IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

EMPOWER OVERSIGHT WHISTLEBLOWERS & RESEARCH,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

Defendant.

No. 1:22-cv-559 (MSN/JFA)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Empower Oversight sued the Department of Veterans Affairs seeking declaratory and injunctive relief under the Freedom of Information Act, a statute designed "to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Empower Oversight seeks agency records that implicate matters of public integrity—i.e., potential ethical issues related to actions taken by senior VA officials who were responsible for administering veterans' educational benefits, and the Department's subsequent refusal to comply with congressional oversight requests. The VA urges the Court to grant judgment in its favor, but its arguments cannot withstand scrutiny. No court should construe FOIA as "a convenient formalism." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

This Court should deny the Department's motion for summary judgment for three reasons:

I. The VA undisputedly failed to comply with FOIA's statutory deadline governing administrative agency appeals. To comply with FOIA, the agency had twenty days to make a determination as to Empower Oversight's administrative appeal. But it did not do that. Empower Oversight appealed an agency decision on January 24, 2022, and the VA did not make a determination with respect to the appeal until April 18, 2022.

II. The VA incorrectly claims that it has conducted searches reasonably calculated to lead to responsive records. As proof, the VA touts the fact that it has produced thousands of pages of records. Yet this Court should not accept raw numbers as evidence that the VA has complied with FOIA. The adequacy of an agency's search does not depend on the fruits of its search.

III. FOIA places the burden on the VA to sustain any action to withhold information under any of the statutory exemptions. *See, e.g.*, 5 U.S.C. §§ 552(b)(5), and (b)(6). The agency has not carried its burden here.

STATUTORY BACKGROUND

Since the earliest days of our nation, "openness in government has always been thought crucial to ensuring that the people remain in control of their government." *In re Sealed Case*, 121 F. 3d 729, 749 (D.C. Cir. 1997). FOIA thus provides the people with the opportunity to acquire

"adequate information to evaluate federal programs and formulate wise policies." *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971). "Congress recognized that the public cannot make intelligent decisions without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives." *Id.*

FOIA strongly favors openness. *DOJ v. Tax Analysts*, 492 U.S. 136, 142 (1989). Congress designed the statute to allow public access to "official information," and Congress provided "a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973). This public right "defines a structural necessity in a real democracy." *Favish*, 541 U.S. at 172; *accord Ethyl Corp. v. EPA*, 25 F.3d 1241, 1245 (4th Cir. 1994). Disclosure, "not secrecy, is the dominant objective of the Act." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

A. Agencies must comply with statutory deadlines.

FOIA requires each federal agency to publish guidance for the public to submit requests for information. After an agency receives a valid request for information, it must respond to that request within twenty days (exempting Saturdays, Sundays, and holidays) by notifying the requester of its "determination." 5 U.S.C. § 552(a)(6)(A)(i)(I); *see also CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013). In certain circumstances, an agency may provide notice to the requester that "unusual circumstances" merit additional time—up to an additional ten working days—to render a determination. 5 U.S.C. § 552(a)(4)(viii)(II)(aa). If the agency provides notice of unusual circumstances, it also must provide the requester "an opportunity to arrange with the agency an alternative time frame for processing the request." *Id.* § 552(a)(6)(B)(ii).

FOIA does not require the agency to produce responsive records within the 20-day statutory time limit, but the agency must *respond* to (i.e., provide a determination regarding) a request within the deadline. After an agency responds to a request, it must make records "promptly available" to the requester. *Id.* § 552(a)(3)(A). That typically means the agency must release the

records "within days or a few weeks of a 'determination,' not months or years." *CREW*, 711 F.3d at 188.

For administrative appeals, FOIA requires the agency "to make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal." 5. U.S.C. § 552(a)(6)(A)(ii).

B. Agencies must make reasonable efforts to search for records.

An agency responding to a valid request for records "shall make reasonable efforts to search for [such] records." 5 U.S.C. § 552(a)(3)(C). Courts generally consider an agency's search to be "adequate" if the agency "has conducted a search reasonably calculated to uncover all relevant documents." *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). The reasonableness of a search depends on "the totality of the circumstances" in each case. *Rein v. USPTO*, 553 F.3d 353, 364 (4th Cir. 2009).

No court should accept an agency's "self-imposed limitation" on the scope of its search when the self-imposed limitation broadly excludes potentially responsive documents. *Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235, 1255 (11th Cir. 2008). For example, an "agency 'cannot limit its search' to only one or more places if there are additional sources 'that are likely to turn up the information requested.'" *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (quoting *Oglesby v. Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)).

An agency initially may define the scope of its search, but that does not mean that the agency then "may ignore what it cannot help but know." *Kowalczyk v. DOJ*, 73 F.3d 386, 389 (D.C. Cir. 1996). When a requester "clearly states" that it is seeking "all agency records on a subject" regardless of their location, the agency cannot in good faith ignore an apparent lead to other responsive records. *Id.* The agency is "obliged to pursue" that lead, *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999), and the agency "must revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry," *Campbell v. DOJ*, 164 F.3d 20, 28 (D.C. Cir. 1998).

C. Agencies may withhold only exempted information.

Public access to records "does not apply to matters" that fall within discrete categories of exemptions. 5 U.S.C. § 552(b). For example, FOIA exempts "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," except where such records were "created 25 years or more before the date on which the records were requested." *Id.* § 552(b)(5). And FOIA exempts the disclosure of records that "would constitute a clearly unwarranted invasion of personal privacy," such as "personnel and medical files." *Id.* § 552(b)(6).

Under FOIA, "the burden is on the agency to sustain its action" to withhold information under any of the statutory exemptions. *Id.* § 552(a)(4)(B). A court may review records in camera to determine whether the agency has satisfied its burden. *See id.* Even if portions of responsive documents are covered by FOIA's exemptions, however, the statute requires agencies to engage in reasonable efforts to "segregate and release nonexempt information." *Id.* § 552(a)(8)(A)(ii)(II). "The burden is on the agency to show that no segregable materials exist." *Carter, Fullerton & Hayes, LLC v. FTC*, 601 F. Supp. 2d 728, 744 (E.D. Va. 2009).

DISPUTED AND UNDISPUTED FACTS

I. Senator Grassley's letters

VA Secretary. On April 2, 2021, Senator Grassley sent a letter to the Secretary because he was concerned that the Department appeared "to be sweeping under the rug a history of conflicts and ethical issues among senior officials at the Veterans Benefits Administration." Am. Compl. Ex. A at 1 (Dkt. No. 24-1). Senator Grassley noted that the Executive Director of the Veterans Benefits Administration's Education Service, Charmain Bogue, allegedly failed to recuse herself from VBA activity involving clients of her husband's consulting business. *See id.* at 1–2. Senator Grassley also asked about Ms. Bogue's supervisor, Acting Undersecretary of Benefits Thomas Murphy, who was responsible for ensuring that Ms. Bogue complied with recusal and other ethical requirements. *See id.* at 3–4. Prompted by a series of whistleblower allegations that Mr. Murphy had a history of failing to follow controlling ethical standards, Senator Grassley asked whether

Mr. Murphy ever had been recommended for suspension for accepting prohibited gifts. Senator Grassley requested a response from the Secretary "no later than April 16, 2021." *Id.* at 5.

