

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

August 16, 2018

VIA ELECTRONIC MAIL

U.S. Department of Veterans Affairs
Office of the General Counsel (024)
810 Vermont Avenue, N.W.
Washington, D.C. 20420
Email: ogcfoiaappeals@va.gov

Re: Freedom of Information Act Appeal, Request No. 18-10934-F

Dear FOIA Appeals Officer:

This is a timely administrative appeal from the adverse determination of the Department of Veterans Affairs (“VA”) on Cause of Action Institute’s (“CoA Institute”) August 1, 2018 Freedom of Information Act (“FOIA”) request, No. 18-10934-F. Specifically, CoA Institute appeals the adequacy of the VA’s search for responsive records.

Procedural History

On August 1, 2018, CoA Institute submitted a FOIA request to the VA Office of Assistant Secretary for Information and Technology, seeking access to three categories of records concerning sensitive FOIA review.¹ Responsive records were expected to include “communications, memoranda, guidelines, procedures, processing metrics, and tracking tables” related to the “handling of ‘politically charged’ or ‘high visibility’ requests,” as well as communications related to “White House equities” review and any VA Inspector General inquiries into the involvement of political appointees in FOIA processes.² CoA Institute requested a public interest fee waiver and categorization as a representative of the news media for fee purposes.³

The VA Office of Information and Technology (“OI&T”) acknowledged that it had received CoA Institute’s FOIA request by e-mail, dated August 6, 2018.⁴ OI&T indicated that copies of the FOIA request had been distributed amongst multiple VA components and tracking numbers assigned accordingly: (1) Office of the Executive Secretary of Veterans Affairs (“OSVA”), No. 18-10934-F; (2) Office of General Counsel (“OGC”), No. 18-10935-F; (3) OI&T, No. 18-10936-F ; and (4) Office of Inspector General (“OIG”), No. 18-10941-F.⁵ OI&T did not issue any fee determinations.

¹ Letter from CoA Inst. to Office of Assistant Sec’y for Info. & Tech., Dep’t of Veterans Affairs at 2–3 (Aug. 1, 2018) (attached as Exhibit 1).

² *Id.*

³ *Id.* at 3–5.

⁴ E-mail from Jacqueline Short, VACO FOIA Serv., Office of Info. & Tech., Dep’t of Veterans Affairs, to CoA Inst. (Aug. 6, 2018) (attached as Exhibit 2).

⁵ *Id.*

By letter, dated August 7, 2018,⁶ OSVA provided its final determination—described as an “initial agency decision”—on CoA Institute’s request.⁷ The component reproduced the language of Item One of CoA Institute’s request, indicated that it had conducted a search, and identified one (1) responsive record totaling two (2) pages.⁸ This record—a February 11, 2014 memorandum—was released in full.⁹ This timely appeal follows OSVA’s determination.

Argument

The VA “must conduct a search reasonably calculated to uncover all relevant documents.”¹⁰ This search must pass “a ‘reasonableness’ test to determine the ‘adequacy’ of a search methodology, consistent with congressional intent tilting the scale in favor of disclosure.”¹¹ The VA is required to search where responsive records are likely to be found and it may not limit its search to exclude certain record systems, custodians, or offices if they may contain responsive records.¹²

In this case, the OSVA only uncovered a single responsive record. But the record itself identifies other documents that should have been located. Specifically, the record produced to CoA Institute, which is a departmental memorandum containing guidance on intra-agency consultations, mentions “[f]ollow-up guidance” that “will be forthcoming” on “what constitutes a FOIA request of substantial interest to the Office of the Secretary.”¹³

Considering that this “follow-up guidance” was announced in February 2014, it is likely to already have been issued. The OSVA’s failure to locate, process, and disclose the foregoing “guidance” casts doubt on the overall adequacy of its search, which was completed less than a week after CoA Institute submitted its FOIA request.¹⁴ Indeed, the speed with which the search was conducted, and the agency’s failure to locate multiple records on a FOIA practice that has long been known to take place at the VA,¹⁵ is cause for concern.

Conclusion

For the foregoing reasons, the VA’s final response is inadequate. The agency failed to conduct an adequate search. CoA Institute respectfully requests that the OSVA be directed to conduct a supplemental search.

⁶ The OSVA response letter incorrectly states the year as “2017.”

⁷ None of the other VA components processing CoA Institute’s request have provided their final determinations.

⁸ Letter from Richard Ha, FOIA Officer, Office of the Exec. Sec’y, Dep’t of Veterans Affairs, to CoA Inst. at 1 (Aug. 7, 2018) (attached as Exhibit 3).

⁹ *Id.*; see also Exhibit 4, attached hereto (Mem. from Exec. in Charge & Chief. Info. Office for Info. & Tech to Under Sec’y, Assistant Sec’y, & Other Key Officials regarding Release of Freedom of Info. Act (FOIA) Info., No. VAIQ# 7441746 (Feb. 11, 2014)).

¹⁰ *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (internal quotation marks, alterations, and citation omitted).

¹¹ *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (citation omitted).

¹² *Callaway v. Dep’t of the Treasury*, No. 08-5480, 2009 WL 10184495 at *2 (D.C. Cir. June 2, 2009).

