DEPARTMENT OF VETERANS AFFAIRS
Washington DC 20420

May 6, 2020

In Reply Refer To: 001B
FOIA Request: 20-06076-F

Austin Evers & Mehreen Rasheed
American Oversight
[no physical address provided]
foia@americanoversight.org

Dear Austin Evers & Mehreen Rasheed,

This is the Second Partial Initial Agency Decision (IAD) to your Freedom of Information Act (FOIA) request to the Office of the Secretary, U.S. Department of Veterans Affairs (OSVA), dated and received April 14, 2020, and assigned FOIA tracking number **20-06076-F**. You requested:

"All text messages or messages on messaging applications similar in form to text messages (such as Signal, WhatsApp, Facebook Messenger, Twitter DMs, etc.) of Secretary Wilkie or Chief of Staff Pamela Powers regarding any aspect of allegations of sexual harassment at a VA hospital made by House staffer Andrea Goldstein in fall 2019 (including but not limited to any communications regarding the allegations, Ms. Goldstein, or investigations of the allegations, or any communications with Rep. Dan Crenshaw). Please provide all responsive records from September 20, 2019, through the date the search is conducted."

Reasonable Searches Dated 2/18/20, 2/19/20, 2/27/20, 2/28/20, 3/4/20, & 3/23/20

Even before your FOIA request due to public interest, on February 18, 2020 and February 28, 2020, the OSVA FOIA Officer searched through the email boxes and calendar entries of Secretary Robert Wilkie, former Deputy Secretary Jim Byrne, and Chief of Staff Pam Powers. The OSVA FOIA Officer used the following stemmed search terms with search timeframe of September 1, 2019, to February 18, 2020: 1) Goldstein, 2) Byrne and (employ or dismiss or status or perform), 3) Takano, and 4) Crenshaw. These February 18, 2020, and February 28, 2020, search yielded three hundred twelve (312) pages of emails.

On February 18, 2020, the OSVA FOIA Officer requested that the VA Office of Operations, Security, and Preparedness (OSP) submit all responsive records in its possession. The VA OSP office replied that the responsive records were not under its possession, but likely at the DC VAMC. On February 19, 2020, the OSVA FOIA Officer requested that the DC VAMC submit all responsive records in its possession.

On February 27, 2020, the OSVA FOIA Officer searched through Jim Byrne's three (3) boxes of paper files for responsive records. The OSVA looked for records relating to Ms. Goldstein, Rep. Crenshaw, or Rep. Takano. This February 27, 2020, search yielded six (6) responsive pages.

On March 4, 2020, the DC VAMC submitted nine (9) pages of responsive records. On March 23, 2020, the OSVA FOIA Officer searched through the VA Secretary's cabinets where he keeps his notes. The OSVA FOIA Officer searched for references to Ms. Goldstein and Rep. Crenshaw. This March 23, 2020, search did not yield any responsive records.

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April 27, 2020 Partial Initial Agency Decision

On April 27, 2020, OSVA released to you three hundred twenty-seven (327) pages redacted with FOIA Exemptions 5, 6, and 7(A). 5 U.S.C. § 552(b)(5) exempts from required disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Under the attorney-client and work product privileges, the VA redacts portions of records, emails, and communications between VA employees and VA/DOJ attorneys relating to legal issues on implemented smoking bans and their ongoing lawsuits, alleged criminal violations, pending civil and criminal investigations, and legal reviews of draft letters and draft responses to media or Congressional inquiries. The release of this information would impede the ability of VA employees and VA/DOJ attorneys to speak openly and frankly about legal issues concerning smoking bans and their ongoing lawsuits, alleged criminal violations, criminal/civil investigations, draft letters, and draft responses to media or Congressional inquiries. The release of this information would also compromise the VA's legal positions for any ongoing or potential lawsuits.