The Secretary did not respond, so Senator Grassley sent another letter on July 20, 2021, expressing his disappointment. *See* Am. Compl. Ex. C (Dkt. No. 24-3). Senator Grassley included two follow-up questions generated from information that he had received, and he requested that the VA answer these new questions by July 30, 2021. The VA failed to comply with this deadline. *See* Ha Decl. ¶ 87 (Dkt. No. 28-1).

VA OIG. Senator Grassley also sent a letter to the VA Office of the Inspector General, and the Office responded on May 26, 2021. *See* Am. Compl. Ex. B. (Dkt. No. 24-2). OIG explained that it would investigate the allegations related to Ms. Bogue but that it would "not be reviewing the other matters raised in [the Senator's] letter." *Id.* at 1.

II. Empower Oversight's FOIA Request to the VA Secretary

1. Undisputed. *See* Am. Compl. Ex. D (Dkt. No. 24-4).

2. Undisputed to the extent that the VA generally describes its review process.

OSVA's Searches for Documents

3. Undisputed.

4. Disputed in part. To the extent that the VA FOIA Officer selected "20 email boxes" belonging to unnamed employees based on the Officer's "personal knowledge" and "in consultation with [the Office of General Counsel]," Ha Decl. ¶ 18, Empower Oversight disputes that the "email pulls were more than adequate and over-inclusive," *id.* ¶ 17.

5. Undisputed.

6. Disputed in part. Empower Oversight acknowledges that "the VA can search for information and records responsive to [its] FOIA requests" using a VIEWS tracking number. Am. Compl. ¶ 23. But, because "VA employees typically communicate directly through email when preparing Congressional correspondence," Gov. Memo at 6 (¶ 6) (Dkt. No. 24), Empower Oversight disputes that the VA conducted an adequate search merely because it searched for a VIEWS tracking number. VA employees do not necessarily refer to a VIEWS tracking number in

their email communications, and VIEWS itself may contain unique information that is not duplicated in the VA email system, including communication about correspondence, internal tasking deadlines, and related document attachments.

7. Undisputed.

8. Undisputed.

9. Undisputed.

OSVA's Document Releases and Exemptions

10. Undisputed. *See* Am. Compl. ¶ 26.

11. Disputed in part. Empower Oversight acknowledges that the VA issued the second interim agency decision on October 29, 2021. But the VA omits material facts related to the scope its search. The FOIA Officer limited the scope of the agency's search to "20 VA employee mailboxes and the calendars pertaining to Charmain Bogue." Am. Compl. ¶ 28 (quoting Ex. E, at 3 (Dkt. No. 24-5)). And the "key term search was limited to" only one term—"04890714"—i.e., the tracking number assigned to Senator Grassley's request in VIEWS. *Id.* Ex. E, at 4.

12. Undisputed. *See* Am. Compl. ¶¶ 34–37; *id.* Ex. J (Dkt. No. 24-10) (appeal); *id.* Ex. K (Dkt. No. 24-11) (illustrative records).

13. Undisputed. *See* Am. Compl. ¶ 29.

14. Undisputed. *See* Am. Compl. ¶¶ 30–32; *id.* Ex. H (Dkt No. 24-8) (fourth IAD).

15. Undisputed. *See* Am. Compl. ¶¶ 38–41; *id.* Ex. P (Dkt. No. 24-16) (appeal).

16. Undisputed. *See* Am. Compl. ¶ 33; *id.* Ex. I (Dkt No. 24-9) (fifth IAD).

17. Undisputed. *See* Am. Compl. ¶¶ 42–46; *id.* Ex. R (Dkt. No. 24-18) (appeal); *id.* Ex. S. (Dkt. No. 24-19) (agency decision).

OIG's Searches for Documents

18. Undisputed. *See* Am. Compl. ¶¶ 47–48.

19. Undisputed to the extent that the VA describes how the agency misinterpreted Empower Oversight's FOIA request and then self-imposed a limitation on the scope of its search. *See* Am. Compl. ¶¶ 19–21, 49–50; *id.* Ex. M (Dkt. No. 24-13) (appeal refiled here as Exhibit 1).

20. Disputed in part. Empower Oversight acknowledges that OIG confirmed receipt of its request. *See* Am. Compl. ¶ 47. But OIG's letter did not require a response, and it did not notify Empower Oversight of any appeal rights.

21. Disputed in part. To the extent that the agency limited its search to only two "high-level OIG employees" and six search terms/phrases, Gowins-Bellamy Decl. ¶¶ 13, 15, 21, Empower Oversight disputes that there are no other locations "likely to contain responsive records," *id.* ¶ 15 (Dkt. No. 27-1). Empower Oversight also disputes that any responsive communications necessarily "would be limited to high-level OIG employees." *Id.* ¶ 13.

22. Undisputed, as the VA characterizes its own searches.

OIG's Document Releases and Exemptions

23. Undisputed. *See* Am. Compl. ¶ 49.

24. Undisputed. *See* Am. Compl. ¶ 51; *id.* Ex. M (refiled here as Exhibit 1); *id.* Ex. N (Dkt. No. 24-14) (agency decision).

25. Undisputed, as the VA now concedes that it "self-imposed" a limitation on the scope of its search, *Miccosukee Tribe of Indians of Florida*, 516 F.3d at 1253, by excluding "the OIG investigator's email account" from its search, Gowins-Bellamy Decl. ¶ 31.

26. Disputed in part. Empower Oversight does not dispute that the VA found 103 additional pages of responsive records after this litigation began. Yet, when it released those records on August 11, 2022, OIG did not explain how or why it had not produced these records based on its earlier searches. Nor did OIG explain the parameters of any subsequent searches that led to the production of those records. OIG stated only that the agency had redacted portions of the records under FOIA Exemptions 5 and 6. Moreover, Empower Oversight disputes the agency's assertion that "OIG has provided all non-exempt information that could be segregated from exempt information." Gowins-Bellamy Decl. ¶ 33.

III. Empower Oversight's Statement of Undisputed Facts

1. More than three months passed between the VA advising Empower Oversight on January 11, 2022, that, in connection with its fourth interim agency decision, the FOIA Officer

had "finished conduct[ing] the next key term search" and that she had "moved the records over to the review log" for potential release, Am. Comp. Ex. F (Dkt. No. 24-6), and the Department's eventual production of responsive, non-exempt records on April 13, 2022, *id.* Ex. H.