¹³ Ex. 4 at 2.

¹⁴ See *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326, 392 (D.C. Cir. 1999).

¹⁵ Ex. 1 at 1–2, nn.2–8 and accompanying text.

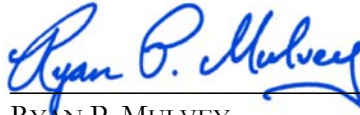
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Thank you for your attention to this matter. If you have any questions about this appeal, or the underlying request, feel free to contact me by telephone at (202) 499-4232 or by email at ryan.mulvey@causeofaction.org.

Sincerely,

A handwritten signature in blue ink that reads "Ryan P. Mulvey". The signature is fluid and cursive, with a horizontal line extending from the end of the name.

RYAN P. MULVEY
COUNSEL

APPEAL
EXHIBIT

1

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

August 1, 2018

VIA ELECTRONIC MAIL

U.S. Department of Veterans Affairs
Office of Assistant Secretary for Information & Technology
810 Vermont Avenue, N.W.
(005R1C) VACO
Washington, D.C. 20420
E-mail: vacofoiaservice@va.gov

Re: Freedom of Information Act Request

Dear FOIA Officer:

I write on behalf of Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.¹ In carrying out its mission, CoA Institute uses investigative and legal tools to educate the public about the importance of government transparency and accountability.

On July 25, 2018, a group of eight Democratic Senators, led by Ranking Member Jon Tester of the U.S. Senate Committee on Veterans’ Affairs, wrote to then-Acting Secretary Peter O’Rourke to express concern over the possible politicization of the Freedom of Information Act (“FOIA”) at the Department of Veteran Affairs (“VA”).² These senators requested various records concerning the involvement of political appointees in the FOIA decision-making process, as well as other “sensitive review”-type policies. The senators concurrently wrote to the VA’s Inspector General to request “an assessment of the role that political appointees play in the FOIA process, what types of oversight exist to ensure employees are providing all responsive material, and who makes determinations about what is or is not responsive to a request[.]”³

Despite previous claims by the VA Office of Inspector General that there has not been regular political interference leading to the delay of FOIA requests,⁴ the public has long known of internal practices at the VA that likely contribute to FOIA politicization. In August 2007, for

¹ See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about (last visited Aug. 1, 2018).

² Letter from Hon. Jon Tester, Ranking Member, U.S. S. Comm. on Veterans’ Affairs, *et al.*, to Peter O’Rourke, Acting Sec’y, Dep’t of Veterans Affairs (July 25, 2018) (attached as Exhibit 1); *see also* Office of Sen. Jon Tester, Press Release, Tester Doubles Down on Fight to Protect Veterans from Political Agendas at VA (July 25, 2018), *available at* <http://bit.ly/2LIIMIL>.

³ Letter from Hon. Jon Tester, Ranking Member, U.S. S. Comm. on Veterans’ Affairs, *et al.*, to Hon. Michael J. Missal, Inspector Gen., Dep’t of Veterans Affairs (July 25, 2018) (attached as Exhibit 2).

⁴ *See* Letters from Hon. George J. Opfer, Inspector Gen., Dep’t of Veterans Affairs, to Hon. Charles E. Grassley, Ranking Member, U.S. S. Comm. on Finance, & Hon. Darrell Issa, U.S. H.R. Oversight & Gov’t Reform Comm. (Sept. 9, 2010) (on file with CoA Inst.); *see also* Letter from Linda A. Halliday, Deputy Inspector Gen., Dep’t of Veterans Affairs, to Hon. Ron Johnson, Chairman, U.S. S. Comm. on Homeland Sec. & Governmental Affairs (Sept. 18, 2015) (on file with CoA Inst.).

example, the agency issued a directive concerning the processing of “high visibility” or “sensitive” FOIA requests that implicate potentially embarrassing or newsworthy records.⁵ Intra-agency politicization only worsened during the Obama Administration.⁶ An October 2013 memorandum instructed all Central Office components to clear FOIA responses and productions through Jim Horan, Director of the VA FOIA Service, who is still part of the leadership in the Office of Privacy and Records Management.⁷ This clearance process imposed a “temporary requirement” for front office review—although it is unknown whether the practice continues—and entailed a “sensitivity determination” leading to unnamed “specific procedures.”⁸

Although “sensitive review”—including the heightened scrutiny of FOIA requests from news media requesters and the pre-disclosure review of potentially embarrassing records by political appointees—is not a new phenomenon, that such a practice continues to exist, at the VA and other agencies, raises questions of fundamental fairness and impartial administration of the FOIA.

Pursuant to the FOIA, 5 U.S.C. § 552, CoA Institute requests access to following agency records⁹ for the period of January 20, 2017 to the present¹⁰:

1. All records, including but not limited to communications, memoranda, guidelines, procedures, processing metrics, and tracking tables, concerning “sensitive review” FOIA processes, including any process for the handling of “politically charged” or “high visibility” requests or those submitted by representatives of the news media. The scope of this item includes any records defining or describing the sensitive review process.
2. All communications between (i) the VA’s Office of Privacy and Records Management, Office of FOIA Service, and/or Office of General Counsel, and (ii) the Office of the White

⁵ See Dep’t of Veterans Affairs, Assistant Sec’y for Info. & Tech., “Processing High-Visibility/Sensitive FOIA Requests (WebCIMS 380797) (Aug. 30, 2007).

