

**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)

NOTICE

Please take notice that Plaintiff Empower Oversight Whistleblowers & Research submits two documents (attached here as exhibits) for the Court’s review. These documents support arguments that Empower Oversight raised in opposition to defendant’s motion for summary judgment (Dkt. No. 30), including that the Department of Veterans Affairs failed to conduct searches reasonably calculated to locate responsive records in violation of 5 U.S.C. § 552(a)(6), and that the Department improperly withheld information under 5 U.S.C. § 552(b)(5).

First, Empower Oversight submits an affidavit signed by Charmain Bogue on February 19, 2019, in connection with the processing of an equal employment opportunity complaint within the Department of Veterans Affairs. *See* Exhibit A (attached). Empower Oversight obtained a copy of this affidavit after it filed its opposition to the VA’s motion for summary judgment. The VA *did not* produce the affidavit to Empower Oversight even though the affidavit is responsive to Empower Oversight’s FOIA request. *See, e.g.*, Am. Coml. ¶ 19 (Dkt. No. 24) (Item 3). The affidavit supports Empower Oversight’s argument that the VA impermissibly 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)—and that the VA

failed to follow leads to expand its search to include other filing systems and/or record custodians. *See* Opp. at 14–17 (Dkt. No. 30).¹

Second, Empower Oversight submits an email chain with an enclosure that includes unredacted portions of draft answers to Senator Grassley’s questions. *See* Exhibit B (attached). The VA produced this document to the plaintiff in a similar FOIA lawsuit, *Pomares v. Dep’t of Veterans Affairs*, No. 21-cv-00084-H-MSB (S.D. Cal.). Empower Oversight obtained a copy of the email after it filed its opposition to the VA’s motion for summary judgment. In this case, the VA produced a similar email dated May 20, 2021, with the same enclosure: the Department’s draft answers to Senator Grassley’s questions. *See, e.g.*, Opp. Ex. 3 (Dkt. No. 30-3) (Bates 001855 to Bates 001864). But the VA entirely redacted the draft answers in this case, insisting in its motion for summary judgment that *everything* in those records is “predecisional” and therefore subject to withholding under Exemption 5. Gov. Memo at 23 (Dkt. No. 27). Empower Oversight challenged such a broad interpretation of Exemption 5, arguing that the VA has not satisfied its burden of demonstrating that factual information cannot be segregated from the responsive records. *See, e.g.*, Opp. at 22–26 (Dkt. No. 30). Exhibit B, attached here, supports Empower Oversight’s argument because it confirms that the VA actually *can segregate* factual information in the draft answers. In the *Pomares* litigation, the VA produced draft answers from *April 2021*—one month *before* the version of the document produced in this litigation—and the draft answers include *unredacted* factual information. *See* Exhibit B (Bates 0013345 to Bates 001338). Exhibit B thus supports Empower Oversight’s argument that the VA improperly withheld information under 5 U.S.C. § 552(b)(5) in this case.

¹ Empower Oversight never has suggested that the VA must conduct a “perfect search” that uncovers *all* responsive documents. Opp. at 14 (Dkt. No. 30). Instead, Empower Oversight properly has argued that, in considering the totality of the circumstances of this case, this Court should conclude that the VA has not demonstrated that the agency’s search complied with FOIA. Exhibit A (attached here) supports that conclusion.

Respectfully submitted,

/s/ Jeffrey S. Beelaert

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