

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

VOTEVETS ACTION FUND,
2201 Wisconsin Avenue, NW #320
Washington, DC 20007,

Plaintiff,

v.

U.S. DEPARTMENT OF VETERANS
AFFAIRS,
810 Vermont Avenue, NW
Washington, DC 20240,

Defendant.

Case No. _____

COMPLAINT FOR INJUNCTIVE RELIEF

1. Plaintiff VoteVets Action Fund (“VoteVets”) brings this action under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), to compel the production of documents pertaining to Defendant U.S. Department of Veterans Affairs’ (“VA”) procedures concerning the appointment of Veterans Law Judges to the VA’s Board of Veterans’ Appeals (the “Board” or “BVA”).

2. Plaintiff seeks information that would illuminate for the public the process by which the Board’s Veterans Law Judges (“VLJs”) are appointed, and the degree to which the personal political beliefs and activities of potential nominees have played a role in their selection during the Trump Administration. Defendant’s failure to respond to Plaintiff’s request violates FOIA and deprives the public of the transparency to which it is entitled. Accordingly, Plaintiff

seeks injunctive relief compelling Defendant to immediately and fully comply with Plaintiff's requests under FOIA.

JURISDICITON AND VENUE

3. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

4. Venue in this Court is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

5. Plaintiff VoteVets, also known as VoteVets.org, is a not-for-profit organization incorporated under the laws of the District of Columbia. VoteVets has nearly 500,000 supporters with whom it regularly communicates about issues concerning veterans, including VA health care, veterans' employment, and veterans' education benefits. VoteVets' mission is to coordinate and execute public issue campaigns on topics such as these to ensure that the voices of America's veterans are heard regarding matters of public policy.

6. Defendant VA is a federal agency within the meaning of FOIA, *see* 5 U.S.C. § 552(f)(1), that is headquartered in Washington, D.C. Defendant has possession, custody, and control of records to which Plaintiff seeks access.

STATEMENT OF FACTS

The Board of Veterans' Appeals

7. The VA is the product of a 150-year-old promise by the federal government to provide health care to Americans who serve their country in the military. Today, over nine million individuals are enrolled in the VA health care system.¹

8. When veterans believe their care or claims for benefits have been mishandled by the VA, their recourse is to file a claim with the Board. The Board's VLJs decide tens of thousands of such claims every year to try to ensure that injured veterans receive the care to which they are entitled by law.²

9. VLJs are "appointed by the Secretary, with the approval of the President, based upon recommendations of the Chairman" of the Board. 38 U.S.C. § 7101A(a)(1).

10. The Board has historically been a nonpartisan body: VLJs are drawn largely from the ranks of career civil servant attorneys already working as assistants within the Board, where they have earned the requisite, specialized legal experience to enable them to fairly adjudicate veterans' claims.³

11. The VA considers VLJs to be impartial arbiters who enjoy decisional independence and work free from the influence of Defendant's political leadership.⁴

¹ VA, *Department of Veterans Affairs FY 2018-2024 Strategic Plan 6* (Feb. 12, 2018), <https://www.va.gov/oei/docs/VA2018-2024strategicPlan.pdf>.

² *VA's Board of Veterans' Appeals Resolves Record Number of Claims to Date for FY 2018*, VA (June 4, 2018), <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=4066>.

³ Lisa Rein, *'I've Never Seen These Positions Politicized': White House Rejection of Veterans Judges Raises Concerns of Partisanship*, Wash. Post, Oct. 23, 2018, https://www.washingtonpost.com/politics/ive-never-seen-these-positions-politicized-white-house-rejection-of-veterans-judges-raises-concerns-of-partisanship/2018/10/23/f488046a-ce51-11e8-920f-dd52e1ae4570_story.html.

⁴ *See, e.g.*, Appeals Regulations: Title for Members of the Board of Veterans' Appeals, 68 Fed. Reg. 6621, 6623 (Feb. 10, 2003) ("We categorically deny both that VA management has attempted to influence the result of Board members' decisions and that Board members do not provide appellants the assurance of impartiality.").

12. The Board is currently going through a period of expansion, adding judges and attorneys in order to reduce the chronic backlog of cases and the long waits veterans endure to have their claims resolved.⁵

13. During FY 2018, veterans whose claims were resolved by the Board waited an average of four and a half years for their appeals to be resolved.⁶

14. As of the end of FY 2018, there were ninety-two VLJs sworn in, with an additional twenty acting judges over the course of the year providing further assistance.⁷

15. The Board projects that it will receive more than twice as many cases in FY 2019 as it did in FY 2018.⁸

Selection of VLJs in 2018

16. On October 23, 2018, the *Washington Post* reported that earlier that year, four applicants to become VLJs were rejected, after they and four other prospective applicants were required by the White House to disclose “their party affiliation and other details of their political leanings”; their “address on Election Day in 2016”; and “whether they had ever given a speech to Congress, spoken at a political convention, appeared on talk radio, or published an opinion piece in a conservative forum such as Breitbart News or a liberal one such as Mother Jones,” among other materials.⁹

17. According to the *Post*, which based its reporting on documents and interviews with current and former VA staff, three of the four rejected applicants were Democrats and one

⁵ Rein, *supra* n.3.