⁶ See Eliana Johnson, *The Obama Administration’s Newly Political Approach to FOIAs*, NAT’L REV. (June 9, 2015), <http://bit.ly/2Lz2Mcl> (“Agency documents also indicated that . . . the Department of Veterans Affairs has ha[s] sensitive-review procedures, though it’s unclear whether political appointees are involved in the process.”); see also CoA Inst., Press Release, “CoA Institute Sues Treasury for ‘Sensitive’ Records Concealed from Public Disclosure” (Nov. 1, 2016), available at <https://coainst.org/2NZ598U> (“According to information obtained from various agency inspectors general, similar sensitive review policies have been used at . . . the Department of Veterans Affairs.”).

⁷ Mem. from Stephen W. Warren, Exec. in Charge & Chief Info. Officer for Info. & Tech., Dep’t of Veterans Affairs, to Under Sec’ys, Assistant Sec’ys, and Other Key Officials regarding Release of FOIA Information (VA IQ Folder 7413064) (Oct. 31, 2013) (attached as Exhibit 3); see also “Leadership,” *Office of Privacy & Records Mgmt.*, DEP’T OF VETERANS AFFAIRS, <http://bit.ly/2OzlzWH> (last visited Aug. 1, 2018).

⁸ *Id.*

⁹ For purposes of this request, the term “record” means the entirety of the record any portion of which contains responsive information. See *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. 2016) (admonishing agency for withholding information as “non-responsive” because “nothing in the statute suggests that the agency may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure”).

¹⁰ The term “present” should be construed as the date on which the VA begins its search for responsive records. See *Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002).

House Counsel concerning the processing of FOIA requests containing “White House equities.”¹¹

3. All communications between (i) the VA Office of Privacy and Records Management, Office of FOIA Service, and/or Office of General Counsel, and (ii) the VA Office of Inspector General concerning any audit, investigation, inspection, evaluation, or inquiry into the involvement of non-career officials in the FOIA process (*e.g.*, reviewing or approving proposed FOIA productions, *etc.*). The time period for this item of the request is September 1, 2015 to the present.

As set forth in the VA’s FOIA regulations, CoA Institute respectfully requests that portions of this request be referred to other VA Central Office components, including the Office of the General Counsel or the Office of Inspector General, as necessary.¹²

Request for a Public Interest Fee Waiver

CoA Institute requests a waiver of any and all applicable fees. The FOIA requires the VA to furnish the requested records without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”¹³

In this case, the requested records will unquestionably shed light on the “operations or activities of the government,” namely, the VA’s policies for handling “sensitive,” “high visibility,” or “politically charged” FOIA requests. Such “sensitive review” FOIA processes have led to impermissible politicization at other agencies, and they have prompted multiple congressional investigations and FOIA lawsuits.¹⁴ The public has a right to view these records. Disclosure is likely to “contribute significantly” to public understanding because, to date, the records have not

¹¹ See *White House FOLA Obstruction*, COA INST., <http://bit.ly/2r0hBub> (last visited Aug. 1, 2018); see also Mem. from Gregory Craig, Counsel to the President, The White House, to All Exec. Dep’t & Agency Gen. Counsels regarding Document Requests (Apr. 15, 2009), available at <https://coainst.org/2uz2NWT>.

¹² See 38 C.F.R. § 1.555(a), (c).

¹³ 5 U.S.C. § 552(a)(4)(A)(iii); 38 C.F.R. § 1.561(n)(2)(i)–(ii); see also *Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1115–19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

¹⁴ See, e.g., Johnson, *supra* note 6; COA INST., GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://coainst.org/2AEWiE2>; see also *EPA responds to House OGR Democrats, arguing FOLA “sensitive review” originated with the Obama Administration*, COA INST. (July 19, 2018), <https://coainst.org/2O2NMUJ>; *EPA Chief of Staff describes agency’s sensitive review process for “politically charged” FOLA requests*, COA INST. (July 16, 2018), <https://coainst.org/2muw1BU>; *New Records Reveal the FAA Has Been Tracking FOLA Media Requesters*, COA INST. (May 16, 2018), <https://coainst.org/2mZ6aSO>; *NOAA Records Demonstrate Expansion of Sensitive Review FOLA Procedures*, COA INST. (Mar. 12, 2018), <http://coainst.org/2tFnLp5>; *Politicizing FOLA review at the EPA and Interior*, COA INST. (Dec. 19, 2017), <https://coainst.org/2O1MucF>; *DHS Watchdog Claims Political Appointees No Longer Politicizing FOLA*, COA INST. (Oct. 20, 2017), <http://coainst.org/2j9dbT7>; *CLIA too busy for transparency*, COA INST. (Aug. 11, 2016), <http://coainst.org/2iDH0qO>; *White House and Treasury Department Politicize FOLA*, COA INST. (June 24, 2013), <http://coainst.org/2A4igPr>; *FOLA Follies: HUD Flags Sensitive Freedom of Information Act Requests for Extra Scrutiny; Political Appointees Involved*, COA INST. (July 31, 2013), <http://coainst.org/2kbV4Ix>.

been made publicly available. CoA Institute intends to educate the interested public about the processing of “sensitive” FOIA requests at the VA.