2. Empower Oversight appealed the VA's second interim agency decision on January 24, 2022. Ha Decl. ¶ 66. FOIA required the VA to make its determination with respect to this appeal within 20 working days—i.e., by February 21, 2022. The VA admits that it issued its decision nearly two months later on April 18, 2022. Ha Decl. ¶ 67.

3. In denying Empower Oversight's OIG appeal, an agency lawyer claimed that he had "reviewed the FOIA file for the search conducted by VA OIG staff, as well as the records produced in response to" the request. Am. Compl. Ex. N at 3. The lawyer determined "that the FOIA staff reasonably interpreted the referred portions of" the request and that the FOIA staff had "conducted an adequate search." *Id.* Yet he also conceded that the FOIA staff "did not search the working files of the open investigation" into Ms. Bogue. *Id.* The VA offered no explanation as to how the agency's search could be reasonable given the self-imposed limitation on the scope of its search. Nor did the agency claim that the records included in the investigative file—that the FOIA staff admittedly excluded from its search—were eligible for withholding under one or more FOIA exemptions.

4. As to the second claim in Empower Oversight's OIG appeal, the agency lawyer determined that OIG "properly withheld" portions of redacted records under Exemptions 5 and 6. Am. Compl. Ex. N at 2. The agency did not address Empower Oversight's argument concerning whether any of the redacted portions of those records were in fact segregable from other exempt portions. Nor did the agency identify—let alone balance—the asserted privacy interests protected by the redacted information against the public interest in disclosure.

IV. Procedural History

Just a few days before the VA moved for summary judgment, the agency "re-released" certain documents, including updated versions of OIG records that removed redactions previously challenged by Empower Oversight. Gov. Memo at 11 n.2. For example, in its OIG appeal,

Empower Oversight had argued that the VA improperly redacted purely factual information, including "Document ID" numbers and the titles of certain "Attachments," under Exemption 5. Am. Compl. Ex. M at 15 (Dkt. No. 24-13) (refiled here as Exhibit 1). Empower Oversight correctly explained that this information was "factual data which is not protected by the deliberative process privilege." *Id.* As explained above, however, the agency previously rejected this argument in denying the OIG appeal in December 2021. The VA now claims that the re-released records correct "minor discrepancies regarding certain redactions." Gov. Memo at 11 n.2. Those discrepancies relate directly to arguments raised by Empower Oversight in this litigation.

The corrected "minor discrepancies" also include the removal of redactions that the VA previously made under Exemption 6. In its OIG appeal, Empower Oversight argued that the VA improperly had redacted the names of government officials, email addresses, and certain passages of text. Am. Compl. Ex. M at 17 (Dkt. No. 24-13) (refiled here as Exhibit 1). Although the VA previously rejected this argument, it apparently reconsidered its position because the agency removed many of those redactions. *See* Exhibit 2 (attached here) (adding yellow highlights to show the redactions that the VA removed).

LEGAL STANDARD

This Court may grant summary judgment only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(A). A fact is "material" if a dispute over it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court must view the evidence in the light most favorable to Empower Oversight as the nonmovant, drawing all reasonable inferences in its favor. *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 645 (4th Cir. 2002).

At summary judgment in a FOIA case, the "burden is on the agency to demonstrate that it made a 'good faith effort to conduct a search . . . using methods which can be reasonably expected to produce the information requested.'" *DiBacco v. Army*, 795 F.3d 178, 188 (D.C. Cir. 2015)

(quoting *Oglesby*, 920 F.2d at 68). Courts must deny summary judgment "if a review of the record raises substantial doubt, particularly in view of well defined requests and positive indications of overlooked materials." *Id.* (quoting *Valencia-Lucena*, 180 F.3d at 326). Adequacy depends on the "appropriateness of the methods used" by the agency to conduct its search, not on the "fruits of the search." *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003).

FOIA also "places the burden on the government agency to sustain its action to withhold information under any of the FOIA Exemptions." *Wickwire Gavin, P.C. v. U.S. Postal Serv.*, 356 F.3d 588, 591 (4th Cir. 2004) (citing 5 U.S.C. § 552(a)(4)(B)). This Court must determine as a matter of law whether the agency properly applied "FOIA's prescribed exemptions." *Id.* In doing so, the Court must construe the statutory exemptions narrowly "in favor of disclosure." *JP Stevens & Co., Inc. v. Perry*, 710 F.2d 136, 139 (4th Cir. 1983) (citing *Rose*, 425 U.S. at 360–61).

ARGUMENT

I. The VA failed to comply with the 20-day statutory deadline for administrative appeals.

In a run-of-the-mill case in which an agency has not promptly acted on a FOIA request, the "statute offers a clear and simple remedy for agency non-compliance with the FOIA deadlines: a motion asking the court to compel the agency to act on the FOIA request." *Edmonds Inst. v. DOI*, 383 F. Supp. 2d 105, 111 (D.D.C. 2005). This Court indeed "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." 5 U.S.C. § 552(a)(4)(B). The VA misreads this provision to suggest that "judicial relief in FOIA cases is *limited*" only to an order requiring the agency to produce documents after it has failed to comply with the statutory deadlines. Gov. Memo at 13 (emphasis added). Yet "Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773 (1979).

FOIA imposes certain timeliness requirements. An agency, for instance, must make responsive records "promptly available" to a requesting party. 5 U.S.C. § 552(a)(3)(A). FOIA also requires all federal agencies —including the VA—"to make a determination with respect to any appeal within *twenty days* (excepting Saturdays, Sundays, and legal public holidays) after the

receipt of such appeal." *Id.* § 552(a)(6)(A)(ii) (emphasis added). The VA admits that it did not comply with that deadline. Empower Oversight appealed the second interim agency decision on January 24, 2022, and the VA did not make a determination with respect to the appeal until April 18, 2022. *See* Ha Decl. ¶¶ 66–67. More than twenty working days elapsed in that time.

Now, the VA insists that the 20-day statutory deadline for appeals is irrelevant. The VA suggests that "once all requested records are surrendered, federal courts have no further statutory function to perform." Gov. Memo 13 (quoting *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982)). But the VA misinterprets this precedent and mischaracterizes Empower Oversight's position. Context matters.