Exemption 5 permits an agency to withhold material reflecting the thoughts, opinions, and recommendations of federal officials reviewing an issue. Under the deliberative process privilege and FOIA Exemption 5, OSVA redacts VA's deliberations and discussions on at-the-time pending civil and criminal investigations, alleged criminal or civil infractions, investigation statuses and updates, details, witnesses, and investigation subjects; on proposed, preliminary responses to media and Congressional inquiries; on draft press releases and draft changes; and on drafts of the VA Secretary's letters and on their changes. The redacted information is both predecisional and deliberative because it reflects preliminary opinions and recommendations, which do not reflect VA's final decision. Exposure of premature discussions before a final decision is made could create undue public confusion. The release of the redacted information would negatively impact the ability of federal employees to openly and frankly consider issues amongst themselves when deliberating, discussing, reviewing, and making recommendations on pending criminal and civil investigations; on preliminary VA responses to media and Congressional inquiries and Congressional requests; on draft press releases and their changes; and on drafts of the VA Secretary's letters and their changes. The information reveals the thoughts, deliberations, and opinions that, if released, would have a chilling effect on the ability of federal officials to discuss, opine, recommend or be forthcoming about the agency's issues which require full and frank assessment. Here, the disclosure of the withheld information is likely to compromise the integrity of this deliberative or decision-making process. Moreover, the predecisional character of a document is not altered by the passage of time. Bruscino v. BOP, No. 94-1955, 1995 WL 444406 at *5 (D.D. C. May 15, 1995), aff'd in part, No. 95-5212, 1996 WL 393101 (D.C. Cir. June 24, 1996); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 174 (D.D.C. 2004) (protecting recommendations on how to answer questions); St. Louis Sewer Dist., No. 10-2103, at *18 (E.D. Mo. Mar. 2, 2012) (protecting e-mail communications, "press releases, talking points and 'Q & A,'"); Citizens for Responsibility & Ethics in Wash. v. DHS, 514 F. Supp. 2d 36, 44 (D.D.C. 2007) (protecting potential Hurricane Katrina responses including proposed "solutions and approaches"); Klunzinger v. IRS, 27 F. Supp. 2d 1015, 1026 (W.D. 1998) (protecting paper to brief commissioner for meeting); Thompson v. Dep't of the Navy, No. 95-347, 1997 WL 527344, at *4 (D.D.C. Aug. 18, 1997) (protecting potential media inquiries, as "disclosure of materials reflecting the process by which the Navy formulates its policy concerning statements to and interactions with the press" could stifle frank communication within the agency), aff'd, No. 97-5292, 1998 WL 202253, at *1 (D.C. Cir. Mar. 11, 1998) (per curiam); Williams v. DOJ, 556 F. Supp. 63, 65 (D.D.C. 1982) (protecting "briefing papers prepared for the Attorney General prior to an appearance before a congressional committee").

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5 U.S.C. § 552(b)(6) exempts from required disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." FOIA Exemption 6 permits VA to withhold a document or information within a document if disclosure of the information, either by itself or in conjunction with other information available to either the public or the FOIA requester, would result in an unwarranted invasion of an individual's personal privacy without contributing significantly to the public's understanding of the activities of the federal government. Specifically, the information being withheld, as indicated on the attached documents, under FOIA Exemption 6, consists of names, identities, email addresses, phone numbers, cellular numbers, facsimile numbers, and other contact information of: federal and Congressional employees and an alleged sexual assault victim. However, we release the names of Senior Executives, and names and contact information of journalists. Federal and Congressional employees and an alleged sexual assault victim retain a significant privacy interest under certain circumstances, such as in instances where the release of their information could represent a threat to their well-being, harassment, or their ability to function within their sphere of employment. The federal and Congressional employees and an alleged sexual assault victim whose information is at issue have a substantial privacy interest in their personal information. In weighing the private versus the public interest, we find that there is no public interest in knowing the names, identities, email addresses, phone numbers, cellular numbers, facsimile numbers, and other contact information of: federal and Congressional employees and an alleged sexual assault victim. The coverage of FOIA Exemption 6 is absolute unless the FOIA requester can demonstrate a countervailing public interest in the requested information by demonstrating that the FOIA requester is in a position to provide the requested information to members of the general public and that the information requested contributes significantly to the public's understanding of the activities of the Federal government. Additionally, the requester must demonstrate how the public's need to understand the information significantly outweighs the privacy interest of the person to whom the information pertains. Upon consideration of the records, I have not been able to identify a countervailing public interest of sufficient magnitude to outweigh the privacy interest of the individuals whose names are redacted. The protected information has been redacted and (b)(6) inserted. "Withholding a telephone number or e-mail address, alone, is not sufficient to protect that [privacy] interest; alternate means of contacting and harassing these employees would be readily discoverable on the Internet if this court ordered their names disclosed." Long v. Immigration & Customs Enf't, 2017 U.S. Dist. LEXIS 160719 (D.C. Cir. 2017).

5 U.S.C. § 552(b)(7)(A) exempts from required disclosure "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." Redacted information includes discussions and deliberations amongst VA employees and between VA and DOJ employees on pending criminal investigations relating to two VA Medical Centers located in a U.S. Southeast state, alleged criminal infractions, investigation statuses and updates, details, witnesses, and investigation subjects. OSVA does **not** take any (b)(7)(A) redactions on any references to an alleged sexual assault victim at the DC VAMC.

Second Initial Agency Decision & Searches Dated 5/6/2020

On May 6, 2020, the OSVA FOIA Officer searched through the email boxes and calendar entries of Robert Wilkie and Pam Powers, with the search date timeframe of February 19, 2020, to April 14, 2020. The OSVA FOIA Officer used the search term "Goldstein." This May 6, 2020, search did not yield any additional responsive records.

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FOIA Mediation

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. Under the provisions of the FOIA Improvement Act of 2016, the following contact information is provided to assist FOIA requesters in resolving disputes:

VA Central Office FOIA Public Liaison:
Name: Doloras Johnson
Email Address: vacofoiaservice@va.gov

Office of Government Information Services (OGIS)
Email Address: ogis@nara.gov
Fax: 202-741-5769
Mailing address:
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

FOIA Appeal

This concludes OSVA's response to FOIA request **20-06076-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,

Richard Ha, JD, CIPP/G
OSVA FOIA Officer

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