⁶ VA, *Department of Veterans Affairs (VA) Board of Veterans' Appeals: Annual Report Fiscal Year (FY) 2018 25*, https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2018AR.pdf.

⁷ *Id.* at 26.

⁸ *Id.* at 24.

⁹ Rein, *supra* n.3.

was an independent. At the same time, the four applicants approved to serve as VLJs consisted of three Republicans and an unaffiliated individual who had previously voted in GOP primaries.

18. All eight applicants were career Board attorneys with six to twelve years of experience, who had been serving as acting VLJs due to the staffing shortage described above and had been vetted by multiple interviewers and recommended for promotion by Board Chairman Cheryl L. Mason.

19. Materials received in a FOIA production from BVA confirm that the Board's interview process for prospective applicants yielded eight recommendations for new VLJs, of which those ranked 3, 4, 5, and 7 were apparently not ultimately selected to serve on the Board. Those materials are attached as Exhibit A.

Plaintiff's FOIA Request

20. The rejection of prospective Board candidates on the basis of their personal political beliefs raises a variety of legal concerns, potentially implicating the federal Civil Service Reform Act, the VA's internal Equal Employment Opportunity policies, the federal Privacy Act, and the First Amendment of the U.S. Constitution.

21. To understand and explain to the public the process by which the VA selected its new VLJs in summer and fall of 2018, Plaintiff filed a FOIA request (jointly with Democracy Forward Foundation) with the VA on November 9, 2018.

22. The FOIA request, attached here as Exhibit B, requested various documents related to the VA's VLJ selection process, including (1) communications with White House email addresses concerning the VLJ process, and any VLJ application materials and communications about those application materials; (2) communications within the VA

concerning the VLJ application process; and (3) communications within the VA concerning the *Washington Post* article.

23. The request specified various custodians within the VA Office of the Secretary (“OSVA”), BVA, Office for Public and Intergovernmental Affairs (“OPIA”), Office of Congressional and Legislative Affairs (“OCLA”), Office of Human Resources and Administration (“HRM”), Office of Labor Management Relations (“LMR”), and Office of General Counsel (“OGC”).

24. Plaintiff sought a waiver of search and duplicating fees under 5 U.S.C. § 552(a)(4)(A)(iii), which requires waiver of fees if the disclosure 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.”

25. On November 27, 2018, Plaintiff received an acknowledgement from Defendant dated November 20, 2018 that Defendant had received the FOIA Request, and assigned it various control numbers, each directed to different parts of the VA: 19-01643-F (BVA), 19-01684-F (LMR), 19-01687-F (HRM), 19-01688-F (OGC), 19-01689-F (OSVA), 19-01690-F (OPIA), and 19-01691-F (OCLA). This acknowledgement is attached as Exhibit C.

26. On January 15, 2019, Defendant sent Plaintiff an update concerning the record search at OSVA. According to this correspondence, OSVA had received responsive records that would be processed behind fifty-three other FOIA requests that were ahead of 19-01689-F in VA’s FOIA processing queue. The correspondence contained no indication that VA had made a determination about Defendant’s fee waiver request. This correspondence is attached as Exhibit D.

27. To date, this January 15, 2019 correspondence was the last communication from Defendant to Plaintiff about OSVA's FOIA request.

28. To date Plaintiff has received final responses from two VA entities: OCLA (on November 28, 2018) and BVA (on March 15, 2019).

29. Pursuant to 5 U.S.C. § 552(a)(6), the VA had, at most, thirty working days to notify Plaintiff of its determinations regarding the FOIA request, its reasons therefore, and the right to appeal any adverse determinations.

30. As of the date of this Complaint, with respect to OSVA, LMR, HRM, OGC, and OPIA, Defendant has failed to: (1) determine whether to comply with the FOIA request, (2) notify Plaintiff of any such determination of the reasons therefor, (3) advise Plaintiff of the right to appeal any adverse determination, or (4) produce the requested records or otherwise demonstrate that the requested records are exempt from production.

31. As of the date of this Complaint, Defendant has not complied with its statutory obligations. Because the VA has "fail[ed] to comply with the applicable time limit provisions" of the FOIA, Democracy Forward is "deemed to have exhausted [its] administrative remedies." 5 U.S.C. § 552(a)(6)(C)(i).

CLAIM FOR RELIEF

32. Plaintiff incorporates by reference the foregoing paragraphs as if fully set forth herein.

33. By failing to respond to Plaintiff's request within the statutorily mandated timeframe, Defendant (with respect to OSVA, LMR, HRM, OGC, and OPIA) has violated its duties under 5 U.S.C. § 552, including but not limited to the duties to conduct a reasonable

search for responsive records, to take reasonable steps to release all nonexempt information, and not to withhold responsive records.

WHEREFORE, Plaintiff prays that this Court:

1. order Defendant to conduct a search for any and all responsive records to Plaintiff's FOIA requests using search methods reasonably likely to lead to discovery of all responsive records;
2. order Defendant to produce, by a date certain, any and all non-exempt responsive records and a *Vaughn* index of any responsive records withheld under a claim of exemption;
3. enjoin Defendant from continuing to withhold any and all non-exempt responsive records;
4. order Defendant to grant Plaintiff's request for a fee waiver; and
5. grant any other relief this Court deems appropriate.

Dated: April 18, 2019

Respectfully submitted,

/s/ Javier Guzman

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