When a litigant argues that an agency has "failed to meet FOIA's mandated standards of *promptness*" in releasing responsive records, there is no further judicial function for the court to perform after the agency subsequently has "released *all* nonexempt materials." *Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987) (applying *Perry v. Block*) (emphasis added). In that situation, it makes sense that a Section 552(a)(3)(A) promptness claim no longer presents a live controversy as there are no outstanding responsive records for the agency to release. The plaintiff's "challenge to a particular denial of a FOIA request becomes moot if an agency produces the requested documents." *Reg'l Mgmt. Corp. v. Legal Servs. Corp.*, 186 F.3d 457, 465 (4th Cir. 1999).[1]

Here, the situation is different, and the Court should not condone the VA's attempt to gloss over the unique circumstances of this case. Empower Oversight does not agree that the VA has released *all* nonexempt materials. *See* Gov. Memo at 13. Indeed, Empower Oversight continues to seek additional responsive records because the VA failed to conduct an adequate search (Count III) and because the VA continues to improperly withhold redacted information (Count IV). There is still a live controversy, as Empower Oversight seeks a "response to its FOIA

[1] Under Count I, Empower Oversight alleged that the VA's production of responsive records in the fourth interim agency decision was not "prompt." Am. Compl. ¶ 79. Yet Empower Oversight also alleged that the VA failed to promptly provide "segregable portions of records not subject to a FOIA exemption." *Id.* ¶ 76. That claim is still live because the VA has not yet released segregable portions of those records.

requests beyond what it already has received." *Cornucopia Inst. v. USDA*, 560 F.3d 673, 676 (7th Cir. 2009). This Court has a judicial function to perform because the VA has not surrendered "all requested records." *Perry v. Block*, 684 F.2d at 125. The case is not moot.

In any event, Empower Oversight properly requested that the Court declare that the VA failed to issue a timely decision on Empower Oversight's *administrative appeal*, and Empower Oversight properly asked the Court to consider awarding reasonable fees and costs as one form of relief. *See* Am. Compl. at 29. Congress "says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). The Court must "give effect, if possible, to every clause and word" that Congress used in the statute. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted). In a FOIA lawsuit, the Court "may assess" against the VA "reasonable attorney fees and other litigation costs," 5 U.S.C. § 552(a)(4)(E)(i), "where doing so will encourage fulfillment of the purposes of FOIA," *Nix v. United States*, 572 F.2d 998, 1007 (4th Cir. 1978).

"Congress adopted the time limit provision in the FOIA 'in order to contribute to the fuller and faster release of information, which is the basic objective of the Act.'" *Oglesby*, 920 F.2d at 64 n.8 (quoting H.R. Rep. No. 876, 93rd Cong., 2d Sess. (1974)). Congress did not impose a 20-day deadline for the agency to render a determination on a pending administrative appeal with injunctive meddling in mind. To be sure, Congress "did not mean for the court to take over the agency's decisionmaking role in midstream or to interrupt the agency's appeal process when the agency has already invested time, resources, and expertise into the effort of responding." *Id.* at 64.

By its plain terms, FOIA contemplates relief that extends beyond "ordering the production of documents" after an agency has failed to comply with certain statutory deadlines. Gov. Memo at 13. When an agency has failed to comply with the 20-day deadline for administrative appeals—as is the case here—the Court may acknowledge that failure, and it may award fees and costs when doing so will encourage fulfillment of the purposes of FOIA.

From "the very beginning" of this case, Empower Oversight has sought "declaratory relief as well as an injunction." *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 121 (1974); *see*

also Compl. (Dkt. No. 1) (relief requested); Am. Compl. (Dkt. No. 24) (relief requested). This Court therefore may order the VA to conduct additional searches or to produce additional unredacted records, while, at the same time, the Court also may declare that the VA failed to comply with FOIA's statutory deadline for deciding the appeal of the second interim agency decision. Granting such relief in these circumstances would not amount to an impermissible "advisory opinion in contravention of Article III of the Constitution." *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988). The VA errs in suggesting otherwise.

What "makes a declaratory judgment action a proper judicial resolution of a case or controversy rather than an advisory opinion is the settling of some dispute which affects the behavior of *the defendant toward the plaintiff*." *Jordan v. Sosa*, 654 F.3d 1012, 1025 (10th Cir. 2011) (quoting *Rio Grande Silvery Minnow*, 601 F.3d 1096, 1109–10 (10th Cir. 2010)) (court's emphasis). The action for declaratory relief is not moot. Empower Oversight seeks "more than a retrospective" decision from this Court stating that the VA failed to comply with the statutory deadline. *Id.* Empower Oversight properly seeks to affect the VA's future behavior. *Id.* This Court's "declaration of rights" should alter the agency's "future conduct." *Id.* at 1026. Consistent with its mission, Empower Oversight continues to submit FOIA requests designed to educate the public and to enhance independent oversight of the VA through transparency.[2] In adjudicating those requests, the VA must adhere to the statutory deadlines that Congress imposed.

II. The VA failed to conduct searches reasonably calculated to locate responsive records.

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. *See, e.g.*, *Larson v. Dep't of State*, 565 F.3d 857, 869 (D.C. Cir. 2009). An adequate search requires both an understanding of the nature and the scope of Empower Oversight's request as well as knowledge of where responsive information may be stored within the agency. The VA "has the burden of establishing the adequacy of its search." *Heily v. U.S. Dep't of Commerce*, 69 Fed. App'x 171, 173 (4th Cir. 2003)

[2] *See* Mission Statement, https://empowr.us/mission/.

(citing *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994)). And in deciding whether the VA has satisfied its burden, this Court "must consider everything in the light most favorable to the nonmoving party"—i.e., Empower Oversight. *Id.*

To fulfill its statutory obligations under FOIA, the VA points out that the agency does not need to design the "perfect search" that will "uncover all relevant documents." Gov. Memo 14 (quoting *Rein*, 553 F.3d at 362). Empower Oversight never has suggested otherwise. Undoubtably, courts tend to afford agencies some leeway in crafting their initial search for responsive records. An agency, for example, "is not required to speculate about potential leads." *Kowalczyk*, 73 F.3d at 389. Nor is the agency "obliged to look beyond the four corners of the request for leads to the location of responsive documents." *Id.* But that does not mean that an agency "may *ignore* what it cannot help but know." *Id.* (emphasis added).

Empower Oversight fulfilled its responsibility to frame its request with sufficient particularity. *Light v. DOJ*, 968 F. Supp. 2d 11, 24 (D.D.C. 2013). This Court therefore must evaluate the VA's search "in light of the request made." *Id.* The Court should conclude, after reviewing the totality of the circumstances, that the VA has not "demonstrated that it has conducted a search reasonably calculated to uncover all relevant documents." *Ethyl Corp.*, 25 F.3d at 1246. No agency may ignore an obvious lead to other responsive records—the agency instead must pursue the lead. *Halpern*, 181 F.3d at 288. Moreover, the agency "*must revise* its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry." *Campbell*, 164 F.3d at 28 (emphasis added). Neither the Secretary nor OIG did that here.

A. Office of the Secretary

The VA confined the scope of its search for responsive records to: the email accounts for the VA Secretary, the Chief of Staff, and twenty unnamed VA employees; the electronic personnel file of Thomas Murphy; and calendars "pertaining" to Ms. Bogue. *See, e.g.*, Am. Compl. Ex. I at 3–5. There is no evidence that the VA followed any leads to expand its search to include other filing systems and/or record custodians before Empower Oversight administratively appealed the

fifth interim agency decision in July 2022. Nor has the agency suggested otherwise in the declarations that it has filed here.