CoA Institute has the intent and ability to make the results of this request available to a reasonably broad public audience through various media. CoA Institute staff has considerable experience and expertise in other areas of government oversight, investigative reporting, and federal public interest litigation. Its professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work, and intend to share the resulting analysis with the public, whether through CoA Institute’s regularly published online newsletter, memoranda, reports, or press releases.¹⁵ Additionally, CoA Institute is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code and, accordingly, it has no commercial interest in making this request.

Request to Be Classified as a Representative of the News Media

For fee purposes, CoA Institute also qualifies as a “representative of the news media.”¹⁶ As the D.C. Circuit has held, the “representative of the news media” test is properly focused on the requestor, not the specific request at issue.¹⁷ CoA Institute satisfies this test because it gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience. Although it is not required by the statute, CoA Institute gathers the news it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. CoA Institute does not merely make raw information available to the public, but rather distributes distinct work product, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.¹⁸ These distinct works are distributed to the public through various media, including CoA Institute’s website, Twitter, and Facebook. CoA Institute also provides news updates to subscribers via e-mail.

¹⁵ See *Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

¹⁶ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 38 C.F.R. § 1.561(b)(7).

¹⁷ See *Cause of Action*, 799 F.3d at 1121.

¹⁸ COA INST., *EVADING OVERSIGHT: THE ORIGINS AND IMPLICATIONS OF THE IRM CLAIM THAT ITS RULES DO NOT HAVE AN ECONOMIC IMPACT* (2018), <http://coainst.org/2mgpYAu>; CoA Inst., *Documents Reveal Special Interest Groups Lobbied HUD for Mortgage Settlement Funds* (Aug. 8, 2017), <http://coainst.org/2yLaTyF>; CoA Inst., *The GSA Has No Records on its New Policy for Congressional Oversight Requests* (July 26, 2017), <http://coainst.org/2eHooVq>; COA INST., *SENSITIVE CASE REPORTS: A HIDDEN CAUSE OF THE IRS TARGETING SCANDAL* (2017), <http://coainst.org/2y0fbOH>; COA INST., *INVESTIGATIVE REPORT: PRESIDENTIAL ACCESS TO TAXPAYER INFORMATION* (2016), <http://coainst.org/2d7qTRY>; James Valvo, *There is No Tenth Exemption* (Aug. 17, 2016), <http://coainst.org/2doJhBt>; CoA Inst., *CLA too busy for transparency* (Aug. 11, 2016), <http://coainst.org/2mtzhHP>; *Hearing on Watchdogs Needed: Top Government Investigator Positions Left Unfilled for Years Before the S. Comm. on Homeland Sec. & Gov’t Affairs*, 114th Cong. (June 3, 2015) (statement of Daniel Z. Epstein, Cause of Action Inst.), <http://coainst.org/2mrwHr1>; COA INST., *2015 GRADING THE GOVERNMENT REPORT CARD* (2015), <http://coainst.org/2as088a>; *Hearing on Potential Reforms to the Freedom of Information Act (FOIA) Before the H. Comm. on Oversight & Gov’t Reform*, 114th Cong. (Feb. 27, 2015) (statement of Daniel Z. Epstein, Exec. Dir., Cause of Action Inst.), <http://coainst.org/2lLsph8>; *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com* (Sept. 8, 2014), <http://coainst.org/2aj8sm5>; COA INST., *GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS* (2014), <http://coainst.org/2aFWxUZ>; see also CoA Institute, *Newsletters*, <http://causeofaction.org/media/news/newsletter/>.

The statutory definition of a “representative of the news media” contemplates that organizations such as CoA Institute, which electronically disseminate information and publications via “alternative media[,] shall be considered to be news-media entities.”¹⁹ In light of the foregoing, numerous federal agencies have appropriately recognized CoA Institute’s news media status in connection with its FOIA requests.²⁰

Record Preservation Requirement

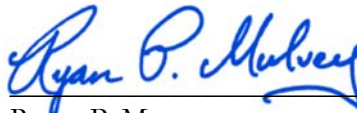
CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and any administrative remedies for appeal have been exhausted. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request.²¹

Record Production and Contact Information

In an effort to facilitate document review, please provide the responsive documents in electronic form in lieu of a paper production. If a certain portion of responsive records can be produced more readily, CoA Institute requests that those records be produced first and the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact me by telephone at (202) 499-4232 or by e-mail at ryan.mulvey@causeofaction.org. Thank you for your attention to this matter.

