 2021 08:15:44 EDT
 Attachments: (b)(5)

Good Morning,

(b)(5)

Regards,

(b)(6)

(b)(6)

Department of Veterans Affairs | Office of Inspector General

810 Vermont Ave NW, Washington, DC 20420

T 202-46 (b)(6) C 202-2 (b)(6) (b)(6) va.gov

OIG Portal | [OIG Public Site](#)

From: (b)(6) (OIG)

Sent: Monday, April 5, 2021 6:06 PM

To: Mitchell, Jamie (OIG) <(b)(6) va.gov> (b)(6) (OIG) (b)(6) va.gov>; Wilber, Chris (OIG) <(b)(6) va.gov>; Fredrikson, Roy (OIG) <(b)(6) va.gov>; Gromek, Catherine A. (OIG) <(b)(6) va.gov>; (b)(6) (OIG) <(b)(6) va.gov>

Subject: RE: Discussion Re: VBA Referral from Grassley

(b)(5)

Regards,

(b)(6)

(b)(6)

Department of Veterans Affairs | Office of Inspector General

810 Vermont Ave NW, Washington, DC 20420

T 202-46 (b)(6) C 202-2 (b)(6) (b)(6) va.gov

OIG Portal | [OIG Public Site](#)

-----Original Appointment-----

From: (b)(6) (OIG)

Sent: Monday, April 5, 2021 6:04 PM

To: (b)(6) (OIG); Mitchell, Jamie (OIG); (b)(6) (OIG); Wilber, Chris (OIG); Fredrikson, Roy (OIG); Gromek, Catherine A. (OIG); (b)(6) (OIG)

(b)(6)

Subject: Discussion Re: VBA Referral from Grassley

When: Tuesday, April 6, 2021 9:00 AM-10:00 AM (UTC-05:00) Eastern Time (US & Canada).

Where: Microsoft Teams Meeting

Good Afternoon Everyone,

(b)(5)

Regards,

(b)(6)

(b)(6)

Department of Veterans Affairs | Office of Inspector General

810 Vermont Ave NW, Washington, DC 20420

T 202-466-6666 C 202-266-6666 | 6666666666@va.gov

OIG Portal | [OIG Public Site](#)

Microsoft Teams meeting

Join on your computer or mobile app

[Click here to join the meeting](#)

Or call in (audio only)

+1 872-766-6666# United States, Chicago

Phone Conference ID: 6666666666

Document ID: (b)(5)

From: Gromek, Catherine A. (OIG)
</o=exchangelabs/ou=exchange administrative group
(fydibohf23spdlt)/cn=recipients/cn=497f23ac564a4726bc23ca37fdd5
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e77(b)(6)>
Cc:
Bcc:
Subject: RE: Discussion Re: VBA Referral from Grassley
Date: Tue Apr 06 2021 08:09:38 EDT
Attachments: (b)(5)

This is the letter from Grassley to us. (b)(5)

(b)(5)

From: (b)(6) (OIG) <(b)(6)@va.gov>
Sent: Tuesday, April 6, 2021 7:53 AM
To: Gromek, Catherine A. (OIG) <(b)(6)@va.gov>
Subject: RE: Discussion Re: VBA Referral from Grassley

Hi Cathy,

(b)(5);(b)(6) Thank you.

Regards,

(b)(6)

(b)(6)

Department of Veterans Affairs | Office of Inspector General

810 Vermont Ave NW, Washington, DC 20420

(b)(6)

T 202-4 (b)(6) C 202-28 (b)(6) (b)(6) va.gov

OIG Portal | OIG Public Site

From: Gromek, Catherine A. (OIG) <(b)(6)> va.gov>
Sent: Tuesday, April 6, 2021 7:52 AM
To: (b)(6) (OIG) <(b)(6)> va.gov>
Subject: RE: Discussion Re: VBA Referral from Grassley

Hi (b)(6)

(b)(6)

Cathy

From: (b)(6) (OIG) <(b)(6)> va.gov>
Sent: Monday, April 5, 2021 6:06 PM
To: Mitchell, Jamie (OIG) <(b)(6)> va.gov>; (b)(6) (OIG) <(b)(6)> va.gov>; Wilber, Chris (OIG) <(b)(6)> va.gov>; Fredrikson, Roy (OIG) <(b)(6)> va.gov>; Gromek, Catherine A. (OIG) <(b)(6)> va.gov>; Johnson, David S. (OIG) <(b)(6)> va.gov>
Subject: RE: Discussion Re: VBA Referral from Grassley

(b)(5)

Regards,

(b)(6)

(b)(6)

Department of Veterans Affairs | Office of Inspector General

810 Vermont Ave NW, Washington, DC 20420

T 202-4 (b)(6) C 202-2 (b)(6) (b)(6) va.gov

OIG Portal | [OIG Public Site](#)

-----Original Appointment-----

From: (b)(6) (OIG)

Sent: Monday, April 5, 2021 6:04 PM

To: (b)(6) (OIG); Mitchell, Jamie (OIG); (b)(6) (OIG); Wilber, Chris (OIG); Fredrikson, Roy (OIG); Gromek, Catherine A. (OIG); (b)(6) (OIG)

Subject: Discussion Re: VBA Referral from Grassley

When: Tuesday, April 6, 2021 9:00 AM-10:00 AM (UTC-05:00) Eastern Time (US & Canada).

Where: Microsoft Teams Meeting

Good Afternoon Everyone,

(b)(6)

Regards,

(b)(6)

(b)(6)

Department of Veterans Affairs | Office of Inspector General

810 Vermont Ave NW, Washington, DC 20420

T 202-46 (b)(6) C 202-2 (b)(6) (b)(6) va.gov

OIG Portal | [OIG Public Site](#)

Document ID (b)(5)

From: (b)(6) (OIG)

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To: Mitchell, Jamie (OIG)

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a17 (b)(6); Wilber, Chris (OIG)

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57 (b)(6); Fredrikson, Roy (OIG)

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e5 (b)(6); Gromek, Catherine A. (OIG)

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8e (b)(6) (b)(6) (OIG)

</o=exchangelabs/ou=exchange administrative group
(fydibohf23spdlt)/cn=recipients/cn=27844be405cd4ed3a789f36b323e
5d (b)(6)>

Cc:

Bcc:

Subject: RE: Discussion Re: VBA Referral from Grassley

Date: Mon Apr 05 2021 18:05:43 EDT

Attachments: (b)(5)

Please see attached readahead.

Regards,

(b)(6)

(b)(6)

Department of Veterans Affairs | Office of Inspector General

810 Vermont Ave NW, Washington, DC 20420

T 202-4 (b)(6) C 202-2 (b)(6) (b)(6) va.gov

Sent: Friday, April 2, 2021 5:03 PM

To: Gromek, Catherine A. (OIG) <(b)(6)@va.gov>

Cc: Ragsdale, DeLisa (Judiciary-Rep) <DeLisa_Ragsdale@judiciary-rep.senate.gov>; CEG (Judiciary-Rep) <CEG@judiciary-rep.senate.gov>

Subject: [EXTERNAL] 2021-04-02 CEG to VA OIG

Hello Cathy,

Please find the attached letter from Senator Grassley to the U.S. Department of Veterans Affairs Office of Inspector General.

Please confirm receipt of this letter. Thank you.

--

Best Regards,

Quinton A. Brady

Investigative Counsel

Ranking Member Charles E. Grassley

U.S. Senate Committee on the Judiciary

Exhibit 8



U.S. Department
of Veterans Affairs

Inspector General
Washington DC 20420

May 26, 2021

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Senator Grassley:

I am writing in response to your April 2, 2021 letter regarding allegations related to the Veterans Benefits Administration (VBA) and specifically allegations of ethical violations and other misconduct by VBA leadership.

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

For the reasons summarized below, at this time we will not be reviewing the other matters raised in your letter:

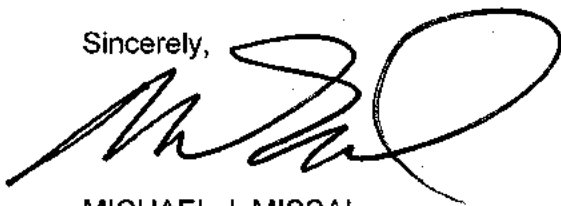
- ***Mitigation of Disciplinary Penalties for Certain Senior VA Officials.*** Your letter requested that the OIG review and report on the reasons why VA allegedly mitigated penalties recommended in disciplinary actions of specific senior-level VBA employees. VA's Office of Accountability and Whistleblower Protection (OAWP) investigated the matters referenced by your letter. The OAWP makes recommendations relating to discipline and it tracks the information that your letter requests. The OIG will defer to OAWP's response to the corresponding request in your letter to VA Secretary McDonough.
- ***Potential Disclosure of Material Non-Public Information Concerning Certain Education Institutions.*** Since you have separately requested the U.S. Securities and Exchange Commission (SEC) to investigate this matter and the VA OIG has limited authority to compel testimony, we will defer to the SEC. If we uncover information relevant to this potential violation during our review, we will refer that information to the SEC for review.

The Honorable Charles Grassley

- ***Financial Disclosures of VA Employees.*** Your letter asked the OIG to review VA employees' compliance with financial disclosure requirements. The allegations presented relate to one individual's disclosures and, even if true, do not appear to suggest the existence of a broad process failure affecting the nearly 700 VA employees who file public financial disclosures every year. Although the OIG may reconsider initiating a broader review at a future time, we note that the Office of Government Ethics has primary authority in this area and is better positioned to evaluate VA's financial disclosure process, especially as it pertains to an individual's compliance with disclosure requirements.
- ***Compliance with Freedom of Information Act (FOIA) Requests.*** The specific FOIA requests mentioned in your letter are the subject of pending litigation. The OIG generally does not investigate matters under litigation if the issue can be resolved by the decision-maker. In this instance, the court's determination will provide the requestor with any appropriate relief and address your question as to whether VA is failing to comply with FOIA requests.
- ***Anonymous Allegations of Reprisal.*** Your letter raises non-specific allegations of reprisal by individuals who provided unspecified information to your office. The OIG lacks the authority to provide redress for reprisals. For current and former VA employees seeking relief from instances of reprisal, VA's OAWP or the U.S. Office of Special Counsel are the most appropriate offices to review those allegations.

We appreciate the opportunity to consider these matters and thank you for your interest in the OIG.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael J. Missal', with a large, stylized loop at the end.

MICHAEL J. MISSAL

Exhibit N



**Department of Veterans Affairs
Office of Inspector General
Washington, DC 20420**

December 29, 2021

Jason Foster
Empower Oversight
2615 Columbia Pike, #445
Arlington, VA 22204
[Sent via: jf@empowr.us]

Ref: FOIA Appeal # 22-00006-APP for FOIA Response # 21-00357-FOIA

Mr. Foster:

This letter responds to your Freedom of Information Act (FOIA) appeal, received on December 17, 2021, of the referenced Department of Veterans Affairs (VA) Office of the Inspector General (OIG) FOIA response. As background, on August 6, 2021, you directed your request to the VA central FOIA office (VACO FOIA Service) and on August 16, VACO FOIA Service referred to VA OIG those portions of the request for which VA OIG records may be responsive. Other portions of the request were referred to other VA components, including the Veterans Benefit Administration and the VA Assistant Secretary for Congressional and Legislative Affairs.

As a preliminary matter, VA OIG is an independent component of the VA. The VA OIG is required by statute to preserve its independence and impartiality per the Inspector General Act of 1978, as amended, 5 U.S.C. App. 3, see especially section 9(a). In that context, coordination between VA OIG and other VA components on FOIA requests is limited and the referenced response represents the separate response of VA OIG, not the entire response of the Department of Veterans Affairs. This is reflected by the timeline in your appeal letter, where you relate that the VACO FOIA Service (which you reference as VA OI&T), provided you tracking number 21-08450-F, which is distinct from the VA OIG tracking number, 21-000357-FOIA.

In your appeal letter, you request a review of the response on two issues: (1) Whether the response properly applied FOIA Exemptions (b)5 and (b)6; and (2) whether the FOIA staff conducted an adequate search for responsive records. I will address each issue separately.

FOIA Exemptions 5 and 6.

The courts have interpreted the language of FOIA Exemption 5 to protect privileged agency records, except those which would be routinely disclosed in the civil discovery context. See, *Zander v. DOJ*, 885 F. Supp. 2d 1, 15 (D.D.C. 2012) (holding privileges should be given the same meaning under FOIA as under the Rules of Evidence, so that FOIA may not be used as a supplement to civil discovery). The deliberative process privilege protects the non-segregable portions of pre-decisional inter-agency or intra-agency memorandums or other documents that make recommendations or express opinions on legal or policy matters. In addition to the deliberative process privilege cited in the response letter, FOIA Exemption 5 incorporates more than one privilege and includes the attorney-client privilege as well as privileges recognized by federal courts pursuant to Federal Rule of Evidence 501. After a review of the disclosed records, I conclude the redactions marked with FOIA Exemption 5 were privileged communications and the VA OIG response properly withheld those portions.¹

The courts have interpreted FOIA Exemption 6 to require agencies to protect any substantial privacy interests from unwarranted invasions; and the term "unwarranted" requires agencies to balance individual privacy interests against the public interest in the disclosure of facts relating to the administration of government operations. Although the courts have recognized that the identifying information of federal government employees cannot be routinely withheld, the courts have recognized the substantial privacy interests of federal government employees collaterally involved in inspector general audits, investigations, and inspections, who are investigators or third parties. In the disclosed records, the Exemption 6 redactions protected employee email addresses and phone extensions, as well as the names of non-senior VA employees. After a review, I conclude the VA OIG FOIA Office properly withheld the portions marked with FOIA Exemption 6.

Adequacy of the search.

In your appeal, you argue: "... it appears that the VA-OIG FOIA Staff either misinterpreted the scope of Empower Oversight's request for records, failed to conduct a search that was reasonably calculated to uncover all relevant documents, or somehow failed to produce all of the responsive, non-exempt records that they located during their records search." Regarding the adequacy of a search for records responsive to a request, the courts have found searches to be adequate when, among other things, they are based on a reasonable interpretation of the scope of the request, as described by the requester. See, e.g., *Larson v. Dep't of State*, 565 F.3d 857, 869 (D.C. Cir. 2009) (affirming adequacy of search based on the agency's reasonable determination regarding records being requested and searched accordingly). The courts have also recognized that agencies are not required to search for records created or received after the initial search for responsive records. See *Defenders of Wildlife v. Dep't of the Interior*, 314 F. Supp. 2d 1, 12 (D.D.C. 2004).

As detailed in this letter and in the response letter, VACO FOIA Service referred the following portions of your August 6, 2021 request to VA OIG on August 16, 2021.

¹ Although not referenced in the response, the attorney-client privilege applies to some portions withheld under FOIA Exemption 5, 5 U.S.C. § 552 (b)(5).

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

I reviewed the FOIA file for the search conducted by the VA OIG FOIA staff, as well as the records produced in response to your request. Your appeal correspondence argues that records from a VA OIG investigation into the Executive Director of VBA's Education Service, as described in the Inspector General's May 26, 2021, correspondence with Senator Grassley, must have been withheld, since the disclosed records do not include records from the investigation. Although the FOIA staff did not search the working files of the open investigation, I considered that the FOIA staff conducted a reasonable search, including a search of OIG email, and find the FOIA staff reasonably interpreted the referred portions of your request, and conducted an adequate search.