The agency claims that "OSVA FOIA staff" reviewed "each document" from the search "by doing a line-by-line and page-by-page review" to determine whether each document is responsive. Ha Decl. ¶ 6. When an agency conducts such a detailed review, common sense suggests that it would be nearly impossible for the staff *not* to identify potential leads from references to unproduced records, unsearched filing systems, and potential custodians. A careful review of the documents produced in this case demonstrates that the Office of the Secretary failed to account for leads that emerged during its searches and that the Office failed to revise its search parameters. *Campbell*, 164 F.3d at 28. Consider two examples.

First, as part of the second interim agency decision, the VA produced an email sent on May 18, 2021 (Bates 001802 – 001803) by an Executive Writer in the Office of the Executive Secretary, whose name is redacted purportedly under Exemption 6. Exhibit 3 (attached). The Executive Writer sent this email to ten or more VA staffers (redactions of names and email addresses on the email make a definitive count nearly impossible) requesting "OGC, OCLA, and OAWP final approval of the proposed responses" to Senator Grassley's April letter. *Id.* The email includes several attachments as well as a "link below that will take you to the 578 pages of releasable records requested under questions 4 and 8 (You are receiving a link to these documents because the file is too large to send via email attachment)." *Id.* It appears that the phrase "releasable documents" refers to public documents or to documents that had been processed by the VA in response to an earlier FOIA request. And, under "Question 4," Senator Grassley sought "all records, communications, and memorandums related to the suspensions, or proposed suspensions, of Tom Murphy, Jamie Manker, and Robert Reynolds." Am. Compl. Ex. A at 4.

The VA withheld in full records stamped Bates 001793 – 001801, which it described as attachments to Bates 001747 (a duplicate of Bates 001802 – 001803).[3] But the agency did not

[3] The VA describes Bates 001793 – 001801 as copies of the "Transmittal Letter" and "DRAFT Enclosure" for final approval. OSVA Vaughn Index at 35 (Dkt. No. 28-3).

withhold an email (Bates 001792) from Carrie McVicker sent on May 19, 2021, to an individual whose name is redacted purportedly under Exemption 6. Exhibit 3 (attached here). The subject line states, "can you send me updated Grassley package," and the message asks, "Without the big FOIA file? Gina wants to show the COS today. COS is out next two days." *Id.*

Second, as part of the fifth interim agency decision, the VA produced an email sent on April 6, 2021 (Bates 003427 – 003428) by a Staff Attorney in the Office of the General Counsel to another redacted recipient in the Office. Exhibit 3 (attached here). The Staff Attorney explained that the Office was still "waiting to hear from OCLA" as to the scope of Senator Grassley's Question 4 "and whether to include everything related to NASCAR attendance." *Id.* The Staff Attorney "already pulled the documents," flagging one "specific folder" that "related to the suspensions." *Id.* It thus appears that the agency discovered an *entire folder* of responsive disciplinary records related to high-level VA officials who allegedly accepted prohibited gifts (i.e., free attendance at events) from NASCAR. The Staff Attorney suggested that the folder was part of the VA's response to an earlier FOIA request and that the folder was so large that the attorney was "not sure how we send this information." *Id.*

Although the VA produced these email messages, the agency failed to advise Empower Oversight that it had searched for responsive records in files that it either collected or produced in response to earlier FOIA requests. Nor does it appear that the agency revised "its assessment of what is 'reasonable'" for the search to account for obvious leads in these email messages to responsive records. *Campbell*, 164 F.3d at 28.

Empower Oversight does not assert that there is—or advocate that there should be—a bright-line blanket rule requiring all agencies to search through their prior FOIA files to conduct a reasonable search. That is not the law. Instead, the reasonableness of an agency's search depends on *the totality of the circumstances* for each unique case. Here, the VA stated that it had performed a line-by-line, page-by-page review of all the records that it produced. In these circumstances, the agency should have followed obvious leads from those documents to search for other responsive records and to revise its search parameters. But the VA did not do that.

Somewhat related, it appears that the VA did not conduct a search of its VIEWS system until after Empower Oversight had appealed the fifth interim agency decision. "On August 15, 2022," the VA granted Empower Oversight's appeal in part, and the agency produced an additional "fifty-seven (57) pages of VIEWS records." Ha Decl. ¶ 73. By then, however, the VA already knew that the VIEWS system included information potentially responsive to Empower Oversight's request. In connection with the second interim agency decision, Empower Oversight successfully challenged redactions purportedly made under 5 U.S.C. § 552(b)(7)(E) for paths/links to records on VIEWS—they were included in emails produced by the agency. Those "leads" apparently were ignored after the appeal. Even assuming that the FOIA Officer mistakenly overlooked the VIEWS system in crafting the agency's original search plan, Empower Oversight's appeal should have alerted the agency that it needed to revise its search plan. Yet it did no such thing.

From the first interim agency decision through to the fifth interim agency decision, the VA steadfastly conducted searches with a self-imposed limitation—the agency searched only 20 email accounts belonging to unnamed agency employees (in addition to the Secretary and his Chief of Staff). *See, e.g.*, Ha Decl. ¶ 17. The VA never identified the 20 unnamed individuals whose mailboxes it searched, and the agency continued to redact the names of all VA personnel below the level of Senior Executive Service in the records that it produced to Empower Oversight. *Id.* ¶ 96. Consequently, Empower Oversight had no way of knowing whether the scope of the search remained reasonable. Obvious leads in the records suggest that it was not. In these circumstances, it appears that other employees may have possessed responsive records and that the agency ignored obvious leads to those records. FOIA Officer Ha has not explained how the self-imposed limitation—i.e., only searching email accounts for 20 unnamed individuals—includes all the mailboxes of employees familiar with and responsible for the VA's responses to Senator Grassley's letters.

B. Office of the Inspector General

Like the Secretary, OIG also stated that its FOIA staff reviewed each one of the 4,781 records "*individually* to determine if they were responsive" to Empower Oversight's request.

Gowins-Bellamy Decl. ¶ 22 (emphasis added). Again, common sense suggests that it would be nearly impossible for the staff *not* to identify potential leads as it conducts such a detailed review.

By letter dated August 23, 2021, OIG acknowledged receipt of Empower Oversight's FOIA request and stated, "We will be reviewing number 2 of your request as it is listed above." *Id.*, Ex. 7. OIG did not characterize the letter as a final agency action, nor did it notify Empower Oversight of its appeal rights, nor in any way suggest that Empower Oversight needed to object to any details in the letter to somehow exhaust its administrative remedies.

A month later, on September 29, 2021, OIG sent a second letter, which it described as a "response to" Empower Oversight's FOIA request. Gowins-Bellany Decl., Ex. 11, at 1. The letter identified the first two items from the request—i.e., (1) 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; and (2) communications between OIG and Department employees regarding to the investigation of Ms. Bogue. *Id.* With the letter, OIG "enclosed redacted copies of the discussion *pertaining to item 1 and 2*." *Id.* (emphasis added).