Sincerely,



RYAN P. MULVEY
COUNSEL

¹⁹ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

²⁰ See, e.g., FOIA Request No. 2018-HQFO-01215, Dep’t of Homeland Sec. (July 10, 2018); FOIA Request No. CFA2018-05, U.S. Comm’n for Fine Arts (June 25, 2018); FOIA Request F-133-18, U.S. Agency for Int’l Dev. (Apr. 11, 2018); FOIA Request 18-HQ-F-487, Nat’l Aeronautics & Space Admin. (Apr. 11, 2018); FOIA Request 1403076-000, Fed. Bureau of Investigation (Apr. 11, 2018); FOIA Request 201800050F, Exp.-Imp. Bank (Apr. 11, 2018); FOIA Request 2016-11-008, Dep’t of the Treasury (Nov. 7, 2016); FOIA Requests OS-2017-00057 & OS-2017-00060, Dep’t of Interior (Oct. 31, 2016); FOIA Request 2017-00497, Office of Personnel Mgmt. (Oct. 21, 2016); FOIA Request 092320167031, Ctrs. for Medicare & Medicaid Servs. (Oct. 17, 2016); FOIA Request 17-00054-F, Dep’t of Educ. (Oct. 6, 2016); FOIA Request DOC-OS-2016-001753, Dept. of Commerce (Sept. 27, 2016); FOIA Request 2016-366-F, Consumer Fin. Prot. Bureau (Aug. 11, 2016); FOIA Request F-2016-09406, Dept. of State (Aug. 11, 2016).

²¹ See 36 C.F.R. § 1230.3(b) (“Unlawful or accidental destruction (also called unauthorized destruction) means . . . disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records.”); 38 C.F.R. § 1.560; *Chambers v. Dep’t of the Interior*, 568 F.3d 998, 1004–05 (D.C. Cir. 2009) (“[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act.”); *Judicial Watch, Inc. v. Dep’t of Commerce*, 34 F. Supp. 2d 28, 41–44 (D.D.C. 1998).

EXHIBIT

1

JOHNNY ISAKSON, GEORGIA,
CHAIRMAN
JERRY MORAN, KANSAS
JOHN BOOZMAN, ARKANSAS
DEAN HELLER, NEVADA
BILL CASSIDY, LOUISIANA
MIKE ROUNDS, SOUTH DAKOTA
THOM TILLIS, NORTH CAROLINA
DAN SULLIVAN, ALASKA

JON TESTER, MONTANA,
RANKING MEMBER
PATTY MURRAY, WASHINGTON
BERNARD SANDERS, VERMONT
SHERROD BROWN, OHIO
RICHARD BLUMENTHAL, CONNECTICUT
MAZIE HIRONO, HAWAII
JOE MANCHIN III, WEST VIRGINIA

United States Senate

COMMITTEE ON VETERANS' AFFAIRS

WASHINGTON, DC 20510

July 25, 2018

Peter O'Rourke
Acting Secretary of Veterans Affairs
810 Vermont Ave, NW
Washington, DC 20420

Acting Secretary O'Rourke,

As a Department that frequently highlights its transparency, the Department of Veterans Affairs (VA) must also place a high priority on timely responses to Freedom of Information Act (FOIA) requests from the media, veterans, and other citizens. As you know, this process must be free from influence or interference by political appointees. Documents, emails from government servers, and other material that is responsive must be provided to the requestor, regardless of whether it is politically advantageous, embarrassing, or could shed light on errors or failures.

We are aware that the vast majority of FOIA requests that come to the Department are from veterans or family members of veterans seeking medical records, and that those generally are handled appropriately at local facilities. However, for those FOIA requests that come to VA central office that require significant document production and/or emails sent from government accounts, we would ask that you answer the following questions:

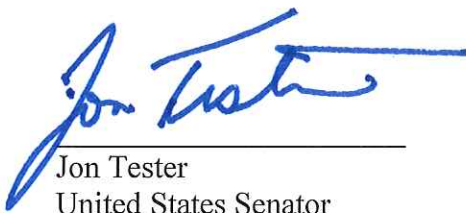
- Who in the Department is responsible for ensuring appropriate and complete response to FOIA requests? Additionally, please provide the same information for each administration and staff office.
- Who is responsible for searching and pulling emails or other documentation for responsive material? How does the Department ensure that an employee provides a complete production of responsive materials? What accountability is there for an individual who does not provide responsive material? If a FOIA Officer or FOIA staff believes they are not receiving full cooperation from employees, please describe the process in place for the FOIA staff to ensure they receive responsive information.
- Please provide an outline of the process, including for each step in the process, the individuals or individual positions responsible for managing it and the length of time it takes to do so. In particular, how does the Department ensure thorough responses when responsive materials are held by different organizations?
- Prior to responding to a FOIA, is there a notification period provided to any internal audiences? If so, please provide the list of positions who currently receive the notification and any instances from 2017 or 2018 in which they have requested an outgoing response be held.

- Please describe any internal reporting that is provided to Department or administration and staff office leadership regarding the timeliness of FOIA productions. Please provide examples of reports or other documents provided to Department-level leadership for 2017 and 2018.
- Who in the Department, as well as each administration and staff office is responsible for determining what is included and excluded in the final production, as well as redactions and the appropriateness of those redactions?
- What role do any political appointees play in the FOIA process whether at the Department or subordinate level?
- Please provide information regarding the Department's actions to improve timeliness and thoroughness in responding to requests. Does the Department or its subordinate entities utilize any multi-track systems related to request complexity or use any other mechanisms to provide quicker responses?
- Please provide the following information for the 10 oldest outstanding requests and 10 oldest appeals: date received, administration or office, whether the requestor is an organization or individual, whether a partial disclosure has been made, and the basis for denial.
- Please provide the average length of time for providing FOIA responses from FY 2016, FY 2017, and FY2018 disaggregated by administration and staff office.
- How are requesters able to track the status of their pending requests?
- Please provide information about whether or not there has been any increase in the number of or complexity of requests received by the Department or its administrations or staff offices, and how the Department has responded to ensure these requesters do not experience long waits.
- Please provide information about how the Department determines whether FOIA Officers or staff are adequately trained and resourced.