Therefore, after a review of the appeal and the FOIA file, I find the FOIA response was proper, and the appeal is denied. This is the final decision of the Department of Veterans Affairs on your appeal. The FOIA requires that I advise that, if you believe the Department erred in this decision, you have the right to file a complaint with the appropriate United States District Court. The FOIA also requires I advise that FOIA requesters may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer as non-exclusive alternatives to litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769. Please note that OGIS does not have the authority to mediate Privacy Act requests.

Respectfully,

Christopher Connor

Christopher Connor
Office of Counselor (50C)

Copy to: VA OIG FOIA Office

Exhibit O

RICHARD J. DURBIN, ILLINOIS, CHAIR

PATRICK J. LEAHY, VERMONT	CHARLES E. GRASSLEY, IOWA
DIANNE FEINSTEIN, CALIFORNIA	LYNDEE D. GRAHAM, SOUTH CAROLINA
THELMA WHITEHOUSE, RHODE ISLAND	JOHN CORNYN, TEXAS
AMY KLOBUCHAR, MINNESOTA	MICHAEL S. LEE, UTAH
CHRISTOPHER A. COONS, DELAWARE	TED CRUZ, TEXAS
RICHARD BLUMENTHAL, CONNECTICUT	BEN RANNEY, NEBRASKA
MAZIE HIRONO, HAWAII	JOHN R. MANWELL, MISSOURI
CORY A. BOOKER, NEW JERSEY	TOM COTTON, ARKANSAS
ALEX PADILLA, CALIFORNIA	JOHN KENNEDY, LOUISIANA
JOHN OSSOFF, GEORGIA	THOM TILLIS, NORTH CAROLINA
	MARSHA BLACKBURN, TENNESSEE

United States Senate
 COMMITTEE ON THE JUDICIARY
 WASHINGTON, DC 20510-6275

July 11, 2021

VIA ELECTRONIC TRANSMISSION

Denis McDonough
 Secretary
 U.S. Department of Veterans Affairs

Dear Secretary McDonough:

On April 2, 2021, I sent corresponding letters to the Department of Veterans Affairs (VA) and its Office of Inspector General (OIG) regarding allegations of potential conflicts of interest and whistleblower reprisal at VA.¹ Quickly after I sent my letter to VA OIG, VA OIG began conducting an investigation into alleged conflicts of interest. On March 24, 2022, the VA OIG released a report titled, “Former Education Service Executive Violated Ethics Rules and Her Duty to Cooperate Fully with the OIG.”² Because the scope of VA OIG’s work did not encompass all of the allegations presented to my office, I also continued to seek information directly from VA. Since April 2, 2021, I have written three additional letters reiterating requests for answers to my questions, and asked that the VA begin producing documents to my office. Since then, the VA has produced hundreds of pages of records – to the public, through Freedom of Information Act (FOIA) requests. On June 21, 2022, after more than a year of requests, the Department provided a paltry 96 pages of documents to me. For more than a year, you have failed to answer a single question in my April 2, 2021 letter – despite the fact that a response was drafted and approved but never delivered to my office. Now, I may know why.

The VA OIG substantiated allegations of a conflict of interest between a senior-level VA official, Mrs. Charmain Bogue, and a company that employed her husband, Veterans Education Services (VES). The VA OIG issued the following four findings as part of its report:

1. Mrs. Bogue Participated in Matters Involving Her Spouse’s Employer without Considering an Apparent Conflict of Interest and Acted Contrary to Ethics Guidance She Received;

¹ Letter from Charles E. Grassley, Ranking Mem., S. Jud. Comm, to Denis McDonough, Sec’y., U.S. Dep’t. of Veterans Aff. (Apr. 2, 2021), https://www.grassley.senate.gov/imo/media/doc/grassley_to_dept.ofveteransaffairsvbaethicsmarketinfoleaks.pdf; Letter from Charles E. Grassley, Ranking Mem., S. Jud. Comm, to Michael J. Missal, Inspector Gen., U.S. Dep’t. of Veterans Aff. Off. of Inspector Gen. (Apr. 2, 2021), https://www.grassley.senate.gov/imo/media/doc/grassley_to_va_inspector_general_ethics_market_info_leaks.pdf.

² U.S. DEP’T. OF VETERANS AFF., OFF. OF INSPECTOR GEN., #21-02076-119, FORMER EDUCATION SERVICE EXECUTIVE VIOLATED ETHICS RULES AND HER DUTY TO COOPERATE FULLY WITH THE OIG (2022), <https://www.va.gov/oig/pubs/VAOIG-21-02076-119.pdf>.

Secretary McDonough
 July 11, 2022
 Page 2 of 8

2. Mrs. Bogue's Interactions with the VES President Violated the Apparent Conflict Rule but the OIG Cannot Substantiate Whether She Used Her Public Office for Private Gain;
3. Mrs. Bogue Provided Insufficient Detail about Her Spouse's Business in 2019 and 2020 Public Financial Disclosures but Remedied It; and
4. Mrs. Bogue Refused to Cooperate Fully in the OIG's Investigation.³

All of these issues were not just presented to my office. Whistleblowers brought these allegations first to the VA, which ignored them. In fact, one of the employees that raised the concerns may have been a victim of whistleblower reprisal – something I have been attempting to get to the bottom of since last year. The VA has an obligation to act as a good steward of taxpayer money, and to root out waste, fraud, and abuse where it occurs. It has a duty to fully investigate concerns raised by VA employees in good faith. Thankfully in this case the VA OIG took these allegations seriously, and unfortunately its work revealed that the facts of the matter were far worse than I suspected.

Mrs. Bogue Participated in Matters Involving Her Spouse's Employer without Considering an Apparent Conflict of Interest and Acted Contrary to Ethics Guidance She Received

Federal law states that an executive branch employee may not participate personally or substantially in a particular matter that, to the employee's knowledge, could directly and predictably affect their financial interest, or that of their spouse, unless they receive a written waiver or the financial interest is exempt.⁴ Mrs. Bogue told the OIG that she received and completed annual ethics training that covered this topic, including trainings on annual public disclosure reports for VA senior executives.⁵ The trainings included advice about seeking additional guidance before taking action in an official VA capacity.⁶ Further, Mrs. Bogue received guidance from VA ethics counsel and her then-supervisory chain of command concerning her duty to ensure no conflict of interest existed with her spouse's business activity.⁷

Despite Mrs. Bogue's apparent extensive training and guidance regarding conflicts of interest and the rules required of senior federal employees, the VA OIG found that, during the period in which her spouse worked for VES, Mrs. Bogue nevertheless participated in VA matters in which VES or her spouse was, or represented, a party.⁸ In fact, Mrs. Bogue participated in VES matters on more than one occasion. The VA OIG found that Mrs. Bogue participated in the

³ U.S. DEP'T. OF VETERANS AFF., OFF. OF INSPECTOR GEN., #21-02076-119, FORMER EDUCATION SERVICE EXECUTIVE VIOLATED ETHICS RULES AND HER DUTY TO COOPERATE FULLY WITH THE OIG (2022), *supra* note 1, at iv.

⁴ 18 U.S.C. § 208; 5 C.F.R. § 2635.402(a), (d); 5 C.F.R. § 2640(B), (C).

⁵ U.S. DEP'T. OF VETERANS AFF., OFF. OF INSPECTOR GEN., #21-02076-119, FORMER EDUCATION SERVICE EXECUTIVE VIOLATED ETHICS RULES AND HER DUTY TO COOPERATE FULLY WITH THE OIG (2022), *supra* note 1, at 3, 5.

⁶ *Id.* at 5

⁷ *Id.*

⁸ *Id.* at 3.

approval of a memorandum of understanding (MOU) that benefitted VES.⁹ An email reviewed by VA OIG reflected that Mrs. Bogue, in 2019, negotiated the terms of an MOU between the Veterans Benefits Administration (VBA) and an outside entity, “in which VES was intended to be a named party.”¹⁰ After learning that VES was to be a named party in the MOU, Mrs. Bogue did not recuse herself from the matter.¹¹ Further, Mrs. Bogue purportedly advised the VES president that if VES was not named at all, she could then clear the MOU with her supervisor.¹² Mrs. Bogue was a signatory of the MOU.¹³ VES was not named in the MOU, which was eventually cleared by Mrs. Bogue’s supervisors.¹⁴ In total, VA OIG found email exchanges between VES and Mrs. Bogue regarding the MOU from at least December 2018 to January 2020.¹⁵ Further, Mrs. Bogue interacted directly with her husband, Barret Bogue, on multiple occasions as it related to VA matters with VES.¹⁶ The VA OIG report stated that the circumstances “indicated that [Mr. Bogue] was trading on his access to Mrs. Bogue. . . .”¹⁷

VES paid Mr. Bogue \$5,000 a month between November 2018 and November 2020, as well as a lump sum payment to Mr. Bogue in the amount of \$35,000 to terminate his contract, despite the fact that the contract between VES and Mr. Bogue only had two months left.¹⁸ This represented an excess of \$30,000 more than what VES owed Mr. Bogue in the event that VES elected to keep Mr. Bogue’s services until the end of the contract.¹⁹ Despite all this, it appears that VES did not believe Mr. Bogue provided substantial enough value based on what VES was paying Mr. Bogue. In fact, VES’s president stated that Mr. Bogue was working less than 20 hours per week on behalf of VES and that Mr. Bogue – whom VES employed for strategic communications – was not “particularly savvy media-wise.”²⁰ It is clear that VES did not believe Mr. Bogue was performing well at his duties, so it is unclear why VES elected to keep Mr. Bogue under contract for as long as it did, and why VES elected to pay Mr. Bogue \$30,000 to cancel their contract, despite the fact that there was no termination clause in their contract.²¹

The VA OIG could not determine whether an actual conflict of interest existed because Mrs. Bogue and VES both refused to cooperate with the OIG’s investigation.²² Further, VA OIG could not determine the basis for VES’s final, excess payment to Mr. Bogue.²³

⁹ *Id.* at 7.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 7-9.

¹³ *Id.* at 9.

¹⁴ *Id.* at 7-8.

¹⁵ *Id.* at 8.

¹⁶ *Id.* at 10.

¹⁷ *Id.*

¹⁸ *Id.* at 12.

¹⁹ *Id.*

²⁰ *Id.* at 13.

²¹ *Id.*

²² *Id.* at 4.

²³ *Id.* at 13.

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Mrs. Bogue's Interactions with the VES President Violated the Apparent Conflict Rule but the OIG Cannot Substantiate Whether She Used Her Public Office for Private Gain

During the course of VA OIG's investigation, it identified two additional issues involving Mrs. Bogue and VES not raised in my April 2, 2021 letter.²⁴ In a November 2020 email reviewed by VA OIG, the VES president indicated that both Mr. and Mrs. Bogue asked the VES president not to terminate Mr. Bogue's contract in response to media reports alleging that a conflict of interest existed.²⁵ In her initial interview with VA OIG, Mrs. Bogue denied this communication, and she denied asking her husband to communicate this to VES. VA OIG could not investigate this matter further because Mr. Bogue and VES refused to cooperate with the VA OIG's investigation.²⁶

On a separate occasion in late November 2020, Mrs. Bogue provided her personal resume to the VES president, who subsequently endorsed Mrs. Bogue for a presidentially appointed position within VA.²⁷ After receiving Mrs. Bogue's resume, the VES president responded that she would "send this in for now."²⁸ The VA OIG found that after Mrs. Bogue forwarded her resume to VES, the VES president and VES staff forwarded Mrs. Bogue's resume to several U.S. Senators and a subcommittee for the U.S. House of Representatives Committee on Veterans Affairs.²⁹ In December 2020, one month after giving Mrs. Bogue's husband a lump sum payment of \$30,000, the VES president forwarded a link to a job application for President Joe Biden's transition team website.³⁰ Mrs. Bogue stated that she sent her resume to VES for feedback and that she never applied for a presidentially appointed position.³¹

Mrs. Bogue Provided Insufficient Detail about Her Spouse's Business in 2019 and 2020 Public Financial Disclosures but Remedied It

In my April 2, 2021 letter, I asked if Mrs. Bogue listed her husband, or his company, on her financial disclosure.³² The VA OIG found that, although VA certified Mrs. Bogue's 2019 and 2020 annual public financial disclosure reports, Mrs. Bogue "failed to report some required information concerning her husband's business."³³ Mrs. Bogue stated in her financial disclosure reports that her husband was "self-employed (consulting firm)" and that his income type was "salary, consulting fees."³⁴ Mrs. Bogue failed to report the income amount as well as the income source. After my April 2, 2021 letter, Mrs. Bogue emailed VA ethics counsel to verify that she was not missing any important information.³⁵ VA ethics clarified that if her spouse owned or

²⁴ *Id.* at 14.

²⁵ *Id.*

²⁶ *Id.* at 14-15.

²⁷ *Id.* at 14.

²⁸ *Id.* at 16.

²⁹ *Id.*

³⁰ *Id.*, at 17.

³¹ *Id.*

³² See Letter from Charles E. Grassley to Denis McDonough (Apr. 2, 2021), *supra* note 2.

³³ *Id.* at 19.

³⁴ *Id.* at 20.

³⁵ *Id.*

operated an LLC, then this needed to be reported as a business, and to comply with disclosure rules, Mrs. Bogue needed to report the business name and type of business.³⁶ Mrs. Bogue stated that, prior to the allegations, she believed she was properly reporting information related to her husband's business.³⁷

Mrs. Bogue Refused to Cooperate Fully in the OIG's Investigation

According to 5 U.S.C. App. 3. § 6 (a)(3), inspectors general may request information necessary to carry out their duties, which includes obtaining sworn testimony from federal employees.³⁸ Moreover, VA regulation also instructs VA employees to furnish information and testify freely and honestly in matters involving employment and discipline.³⁹ The VA OIG conducted an initial interview of Mrs. Bogue on April 15, 2021.⁴⁰ VA OIG also requested a follow-up interview with Mrs. Bogue on December 8, 2021.⁴¹ VA OIG was unable to complete its line of questioning during this second session, and informed Mrs. Bogue that another interview session would be necessary.⁴² VA OIG noted that, at this second interview, Mrs. Bogue repeatedly refused to answer questions and was uncooperative at many points in the interview.⁴³ A third interview session was scheduled for December 27, 2021.⁴⁴ Mrs. Bogue submitted her resignation on December 21, 2021, to be effective on January 15, 2022.⁴⁵ On December 23, 2021, by way of counsel, Mrs. Bogue informed VA OIG that she would refuse further voluntary participation in the VA OIG investigation into her conduct.⁴⁶ After being advised of her duty as a federal employee to cooperate, Mrs. Bogue's counsel asserted that Mrs. Bogue would not participate unless VA OIG provided immunity from criminal prosecution by issuing Mrs. Bogue a *Kalkines*⁴⁷ warning.⁴⁸ Because of Mrs. Bogue's refusal to cooperate with VA OIG's investigation, Mrs. Bogue neglected her duty as a federal employee to fully cooperate with an OIG investigation.