Government counsel now asserts that "item 1 of the Request does not apply to any records generated by OIG." Gov. Memo at 18 (citing Gowins-Bellamy's Decl. ¶ 10). But that assertion contradicts what the agency previously stated (and in fact acted upon). In the letter dated September 29, 2021, OIG stated: "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*"—an unmistakable reference to the first item of Empower Oversight's FOIA request—"since it has already been published on the Senator's website." Gowins-Bellany Decl., Ex. 11, at 2. In its letter, OIG even provided a link to the website with an "unredacted copy." *Id.*

The letter properly notified Empower Oversight of its administrative appeal rights, and Empower Oversight took advantage of that opportunity. But Empower Oversight never appealed the OIG's failure to search for records responsive to the first item of its FOIA request because it had no reason to do so. The September 29, 2021, letter plainly stated that OIG was *responding to* the first item of the request and that, although OIG had not enclosed responsive records with the

letter, it told Empower Oversight exactly where it could find them. The government's litigation position makes no sense.

Nor does the post hoc explanation found in Ms. Gowins-Bellany's declaration. Paragraphs 9–10 and 21–22 demonstrate a clear issue of disputed material fact—i.e., whether OIG searched for records responsive to the first item of Empower Oversight's FOIA request. Either way, OIG undisputedly searched for records responsive to the second item. The "searches returned 4,781 pages of records." Gowins-Bellany Decl. ¶ 21. And within those records, there are obvious leads suggesting that OIG needed to refine its search to include the first item of Empower Oversight's FOIA request.

Records stamped Bates 002794, 002805 – 2808, and 2812 – 2815, which the VA produced to Empower Oversight as part of its fourth interim agency decision, are April 7 and 8, 2021, emails to/from/or copied to VA's Inspector General from/to VA employees, and these email messages discuss both Senator Grassley's April letter and ethical violations or misconduct in VA's "Veterans Benefit Administration" or "VBA." The term "VBA" is included among the search terms that the VA used in its search, according to Ms. Gowins-Bellany (Decl. ¶¶ 15, 21).

More importantly—if OIG indeed had failed to search for records related to the first item of the request—Empower Oversight was prevented from challenging OIG's failure. As stated above, a plain and reasonable interpretation of Ms. Gowins-Bellany's September 29, 2021, letter is that OIG searched for records "in response" to the first item of Empower Oversight's FOIA request.

Although it may have been reasonable for OIG to initially limit its search to the Inspector General's and the Congressional Liaison Officer's (Catherine Gromek's) mailboxes, the 16 pages that OIG produced in connection with its October 31, 2022, "re-release" identify five other staffers (Roy Fredrikson, David Johnson, Jamie Mitchell, Katherine Smith, and Chris Wilber) who participated in activities covered by the second item of Empower Oversight's FOIA request. *See* Exhibit 2 (unredacted names highlighted in yellow) (attached here). These "re-released" unredacted records reveal that other staffers may have had responsive records that were not shared

with the Inspector General and the Congressional Liaison Officer (i.e., the staffers could have communicated among themselves on the topic without copying either the Inspector General or the Congressional Liaison Officer),[4] and, so, OIG should have adjusted its search plan to account for what it learned from its careful review of "the 4,781 records individually." Gowins-Bellamy Decl. ¶ 22. If OIG actually had modified its plan to search the mailboxes of these individuals, then Ms. Gowins-Bellany has omitted that information from her declaration.

Additionally, in its December 16, 2021, appeal of OIG's search for records responsive to its FOIA request, Empower Oversight pointed out that, although the second item of its request relates to communications between OIG and VA personnel about Ms. Bogue's compliance with applicable conflict-of-interest provisions, the 16 pages of records that OIG produced did not include communications with VA personnel. *See* Exhibit 3 (attached here). Empower Oversight observed: "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 for briefings, etc." Am. Compl. Ex. M at 10–11 (attached as Exhibit 1 here). Nevertheless, in response to this observation, the OIG reviewing attorney concluded that "the FOIA staff conducted a reasonable search, including a search of OIG email." *Id.* Ex. N at 3. Even though, as discussed above, "the FOIA staff did not search the working files of the open investigation." *Id.*

In other words, the OIG attorney conceded that OIG had failed to search for responsive records in files of an investigation that unmistakably was within the scope of Empower Oversight's FOIA request—actually, it was the center of the second item of Empower Oversight's FOIA request—but the OIG attorney nonetheless concluded that this omission was not fatal to the reasonableness of OIG's search. *Id.* Further, the OIG attorney did not advise Empower Oversight

[4] For example, the VA produced an April 8, 2021, email from Carrie McVicker to Chris Wilber to "check with" him, asking whether "OIG had received any documents" related to the topics included in the Senator Grassley's letter. Exhibit 3 (Bates 002790 – 002791). The email did not copy the Inspector General or the Congressional Liaison Officer, and OIG did not produce it to Empower Oversight.

that OIG had remedied the omission from its search, e.g., by searching the files of the investigation for responsive records or, otherwise, claiming that the investigation file is subject to one of the statutory exemptions.

Six months later, in what Ms. Gowin-Bellany describes as "the spirit of cooperation during litigation and in light of the completion of the OIG investigation," it appears that OIG finally reviewed the investigative file for responsive records. Gowins-Bellamy Decl. ¶ 31. And on August 11, 2022, it produced to Empower Oversight the precise types of responsive, non-exempt records that Empower Oversight identified in its administrative appeal, in which Empower Oversight had expressly noted that these records were conspicuously missing from OIG's original production (e.g., communications notifying the parent agency of the existence of the administrative investigation, requesting records, scheduling interviews, requesting and responding to requests for briefings). *See id.* ¶ 33. An agency, through its inaction and failure to abide by its statutory obligations, should not be countenanced to compel a requester to seek judicial review to enforce its rights to access agency information under FOIA.

In sum, this Court should not grant judgment to the VA in these circumstances. The agency has failed to demonstrate that it conducted searches reasonably calculated to lead to responsive records.

III. The VA failed to carry its burden of demonstrating that it properly withheld information under FOIA exemptions.

This Court should conclude as a matter of law that the VA failed to comply with FOIA in redacting certain information. The agency has not satisfied its burden to sustain withholding all the information that it withheld under Exemptions 5 and 6.

