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 THE VA'S MOTION TO STRIKE

Empower Oversight opposes the VA's motion to strike the notice that it previously filed. In essence, the VA invites the Court to turn a blind eye to what it dismisses as "extrinsic" agency records. This Court should reject the VA's arguments, and it should deny the VA's motion.

The VA characterizes Empower Oversight's notice as "an impermissible attempt to file a sur-reply." Motion at 1 (Dkt. No. 36). That is not, however, what Empower Oversight filed. Yet even if the Court were to accept the VA's mischaracterization of the filing, the Court still has the *discretion* to allow a sur-reply or a supplemental filing. *See, e.g.*, *FDIC v. Cashion*, 720 F.3d 169, 173–74 (4th Cir. 2013) (discussing discretion); *Weinberger v. Tucker*, 510 F.3d 486, 495 n.6 (4th Cir. 2007) (accepting a sur-reply); *Clawson v. FedEx*, 451 F. Supp. 2d 731, 733–35 (D. Md. 2006) (accepting a "supplemental" filing construed as a sur-reply). The same discretion applies when courts consider arguments raised for the first time in a reply brief. District courts have the *discretion* to "overlook waiver" in certain circumstances, including when an untimely argument is "intimately related" to an earlier argument. *DeSimone v. VSP Pharma., Inc.*, 36 F.4th 518, 531 (4th Cir. 2022) (internal quotation marks omitted).

When it filed the notice (Dkt. No. 32), Empower Oversight did not raise or respond to any new arguments. Nor has VA suggested that it did. Empower Oversight explained that it submitted

two documents that "support arguments that Empower Oversight raised in opposition to defendant's motion for summary judgment." Notice at 1 (Dkt. No. 32). Those documents are intimately related to arguments that Empower Oversight previously has advanced, and the VA has not argued that it will be prejudiced by this Court's review of those documents.

Contrary to the VA's speculation and unsupported assertions, Empower Oversight already explained that it obtained the documents *after* filing its opposition to the VA's motion for summary judgment in this case.[1] To be more specific, on January 3, 2023, Empower Oversight obtained consent from counsel for Maria Pomares to file the email and draft answers here. Foster Decl. ¶ 5 (attached here). And on January 10, 2023, Empower Oversight obtained authorization from a confidential whistleblower to disclose the affidavit. *See id.* ¶ 8.

The VA does not dispute that the documents are agency records. Nor could it. The VA confirmed that Exhibit B (Dkt. No. 33-1) "consists of an email and attachment produced in separate FOIA litigation." Motion at 2. The VA even filed a copy of an email from the government to the plaintiff in that case suggesting that the agency "inadvertently released" those records. Motion Ex. 1 (Dkt. No. 36-1). Empower Oversight has challenged—and continues to challenge—the agency's exceptionally broad interpretation of Exemption 5. The Southern District of California may have granted summary judgment to the VA in that case, but this Court should not follow it. In this case, the VA has not satisfied its burden to sustain agency redactions withholding information. *See* 5 U.S.C. § 552(a)(4)(B). Nor has the VA demonstrated that factual information cannot be segregated from the responsive records that it redacted. This Court should review in camera the records produced in this case even if it grants the VA's motion to strike. *See id.*

[1] Citing Empower Oversight's website, the VA notes that Gary Aguirre serves as general counsel to the nonprofit organization. Motion at 2 & n.3. But Mr. Aguirre filed a FOIA suit in the Southern District of California on behalf of another client who is "a citizen of the United States and a resident of the County of San Diego." Compl. ¶ 3, *Pomares v. VA*, No. 3:21cv84 (S.D. Cal. Jan. 15, 2021) (Dkt. No. 1). Empower Oversight was never a party to that litigation. In fact, the litigation pre-dates the formation of Empower Oversight. Either way, "the identity of the requesting party has no bearing on the merits of [the] FOIA request." *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989).

As to the reasonableness of the agency's search, the VA once again misconstrues Empower Oversight's argument. Empower Oversight never has relied on the "fruits of the search" to argue that the VA failed to comply with FOIA. *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). Instead, Empower Oversight properly has argued "that 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." Notice at 1–2 (Dkt. No. 32) (citing Opp. at 14–17 (Dkt. No. 30)); *see also id.* at 2 n.1.

In any event, the VA *concedes* that the agency "fail[ed] to locate" the affidavit signed by Charmain Bogue on February 19, 2019, in connection with the equal employment opportunity complaint. Motion at 3. 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). 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.* In these circumstances, Empower Oversight has demonstrated that the VA has not carried its burden.

Finally, Empower Oversight properly requested oral argument in this case to "provide the Court an opportunity to address legal and factual issues in greater detail, including any issues related to the documents recently filed." Notice (Dkt. No. 35).

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This Court should deny the VA's motion to strike. Or, alternatively, the Court should defer consideration of the VA's motion until after oral argument on summary judgment.

Respectfully submitted,

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