VA must stop hindering Congressional oversight

It is extremely troubling to me that, given the nature and seriousness of the allegations posed to my office, and given the egregious conduct that VA OIG uncovered in the course of its

³⁶ *Id.*

³⁷ *Id.*

³⁸ See 5 U.S.C. App. 3. § 6 (a)(3).

³⁹ 38 C.F.R. § 0.735-012(b); Dep't. of Veterans Aff., VA Handbook 5025, *Legal*, Pt. I.4.b (Mar. 25, 2022).

⁴⁰ *Id.* at 21.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 22.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Kalkines v. U.S.*, 473 F.2d 1391 (Ct. Cl. 1973). A *Kalkines* warning advises an employee that the investigation is purely administrative in nature, and that any information provided cannot and will not be used against the witness in any subsequent criminal proceedings. Granting immunity from prosecution is a Department of Justice decision.

⁴⁸ U.S. DEP'T. OF VETERANS AFF., OFF. OF INSPECTOR GEN., #21-02076-119, FORMER EDUCATION SERVICE EXECUTIVE VIOLATED ETHICS RULES AND HER DUTY TO COOPERATE FULLY WITH THE OIG (2022), *supra* note 1, at 22.

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investigation, VA would continue to stonewall my investigation into additional wrongdoing. The VA has not disputed a single sentence of this VA OIG report. In fact, it concurred, without comment, with all of VA OIG's findings.⁴⁹ The VA OIG findings are consistent with whistleblower disclosures made to my office. However, as I am sure you know, the VA OIG investigation did not encompass the entirety of the allegations that I presented in my April 2, 2021 letter.⁵⁰

To that end, it is important to note yet again that my investigation into this matter is separate and distinct from the VA OIG investigation. The allegations made to my office also include allegations of whistleblower reprisal. As I noted in my November 17, 2021 letter, FOIA documents obtained by a government watchdog show that Thomas Murphy, Acting Undersecretary of Benefits – a subject of my April 2, 2021 letter – disclosed to you the identity of the person he believed contacted my office and bragged about terminating that person.⁵¹ Despite this conduct – conduct that I found unbecoming of a federal employee – Mr. Murphy remains in his federal position, and it is unclear if he has been reprimanded for his actions. Further, allegations made to my office include mishandling of market-sensitive information that may have affected investors. None of these questions or concerns were addressed by the VA OIG report, and the VA has refused to answer them.

On November 30, 2021, VA General Counsel Richard Sauber spoke with my staff and made a commitment to be transparent and to produce documents in a timely manner pursuant to my requests. As previously stated, your office has provided a paltry 96 pages of documents. However, your office has still failed to produce VA's response to my April 2, 2021 letter, which was released in redacted form to a third party via FOIA. I have made countless good faith efforts to work with the VA to obtain information that is critical to my investigation, yet the VA continues to stonewall.

On June 15, 2022, Whistleblowers of America and Empower Oversight, two non-profit whistleblower and government accountability groups, wrote to you as well as VA OIG, encouraging VA to conduct an extensive review of contracts and grants to screen and identify individuals who refused to cooperate with VA OIG investigations, or former senior leaders who have been sanctioned through suspension or removal because of wrongdoing or whistleblower reprisal.⁵² Further, the groups encouraged VA to consider whether VA should continue to allow these individuals or entities to participate in future VA business.⁵³ This information would be critical in informing the Congress on whether VA would allow individuals who have engaged in previous wrongdoing to continue to benefit from future work with VA. Snuffing out

⁴⁹ *Id.* at ii.

⁵⁰ See Letter from Charles E. Grassley to Denis McDonough (Apr. 2, 2021), *supra* note 2.

⁵¹ Letter from Charles E. Grassley, Ranking Mem., S. Jud. Comm., to Denis McDonough, Sec'y., U.S. Dep't. of Veterans Aff. (Nov. 17, 2021) (on file with author).

⁵² See Letter from Jason Foster, Founder & President, Empower Oversight, Whistleblowers & Research, & Jacqueline Garrick, President, Whistleblowers of Am., to the Hon. Denis R. McDonough, Sec'y, U.S. Dep't of Veterans Aff., & the Hon. Michael J. Missal, Inspector Gen., U.S. Dep't of Veterans Aff. (June 15, 2022), <https://empowr.us/wp-content/uploads/2022/06/2022-06-15-EO-WoA-to-VA-VES.pdf>.

⁵³ *Id.*

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wrongdoing and prohibiting taxpayer dollars to flow into the pockets of well-connected parties who engage in wrongdoing should be critical to VA's stewardship of taxpayer dollars.

To that end, I reiterate my request for answers in my April 2, 2021, and November 17, 2021 letters. In addition to the questions in my above-referenced letters, and in light of the VA OIG findings, I request that VA answer the following questions and provide the previously requested documents no later than July 25, 2022.

1. Why has the VA refused to transmit the completed response to my April 2, 2021 letter, which it has already released, albeit in redacted form, via FOIA?
2. Who made the determination to not transmit the completed draft response to my office?
3. It is clear that there were several lapses in how the VA monitors and prevents potential conflicts of interest. Since the conclusion of the VA OIG's investigation, what steps has the VA taken to ensure their officials are properly documenting information in public financial disclosures to adequately allow VA ethics officials to identify and mitigate potential conflicts of interest?
 - a. Further, has the VA engaged in any substantive review of agency officials' compliance with public financial disclosure requirements to ensure that these officials properly understand their responsibility to prevent and mitigate conflicts of interest? If not, why not?
4. After Mrs. Bogue refused to cooperate with VA OIG during the course of its investigation, what has the VA done to properly inform VA employees of their duty to comply with OIG investigations?
5. Please provide all records regarding communications between Mrs. Bogue and any individual who worked at, or was employed by, VES.
6. The VA OIG noted that VES refused to cooperate with its investigation. Does VES have any current contracts, grants, or MOUs with the VA? Has VES's lack of cooperation with OIG affected its ability to contract with the federal government on future contracts in any way? If not, why not?

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The time has come for the VA to comply with my many requests for information. Should you have any questions, contact my Committee staff at (202) 224-5225.

Sincerely,

A handwritten signature in blue ink that reads "Chuck Grassley". The signature is written in a cursive, flowing style.

Charles E. Grassley
Ranking Member
Committee on the Judiciary

Exhibit P



July 12, 2022

VIA ELECTRONIC TRANSMISSION: 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
4th Interim Agency Decision**

Dear Office of General Counsel:

Introduction

With respect to Freedom of Information Act ("FOIA")¹ Request Number 21-08490-F, Empower Oversight Whistleblowers & Research ("Empower Oversight")² appeals the fourth Interim Agency Decision ("IAD") 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). Empower Oversight respectfully requests that the VA review the OSVA's exemption claims and correct any errors that are identified.

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

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

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. Empower Oversight's August 6th FOIA request is attached as Exhibit 1.

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 21-08~~250~~**90**-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.

On August 23, 2021, the VA-OI&T submitted to Empower Oversight a letter that "updated" its August 16th acknowledgment email. The VA-OI&T's August 23rd letter advised that the VA received Empower Oversight's FOIA request on August 8, 2021; that VA-OI&T was revising the request's tracking number to 21-08~~490~~**90**-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 and, among other actions, advised that it would continue to use the 21-08940 tracking number for the request.

On April 13, 2021, the OSVA issued its fourth interim Initial Agency Decision ("IAD") in response to Empower Oversight's August 6th FOIA request.³ The fourth IAD described searches that OSVA had conducted (*i.e.*, searches of the email accounts of 20 un-identified VA employees were made using the search term "Grassley") to accomplish the response. OSVA also advised that a total of 1,313 pages of responsive records—with Bates Numbers 002096 through 003408—had been located and processed, and that of the 1,313 pages of responsive records 643 pages had been redacted and another 74 withheld in their entirety pursuant to FOIA exemptions b(5), b(6), and/or b(7)(C).

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

The OSVA's assertions of FOIA Exemptions b(5) exceed, or appear to exceed, the understood parameters of the exemption, and Empower Oversight respectfully requests that the

³ The OSVA's April 13th fourth IAD is attached as Exhibit 2.

VA closely review OSVA's claims on the 717 redacted and/or withheld pages, identify all deficiencies, and remedy them.

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.⁴

Courts have construed FOIA Exemption b(5) to "exempt those documents, and only those documents, that are normally privileged in the civil discovery context."⁵ 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),⁶ the OSVA's April 13th fourth IAD states that its reliance on the exemption is limited to deliberative process.⁷ 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, 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.⁸

The purpose of the deliberative process privilege is to "prevent injury to the quality of agency decisions."⁹ In this setting, the Circuit Court has explained that "quality" encompasses encouraging frank discussions during policy making, preventing advance disclosure of decisions,

⁴ 5 U.S.C. § 552(b)(5).

⁵ *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).

⁶ *See*, *Martin*, 819 F.2d at 1185.

⁷ *See*, Exhibit 2.

⁸ *See*, Exhibit 2 (citations omitted).

⁹ *Sears*, 421 U.S. at 151.

and protecting against public confusion that may result from disclosure of reasons or rationales that were not in fact the grounds for agency decisions.¹⁰

To claim the deliberative process privilege with respect to a record, the Circuit Court has held that an agency must show¹¹ that the record is “predecisional” (*i.e.*, “antecedent to the adoption of agency policy”)¹² and “deliberative” (*i.e.*, “a direct part of the deliberative process in that it makes recommendations and expresses opinions on legal or policy matters”).¹³

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.¹⁴

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.¹⁵ Accordingly, factual information is typically available in civil discovery and its release is not considered to have a chilling effect on agency deliberations.¹⁶

Several items that the OSVA redacted purportedly pursuant to FOIA Exemption b(5) are or appear factual in nature, not deliberative. For example:

- Bates Number 002657 includes an April 6, 2021, 21:32:42, email to a person with a redacted name and there is no “From” line on the email. The email has a “Subject” “RE: 2021-04-CEG to VA,” presumably is a reference to Senator Chuck Grassley’s April 2, 2021 letter to VA, and it includes a relatively large text block that is completely redacted purportedly pursuant to Exemption b(5). Before the redacted text block, the email states “I need to connect with VBA on a few issues. Here is the current status:” The “current status” reference reasonably sounds like factual information concerning VA’s processing of its response to Senator Grassley’s letter. Descriptions of VA’s progress at responding to Senator Grassley should not be comprised of opinions or recommendations; processing steps and progress are facts, not opinions or recommendations. Thus, we question whether the redacted information qualifies as deliberative.¹⁷
- Bates Numbers 003047 – 003049 include April 15 and 16, 2021, emails between Ruthann Parise and an OGC employee whose name is redacted. On April 15th at 6:30 PM the OGC employee sends Ms. Parise an email with two

¹⁰ 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).

¹¹ Coastal States Gas Corp., 617 F.2d at 866.

¹² See, Ancient Coin Collectors Guild v. U.S. Dep’t of State, 641 F.3d 504, 513 (D.C. Cir. 2011).

¹³ See, Vaughn v. Rosen, 523 F.2d 1136, 1143 – 1144 (D.C. Cir. 1975).

¹⁴ Coastal States Gas Corp., 617 F.2d at 867.

¹⁵ 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).

¹⁶ 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).

¹⁷ Bates Number 002657 is attached at Exhibit 3.

relatively large text blocks that are redacted in their entirety purportedly pursuant to Exemption b(5), and the email describes these text blocks as “IALG’s language for inclusion in the response to the letter to Senator Grassley regarding the Pomeroy litigation/Aguirre FOIA appeals.” Later, on April 16th at 9:33 AM, the OGC employee whose name is redacted sends Ms. Parise and email that states, “I just realized that it says the appeals will be done by the end of March – can you change that to April.” The timing of the FOIA appeals that the OGC employee references is not an opinion or a recommendation, it’s fact. And, yet, from the context of the referenced emails, it would appear that this factual information is part of the text that is redacted from the April 15th email. Thus, we question just how much of the redacted text of the April 15th email is non-deliberative content that should not have been withheld.¹⁸

- Bates Number 003144 – 003145 are comprised of an April 21, 2021, email from and Executive Writer whose name is redacted to another person whose name is redacted. The email quotes Question 5 and Question 5a of Senator Grassley’s April 2nd letter to VA, and provides responses to those questions. The text of such responses is fully redacted purportedly pursuant to Exemption b(5). Senator Grassley’s recited questions pertain to VA’s precautions to protect investors by safeguarding non-public information about future enforcement actions, which clearly is a factual question. The senator wants to know what VA has done and is doing. His question does not seek a policy recommendation or an opinion. He wants to know facts. Hence, the redacted proposed responses are either non-responsive to the senator’s question, or they include the type of factual content that is not subject to redaction under Exemption b(5).¹⁹

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.²⁰ 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.

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), confirm that its determinations are appropriate, and—if they are not—produce the non-exempt records or portions thereof.

¹⁸ Bates Numbers 003047 – 003049 is attached at Exhibit 3.

¹⁹ Bates Numbers 003144 – 003145 is attached at Exhibit 3.

²⁰ 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”).

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



August 6, 2021

VIA ELECTRONIC TRANSMISSION: 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.¹ 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.²

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.³ 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.⁴ 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.⁵

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.⁶ 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.⁷

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).⁸ 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.⁹

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.”¹⁰

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

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

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

⁴ *Id.* at 3-4.

⁵ *Id.*

⁶ *Id.* at 2.

⁷ *Id.*

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

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

¹⁰ “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 gifts¹¹ 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.¹²

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:¹³

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).

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

¹² 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](#)).

¹³ 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

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



**DEPARTMENT OF VETERANS AFFAIRS
Washington DC 20420**

April 13, 2022

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

Via Email: jf@empowr.us

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

Dear Mr. Foster:

This is the fourth 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;

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- 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

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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

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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.

On October 29, 2021, for our second interim response, 978 pages were released in their entirety, 290 pages were partially released, and 158 pages were withheld in full. The pages were Bates numbered (21-08490-F) 000653 through (21-08490-F) 002078.

That same day, October 29, 2021, I conducted a key term search of the 20 mailboxes provided by the OI&T. The key term search was limited to 22-05571-F, the case number utilized in FOIAXpress, the official FOIA processing system utilized by the VA for processing FOIA requests. While Senator Grassley's request was not a FOIA request, records were uploaded to FOIAXpress in order to review and redact the records.

On December 23, 2021, for our third interim response, 6 pages were released in their entirety and 11 pages were partially released. The pages were Bates numbered (21-08490-F) 002079 through (21-08490-F) 002095.

On January 11, 2022, I conducted a key term search of the 20 mailboxes provided by the OI&T. The key term search was limited to Grassley. Attempts were made to exclude records that were previously processed and released under any of the prior key terms.

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For this fourth interim release, a total of 1,313 pages of responsive records, subsequently Bates (21-08490-F) 002096 through (21-08490-F) 003408, were reviewed. Records contained in this release are responsive to items 1-3 and 7 and consist of records from my search conducted on January 11, 2022. I have determined 596 pages are releasable in their entirety, 643 pages are partially releasable, and 74 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, phone numbers and email addresses of federal civilian employees. We do however release the names of VA Senior Executives and individuals whose names are in the public domain. 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

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numbers of federal civilian employees and private citizens 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).