A. The VA improperly withheld information under 5 U.S.C. § 552(b)(5).

Courts generally have construed Exemption 5 as allowing an agency to withhold information from documents, or portions of documents, that normally would be "privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The "clear thrust" of Exemption 5 "is simply to ensure that FOIA does not deprive the government of the

work-product and attorney-client protections otherwise available to it in litigation." *Hunton & Williams v. DOJ*, 590 F.3d 272, 278 (4th Cir. 2010). To qualify for this exemption, a document must "satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it," such as the attorney-client, deliberative process, or attorney work product privileges. *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

The purpose of the deliberative process privilege "is to prevent injury to the quality of agency decisions." *Sears*, 421 U.S. at 151. "In deciding whether a document should be protected by the privilege," courts typically consider whether the document is "predecisional"—i.e., "it was generated before the adoption of an agency policy"—and whether the document is "deliberative"—i.e., "it reflects the give-and-take of the consultative process." *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 866 (D.C. Cir. 1980). In this case, the VA heavily relied on Exemption 5 to redact information that it deemed to fall within the deliberative process privilege. Yet the agency has not carried its burden to demonstrate that its extensive redactions were proper under FOIA. No court should accept the redaction of scores of full paragraphs of responsive text when the statute requires agencies to "take reasonable steps necessary to segregate and release nonexempt information." 5 U.S.C. § 552(a)(8)(A)(ii)(II).

1. Office of the Secretary

Because "all the records in question were created *before* OSVA responded to Senator Grassley's letter on December 23, 2021," the VA insists that *everything* in those records is "predecisional" and therefore subject to withholding under Exemption 5. Gov. Memo at 23 (emphasis added). The VA suggests that Empower Oversight has misinterpreted "the deliberative process exemption" in seeking the release of "segregated factual information." *Id.* But the VA has it exactly backwards.

"Purely factual material usually *cannot be withheld* under Exemption 5 unless it reflects an 'exercise of discretion and judgment calls.'" *Ancient Coin Collectors Guild v. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011) (quoting *Mapother v. DOJ*, 3 F.3d 1533, 1539 (D.C. Cir. 1993))

(emphasis added). The "legitimacy" of an agency's withholding of purely factual information under Exemption 5 thus turns "on whether the selection or organization of facts is part of an agency's deliberative process." *Id.* (citing *Montrose Chemical Corp. of Cal. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974)).

The VA argues that the "process of collecting and organizing information and deciding how to present a response containing facts is *inherently deliberative*." Gov. Memo at 23 (emphasis added). But that argument goes too far. More than forty years ago, the Department of Justice similarly argued that it could withhold the entirety of a report under the deliberative process privilege of Exemption 5 because "the very narration of the facts" in the report reflected "evidence selected and credited" by the Department. *Playboy Enterprises v. DOJ*, 677 F.2d 931, 935 (D.C. Cir. 1982) (quoting the government's brief). The D.C. Circuit correctly rejected that argument, and this Court should too. The entirety of a "report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material." *Id.* "If this were not so, every factual report would be protected as a part of the deliberative process." *Id.* That is not the law.

To comply with FOIA, the VA *must provide* Empower Oversight any reasonably segregable factual portions of responsive records. *Carter*, 601 F. Supp. 2d at 744. That is because the statute focuses on "*information*, not documents." *City of Va. Beach v. Dep't of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993) (quoting *Mead Data Central, Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)) (emphasis added). And, contrary to the VA's argument, the "draft" label is not dispositive. *U.S. Fish & Wildlife Service v. Sierra Club*, 141 S. Ct. 777, 786 (2021). Purely factual material does not fall within Exemption 5 "unless it is 'inextricably intertwined with policymaking processes' such that revelation of the factual material would simultaneously expose protected deliberation." *City of Va. Beach*, 995 F.2d at 1253 (quoting *Mink*, 410 U.S. at 92).

The VA has not satisfied its burden of demonstrating that factual information cannot be segregated from the responsive records that it has redacted under the deliberative process privilege

of Exemption 5. Most of Senator Grassley's questions require only a factual "yes" or "no" response, including, for example:

> **Question 1**: Has Acting Undersecretary Tom Murphy ever been recommended for suspension for accepting gifts as prohibited by law?
>
> **Question 2**: Had former Deputy Undersecretary Robert Reynolds ever been recommended for suspension for accepting gifts as prohibited by law?
>
> **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)?

Am. Compl. Ex. A at 4–5.

Given the nature of these straightforward factual questions, a VA Executive Writer circulated a template for the agency to use in responding to Senator Grassley. *See* Exhibit 3 (Bates 001855 – 01864) (attached here). The template includes a two-page cover letter with a seven-page enclosure. The enclosure recites the text of each of the questions posed by Senator Grassley—several of which have subparts—and below each recited question there is a "VA Response." Most of the responses should contain purely *factual information*. 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'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. There is no room for opinions, recommendations, or proposed solutions concerning these and other questions from Senator Grassely. Nor has the VA

demonstrated that factual yes-or-no answers to his questions are "inextricably intertwined" with agency policymaking or deliberation. *Mink*, 410 U.S. at 92.

Several records suggest that the redacted content includes purely factual information that the agency should have segregated. For example:

- An Executive Writer emailed an unknown recipient after getting "off the phone with OGC and OAWP." Exhibit 3 (Bates 000924). In response, the unknown recipient thanked the Writer for the "good info," *id.* (Bates 000923), all of which is redacted under Exemption 5.

- On April 9, 2021, Ruthann Parise wrote that she had "reviewed the asks that begin on page 4" and reported what she found. Exhibit 3 (Bates 001110 – 001111). The VA entirely redacted information even though it pertained to "ownership of potential records." *Id.* (Bates 001110).

- That same day, April 9, 2021, Ms. Parise emailed Carrie McVicker to explain that she had completed "a search by requests in FOIAXpress" and that she found certain information, all of which the VA redacted. Exhibit 3 (Bates 001143). The agency did not disclose any factual information related to those requests.

- In an email with the subject line "RE: 2021-04-CEG to VA" (appearing to refer to Senator Grassley's letter), there is a large text block that is completely redacted purportedly under Exemption b(5), even though the author was providing a "current status" report. Exhibit 3 (Bates 002657). The "current status" appears to be factual. A summary of progress is not deliberative material.

- An OGC employee emailed Ms. Parise "IALG's language for inclusion in the response to the letter to Senator Grassley regarding the Pomeras litigation/Aguirre FOIA appeals." Exhibit 3 (Bates 003047 – 003049). But the VA redacted the information in its entirety. Later, the OGC employee "realized that it says the appeals will be done by the end of March," and the employee asked to "change that to April." *Id.* The timing of the FOIA is not an opinion or a recommendation, it is a fact. It appears, however, that the VA entirely redacted this factual information.

- An Executive Writer emailed an unknown employee quoting the text of Senator Grassley's Question 5 and Question 5a. Exhibit 3 (Bates 003144 – 003145). The VA entirely redacted the responses, even though the questions relate to the agency's precautions to protect investors by safeguarding non-public information about future enforcement actions, which is factual information. Senator Grassley did not ask the VA to provide an opinion. He sought facts. It appears that the redacted responses are either non-responsive to the Senator's questions, or they include segregable factual content that is not subject to redaction under Exemption 5.