We look forward to better understanding the process for FOIA productions within the Department, and to clarify the roles and responsibilities of those participating in the productions. We are especially interested in any oversight mechanisms that may be in place to ensure that responsive emails are turned over by employees.

Thank you for your timely response.

Sincerely,



Jon Tester
United States Senator



Richard Blumenthal
United States Senator



Sherrod Brown
United States Senator



Tammy Duckworth
United States Senator



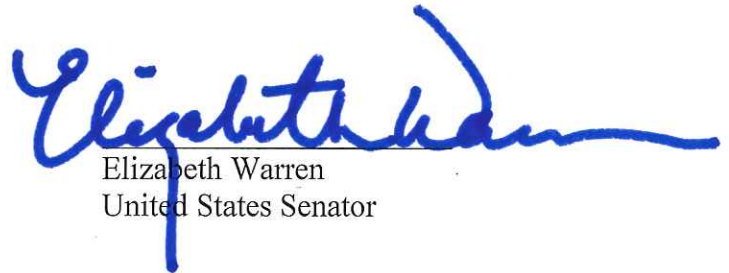
Heidi Heitkamp
United States Senator



Mazie K. Hirono
United States Senator



Tim Kaine
United States Senator



Elizabeth Warren
United States Senator

EXHIBIT

2

JOHNNY ISAKSON, GEORGIA,
CHAIRMAN
JERRY MORAN, KANSAS
JOHN BOOZMAN, ARKANSAS
DEAN HELLER, NEVADA
BILL CASSIDY, LOUISIANA
MIKE ROUNDS, SOUTH DAKOTA
THOM TILLIS, NORTH CAROLINA
DAN SULLIVAN, ALASKA

JON TESTER, MONTANA,
RANKING MEMBER
PATTY MURRAY, WASHINGTON
BERNARD SANDERS, VERMONT
SHERROD BROWN, OHIO
RICHARD BLUMENTHAL, CONNECTICUT
MAZIE HIRONO, HAWAII
JOE MANCHIN III, WEST VIRGINIA

United States Senate

COMMITTEE ON VETERANS' AFFAIRS
WASHINGTON, DC 20510

July 25, 2018

Honorable Michael J. Missal
Inspector General
Department of Veterans Affairs
810 Vermont Ave, NW
Washington, DC 20420

Mr. Missal,

Recent events at the Department of Veterans Affairs (VA) have raised questions about the extent of political influence that exists over what should be nonpolitical and non-partisan processes. One of these processes is the review of documents requested through the Freedom of Information Act (FOIA) process.


This longstanding disclosure requirement by Federal Agencies allows citizens to demand transparency from their government. In many cases, this is the mechanism through which family members have access to medical records of their loved ones. In other cases, it is the route through which media and other interested parties get answers and information after their requests to VA about policies and initiatives have gone unanswered.

The Committee has recently been told of concerns about the role of political appointees in the FOIA process, and their refusal to turn over emails from their government accounts that would be considered responsive. As a result, we are interested in getting an assessment of the role that political appointees play in the FOIA process, what types of oversight exist to ensure employees are providing all responsive material, and who makes determinations about what is or is not responsive to a request, and therefore, what is provided.

We request that you and your team look into this process at VA, to ensure that all responsive material is being provided, regardless of whether it is politically advantageous, embarrassing, or could shed light on errors or failures.

Thank you for your consideration.

Sincerely,


Jon Tester
United States Senator
Richard Blumenthal
United States Senator



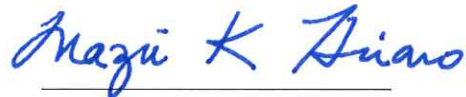
Sherrod Brown
United States Senator




Tammy Duckworth
United States Senator



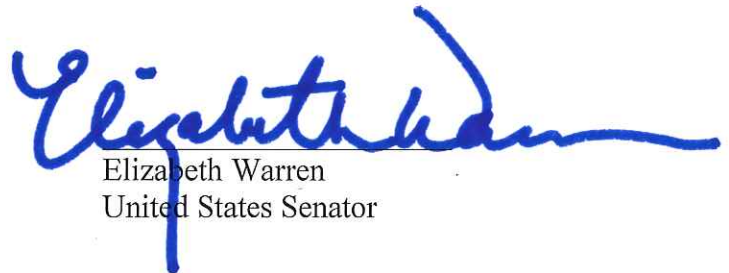
Heidi Heitkamp
United States Senator



Mazie K. Hirono
United States Senator



Tim Kaine
United States Senator



Elizabeth Warren
United States Senator

EXHIBIT

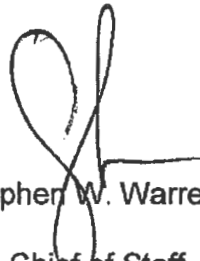
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**Department of
Veterans Affairs**