Additionally, 5 U.S.C. § 552(b)(5) exempts from required disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Under the attorney-client and work product privileges, the VA redacts portions of records, emails, and communications between VA employees and attorneys relating to federal lawsuits against the VA. The release of this information would impede the ability of VA employees and attorneys to speak openly and frankly about legal issues concerning lawsuits against the VA. The release of this information would also compromise the VA's legal positions for its lawsuits.

FOIA Exemption 7C exempts from required disclosure law enforcement information the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Redacted information includes names, email addresses, titles, and phone numbers of VA law enforcement employees. The release of this information would risk impersonation of law enforcement personnel and jeopardize the health and safety of not only law enforcement personnel, but those persons they are charged with protecting.

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

Bates numbered pages (21-08490-F) 002679-002696, 002718-002735, and 002833-002850 have been withheld pursuant to FOIA Exemption 3 and specifically to 5 U.S.C. § 105(b)(2);

Bates numbered pages (21-08490-F) 002171, 002801, 002810, and 002818 have been withheld pursuant to FOIA Exemption 5; and,

Bates numbered pages (21-08490-F) 002697-002702, 002706-002711, 002713, and 002715-002717 have been withheld pursuant to FOIA Exemption 5 and FOIA Exemption 6.

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

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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 have been uploaded to the VA FOIA website under Document Retrieval at [Document Retrieval - Freedom Of Information Act FOIA](#). Please know, the file is listed in Document Retrieval as 21-08490-F 1 and 21-08490-F 2 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:

Email Address: vacofoiaservice@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

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

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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: 1,239 pages, 4th interim releasable records

Exhibit 3

Sent: Tue, 6 Apr 2021 21:32:42 +0000
To: (b)(6)
Cc: (b)(6) (OGC); Cromwell, Sonya (OGC)
Subject: RE: 2021-04-02 CEG to VA

(b)(6)

I need to connect with VBA on a few issues. Here is the current status:

(b)(5)

From: (b)(6) (OGC) (b)(6)@va.gov>
Sent: Tuesday, April 6, 2021 3:22 PM
To: (b)(6)@va.gov>; Hogan, Michael R. (OGC) (b)(6)@va.gov>
Subject: RE: 2021-04-02 CEG to VA

(b)(6)

Mike Hogan can answer that one-

(b)(6)

From: (b)(6)@va.gov>
Sent: Tuesday, April 6, 2021 3:20 PM
To: (b)(6) (OGC) (b)(6)@va.gov>
Subject: FW: 2021-04-02 CEG to VA

H (b)(6)

(b)(6) forwarded me your email to OCLA. Does OGC still want a Chairman's letter?

From: (b)(6)@va.gov>
Sent: Tuesday, April 6, 2021 3:15 PM
To: (b)(6)@va.gov>

From: Parise, Ruthann
Sent: Fri, 16 Apr 2021 13:34:50 +0000
To: (b)(6) OGC (b)(6) (OGC)
Subject: RE: Congressional response: Senator Grassley re FOIA

Thanks for the update (b)(6)

Respectfully,

Ruthann Parise
OSVA FOIA/Privacy Officer
Office of the Executive Secretary
Office of the Secretary, U.S. Dept. of Veterans Affairs (OSVA)
ruthann.parise@va.gov
Phone: (202) 461-4866
iPhone: (202) 306-3112

This message and attachments, if any, are For Official Use Only, not to be shared outside intended parties, and may be exempt from disclosure pursuant to 5 U.S.C. § 552. If you received this message and attachments, if any, in error, you must inform the FOIA Officer and destroy them immediately.

From: (b)(6) (OGC (b)(6) @va.gov>
Sent: Friday, April 16, 2021 9:33 AM
To: Parise, Ruthann <Ruthann.Parise@va.gov> (b)(6) (OGC)
(b)(6) @va.gov>
Subject: RE: Congressional response: Senator Grassley re FOIA

I just realized that it says the appeals will be done by the end of March – can you change that to April...

Thanks,

(b)(6)
Deputy Chief Counsel – FOIA/PA Appeals/Litigation
Information and Administrative Law Group (024A)
Office of General Counsel
U.S. Dept. of Veterans Affairs
(Office) (b)(6)
(b)(6) @VA.gov

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any action in reliance on this information is prohibited. If you receive this e-mail in error, please notify this office immediately by return e-mail.

From: Parise, Ruthann <Ruthann.Parise@va.gov>
Sent: Thursday, April 15, 2021 7:56 PM
To: (b)(6) (OGC) (b)(6) @va.gov>
Cc: (b)(6) (OGC) (b)(6) @va.gov>
Subject: RE: Congressional response: Senator Grassley re FOIA

Thanks (b)(6)

Respectfully,

Ruthann Parise
OSVA FOIA/Privacy Officer
Office of the Executive Secretary
Office of the Secretary, U.S. Dept. of Veterans Affairs (OSVA)
ruthann.parise@va.gov
Phone: (202) 461-4866
iPhone: (202) 306-3112

This message and attachments, if any, are For Official Use Only, not to be shared outside intended parties, and may be exempt from disclosure pursuant to 5 U.S.C. § 552. If you received this message and attachments, if any, in error, you must inform the FOIA Officer and destroy them immediately.

From: (b)(6) (OGC) (b)(6) @va.gov>
Sent: Thursday, April 15, 2021 6:20 PM
To: Parise, Ruthann <Ruthann.Parise@va.gov>
Cc: (b)(6) (OGC) (b)(6) @va.gov>
Subject: Congressional response: Senator Grassley re FOIA
Importance: High

Hi Ruthann,

Below please find IALG's language for inclusion in the response letter to Senator Grassley regarding the Pomeroy litigation/Aguirre FOIA appeals. If you have any questions or concerns, please reply all as I am OOO on Friday 4/16. Thank you.

(b)(6)



(b)(5)



(b)(5)



Law Group //

(b)(5)



// Attorney // VA Office of General Counsel // Information & Administrative

From: (b)(5)
Sent: Wed, 21 Apr 2021 12:53:00 +0000
To: (b)(5)
Subject: Grassley question

Question 5. What steps does the VA take to protect retail investors by safeguarding market sensitive information regarding potential enforcement announcements related to publicly-traded companies?

VA Response:

(b)(5)

Question 5a. Is it possible these steps failed in this instance? If so, what will VA do to prevent this from happening again in the future?

VA Response:

(b)(5)

(b)(5)

Executive Writer
Office of the Executive Secretary
Department of Veterans Affairs
810 Vermont Avenue NW

(b)(6)

Exhibit Q



U.S. Department of Veterans Affairs
Office of General Counsel
Information and Administrative Law Group

810 Vermont Avenue NW
Washington DC 20420
www.va.gov/ogc

In Reply Refer To: IALG/024L
OGC Case #: 161258
FOIA Request #: 21-08490-F

August 4, 2022

Jason Foster
Empower Oversight
jf@empowr.us

Dear Mr. Foster:

This is the final agency decision issued under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, in response to your appeal of the fourth interim initial agency decision issued by the Department of Veterans Affairs (VA) Office of the Executive Secretary (OSVA). For the reasons outlined below, your appeal is granted in-part and denied in-part.

Procedural History

Initial request On August 6, 2021, you provided background information and submitted a FOIA request for 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.

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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.

You also included two (2) attachments. Attachment A is a letter dated April 2, 2021, from Senator Grassley to Secretary McDonough. Attachment B is a letter dated July 20, 2021, from Senator Grassley to Secretary McDonough. Additionally, you requested a fee waiver and stated that Empower Oversight is a non-profit educational organization.

On August 16, 2021, VA Central Office (VACO) FOIA Service Management Analyst, Ms. Chaquanna Price acknowledged your request, assigned it tracking number 21-08250-F, and notified you that the information you requested fell under the purview

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of three (3) other VA FOIA offices: Veterans Benefit Administration (VBA), Office of Assistant Secretary for Congressional & Legislative Affairs, and Office of Inspection General. Ms. Price stated that your request had been referred to the aforementioned offices for processing and direct response to you, thus concluding the VACO FOIA Service Office's response.

On August 23, 2021, Ms. Price issued another acknowledgement letter, assigning your request tracking number 21-08490-F, and notifying you that your request had been referred to the Office of the Executive Secretary (OSVA). Ms. Price also noted that your request had been referred to the Office of Inspector General, who would provide a separate tracking number.

On August 24, 2021, OSVA FOIA Officer Ruthann Parise acknowledged your request and granted your request for a fee waiver. Ms. Parise also requested further clarification regarding item #5 of your request, such as the time frame for your request.

On August 25, 2021, Mr. Bryan Saddler provided clarification regarding item #5, proposing the time frame of December 1, 2019 through July 20, 2021.

Fees VA's FOIA regulations require each request to be characterized under 38 C.F.R. § 1.561(c) and fees to be estimated and charged, when applicable. Your request was characterized as an "Educational or Non-Commercial" requester, which means that you are not required to pay search or review fees. You have not been charged any fees for the processing of this request.

First Interim Initial Agency Decision (IAD) On September 7, 2021, Ms. Parise issued her first interim IAD, notifying you that responsive records had been located. She identified 652 pages of records and 1 Excel spreadsheet as responsive to items # 1, 3, and 6(a)-(d) of your request. She determined that 249 pages and 1 Excel spreadsheet were releasable in full, 330 pages were partially releasable, and 73 pages were withheld in full pursuant to FOIA Exemptions 3, 5, 6, and 7(C). Ms. Parise stated that remaining releasable records, if any, would be provided on a rolling basis. She also provided the appropriate appeal, mediation, and public liaison rights.

On September 8, 2021, Ms. Parise issued a correction to the IAD, noting that Bates numbered pages 000321-000347 were in response to item #4 of your request as opposed to item #3.

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On September 9, 2021, Ms. Parise requested further clarification regarding item #5 of your request. She asked for the names of the VES/SVA representatives that you are requesting aside from Barrett Bogue. On September 30, 2021, Mr. Saddler provided a list of names.

Second Interim IAD On October 29, 2021, Ms. Parise issued a second interim IAD, notifying you that responsive records had been located. She identified 1,426 pages of records responsive to your request item #1. She determined that 978 pages were releasable in full, 290 pages were partially releasable, and 158 pages were withheld in full pursuant to FOIA Exemptions 5, 6, and 7(E). You were also provided with the appropriate appeal, mediation, and public liaison rights.

Appeal of Second Interim IAD On January 24, 2022, you appealed the second interim IAD. You wrote that OSVA's assertions of Exemptions 5 and 7(E) "exceed, or appear to exceed, the understood parameters of the exemptions."

Final Agency Decision On April 18, 2022, this office issued a final agency decision regarding your appeal of the second interim IAD, granting your appeal of the Exemption 7(E) redactions. This office denied your appeal of the Exemption 5 redactions and additionally determined that certain information was also protected from disclosure under attorney-client privilege.

Third Interim IAD On December 23, 2021, Ms. Parise issued a third interim IAD. She disclosed six pages in their entirety and 11 pages with redactions pursuant to FOIA Exemptions 5 and 6.

Search For the fourth interim IAD, Ms. Parise searched the files of 20 VA employee mailboxes provided to her by OI&T for the search term "Grassley."

Fourth Interim IAD On April 13, 2022, Ms. Parise issued a fourth interim IAD, notifying you that responsive records had been located. She identified 1,313 pages of records as responsive to items #1, 2, 3, and 7 of your request. She determined that 596 pages were releasable in full, 643 pages were partially releasable, and 74 pages were withheld in full, pursuant to FOIA Exemptions 3, 5, 6, and 7(C). Ms. Parise cited the deliberative process privilege in support of the application of Exemption 5, and elsewhere in the IAD cited attorney-client and work product privileges, which also fall under Exemption 5. You were also provided with the appropriate appeal, mediation, and public liaison rights.

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Responsive Records The responsive records disclosed to you consisted of emails and attachments, with redactions pursuant to Exemptions 3, 5, 6, and 7(C).

Appeal of Fourth Interim IAD On July 12, 2022, you appealed the fourth interim IAD. You wrote that OSVA's assertions of Exemption 5 "exceed, or appear to exceed, the understood parameters of the exemption..." You also stated that the fourth interim IAD "states that its reliance on the exemption is limited to deliberative process." You claimed that "[f]actual information" is "not covered by the deliberative process privilege because the release of factual information does not expose the deliberations or opinions of agency personnel" and "its release is not considered to have a chilling effect on agency deliberations." You cited specific examples of redactions that you found to "appear factual in nature, not deliberative" on the following Bates Numbers: 002657, 003047 – 003049, and 003144 – 003145.

Relevant Law We have thoroughly reviewed your appeal under the provisions of the FOIA, which provides that federal agencies must disclose records requested unless they may be withheld in accordance with one or more of nine statutory exemptions. 5 U.S.C. § 552(b).

Analysis Your appeal is limited to the applicability of Exemption 5; therefore, we will not address the redactions made pursuant to FOIA Exemptions 3, 6, and 7(C).

At the outset, we note that VA employee names and email addresses were incorrectly marked as redacted pursuant to Exemption 5 on Bates Numbers 003209 and 003210. Those redactions should have been marked as Exemption 6. Since the information is still protected under Exemption 6, we will not re-release those two (2) pages.

We have reviewed each page of the responsive records and determined that certain information redacted pursuant to Exemption 5 may be released because we do not foresee that disclosure would harm a protected interest. Enclosed please find the relevant thirty (30) pages with the Exemption 5 redactions removed: Bates Numbers 002130, 002163, 002173-002174, 002177, 002179-002180, 002182-002183, 002184, 002482-002483, 002490, 002497, 002752, 002755, 002793, 002805-002806, 002807, 002812-002813, 002814, 002979, 002996, 003099, 003132, 003134, 003137, and 003139.

We find that the remaining Exemption 5 redactions were appropriately applied. FOIA Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the

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agency.” 5 U.S.C. § 552(b)(5). Exemption 5 encompasses the deliberative process privilege, the general purpose of which is to “prevent injury to the quality of agency decisions.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). Three policy purposes have been held to constitute the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982). The deliberative process privilege is designed to protect the “decision making processes of government agencies.” *Sears*, 421 U.S. at 150. In order to “encourage candor, which improves agency decisionmaking, the privilege blunts the chilling effect that accompanies the prospect of disclosure.” *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S.____, 141 S. Ct. 777, 785 (2021). Thus, the privilege protects not merely documents, but the integrity of the deliberative process itself where the exposure of that process would result in harm.

To be exempt from disclosure under the deliberative process privilege, the records must be both pre-decisional and deliberative. A document is predecisional if it was generated “before any final agency decision on the relevant matter,” *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014), and deliberative if it “reflects the give-and-take of the consultative process.” *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (1980). The privilege protects factual material if it is “inextricably intertwined” with deliberative material, *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (per curiam), or if disclosure “would ‘expose an agency’s decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.’” *Quarles v. Dep’t of Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (quoting *Dudman Commc’ns Corp. v. Dep’t of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)). Examples of predecisional documents include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” (emphasis added) *Coastal States*, 617 F.2d at 866.