All told, the VA withheld in full or in part under Exemption 5 "four hundred forty-eight (448) pages" of responsive records released with its second interim agency decision and an additional "seven hundred and seventeen (717) pages" released with its fourth interim agency decision. Ha Decl. ¶ 97. Mr. Ha declared that he personally reviewed the redacted or withheld "records to determine whether any facts contained in those records could be segregated for public disclosure." *Id.* Based on his careful page-by-page, line-by-line review, he determined that it was not possible to do so because "the protected material is so inextricably intertwined with *any disclosable information* that it cannot be meaningfully segregated for release without destroying the integrity of the document." *Id.* (emphasis added).

This Court should not "blindly accept" such a "conclusory assurance" that the VA in fact "has taken reasonable steps to segregate information" because the record in this case suggests otherwise. *Project Democracy Project, Inc. v. Dep't of Health & Human Services*, 569 F. Supp. 3d 25, 36 (D.D.C. 2021). Neither the *Vaughn* index nor any declaration submitted here provides sufficient details to "permit the Court to meaningfully assess whether further segregability is possible" under its de novo review. *Id.* This Court should reject the VA's counterarguments.

2. Office of the Inspector General

OIG's conclusory assurances fare no better. Ms. Gowins-Bellamy simply states (at Decl. ¶ 33) that "OIG has provided all non-exempt information that could be segregated from exempt information." And she adds that, under Exemption 5, "OIG withheld one paragraph within the 103 pages of records that contains discussion of items possibly relevant to an ongoing and open

investigation." *Id.* That is not enough for the VA to satisfy its burden. *See Project Democracy*, 569 F. Supp. 3d at 36.

Instead of explaining how the agency complied with FOIA, the VA dismisses Empower Oversight's concern as nothing more than naked "speculation." Gov. Memo at 25. The record belies this assertion. In December 2021, Empower Oversight administratively appealed OIG's initial determination. *See* Am. Compl. Ex. M (attached here as Exhibit 1). Empower Oversight properly explained that FOIA requires the VA to release "segregable portions" of responsive records. *Id.* at 15. In particular, Empower Oversight challenged "six consecutive paragraphs" that the VA redacted in their entirely three times in the records that it produced. *Id.* at 16 (referring to pages 1–2, 5–6, and 7–8 of Exhibit 2, which is attached here). Empower Oversight asked OIG to review those redactions to confirm that the agency could not reasonably segregate purely factual information contained in those paragraphs. *See id.* OIG summarily denied the appeal.

Then, just days before it moved for summary judgment, the VA "re-released" OIG documents with certain "redactions lifted." Gov. Memo. at 11 n.2. It appears that the VA recognized that it had not complied with FOIA to "segregate and release nonexempt information," 5 U.S.C. § 552(a)(8)(A)(ii)(II), because the agency removed redactions that it previously had applied under Exemption 5 to purely factual information—e.g., "Document ID" numbers and the titles of certain "Attachments." *See* Exhibit 2 (changes highlighted in yellow). Yet the VA did not re-release any information in the six consecutive paragraphs that Empower Oversight previously challenged and continues to challenge here. This Court should view those redactions with skepticism.

B. The VA improperly withheld information under 5 U.S.C. § 552(b)(6).

Exemption 6 allows an agency to withhold "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). In balancing individual privacy interests and public disclosure interests, courts first must determine "whether disclosure of the files 'would compromise a substantial, as opposed to de minimis, privacy interest.'" *MultiAg Media LLC v. USDA*, 515 F.3d 1224, 1229

(D.C. Cir. 2008) (quoting *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C.Cir. 1989)). If no *significant* privacy interest is implicated, "FOIA demands disclosure." *Id.*

The VA argues that both the Office of the Secretary and OIG properly applied "Exemption 6 to protect the names and job titles of lower-level employees, as well as contact information for all employees." Gov. Memo at 26. Yet the VA "has failed to rebut the presumption favoring disclosure, which is at its zenith under Exemption 6." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 37 (D.C. Cir. 2002). On this record, the agency has not demonstrated that disclosure of certain information (including names and work telephone numbers) would be "clearly unwarranted" so as to "tilt the balance" against disclosure. *Wash. Post v. Dep't of Health & Human Services*, 690 F.2d 252, 261 (D.C. Cir. 1982) (quoting *Ditlow v. Shultz*, 517 F.2d 166, 169 (D.C.Cir.1975)). The VA fails to recognize that, under Exemption 6, "the presumption in favor of disclosure is as strong as can be found anywhere in the Act." *Id.*

1. Office of the Secretary

It is well established that a *Vaughn* index is intended to permit adequate adversarial testing of the agency's claimed right to an exemption and to enable the Court to make a rational decision as to whether the agency should produce the information that it seeks to withhold. *King v. DOJ*, 830 F.2d 210, 218–19 (D.C. Cir. 1987). Courts understandably have rejected the "[c]ategorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure" as "clearly inadequate." *Id.* at 224 & n.8. Repeating the same justification over and over again provides no opportunity for meaningful review. Yet that is exactly what the VA did here.

In the OSVA *Vaughn* index, the agency repeatedly invoked Exemption 6 purporting to withhold personally identifiable information "consisting of the names, email addresses, and telephone numbers of non-SES VA OGC employees, consisting of VA Attorneys who do not have Senior Executive roles and the email address of a higher-level OGC employee." *See* Index at 69–83 (Dkt. No. 28-3). And the VA repeated the same explanation to justify each of the redactions.

Id. On top of that, the agency claims that there is "*no public interest* in the disclosure of this information." *See id.* (explanation at Bates 003409) (emphasis added). That goes too far.

This Court should not accept such a sweeping claim because "the public interest must involve shedding light on government behavior." *Kleinert v. BLM*, 132 F. Supp. 3d 79, 95 (D.D.C. 2015). Indeed, "the disclosure of names and addresses is not inherently and always a significant threat to the privacy of those listed." *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 877 (D.C. Cir. 1989). Disclosure of this information is not an invasion of personal privacy. *See*, *e.g.*, *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (concluding that a "name and work telephone number is not personal or intimate information" that can be withheld under Exemption 6).

Because the VA "has as 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 underlying agency action, or the nature of the agency record at issue," this Court should conclude that the VA has failed to carry its burden with respect to Exemption 6. *SAI v. TSA*, 315 F. Supp. 3d 218, 262 (D.D.C. 2018).

2. Office of the Inspector General

This Court should reach the same conclusion for the Office of the Inspector General. OIG also filed an inadequate *Vaughn* index (Dkt. No. 27-3) with categorical descriptions of the information that it withheld under Exemption 6. And OIG offered little more than conclusory assertions as support for its redactions without describing the positions held by its employees, the role they played, and the significance of the asserted privacy interests. *See SAI*, 315 F. Supp. 3d at 262. In these circumstances, the Court should conclude that OIG did not carry its burden to withhold that information under Exemption 6.

CONCLUSION

This Court should deny the VA's motion for summary judgment.

Respectfully submitted,

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