Memorandum

Date: OCT 31 2013
From: Executive in Charge and Chief Information Officer for Information and Technology (005A)
Subj: Release of FOIA Information (VA IQ Folder 7413064)
To: Under Secretaries, Assistant Secretaries, and Other Key Officials

1. Effective immediately, all responses to FOIA requests by VACO offices and field components will be reviewed by the designated officials prior to release to the public. This guidance will be reviewed in 90 days.
2. The designated officials are:
VBA FOIA Officer for VBA Release
VHA FOIA Officer for VHA Release
NCA FOIA Officer for NCA Release
Director, VA FOIA Service for all staff offices.
3. This temporary requirement to review FOIA releases does not apply to first and third party Privacy Act requests.
4. The purpose of the review will be for sensitivity determination after the request has been perfected and responsive records have been identified. Each of the designated review offices will develop specific procedures for review for their respective components. All field components are expected to follow these procedures.
5. The designated officials are required to approve FOIA requests prior to the release by the responsible office. Under no circumstances will a FOIA Officer release records without approval of the designated officials.
6. For additional information or any questions, please contact John Buck at 202-632-7385; john.buck1@va.gov or Jim Horan at 202-632-7453; james.horan@va.gov.



Stephen W. Warren

cc: Chief of Staff (00A)

APPEAL
EXHIBIT

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Ryan Mulvey

From: Short, Jacqueline <Jacqueline.Short@va.gov>
Sent: Monday, August 06, 2018 2:23 PM
To: Ryan Mulvey
Subject: Acknowledgement Letter 18-10934;10935;10936;10941-F (Mulvey)

Dear Mr. Mulvey,

This email acknowledges receipt of your Freedom of Information Act (FOIA) request to the Department of Veterans Affairs (VA) dated August 1, 2018, in which you requested

1. All records, including but not limited to communications, memoranda, guidelines, procedures, processing metrics, and tracking tables, concerning "sensitive review" FOIA processes, including any process for the handling of "politically charged" or "high visibility" requests or those submitted by representatives of the news media. The scope of this item includes any records defining or describing the sensitive review process.
2. All communications between (i) the VA's Office of Privacy and Records Management, Office of FOIA Service, and/or Office of General Counsel, and (ii) the Office of the White House Counsel concerning the processing of FOIA requests containing "White House equities."
3. All communications between (i) the VA Office of Privacy and Records Management, Office of FOIA Service, and/or Office of General Counsel, and (ii) the VA Office of Inspector General concerning any audit, investigation, inspection, evaluation, or inquiry into the involvement of non-career officials in the FOIA process (e.g., reviewing or approving proposed FOIA productions, etc.). The period for this item of the request is September 1, 2015 to the present.

The FOIA Service received your request on August 1, 2018, and assigned it FOIA tracking numbers **18-10934-F**; **18-10935-F**; **18-10936-F**; and **18-10941-F**. Please refer to these numbers when communicating with the VA about this request.

The records you requested, if they exist, would be maintained by the Office of the Executive Secretary of Veterans Affairs (OSVA) (**18-10934-F**); Office of General Counsel (OGC) (**18-10935-F**); Office of Inspector General (IG) (IG has its own tracking number. You will be notified by them of its FOIA tracking number); and Office of Assistant Secretary for Information and Technology (OI&T) (**18-10936-F**). OI&T is conducting a search for records and will get back to you with additional information. If you wish to know the status of your request, please contact them directly at the following addresses:

Department of Veterans Affairs
OSVA, (002B) VACO
FOIA Officer: Richard Ha
810 Vermont Avenue, NW
Washington, DC 20420
Email: osvafoia@va.gov
Phone: (202) 461-4809
Fax: (202) 273-4880

Department of Veterans Affairs
OGC, (026H) VACO
FOIA Officer: Renee Baxter
810 Vermont Avenue, NW

Washington, DC 20420
Email: ogcfoiarequests@va.gov
Phone: (202) 461-7860
Fax: (202) 273-9299

Department of Veterans Affairs
IG, (50CI) VACO
FOIA Officer: Richard Ha
810 Vermont Avenue, NW
Washington, DC 20420
Email: vaoigfoia-pa@va.gov
Phone: (202) 461-4412
Fax: (202) 273-5859

Department of Veterans Affairs
OI&T (005R1C)
Attention: Jackie Short
810 Vermont Avenue, NW
Washington, DC 20420
Email: vacofoiaservice@va.gov
Phone: (202) 632-7426
Fax: (202) 632-7581

We appreciate your interest in the Department of Veterans Affairs.

Sincerely,

Jacqueline (Jackie) Short
VACO FOIA Service (005R1C)
Office of Privacy Information and Identity Protection (PIIP)
Quality, Privacy, and Risk (QPR)
Office of Information and Technology (OI&T)
Email: vacofoiase@va.gov
Office: (202) 632-7426
Fax: (202) 632-7581
FOIA Service Hotline: 1-877-750-3642

Please take a moment and let us know how we did by completing a quick evaluation: [Got a minute? Rate Our Service!](#)



QPR's Mission Statement:

"To instill and promote a culture of quality, privacy and risk management in collaboration with our business partners to enable a better Veteran experience."