The records at issue are intra-agency communications that contain both pre-decisional and deliberative communications; therefore, meeting the threshold criteria of Exemption 5. These records are pre-decisional because they predate VA’s ultimate disposition of Senator Grassley’s April 1, 2021, letter. The records are also deliberative because they reflect the give-and-take of the consultative process. The records represent relevant considerations in the agency’s review of its response to Senator Grassley’s letter and include the thoughts and opinions of agency employees. The

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records include drafts of documents prepared to inform officials and reflect various factors considered by the agency during its deliberations. The withheld information does not contain an official final agency decision but rather reveals the deliberative process itself as employees exchanged ideas and debated the agency's course of action. Release of this information could undercut employees' willingness to engage in assessments of a situation or provide forthright opinions on matters under review, thus affecting the agency's ability to obtain open and frank communication regarding agency issues. Significantly, releasing this information would undermine the agency's deliberative process itself; the agency relies on its ability to fully evaluate a course of action knowing that the process itself is protected. The release of the information could also result in public misunderstanding or confusion and could harm the overall review process in which agencies must continually engage. In view of the foregoing, we affirm the withholding of the information under Exemption 5.

In your appeal, you raised the concern that some of the Exemption 5 redactions were of factual material and thus, in your opinion, not protected by Exemption 5. You specifically referred to an email on Bates Number 002657 that references "the current status." You argued that such a reference "reasonably sounds like factual information concerning VA's processing of its response to Senator Grassley's letter" and that "processing steps and progress are facts, not opinions or recommendations." We reviewed the email and note that it was written by Michael Hogan, Deputy General Counsel, to a VA employee and two other OGC attorneys. The "current status" related to a discussion of information disclosure principles and their application to the subject of the email. We find that the email contains no segregable factual information.

You also specifically referred to Bates Numbers 003047-003049 and note that a large block of text is redacted pursuant to Exemption 5 in the email dated April 15. The email dated April 16 then states, "I just realized that it says the appeals will be done by the end of March – can you change that to April." You claim that "the timing of the FOIA appeals . . . is not an opinion or a recommendation, it's fact. And, yet, from the context of the referenced emails, it would appear that this factual information is part of the text that is redacted from the April 15th email." We reviewed the April 15 email and note that the April 16 email was authored by a different attorney than the one who wrote the April 15 email. The April 15 email did not present the timing of the FOIA appeals as a fact but as an opinion, which was not captured by the attorney who sent the April 16 email. Furthermore, the April 15 email redactions were of draft language intended for inclusion in VA's response to Senator Grassley's letter.

You also referred to Bates Numbers 003144-003145, which contains an email that "provides responses" to Questions 5 and 5a of Senator Grassley's letter. You wrote

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that the questions are “factual” and do not seek “a policy recommendation or an opinion.” You concluded that “the redacted proposed responses are either non-responsive to the senator’s question, or they include the type of factual content that is not subject to redaction under” Exemption 5. However, the redactions in Bates Numbers 003047-003049 and 003144-003145 concern *draft* responses in which agency officials are deliberating on how to respond. Pre-decisional and deliberative drafts are protected under Exemption 5. See *Nat’l Sec. Archive*, 752 F.3d at 465 (finding draft exempt in its entirety under Exemption 5 because in creating draft, selection of facts thought to be relevant was part of deliberative process); *Skull Valley Band of Goshute Indians v. Kempthorne*, No. 04-339, 2007 U.S. Dist. LEXIS 21079, at *46 (D.D.C. Mar. 26, 2007) (noting that “the drafting process is itself deliberative in nature”).

Furthermore, your appeal asserts that “factual content” and “descriptions of fact” are not protected by Exemption 5. However, even if responsive records contain factual material, “the legitimacy of withholding does not turn on whether the material is purely factual in nature . . . , but rather on whether the selection or organization of facts is part of an agency’s deliberative process.” *Ancient Coin Collectors Guild v. Dep’t of State*, 641 F.3d 504, 513 (D.C. Cir. 2011). For example, factual information “assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action” would be protected under the deliberative process privilege. *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1539 (D.C. Cir. 1993). Factual information is also protected from disclosure when factual material “is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government’s deliberations.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) (“It has long been a rule in this Circuit that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions.”).

Additionally, while Ms. Parise did not include her discussion of attorney-client and work product privileges in the same Exemption 5 section of the IAD as her discussion of the deliberative process privilege, she did note that redactions were made of information “relating to federal lawsuits against the VA.” She stated that release of such information “would impede the ability of VA employees and attorneys to speak openly and frankly about legal issues concerning lawsuits against the VA” and “would also compromise the VA’s legal positions for its lawsuits.” She did not specify which documents were protected from disclosure under attorney-client and/or work product privileges.

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Upon review of the responsive records, we find that guidance from OGC attorneys pertaining to information law is protected from disclosure under the attorney-client privilege. Courts have found that attorney-client privilege “encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts,” as well as “communications between attorneys that reflect client-supplied information.” *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005). In this case, “the agency is the ‘client’ and the agency’s lawyers are the ‘attorneys’ for the purposes of attorney-client privilege.” *Judicial Watch, Inc. v. United States Dep’t of the Treasury*, 796 F. Supp. 2d 13, 33 (D.D.C. 2011).

Furthermore, we find that the attorney work-product privilege also applies, as the documents were prepared by attorneys in contemplation of litigation. *Coastal States*, 617 F.2d at 864. Attorney work-product privilege applies if specific claims have been identified that make litigation probable. See, e.g., *Citizens for Responsibility and Ethics in Wash. v. NARA*, 583 F. Supp. 2d 146, 160 (D.D.C. 2008) (allowing use of privilege in situation where agency “could reasonably have anticipated litigation over” status of requested records). Documents “prepared by non-attorneys in anticipation of litigation may also be protected” by the attorney work-product privilege. *Judicial Watch, Inc. v. United States DOJ*, 806 F. App’x 5, 6-7 (D.C. Cir. 2020). In this case, Empower Oversight’s General Counsel, Gary Aguirre, had already filed suit against the VA regarding related records in *Pomares v. VA* at the time the responsive records were created. The employees involved reasonably anticipated that there would be another lawsuit stemming from VA’s response to Senator Grassley’s letter.

We find that the following documents reflect legal advice from OGC attorneys and are protected by attorney-client privilege; additionally, the following documents were prepared in contemplation of litigation and are protected by the attorney work-product privilege:

Bates No.	Privilege Description
002170-002172, 002798-002799, 002800-002802, 002803-002804, 002809-002811, 002817-002818	Email from Richard Hipolit (Deputy General Counsel, Veterans Programs) to Tanya Bradsher (Chief of Staff) reflecting legal advice for the VA Secretary regarding matters addressed in Senator Grassley’s letter to the Secretary.
002175-002176, 002857-002858	Email from Richard Hipolit (Deputy General Counsel, Veterans Programs) to the VA Secretary and Tanya Bradsher (Chief of Staff) reflecting legal advice regarding matters addressed in Senator Grassley’s letter to the Secretary.

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002570	Internal VA staff email summarizing legal advice from OGC attorneys regarding information disclosure.
002636, 002641	Email from Kimberly McClain (Deputy Assistant Secretary) to Richard Hipolit (Deputy General Counsel, Veterans Programs) requesting legal advice regarding Senator Grassley letter discussion.
002651	Email from Michael Hogan (Deputy General Counsel) to VA employee reflecting legal advice regarding information disclosure.
002654	Email from Michael Hogan (Deputy General Counsel) to OGC attorneys reflecting legal advice regarding information disclosure.
002657	Email from Michael Hogan (Deputy General Counsel) to VA employee and OGC attorneys reflecting legal advice regarding information disclosure.
002697-002702	Draft documents reflecting legal advice of OGC Ethics Specialty Team attorney regarding draft responses to Senator Grassley's letter.
002706-002711	Draft documents reflecting legal advice of OGC Ethics Specialty Team attorney regarding draft responses to Senator Grassley's letter.
002715-002717	Draft documents reflecting legal advice of OGC Ethics Specialty Team attorneys regarding draft responses to Senator Grassley's letter.
002856-002857	Email from VA Secretary to Richard Hipolit (Deputy General Counsel, Veterans Programs) and Tanya Bradsher (Chief of Staff) summarizing legal advice from Mr. Hipolit.
002941, 002945	Email from Director for Investigations (OAWP) to Hansel Cordeiro (OAWP) reflecting legal advice from OGC attorney regarding potential ethics issue.
002957	Email from Deputy Chief Counsel (Ethics Specialty Team) to OGC attorneys reflecting legal advice regarding draft response to Senator Grassley's questions.
002957	Email from OGC attorney (Personnel Law Group) to OGC attorneys providing information to facilitate the provision of legal advice and reflecting legal advice regarding draft response to Senator Grassley's questions.
002958	Email from OGC attorney to OGC attorneys reflecting legal advice regarding draft response to Senator Grassley's questions and requesting information to facilitate the provision of legal advice regarding draft response.
003164	Email from OGC attorney to OGC attorneys reflecting legal advice regarding information disclosure.
003168-003169, 003170	Internal VA staff email reflecting legal advice from Michael Hogan (Deputy General Counsel) regarding draft response to Senator Grassley's questions.
003172	Email from Michael Hogan (Deputy General Counsel) to VA staff regarding draft response to one of Senator Grassley's questions.
003175, 003179	Email from OGC attorney to OGC attorneys providing legal advice regarding information disclosure.
003175, 003179-003180, 003210, 003213-003214, 003217, 003309, 003332	Email from OGC attorney to OGC attorneys requesting information to facilitate the provision of legal advice regarding information disclosure.
003194-003195	Email from Gina Farrisee (Executive Director, Strategy and Analysis) requesting legal advice from Michael Hogan (Deputy General Counsel) regarding information disclosure.

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003209	Email from OGC attorney to OGC attorney providing legal advice regarding information disclosure.
003209, 003213, 003216, 003331	Email from OGC attorney to OGC attorney requesting legal advice regarding information disclosure.
003209-003210, 003213, 003217, 003331-003332	Email from OGC attorney to OGC attorney requesting and reflecting legal advice regarding information disclosure.
003212	Email from OGC attorney to OGC attorney requesting legal advice regarding information disclosure.
003212	Email from OGC attorney to OGC attorney providing legal advice regarding information disclosure.
003247	Email from OGC attorney to Ruthann Parise (OSVA FOIA Officer) providing legal advice regarding information disclosure.
003248	Email from Ruthann Parise (OSVA FOIA Officer) to OGC attorney requesting legal advice regarding information disclosure.
003329	Email from OGC attorney to OGC attorney providing legal advice regarding information disclosure.
003329	Email from OGC attorney to OGC attorney requesting information to facilitate the provision of legal advice regarding information disclosure.
003329	Email from OGC attorney to OGC attorney providing legal advice regarding information disclosure.
003329	Email from OGC attorney to OGC attorney providing legal advice regarding information disclosure.
003330	Email from OGC attorney to OGC attorney providing legal advice and requesting legal advice regarding information disclosure.
003330	Email from OGC attorney to OGC attorney providing legal advice and requesting legal advice regarding information disclosure.
003368	Email from Richard Sauber (General Counsel) to VA Secretary and Tanya Bradsher (Chief of Staff) providing legal advice regarding information disclosure.
003371, 003386	Email from OGC attorney to Michael Hogan (Deputy General Counsel) providing legal advice regarding information disclosure.
003371, 003387	Email from Michael Hogan (Deputy General Counsel) to OGC attorney requesting information to facilitate the provision of legal advice regarding information disclosure.
003371, 003387	Email from OGC attorney to Michael Hogan (Deputy General Counsel) providing information to facilitate the provision of legal advice regarding information disclosure.
003371, 003387	Email from Michael Hogan (Deputy General Counsel) to OGC attorney requesting information to facilitate the provision of legal advice regarding information disclosure.
003386	Email from Michael Hogan (Deputy General Counsel) to OGC attorney providing legal advice regarding information disclosure.

Finally, we note that information that should have been redacted from the documents provided to you was, in fact, improperly disclosed. Specifically, emails on the following pages should have been withheld pursuant to Exemption 5: Bates

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Numbers 002128, 002169, 002959, 002817, 002939, 002944, 002949, 002950, 003176, 003216, 003307, 003308, 003209, 003210, 003213, 003216, 003332, and 003376. Accordingly, should there be a subsequent request for the same information, those emails should not be disclosed.

Conclusion Based upon the foregoing, your appeal is granted in part and denied in part.

Mediation and Appeal Rights This final agency decision concludes the administrative processing of your appeal.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services. Similarly, as part of the FOIA Improvement Act of 2016, VA established a FOIA Public Liaison to offer mediation services. Both OGIS and the VA Public Liaison will assist in resolving disputes between FOIA requesters and VA as a non-exclusive alternative to litigation. Using OGIS or the VA FOIA Public Liaison does not affect your right to pursue litigation. You may contact OGIS or the VA Public Liaison in any of the following ways:

Office of Government Information Services	E-mail: ogis@nara.gov
National Archives and Records Administration	Telephone: 202-741-5770
Room 2510	Facsimile: 202-741-5769
8601 Adelphi Road	Toll-free: 1-877-684-6448
College Park, MD 20740-6001	

VA FOIA Public Liaison	E-mail: vacofoiaservice@va.gov
James Killens III	Telephone: 1-877-750-3642
VA FOIA Service	Facsimile: 202-632-7581
810 Vermont Avenue, NW (005R1C)	
Washington, DC 20420	

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With respect to any information denied to you by this final agency decision, the FOIA requires us to advise you that if you believe the Department erred in this decision, you have the right to file a complaint in an appropriate United States District Court.

Sincerely,

A handwritten signature in black ink, reading "Shaquana L. Cooper". The signature is written in a cursive, flowing style.

Deputy Chief Counsel
Office of General Counsel,
Information and Administrative Law
Group (IALG)

cc: Richard Ha, FOIA Officer, OSVA
James Killens III, VA FOIA Public Liaison

Enclosures: 30 pages

Exhibit



July 19, 2022

VIA ELECTRONIC TRANSMISSION: 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
5th Interim Agency Decision**

Dear Office of General Counsel:

Introduction

With respect to Freedom of Information Act ("FOIA")¹ Request Number 21-08490-F, Empower Oversight Whistleblowers & Research ("Empower Oversight")² appeals the fifth Interim Agency Decision ("IAD") of the Office of the Executive Secretary ("OSVA"), Department of Veterans Affairs ("VA"). Specifically, Empower Oversight challenges the reasonableness of OSVA's search for records and its claim that certain portions of the records requested by Empower Oversight are exempt from disclosure under FOIA Exemption b(6). Empower Oversight respectfully requests that the VA review the OSVA's search and exemption claims and correct any errors that are identified.

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

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

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. Empower Oversight's August 6th FOIA request is attached as Exhibit 1.

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 Office of Inspector General ("VA-OIG"); and that VA-OI&T had thus referred Empower Oversight's FOIA request to those offices for processing and response.

On August 23, 2021, the VA-OI&T submitted to Empower Oversight a letter that "updated" its August 16th acknowledgment email. The VA-OI&T's August 23rd letter advised that the VA received Empower Oversight's FOIA request on August 8, 2021; that VA-OI&T was revising the request's tracking number to 21-08490-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 and, among other actions, advised that it would continue to use the 21-08940 tracking number for the request.

