

VA



U.S.
Department of
Veterans
Affairs

Veterans Health Administration
Washington DC 20420

June 25, 2019

FOIA Request No.: VHA 18-12530-F

Adam Grogg
Democracy Forward Foundation
foia@democracyforwardfoundation.org

Dear Mr. Grogg:

This letter is the second partial initial agency decision to your September 3, 2018, request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, submitted to the Veterans Health Administration (VHA) Central Office FOIA Office for a copy of the following information from January 20, 2017 and the present:

1. All communications, calendar entries (including any associated attachments or notes), call sheets, visitor logs, and meeting minutes or notes reflecting meetings or communication between David Shulkin, Robert Wilkie, Peter O'Rourke, Thomas Bowman, Scott Blackburn, Camilo Sandoval or Pamela J. Powers and any of the following:
 - A. Issac "Ike" Perlmutter
 - B. Laura Perlmutter
 - C. Bruce Moskowitz
 - D. Aaron Moskowitz
 - E. Marc Sherman
 - F. Thomas "Jake" Leinenkugel
 - G. Individuals with emails addressed ending in "@frenchangel59.com"

2. All communications, calendar entries (including any associated attachments or notes), call sheets, visitor logs, and meeting minutes or notes containing any of the following terms:
 - A. Ike
 - B. Perlmutter
 - C. Moskowitz
 - D. Sherman

Please limit this search to the Office of the Secretary.

3. All communications, calendar entries (including any associated attachments or notes), call sheets, visitor logs, and meeting minutes or notes containing any of the following terms:

- A. Ike
- B. Perlmutter
- C. Moskowitz
- D. Sherman
- E. frenchangel59.com
- F. American College of Surgeons
- G. ACS
- H. Zinner

Please limit this search to the following VA employees: David Shulkin, Robert Wilkie, Peter O' Rourke, Thomas Bowman, Scott Blackburn, Camilo Sandoval, Pamela J. Powers, William Gunnar, Carolyn Clancy, Clifford Ko, and David Hoyt.

4. All communications, calendar entries (including any associated attachments or notes), call sheets, visitor logs, and meeting minutes or notes containing any of the following terms:

- A. Ike
- B. Perlmutter
- C. Moskowitz
- D. Sherman
- E. Apple
- F. App for veterans
- G. Mobile application
- H. Mobile app
- I. Aaron

Please limit this search to the following VA employees: David Shulkin, Robert Wilkie, Peter O' Rourke, Thomas Bowman, Scott Blackburn, Camilo Sandoval, Pamela J. Powers, Richard Stone, Melissa Glynn, and John Windom.

5. All communications, calendar entries (including any associated attachments or notes), call sheets, visitor logs, and meeting minutes or notes containing any of the following terms:

- A. Ike
- B. Perlmutter
- C. Moskowitz
- D. Sherman
- E. frenchangel59.com
- F. Electronic health records
- G. EHR
- H. Interoperability
- I. Cerner

Please limit this search to the Office of Electronic Health Record Modernization, the Veterans Health Administration, and the Office of Information and Technology.

6. All emails sent or received by Genevieve Morris and Ash Zenooz containing any of the following terms:
 - A. Cerner
 - B. Privitize
 - C. Privatization
 - D. White House
 - E. Trump
 - F. Ike
 - G. Perlmutter
 - H. Moskowitz
 - I. Sherman
 - J. frenchangel59.com

7. All records or communication concerning the VA final rule VA Claims and Appeals Modernization, 83 Fed. Reg. 39818 (August 10, 2018) where any of the following individuals are included or mentioned:
 - A. Issac "Ike" Perlmutter
 - B. Laura Perlmutter
 - C. Bruce Moskowitz
 - D. Aaron Moskowitz
 - E. Marc Sherman
 - F. Individuals with emails addressed ending in "@frenchangel59.com" Please limit this search to the Veterans Benefits Administration

8. All records and communications concerning the Federal Advisory Committee Act where any of the following are included or mentioned:
 - A. Issac "Ike" Perlmutter
 - B. Laura Perlmutter
 - C. Bruce Moskowitz
 - D. Aaron Moskowitz
 - E. Marc Sherman,
 - F. Individuals with emails addressed ending in "@frenchangel59.com"

On April 26, 2019 you were provided with the first partial release of records responsive to line item 6 of your request. This second partial release is a continuation of the release of these responsive records. As previously discussed by telephone conference on June 6, 2019 and documented in a revision of the original request for records on 6/7/19 line item 6 was revised to state the following:" All emails sent or received by Genevieve Morris and Ash Zenooz containing any of the following terms: (a) Ike, Perlmutter, Moskowitz, Marc Sherman, or frenchangel59.com; and that also include any of the following terms: (b) Cerner, privatize, privatization, White House, Trump." Additionally, following the first partial release provided to you on April 26, 2019, you responded by email on April 30, 2019 requesting that we exclude the email distributions that are solely media summaries and news clips without additional commentary from that point forward.

Subsequently, to ensure an accurate search was conducted for this line item, the search terms were reapplied to the emails as directed above. In addition, the media summaries and news clips with no VA commentary were excluded. This resulted in fifty-six (56) documents totaling two thousand six hundred and sixty (2,660) pages responsive to this line item of the request. Of these remaining responsive records, the VHA FOIA Office has enclosed thirteen (13) Portable Digital Format (PDF) files totaling one thousand six hundred and seven (1,607) pages. For reference purposes, Bates page numbers have been added to the bottom, center of each PDF page numbered from 498 to 2104.