APPEAL
EXHIBIT

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DEPARTMENT OF VETERANS AFFAIRS
Washington DC 20420

August 7, 2017

In Reply Refer To: 001B
FOIA Request: 18-10934-F

Ryan Mulvey, Esq.
Counsel
Cause of Action Institute
1875 Eye Street NW, Suite 800
Washington, DC 20006
ryan.mulvey@causeofaction.org

Dear Mr. Mulvey, Esq.:

This is the Initial Agency Decision to your Freedom of Information Act (FOIA) request to the Office of the Secretary, U.S. Department of Veterans Affairs (OSVA) dated and received on August 1, 2018, and assigned FOIA tracking number **18-10934-F**. You requested: "All records, including but not limited to communications, memoranda, guidelines, procedures, processing metrics, and tracking tables, concerning 'sensitive review' FOIA processes, including any process for the handling of 'politically charged' or 'high visibility' requests or those submitted by representatives of the news media. The scope of this item includes any records defining or describing the sensitive review process."

To clarify, the VA OGC (**18-10935-F**), OIT (**18-10936-F**), and OIG (**18-10941-F**) FOIA offices will issue or have issued separate responses for their own respective FOIA offices.

Initial Agency Decision

On August 6, 2018, the OSVA FOIA Officer searched through his paper and electronic FOIA folders for responsive records relating to "sensitive review" FOIA requests. OSVA identified a February 11, 2014, Memorandum titled "Release of Freedom of Information Act (FOIA) Information." OSVA releases this two (2) page Memorandum in full without redactions.

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: John Buck
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

Mr. Ryan Mulvey, Esq.
Page 2
August 7, 2018

College Park, MD 20740-6001

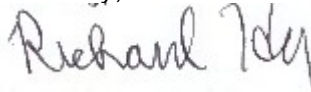
FOIA Appeal

This concludes OSVA's response to request **18-10934-F**. 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,

A handwritten signature in dark ink, appearing to read "Richard Ha".

Richard Ha, JD, CIPP/G
OSVA FOIA Officer

Attachment – February 11, 2014, Memorandum titled "Release of Freedom of Information Act (FOIA) Information"

APPEAL
EXHIBIT

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CISA - copy
2/12/2014

**Department of
Veterans Affairs**

Memorandum

Date: FEB 11 2014
From: Executive in Charge and Chief Information Officer for Information and Technology (005)
Subj: Release of Freedom of Information Act (FOIA) Information (VAIQ# 7441746)
To: Under Secretaries, Assistant Secretaries, and Other Key Officials

1. This is an update to the Release of FOIA Information memorandum, dated 10/31/2013, regarding a review the Department is undertaking related to our FOIA processes. VA has one of the best track records for FOIA responsiveness with less than a 4% backlog which is the second best amongst agencies processing over 20,000 annual requests. However, it is important to occasionally review our processes to ensure that we can continue to improve our performance and responsiveness.
2. The "FOIA Processing Improvement Working Group" met the first week of December and focused on both short and long term improvements to our FOIA program. The short term plan will be implemented immediately while the longer plan will continue to be worked and will be reflected in revised guidance to be followed by all VA FOIA Officers. The designated FOIA Officers listed in the original memo were active participants in developing these plans. I look forward to their continued support and active engagement.
3. VA regulations (38 C.F.R. 1.555(c)) provide that when a FOIA Officer determines that the component maintains responsive records that either originated with another component, or which contain information provided by, or of **substantial interest to**, another component then the FOIA Officer will either:
 - (1) Respond to the request, after consulting with the component that originated or has a substantial interest in the records involved; or
 - (2) Refer the responsibility for responding to the request or portion of the request to the component best able to determine whether to disclose the relevant records, or to the agency that created or initially acquired the record as long as that agency is subject to the FOIA. Ordinarily, the component or agency that created or initially acquired the record will be presumed to be best able to make the disclosure assessment. The referring component shall document the referral and maintain a copy of the records that it refers.

4. While the team implements action plans, we will continue our long standing process of identifying incoming FOIA requests of substantial interest to the Office of the Secretary. This will alert leadership to potential follow-up inquiries that may be forthcoming.
5. Follow-up guidance will be forthcoming from the FOIA working group regarding what constitutes a FOIA request of substantial interest to the Office of the Secretary.
6. The Executive Secretary FOIA Officer will acknowledge receipt of a FOIA request of substantial interest in an approved summary format. The appropriate Administration or Program Office FOIA Officer will be notified if additional documentation describing the request is needed.
7. FOIA requests determined not to be of substantial interest to the Office of the Secretary will continue to be released by the FOIA Officer within the office having jurisdiction over the subject records to be released.
8. The results of the working group will be shared in the coming weeks to include an improved process to formally designate and train your FOIA Officers and FOIA Analysts. Thank you for your support as we continue to improve the FOIA release processes at VA.
9. For additional information or any questions, please contact John Buck at 202-632-7385; john.buck1@va.gov or Jim Horan at 202-632-7453; james.horan@va.gov.



Stephen W. Warren