On April 20, 2021, the OSVA issued its fifth IAD in response to Empower Oversight's August 6th FOIA request.³ The OSVA's fifth IAD, among other things, describes the searches for responsive records that the OSVA conducted (or had conducted on its behalf) and the FOIA exemptions that it claimed with respect to responsive records that it had located and compiled. Regarding its searches, the OSVA advised that its searches were confined to searches of emails of the VA Secretary, the Chief of Staff, and 20 un-named VA employees; the electronic personnel file of Thomas Murphy; and calendars "pertaining" to Ms. Charmain Bogue. With respect to redactions, the OSVA states that—in connection with its fifth IAD—it had redacted 111 pages (and withheld an additional 4 pages) of responsive records purportedly pursuant to FOIA Exemptions b(5), b(6), and b(7)(C).

³ The OSVA's April 20th fifth IAD is attached as Exhibit 2.

**Based upon the Circumstances, It Appears that the OSVA
Failed to Conduct a Records Search that Was Reasonably
Calculated to Uncover All Relevant Documents**

Courts generally analyze the adequacy of a search by considering the reasonableness of the agency's effort in the context of the specific FOIA request.⁴ The legal standard governing searches for records responsive to FOIA requests requires an agency to conduct a search that is "reasonably calculated to uncover all relevant documents."⁵ Courts have found searches to be sufficient when, among other things, they are based on a reasonable interpretation of the scope of the subject matter of the request.⁶

Courts tend to afford agencies leeway in determining the locations to search for responsive records. An agency, for example, "is not required to speculate about potential leads."⁷ Nor is an agency "obliged to look beyond the four corners of the request for leads to the location of responsive documents."⁸ But that does not mean that an agency "may ignore what it cannot help but know."⁹ No agency may ignore a responsive document that "clearly indicates the existence of [other] relevant documents, none of which were disclosed."¹⁰

An April 6, 2021, email from a VA Office of General Counsel ("OGC") official to another OGC official and a VA official—all of whose names are redacted purportedly pursuant to FOIA Exemption b(6)—indicates that, while drafting the VA's response to Senator Grassley's April 2, 2021, letter, the VA discovered a folder of responsive disciplinary records related to high-level VA officials who allegedly accepted prohibited gifts (free attendance at events) from NASCAR.¹¹ Additionally, the email indicates that the folder of disciplinary records is part of VA's response to an earlier FOIA request and that the folder is so large that author of the email "is not sure how we send this information." In spite of its production of this email, the OSVA's fifth IAD does not advise that it searched for records responsive to Empower Oversight's August 6th FOIA request among its files of responses to earlier FOIA requests.¹² Thus, it does not appear that OSVA conducted a search reasonably calculated to lead to the discovery of all responsive records.

Accordingly, please review the scope the OSVA's records search to determine whether—in contrast to its assertions in its fifth IAD—it searched the files of responses to prior FOIA requests; and, if not, whether its search can be accurately characterized as reasonably calculated to lead to the discovery of all responsive documents, in light of the April 6th email described above.

⁴ See, e.g., *Larson v. Dep't of State*, 565 F.3d 857, 869 (D.C. Cir. 2009) (affirming the adequacy of a search based on the agency's reasonable determination regarding records being requested).

⁵ *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

⁶ *Larson*, 565 F.3d at 869.

⁷ *Kowalczyk v. DOJ*, 73 F.3d 386, 389 (D.C. Cir. 1996).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Center for Nat'l Security Studies v. DOJ*, 215 F. Supp. 2d 94, 110 (D.D.C. 2002), *aff'd in part, rev'd in part, and remanded on other grounds*, 331 F.3d 918 (D.C. Cir. 2003).

¹¹ The April 6th email is attached as Exhibit 3.

¹² See, Exhibit 2.

The Scope of OSVA's Exemption b(6) Claims Appear to Be Beyond What Is Acceptable Under the FOIA

Subsection b(6) of the FOIA provides that the FOIA “does not apply to matters that are ... personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”¹³ Courts have found that the plain language of FOIA Exemption b(6) requires agencies to engage in a four-step analysis of records that are potentially responsive to a FOIA request; agencies must:

1. Determine whether a record at issue constitutes a personnel, medical, or “similar” file;
2. Determine whether there is a significant privacy interest invoked by information in such records;
3. Evaluate the requester’s asserted FOIA public interest in disclosure of the records that include information that invoke a privacy interest; and
4. Balance competing interests to determine whether disclosure of the records “would constitute a clearly unwarranted invasion of personal privacy,” if there is a FOIA public interest in disclosure of records that include information that invokes a significant privacy interest.¹⁴

Among the 11 pages that the OSVA produced as part of its fifth IAD are numerous pages with redactions that were made purportedly pursuant to FOIA Exemption b(6). The redactions include the names of government officials, and OSVA explained:

FOIA Exemption 6 exempts from disclosure of [sic.] 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 and email addresses of federal civilian employees. **We do however release the names of VA Senior Executives and individuals whose names our [sic.] in the public domain.** 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

¹³ 5 U.S.C. § 552(b)(6).

¹⁴ See, Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1229 (D.C. Cir. 2008); NARA v. Favish, 541 U.S. 157, 172 (2004); Wash. Post Co. v. HHS, 690 F.2d 252, 261 (D.C. Cir. 1982).

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."¹⁵

First, according to an Office of Personnel Management ("OPM") regulation, the names, titles, grades, salaries, duty stations, and position descriptions of officials of the United States government is public information.¹⁶ Accordingly, the names of government officials generally are not protected under FOIA Exemption b(6).¹⁷

Second, Empower Oversight cannot look behind redactions of text, and so ordinarily it would have no way to confirm or refute the OSVA's claims that the information that it redacted invoke significant privacy interests, and that those privacy interests outweigh the public interest in the VA's operations generally and its delayed response to Congressional oversight specifically. However, in this case, the OSVA made an ineffective redaction of the name of a VA official, and the ineffective redaction either refutes its assertion that it releases the names of VA Senior Executives or it begs the question of whether VA set the "Senior Executive" bar too high to provide the public with adequate information concerning the operations of its government.

An April 12, 2021, email from VA Chief of Staff Brandye Terrell forwarded four questions (i.e., numbers 5, 5a, 6, and 9) from Senator Grassley's April 2nd letter to James Rulman, VA's Deputy Director for Program Management.¹⁸ The OSVA ineffectively redacted Deputy Director Ruhlman's name purportedly pursuant to FOIA Exemption b(6). Based upon the OSVA's intended redaction, Empower Oversight is forced to question whether the OSVA's assertion that it did not redact the names of VA Senior Executives is accurate, or whether it set the bar too high for classifying someone as "Senior Executive" versus a lower-level official. In the latter regard, it seems reasonable for one to conclude that a Deputy Director would have responsibility for the direction of one or more VA operations, and his/her actions—and the effectiveness of them—would be a legitimate public concern.

In contrast to the OSVA's assertion of weak or non-existent privacy interests attached to the names government employees, there is a strong public interest in the VA's compliance with legitimate requests for information from oversight authorities, such as duly elected United States Senators. The "public interest" championed by the FOIA is to inform the public about "an agency's performance of its statutory duties."¹⁹ Such information is "a structural necessity in a

¹⁵ See, Exhibit 2 (citation omitted) (emphasis added).

¹⁶ 5 C.F.R. § 293.311(a).

¹⁷ See, Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (noting that Justice Department paralegals' names and work numbers "are already publicly available from" OPM), *appeal dismissed voluntarily*, No. 06-5055, 2006 WL 1214937 (D.C. Cir. April 28, 2006).

¹⁸ The April 12th email is attached as Exhibit 4.

¹⁹ DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

real democracy” and “should not be dismissed.”²⁰ Here, the public has a clear and unmitigated right to know whether the VA complied with its responsibility to respond to Senator Grassley’s April 2, 2021, and July 20, 2021, oversight letters.

Hence, please review the OSVA’s assertions of FOIA Exemption b(6) to confirm that its redactions actually protect the personal privacy of individuals and that any such privacy interests are not outweighed by the strong public interest in the VA’s operations.

Conclusion

For the reasons set forth herein, Empower Oversight respectfully requests that the VA review the reasonableness of the OSVA’s search for records responsive to Empower Oversight’s August 6th FOIA request, and its initial determinations of the applicability of FOIA Exemption b(6), 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

²⁰ NARA v. Favish, 541 U.S. 157, 172 (2004).

Exhibit 1



August 6, 2021

VIA ELECTRONIC TRANSMISSION: 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.¹ 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.²

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.³ 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.⁴ 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.⁵

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.⁶ 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.⁷

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).⁸ 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.⁹

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.”¹⁰

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

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

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

⁴ *Id.* at 3-4.

⁵ *Id.*

⁶ *Id.* at 2.

⁷ *Id.*

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

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

¹⁰ “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 gifts¹¹ 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.¹²

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:¹³

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).

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

¹² 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](#)).

¹³ 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

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



**DEPARTMENT OF VETERANS AFFAIRS
Washington DC 20420**

April 20, 2022

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

Via Email: jf@empowr.us

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

Dear Mr. Foster:

This is the fifth 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 OIT'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;

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- 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

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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

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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.

On October 29, 2021, for our second interim response, 978 pages were released in their entirety, 290 pages were partially released, and 158 pages were withheld in full. The pages were Bates numbered (21-08490-F) 000653 through (21-08490-F) 002078.

That same day, October 29, 2021, I conducted a key term search of the 20 mailboxes provided by the OI&T. The key term search was limited to 22-05571-F, the case number utilized in FOIAXpress, the official FOIA processing system utilized by the VA for processing FOIA requests. While Senator Grassley's request was not a FOIA request, records were uploaded to FOIAXpress in order to review and redact the records.

On December 23, 2021, for our third interim response, 6 pages were released in their entirety and 11 pages were partially released. The pages were Bates numbered (21-08490-F) 002079 through (21-08490-F) 002095.

On January 11, 2022, I conducted a key term search of the 20 mailboxes provided by the OI&T. The key term search was limited to Grassley. Attempts were made to exclude records that were previously processed and released under any of the prior key terms.

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On March 22, 2022, I conducted a key term search of the 20 mailboxes provided by the OI&T. The key term search was limited to Bogue. Attempts were made to exclude records that were previously processed and released under any of the prior key terms.

On April 6, 2022, I conducted five key term searches within the daily calendar of Charmain Bogue's calendars provided by the OI&T and reviewed as daily calendars. The searches were conducted as follows:

Search 1:

Key terms: Wofford OR Norton OR Tarantino OR Ochinko OR Saunders OR Ang OR Bogue

Search 2:

Key terms: Lyon OR Hubbard OR Augustine OR Schmeling OR Cate OR Norman OR Standage OR Wellman OR Broisius

Search 3:

Key terms: VES OR SVA

Search 4:

Key terms: "Veterans Education Success"

Search 5:

Key terms: "Student Veterans of America"

On April 7, 2022, I conducted a key term search of Charmain Bogue's calendar invitations/notes/attachments provided by the OI&T and uploaded in EDR. The search was conducted as follows:

Search:

Key terms: Barrett OR Wofford OR Norton OR Tarantino OR Ochinko OR Saunders OR Ang OR Lyon OR Hubbard OR Augsutine OR Schmeling OR Cate OR Norman OR Standage OR Wellman OR Broisius OR VES OR SVA OR "Veterans Education Success" OR "Student Veterans of America"

On April 13, 2022, for our fourth interim response, 596 pages were released in their entirety, 643 pages were partially released, and 74 pages were withheld in full. The pages were Bates numbered (21-08490-F) 002096 through (21-08490-F) 003408.

For this fifth interim release, a total of 503 pages of responsive records, subsequently Bates (21-08490-F) 003409 through (21-08490-F) 003911, were reviewed. Records contained in this release are responsive to items 1, 2, 3, 4, and 5 and consist of records from my searches conducted on March 22, 2022, April 6, 2022, and April 7, 2022. I have determined 388 pages

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are releasable in their entirety, 111 pages are partially releasable, and 4 pages are withheld in full pursuant to Title 5 U.S.C. §§ 552(b)(5), (b)(6), and (b)(7)(C), FOIA exemptions 5, 6, and 7C.

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, OSHA 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).

Additionally, exemption 5 protects from disclosure under the attorney-client privilege. Courts have found that attorney-client privilege "encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts," as well as "communications between attorneys that reflect client-supplied information." *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005). In this case, "the agency is the 'client' and the agency's lawyers are the 'attorneys' for the purposes of attorney-client privilege." *Judicial Watch, Inc. v. United States Dep't of the Treasury*, 796 F. Supp. 2d 13, 22 (D.D.C. 2011). Portions of emails requesting and reflecting legal advice from OGC attorneys have been withheld under the attorney-client privilege.

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 and email addresses of federal civilian employees. We do however release the names of VA Senior Executives and individuals whose names are in the public domain. 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,

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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) exempts from required disclosure law enforcement information the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Redacted information includes names, email addresses, titles, and phone numbers of VA law enforcement employees, as well as contractor-customer portal website addresses containing such personal information. The release of this information would risk impersonation of law enforcement personnel and jeopardize the health and safety of not only law enforcement personnel, but those persons they are charged with protecting.

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

Bates numbered pages (21-08490-F) 003429-003431 have been withheld pursuant to FOIA Exemption 5; and,

Bates numbered page (21-08490-F) 003835 has been withheld pursuant to FOIA Exemptions 5, 6, and 7C.

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 5th 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

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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:

Email Address: vacofoiaservice@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
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: 499 pages, 5th interim releasable records

Exhibit 3

Here is an updated version taking in comments from the call and (b)(6) comments. Please review the final two paragraphs for sure to be certain I am incorporating those correctly.

(b)(6)
VA Staff Attorney
Ethics Specialty Team
(b)(6) (BB)
Monday – Thursday only

[OGC Ethics Website](#) | [Ethics contact information](#)

From: (b)(6) (OGC) (b)(6) @va.gov>
Sent: Wednesday, April 7, 2021 8:23 AM
To: (b)(6) (OGC) (b)(6) @va.gov> (b)(6) (OGC) (b)(6) @va.gov>
Subject: FW: Responses

Please see my edits and comments in the last attachment.

(b)(6)

From: (b)(6) (OGC) (b)(6) @va.gov>
Sent: Tuesday, April 6, 2021 5:46 PM
To: (b)(6) (OGC) (b)(6) @va.gov>
Cc: (b)(6) (OGC) (b)(6) @va.gov>
Subject: Responses

Here is the initial draft response to Question 4, 7, 8, 10 and 11. This is all very new to me, so I am open to any comments, edits, suggestions.

We are waiting to hear from OCLA regarding the scope of #4 and whether to include everything related to NASCAR attendance. There was a FOIA request for this information so (b)(6) already pulled the documents. One specific folder is related to the suspensions. [That folder alone is very large so I am not sure how we send this information.]

I have separately pulled our emails and the public financial disclosure reports (those are not attached at this time).

(b)(6)

(b)(6)
VA Staff Attorney

Ethics Specialty Team

(b)(6) (BB)

Monday – Thursday only

[OGC Ethics Website](#) | [Ethics contact information](#)

Exhibit 4

Parise, Ruthann

Sent: Monday, April 12, 2021 1:58 PM
To: (b)(6) **Rothman, James,** VBAVACO

5. What steps does the VA take to protect retail investors by safeguarding market sensitive information regarding potential enforcement announcements related to publicly-traded companies?

a. Is it possible these steps failed in this instance? If so, what will VA do to prevent this from happening again in the future?

6. If the VA is aware that market sensitive information was potentially leaked, has the VA investigated this leak of information? Please provide the report of investigation.

9. Did Mrs. Bogue engage in, participate in, or contribute to VA business with her husband's business? If so, why did VA allow Mrs. Bogue to participate?

Brandye Terrell

Chief of Staff

Veterans Benefits Administration

Department of Veterans Affairs

Exhibit S



U.S. Department of Veterans Affairs
Office of General Counsel
Information and Administrative Law Group

810 Vermont Avenue NW
Washington DC 20420
www.va.gov/ogc

In Reply Refer To: 024L
OGC Case #: 161280
FOIA Request #: 21-08490-F

August 15, 2022

Bryan Saddler
Jason Foster
Empower Oversight
bsaddler@empowr.us
jf@empowr.us

Dear Mr. Saddler and Mr. Foster:

This is the final agency decision issued under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, in response to your appeal of the fifth interim initial agency decision (IAD) issued by the Department of Veterans Affairs (VA) Office of the Executive Secretary (OSVA). For the reasons outlined below, your appeal is granted in-part and denied in-part.

Procedural History

Initial request On August 6, 2021, you provided background information and submitted a FOIA request for 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 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.

You included two attachments with your FOIA request: attachment A is a letter dated April 2, 2021, from Senator Grassley to Secretary McDonough; attachment B is a letter dated July 20, 2021, from Senator Grassley to Secretary McDonough. You also requested a fee waiver and stated that Empower Oversight is a non-profit educational organization.

On August 16, 2021, VA Central Office (VACO) FOIA Service Management Analyst, Ms. Chaquanna Price, acknowledged your request, assigning it tracking number 21-08250-F, and notified you that the information you requested fell under the purview of three other FOIA offices: Veterans Benefit Administration (VBA), Office of Assistant Secretary for Congressional & Legislative Affairs, and Office of Inspection

General. Ms. Price stated that your request had been referred to the aforementioned offices for processing and direct response to you, thus concluding the VACO FOIA Office's response.

On August 23, 2021, Ms. Price issued another acknowledgement letter, assigning your request tracking number 21-08490-F, and notifying you that your request also had been referred to the Office of the Executive Secretary (OSVA). Further, Ms. Price noted that your request had been referred to the Office of Inspector General (OIG), which would provide a separate tracking number.

On August 24, 2021, OSVA FOIA Officer, Ms. Ruthann Parise acknowledged your request and granted your request for a fee waiver. Ms. Parise also requested further clarification regarding item #5 of your request, such as the time frame for your request.

On August 25, 2021, Mr. Bryan Saddler provided clarification regarding item #5, proposing the time frame of December 1, 2019, through July 20, 2021.

Fees VA's FOIA regulations require each request to be characterized under 38 C.F.R. § 1.561(c) and fees to be estimated and charged, when applicable. Your request was characterized as an "Educational or Non-Commercial" requester, which means that you are not required to pay search or review fees. You have not been charged any fees for the processing of this request.

First Interim IAD On September 7, 2021, Ms. Parise issued her first interim IAD, notifying you that responsive records had been located. She identified six hundred and fifty-two (652) pages of records and one (1) Excel spreadsheet as responsive to items # 1, 3, and 6(a)-(d) of your request. She determined that two hundred and forty-nine (249) pages and one (1) Excel spreadsheet were releasable in full, three hundred and thirty (330) pages were partially releasable, and seventy-three (73) pages were withheld in full pursuant to FOIA Exemptions 3, 5, 6, and 7(C). Ms. Parise stated that remaining releasable records, if any, would be provided on a rolling basis. She also provided the appropriate appeal, mediation, and public liaison rights.

On September 8, 2021, Ms. Parise issued a correction to the IAD, noting that Bates numbered pages 000321-000347 were in response to item #4 of your request as opposed to item #3.

On September 9, 2021, Ms. Parise requested further clarification regarding item #5 of your request. She asked for the names of the VES/SVA representatives that you are requesting aside from Barrett Bogue. On September 30, 2021, Mr. Saddler provided a list of names.

Second Interim IAD On October 29, 2021, Ms. Parise issued a second interim IAD, notifying you that responsive records had been located. She identified one thousand four hundred and twenty-six (1,426) pages of records responsive to your request item #1. She determined that nine hundred and seventy-eight (978) pages were releasable in full, two hundred and ninety (290) pages were partially releasable, and one hundred and fifty-eight (158) pages were withheld in full pursuant to FOIA Exemptions 5, 6, and 7(E). You were also provided with the appropriate appeal, mediation, and public liaison rights.

Appeal of Second Interim IAD On January 24, 2022, you appealed the second interim IAD. You wrote that OSVA's assertions of Exemptions 5 and 7(E) "exceed, or appear to exceed, the understood parameters of the exemptions."

Final Agency Decision On April 18, 2022, this Office issued a final agency decision regarding your appeal of the second interim IAD, granting your appeal of the Exemption 7(E) redactions. This Office denied your appeal of the Exemption 5 redactions and additionally determined that certain information was also protected from disclosure under attorney-client privilege.

Third Interim IAD On December 23, 2021, Ms. Parise issued a third interim IAD. She disclosed six pages in their entirety and eleven (11) pages with redactions pursuant to FOIA Exemptions 5 and 6.

Fourth Interim IAD On April 13, 2022, Ms. Parise issued a fourth interim IAD, notifying you that responsive records had been located. She identified one thousand three hundred and thirteen (1,313) pages of records as responsive to items #1, 2, 3, and 7 of your request. She determined that five hundred and ninety-six (596) pages were releasable in full, six hundred and forty-three (643) pages were partially releasable, and seventy-four (74) pages were withheld in full, pursuant to FOIA Exemptions 3, 5, 6, and 7(C). You were also provided with the appropriate appeal, mediation, and public liaison rights.

Appeal of Fourth Interim IAD On July 12, 2022, you appealed the fourth interim IAD. You wrote that OSVA's assertions of Exemption 5 "exceed, or appear to exceed, the understood parameters of the exemption..."

Final Agency Decision On August 4, 2022, this Office issued a final agency decision regarding your appeal of the Exemption 5 redactions in the fourth interim IAD. This Office denied your appeal in-part and granted your appeal in-part.

Fifth Interim IAD: Search For the fifth interim IAD, Ms. Parise conducted three (3) searches. The first search was conducted on March 22, 2022 and consisted of a search of the twenty (20) mailboxes provided by VA's Office of Information and Technology (OI&T) for the term "Bogue."

The second search was conducted on April 6, 2022 and consisted of five (5) key term searches within Charmain Bogue's daily calendars as provided by OI&T: (1) Wofford OR Norton OR Tarantino OR Ochinko OR Saunders OR Ang OR Bog; (2) Lyon OR Hubbard OR Augustine OR Schmeling OR Cate OR Norman OR Standage OR Wellman OR Broisius; (3) VES OR SVA; (4) "Veterans Education Success"; and (5) "Student Veterans of America."

The third search was conducted on April 7, 2022, and consisted of a key term search of Charmain Bogue's calendar invitations, notes, and attachments as provided by OI&T: Barrett OR Wofford OR Norton OR Tarantino OR Ochinko OR Saunders OR Ang OR Lyon OR Hubbard OR Augsutine OR Schmeling OR Cate OR Norman OR Standage OR Wellman OR Broisius OR VES OR SVA OR "Veterans Education Success" OR "Student Veterans of America."

Fifth Interim IAD On April 20, 2022, Ms. Parise issued a fifth and final interim IAD, notifying you that responsive records had been located. She identified five hundred and three (503) pages of records responsive to items # 1, 2, 3, 4, and 5 of your request. She determined that three hundred and eighty-eight (388) pages were releasable in full, one hundred and eleven (111) pages were partially releasable, and four (4) pages were withheld in full, pursuant to FOIA Exemptions 5, 6, and 7(C). Regarding Exemption 6, Ms. Parise explained that the privacy interests of the individuals in the requested records outweighed any minimal public interest in disclosure of the information. She stated that the information withheld under Exemption 6 consisted of the names and email addresses of federal civilian employees and that names of VA Senior Executives were released.

Responsive Records The records disclosed to you consisted of emails and their attachments, in addition to calendar entries, redacted pursuant to Exemptions 5, 6, and 7(C).

Appeal of Fifth Interim IAD On July 19, 2022, you appealed the fifth interim IAD. You wrote, "Empower Oversight challenges the reasonableness of OSVA's search for records and its claim that certain portions of the records . . . are exempt from disclosure under" Exemption 6. Regarding the search, you referred to an email on Bates Number 003427. You wrote that the email "indicates that, while drafting the VA's response to Senator Grassley's April 2, 2021, letter, the VA discovered a folder of responsive disciplinary records related to high-level VA officials who allegedly accepted prohibited gifts (free attendance at events) from NASCAR." You also wrote that the email "indicates that the folder of disciplinary records is part of VA's response to an earlier FOIA request..." You wrote that the fifth interim IAD "does not advise that it searched for records responsive to" your FOIA request "among its files of response to earlier FOIA requests." You claimed, "Thus, it does not appear that OSVA conducted a search reasonably calculated to lead to the discovery of all responsive records."

Regarding Exemption 6, you state that, according to the Office of Personnel Management (“OPM”) regulation, “the names, titles, grades, salaries, duty stations, and position descriptions of officials of the United States government is public information.” You also point to the email on Bates Number 003900, noting that the redaction of James Ruhlman’s name was “ineffective[],” permitting you to view the name. You wrote that this information “forced” you “to question whether the OSVA’s assertion that it did not redact the names of VA Senior Executives is accurate, or whether it set the bar too high for classifying someone as ‘Senior Executive’ versus a lower-level official.” You claimed that “it seems reasonable for one to conclude that a Deputy Director would have responsibility for the direction of one or more VA operations, and his/her actions – and the effectiveness of them – would be a legitimate public concern.” You also claimed that “there is a strong public interest in the VA’s compliance with legitimate requests for information from oversight authorities, such as duly elected United States Senators.” You stated that “the public has a clear and unmitigated right to know whether the VA complied with its responsibility to respond to Senator Grassley’s April 2, 2021, and July 20, 2021, oversight letters.”

Relevant Law We have thoroughly reviewed your appeal under the provisions of the FOIA, which provides that federal agencies must disclose records requested unless they may be withheld in accordance with one or more of nine statutory exemptions. 5 U.S.C. § 552(b).

Analysis You limited your appeal of OSVA’s fifth interim IAD to the applicability of Exemption 6 and the records search; therefore, we will limit our review to those issues.

Upon receipt of your appeal, we examined the administrative record of the FOIA Officer. The searches conducted by Ms. Parise related to items #1-5 of your request: (1) records concerning VA’s receipt, discussions, processing, and response to Senator Grassley’s April and July 2021 letters; (2) communications between OIG and VA employees regarding OIG’s investigation into Ms. Bogue; (3) other communications regarding the OIG investigation into Ms. Bogue; (4) ethics opinions or recusals involving Ms. Bogue; and (5) calendar entries/notes between Ms. Bogue and VES/SVA representatives. An agency is generally required to conduct a search that is “reasonably calculated to uncover all relevant documents.” *Campbell v. SSA*, 446 F. App’x 477, 480 (3d Cir. June 3, 2011) (quoting *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). The adequacy of an agency’s search is “not determined by its results, but by the method of the search itself.” *Citizens for Responsibility & Ethics in Wash. v. VA*, 69 F. Supp. 3d 115, 121 (D.D.C. 2014).

Ms. Parise previously conducted searches for, and provided responsive records to, items #1-4 of your request in the four previous interim productions. Ms. Parise requested that OI&T provide the email boxes of twenty (20) custodians, including the Secretary of the VA and his Chief of Staff. Ms. Parise selected those twenty (20) custodians based on her personal knowledge of which employees, including herself,

worked on processing and/or responding to Senator Grassley's letter(s), and based on suggestions from the Office of General Counsel (OGC). To identify responsive records, she used the timeframe of April 2, 2021 (the date of Senator Grassley's letter) through August 6, 2021 (the date of your FOIA request). In the first interim IAD, Ms. Parise explained the searches she had undertaken thus far, and explained the searches she intended to conduct in the future. During the processing of the first four interim productions, she searched the twenty (20) email boxes for the search terms Grassley, 21-05571-F (the case number utilized in FOIAXpress, VA's official FOIA processing system utilized by VA to review and redact records responsive to Senator Grassley's request), and 04890714 (the case number assigned to Senator Grassley's request in the VA Integrated Enterprise Workflow Solution (VIEWS)-Correspondence and Case Management (CCM)), VA's official correspondence tracking system). For the fifth production, Ms. Parise conducted a search of the twenty (20) email boxes for the search term Bogue. She also searched Ms. Bogue's calendar entries, invitations, notes, and attachments for the search terms that you provided to locate records responsive to item #5 of your request.

In your appeal, the email to which you refer on Bates Number 003427 references a previous FOIA request for "this information"; referring to "NASCAR attendance." You wrote that the fifth interim IAD does not state that a search was conducted "among [VA's] files of responses to earlier FOIA requests" and "[t]hus, it does not appear that OSVA conducted a search reasonably calculated to lead to the discovery of all responsive records." You appear to contend that, in order to conduct a reasonable search, an agency must search responses to previous FOIA requests. When processing a FOIA request, however, an agency views the request on its own merits and is obligated to search locations "reasonably calculated" to locate records responsive to *that* request. In this case, the OSVA FOIA Officer searched for responsive records in areas that were reasonably calculated to locate records responsive to *your* request. If any of the records collected in your request were duplicative of a prior FOIA request related to a different subject matter, the FOIA Officer's search was reasonably calculated to locate those records, as they pertained to *your* request.

Nevertheless, we contacted an OGC attorney with knowledge of the email to which you referred in your appeal. The attorney provided us with the name of the FOIA Officer who processed the FOIA request for which they gathered responsive NASCAR records. We contacted the FOIA Officer, who confirmed that he had requested and produced responsive records from OGC for the FOIA request. The records that were ultimately disclosed in response to that FOIA request are publicly available on VA's FOIA Library, under the heading "Frequently Requested," available at the following address: <https://www.va.gov/FOIA/Library.asp>. You may view those records on that site.

Furthermore, we reviewed the information available in VIEWS/CCM. OSVA utilizes VIEWS/CCM to assign and track tasks across the VA. Tasks can be created with or without attachments, and attachments can be uploaded outside of a task. We

determined that there are seven (7) tasks and twelve (12) attachments posted during the responsive timeframe of April 2, 2021 – August 6, 2021. Emails that included task information were produced in the various prior productions. See, e.g., Bates Number 000717. However, we are providing all seven (7) responsive tasks to you with redactions pursuant to Exemptions 5 and 6; some of the task information we are providing is duplicative of prior releases.

Of the twelve (12) responsive attachments, seven (7) were previously processed in the second interim production with six (6) released in full or in part and one (1) titled “VIEWS 4890714 – Transmittal Letter for FINAL APPROVAL” withheld in full. However, we are providing copies of those records so that you may see they are duplicates of prior OSVA releases. For example, the April 2, 2021, letter from Senator Grassley was produced numerous times in the various interim productions. On VIEWS, it was uploaded as attachment name “04890714 – 2021-04-02 CEG to VA” and attached to six (6) of the seven (7) tasks. We are providing a copy of it with the first task so that you may view the record and see that it is a duplicate. Of the remaining five (5) attachments, one (1) is an email that forwards an email previously disclosed to you with no additional comments. Similarly, we are providing a copy of that email with redactions pursuant to Exemption 6 so that you can see that it is a duplicate.

We were unable to determine if the remaining four (4) attachments were previously produced; accordingly, we processed those records. The records are all draft documents that we are withholding in full pursuant to Exemption 5, which will be discussed below. Enclosed please find Bates Numbers 003912-003979 with the aforementioned redactions. The following Bates Numbers are withheld in full: 003943, 003960-003966, 003976, and 003978-003979. The tables below summarize the VIEWS-CCM tasks and attachments and their current and prior treatment.

No.	Name of Task	Attachments
1	LCT-280216	04890714 – 2021-04-02 CEG to VA VIEWS 4890714 – Interim Response
2	LCT-281541	04890714 – 2021-04-02 CEG to VA* ¹ 4890714 Enclosure template. Regarding VIEWS 4890714 (SME DATA REQUEST)
3	LCT-281627	04890714 – 2021-04-02 CEG to VA* 4890714 Enclosure template.* Regarding VIEWS 4890714 (SME DATA REQUEST)*
4	LCT-281628	4890714 Enclosure template – PLG Final 04890714 – 2021-04-02 CEG to VA* 4890714 Enclosure template.*
5	LCT-281629	04890714 – 2021-04-02 CEG to VA* 4890714 Enclosure template.* Regarding VIEWS 4890714 (SME DATA REQUEST)*
6	LCT-281704	n/a

¹ Starred documents are duplicates not included in the enclosed production.

7	LCT-281779	4890714 – Interim Response (1) 009 edits 04890714 – 2021-04-02 CEG to VA* Regarding VIEWS 4890714 (SME DATA REQUEST)*
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No.	Name of Attachment	Task or Standalone	Applicable Exemptions
1	04890714 – 2021-04-02 CEG to VA	LCT-280216 LCT-281541 LCT-281627 LCT-281628 LCT-281629 LCT-281779	Previously released in full; enclosed with LCT-280216
2	4890714 – Interim Response (1) 009 edits	LCT-281779	Withholding under Exemption 5
3	4890714 DRAFT Enclosure for FINAL Approval	Standalone	Withholding under Exemption 5
4	4890714 Enclosure template – PLG Final	LCT-281628	Enclosed with Exemption 5 redactions with LCT-281628
5	4890714 Enclosure template.	LCT-281541 LCT-281627 LCT-281628 LCT-281629	Previously released in full; enclosed with LCT-281541
6	Approval for Autopen – 4-6-2021 VIEWS #4890714	Standalone	Previously released with Exemption 6 redactions; enclosed
7	FW DISPATCHED TO 009 VIEWS # 4890714 – Letter from Senator Grassley...	Standalone	Email and attachment enclosed with Exemption 6 redactions
8	Interim S&D dated on 4-6-2021 VIEWS # 4890714 – Grassley	Standalone	Previously released with Exemption 6 redactions; enclosed
9	PRINT – Email from Carrie McVicker dated 4-6-2021 FW HOT – letter from...	Standalone	Email previously released with Exemption 6 redactions; enclosed. First attachment enclosed with LCT-280216; second attachment withheld in full under Exemptions 5 and 6; third attachment enclosed with Exemption 5 and 6 redactions
10	Regarding VIEWS 4890714 (SME DATA REQUEST)	LCT-281541 LCT-281627 LCT-281629	Previously released with Exemption 5 and 6 redactions; enclosed with LCT-281541
11	VIEWS 4890714 – Interim Response	LCT-280216	Withholding under Exemptions 5 and 6
12	VIEWS 4890714 – Transmittal Letter for FINAL APPROVAL	Standalone	Previously withheld under Exemption 5

In light of the foregoing, we believe the efforts taken to locate the documents responsive to your request are sufficient to satisfy the duty of the Department under the FOIA to conduct a reasonable search for the requested records. The question is not “whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*.” *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994), *quoting Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984); *see also Hamdan v. DOJ*, 797 F.3d 759, 772 (9th Cir. 2015) (“Plaintiffs were entitled to a reasonable search for records, not a perfect one[,] . . . [a]nd a reasonable search is what they got”). We find that the search was reasonably calculated to locate responsive information.

Additionally, we have redacted or withheld VIEWS-CCM information pursuant to Exemption 5, which protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). We have redacted Bates Numbers 003957 and 003977, and withheld in full Bates Numbers 003943, 003960-003966, 003976, and 003978-003979 pursuant to the deliberative process privilege. The deliberative process privilege is designed to protect the “decision making processes of government agencies.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).

To be exempt from disclosure under the deliberative process privilege, the records must be both pre-decisional and deliberative. A document is predecisional if it was generated “before any final agency decision on the relevant matter,” *Nat’l Sec. Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014), and deliberative if it “reflects the give-and-take of the consultative process.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (1980). The privilege protects factual material if it is “inextricably intertwined” with deliberative material, *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (per curiam), or if disclosure “would ‘expose an agency’s decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.’” *Quarles v. Dep’t of Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (quoting *Dudman Commc’ns Corp. v. Dep’t of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)). Examples of predecisional documents include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Coastal States*, 617 F.2d at 866 (emphasis added).

The records at issue are intra-agency communications that contain both pre-decisional and deliberative communications; therefore, meeting the threshold criteria of Exemption 5. These records are pre-decisional because they predate VA’s ultimate disposition of Senator Grassley’s letters. The records are also deliberative because they reflect the give-and-take of the consultative process. The records represent relevant considerations in the agency’s review of its response to Senator Grassley’s letter and include the thoughts and opinions of agency employees. The records include drafts of documents prepared to inform officials and reflect various factors considered by the agency during its deliberations. The withheld information does not contain an official

final agency decision but rather reveals the deliberative process itself as employees exchanged ideas and debated the agency's course of action. Release of this information could undercut employees' willingness to engage in assessments of a situation or provide forthright opinions on matters under review, thus affecting the agency's ability to obtain open and frank communication regarding agency issues. Significantly, releasing this information would undermine the agency's deliberative process itself; the agency relies on its ability to fully evaluate a course of action knowing that the process itself is protected. The release of the information could also result in public misunderstanding or confusion and could harm the overall review process in which agencies must continually engage. In view of the foregoing, we are withholding the information under Exemption 5.

Furthermore, Bates Numbers 003953-3957, 003960-003966, 003976, and 003978-003979 contain information that is also protected from disclosure under the attorney-client and attorney work-product privileges. Courts have found that attorney-client privilege "encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts," as well as "communications between attorneys that reflect client-supplied information." *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005). In this case, "the agency is the 'client' and the agency's lawyers are the 'attorneys' for the purposes of attorney-client privilege." *Judicial Watch, Inc. v. United States Dep't of the Treasury*, 796 F. Supp. 2d 13, 33 (D.D.C. 2011). Additionally, we find that the attorney work-product privilege also applies, as the documents were prepared by attorneys in contemplation of litigation. *Coastal States*, 617 F.2d at 864. Attorney work-product privilege applies if specific claims have been identified that make litigation probable. See, e.g., *Citizens for Responsibility and Ethics in Wash. v. NARA*, 583 F. Supp. 2d 146, 160 (D.D.C. 2008) (allowing use of privilege in situation where agency "could reasonably have anticipated litigation over" status of requested records). Documents "prepared by non-attorneys in anticipation of litigation may also be protected" by the attorney work-product privilege. *Judicial Watch, Inc. v. United States DOJ*, 806 F. App'x 5, 6-7 (D.C. Cir. 2020). In this case, Empower Oversight's General Counsel, Gary Aguirre, had already filed suit against the VA regarding related records in *Pomares v. VA* at the time the responsive records were created. The employees involved reasonably anticipated that there would be another lawsuit stemming from VA's response to Senator Grassley's letter.

Bates No.	Privilege Description
003953-003956	Draft document reflecting legal advice of OGC Personnel Law Group attorneys regarding draft responses to Senator Grassley's letter.
003957	Task notes reflecting legal advice of OGC Ethics Specialty Team attorney regarding draft responses to Senator Grassley's letter.
003960	Draft document reflecting legal advice of OGC attorneys regarding draft response to Senator Grassley's letter.
003961-3966	Draft document reflecting legal advice of OGC attorneys regarding draft responses to Senator Grassley's letter.

003976	Draft document reflecting legal advice of OGC attorneys regarding draft response to Senator Grassley's letter.
003978-003979	Draft document reflecting legal advice of OGC attorneys regarding draft response to Senator Grassley's letter.

We have also reviewed the redactions made pursuant to Exemption 6 in the documents disclosed to you with the fifth interim IAD and with this appeal. The redactions consist of VA employees' names, a third-party name, email addresses, phone numbers, and titles. Exemption 6 covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The Supreme Court has interpreted the term "similar files" broadly, to include all information that "applies to a particular individual." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982).

In *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the Supreme Court provided the following step-by-step analysis to determine when Exemption 6 applies: (1) determine whether a personal privacy interest is involved; (2) determine whether disclosure would serve the public interest; and (3) balance the personal privacy interest against the public interest.

As a matter of law, career public servants such as VA employees retain personal privacy interests in the discharge of their public duties. Courts have held that federal employees have a privacy interest in their names and contact information. *See Long v. ICE*, 279 F. Supp. 3d 226, 243-44 (D.D.C. 2017). Those employees have an interest in being protected from the risk of annoyance and harassment. In your appeal, you claimed that an OPM regulation, 5 C.F.R. § 293.311, provides a list federal employee information that is public information. However, § 293.311(a) states that the list applies to the official personnel file, the employee performance file system folders, "their automated equivalent records, and from other personnel record files that constitute an agency record within the meaning of the FOIA and which are under control of the Office" of Personnel Management. The records at issue in this case are emails, calendar entries, and attachments; not the applicable files listed in § 293.311(a); nor are the records under control of OPM. Per guidance promulgated by VA's Deputy General Counsel, General Law, and posted on VA's public FOIA website, VA's policy is generally to redact the names of VA employees of GS-15 and below, and to release the names of employees of Senior Executive Service (SES) level or above. This guidance appears to be referenced in Ms. Parise's IAD when she discussed releasing the names of Senior Executives. We have confirmed that all SES names in the responsive records were released. In your appeal, you questioned the redaction of James Ruhlman's name and questioned whether OSVA "set the bar too high for classifying someone as a 'Senior Executive' versus a lower-level official." We confirmed that Mr. Ruhlman is a GS-15 and not an SES. Additionally, the third party whose name appears in one document also has a privacy interest in being protected from the risk of annoyance and harassment.

An analysis regarding disclosure of information under Exemption 6 also includes consideration of whether disclosure would serve the public interest. As noted in *Reporters Committee*, once a personal privacy interest has been ascertained, we must then balance the personal privacy interest against the public interest. In evaluating the public interest in a given case, we must focus on the nature of the requested documents and their relationship to the public interest generally. We must consider whether disclosure of the requested information, or portions thereof that have been withheld, would “open agency action to the light of public scrutiny” rather than focus on the particular purpose for which the document is being requested. *Reporters Committee*, 489 U.S. at 772.

Regarding the inadvertent disclosure of James Ruhlman’s name, please note that typically we would request that you return or destroy the record, and we would provide a properly redacted version. In your appeal, you argued that “it seems reasonable for one to conclude that a Deputy Director would have responsibility for the direction of one or more VA operations, and his/her actions – and the effectiveness of them – would be a legitimate public concern.” You also stated that “the public has a clear and unmitigated right to know whether the VA complied with its responsibility to respond to Senator Grassley’s April 2, 2021, and July 20, 2021, oversight letters.” We reviewed Mr. Ruhlman’s level of responsibility and his role, if any, in responding to Senator Grassley’s letters. Mr. Ruhlman did not draft the response, nor was he in the chain of concurrence or approval for the response. Further, the records provided to you in this regard satisfy the public interest and given this individual’s role here, his name would not necessarily shed light on the activity of the agency. Accordingly, we believe the redaction of his name justified. Given the inadvertent release, however, and given that an argument could be made that this individual was involved (albeit tangentially) with the issue of the agency’s response to Senator Grassley, we have concluded that it is enough of a “close call” to err on the side of releasing his name under these circumstances. Enclosed please find an unredacted copy of the page already disclosed to you, Bates Number 003900. Additionally, we located one additional page in which Mr. Ruhlman’s name appears. Enclosed please find an unredacted copy of that page, Bates Number 003839.

In reviewing the remaining information withheld from you, we find that it warrants protection under the analysis set forth above. We acknowledge that there is a public interest in how VA responded to Senator Grassley’s letters; however, that interest is satisfied by the information disclosed to you. The withheld information would not open agency actions to public scrutiny. In short, additional disclosure of the redacted information would not reveal how VA conducts its business. *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984). We find that the balance weighs in favor of protecting the privacy of the individuals discussed above. We thus affirm withholding of the remaining information pursuant to Exemption 6.

Conclusion Based upon the foregoing, your appeal is granted in-part and denied in-part.

Mediation and Appeal Rights

This final agency decision concludes the administrative processing of your appeal.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services. Similarly, as part of the FOIA Improvement Act of 2016, VA established a FOIA Public Liaison to offer mediation services. Both OGIS and the VA Public Liaison will assist in resolving disputes between FOIA requesters and VA as a non-exclusive alternative to litigation. Using OGIS or the VA FOIA Public Liaison does not affect your right to pursue litigation. You may contact OGIS or the VA Public Liaison in any of the following ways:

Office of Government Information Services	E-mail: ogis@nara.gov
National Archives and Records Administration	Telephone: 202-741-5770
Room 2510	Facsimile: 202-741-5769
8601 Adelphi Road	Toll-free: 1-877-684-6448
College Park, MD 20740-6001	

VA FOIA Public Liaison	E-mail: vacofoiaservice@va.gov
Michael Sarich	Telephone: 1-877-750-3642
VA FOIA Service	Facsimile: 202-632-7581
810 Vermont Avenue, NW (005R1C)	
Washington, DC 20420	

With respect to any information denied to you by this final agency decision, the FOIA requires us to advise you that if you believe the Department erred in this decision, you have the right to file a complaint in an appropriate United States District Court.

Sincerely,

Shaquana L. Cooper

Deputy Chief Counsel
Office of General Counsel,
Information and Administrative Law Group (IALG)

CC: Richard Ha, FOIA Officer, OSVA
Michael Sarich, VA FOIA Public Liaison

Enclosures: 59 pages