Upon completion of my review I have determined that these documents contain information that falls within the disclosure protections of FOIA exemption 5, 5.U.S.C. § 552 (b)(5) and FOIA exemption 6, 5 U.S.C. § 552(b)(6).

FOIA Exemption 5 permits VA to withhold a document or information contained within a document as "pre-decisional" if two requirements are met. First, there must be an identifiable deliberative process. That is, the document must be a direct part of the deliberative process. Second, the agency generated the information or document as part of the agency decision process. Stated another way, VA may withhold information under Exemption 5 where the document or its content makes recommendations or expresses opinions about legal or policy matters during a decision-making process and the document is not the decision document or incorporated into the decision document. Additionally, in accordance with the FOIA Improvement Act of 2016, an agency shall withhold information under the FOIA only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption or disclosure is prohibited by law. Stated another way, if the disclosure is not prohibited by law, the agency must state an articulable, foreseeable harm to the agency or its activities that could occur as a result of release of the document or information.

Information pertaining to this request is being withheld under Exemption 5 as the documents contain open and frank pre-decisional communications between staff at various levels of the organization. Staff are providing feedback by voicing their opinions. Specifically, the redactions contain VA employee opinions and recommendations concerning the Request for Proposal (RFP) review completed as part of the VA Electronic Health Record (EHR) Modernization Project. There are several categories of documents that routinely are protected by the deliberative process privilege of Exemption 5. Among the protected documents are advisory opinions, recommendations and deliberations, comprising parts of a process by which governmental decisions and policies are formulated. They are protected because, by their very nature, their release would likely "stifle honest and frank communication within the agency." Materials of this nature go to the very heart of the privilege, for, as the Supreme Court has stated, "the deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." Schell, 843 F.2d at 941 "A subordinate who wishes to provide information candidly should not fear that the public will be privy to his views merely because his superiors have not yet acted on his recommendations."

In determining whether a document is pre-decisional, an agency does not necessarily have to point specifically to an agency final decision, but merely establish "what deliberative process is involved, and the role played by the documents in issue in the course of that process." Thus, so long as a document is generated as part of such a continuing process of agency decision making, courts have found Exemption 5 can be applicable. In addition, releasing the discussions within the emails requested would cause confusion to the public because the information conveyed was not part of final decisions made and therefore would do very little to add to the public's understanding of the operations and activities of the agency. See, *AFGE v. HHS*, 63 F. Supp. 2d 104, 108 (D. Mass. 1999) (holding that release of pre-decisional documents "could cause harm by providing the public with erroneous information"), *aff'd*, No. 99-2208, 2000 U.S. App. LEXIS 10993 (1st Cir. May 18, 2000); Thus exemption 5 is applied to protect against public confusion that might result from disclosure of reasons or rationales that were not in fact ultimately the grounds for the agency's decision. Specifically, the information withheld includes draft responses to the deliverables from the March 17, 2017 briefing with SVAC staff members.

FOIA exemption 6 permits VA to withhold a document or information within a document if disclosure of the information would constitute a clearly unwarranted invasion of a living individual's personal privacy. Stated another way, VA may withhold information under FOIA exemption 6 where 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.

In order to determine if FOIA exemption 6 was applicable; I had to first conclude if the documents met the threshold of records covered by exemption 6; and if so, determine if disclosure would constitute a clearly unwarranted invasion of personal privacy by balancing the privacy interest that would be compromised by disclosure against any public interest in the requested information. I have determined the documents meet the threshold of records covered by exemption 6, as courts have made it clear that all information that "applies to a

particular individual” meets the thresholds of requirements of exemption 6 protection.

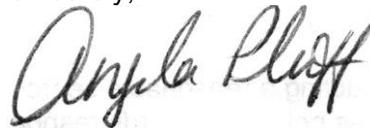
Upon completion of my analysis in balancing personal privacy interests against public interest, I have determined the personal privacy interest outweighs the public interest. Consequently, I am withholding information under the disclosure protections of FOIA exemption 6. Specifically, the information I am withholding, as indicated on the enclosed documents, consists of the names, work phone numbers, cell phone numbers and partial email addresses (except for domain) of lower level VA employees and contractors. Additional information being withheld are the cell phone numbers of VA employees who are part of executive leadership. Although a VA cell phone is a government issued device, it provides internal agency direct contact to the individual during both duty and off duty hours. In addition, personal opinions expressed by higher level VHA employees were withheld. These individuals have a personal privacy interest in their personal opinions. Lastly, the names, phone numbers and partial email addresses of non-VA employees have been withheld. The disclosure of this information would not contribute to the public’s understanding of VHA activities as these individuals are not part of the VHA workforce.

In United States Department of Justice v. Reporters committee for Freedom of the Press, 489 U.S. 749 (1989), we must determine if a privacy interest is involved, and determine if disclosure of the requested information would serve the public interest and balance the personal privacy interest against the public interest. In evaluating the public interest in a given case, we must focus on the nature of the requested document and its relationship to the public interest generally. We must consider whether disclosure of the requested document, or portions thereof that have been withheld, would “open agency action to the light of public scrutiny” rather than focus on the particular purpose for which the document is being requested. See Reporters Committee, 489, U.S. at 772.

It is my determination that the individuals associated with the withheld information have a personal privacy interest in it, warranting protection under the FOIA. 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 individual 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 materials you provided, I have not been able to identify a countervailing public interest of sufficient magnitude to outweigh the privacy interest in this case. The individuals associated with this information have a personal privacy interest in the information that outweighs any public interest served by disclosure of the information under FOIA. Consequently, I am withholding portions of documents as indicated by the redactions on the enclosed records, under FOIA exemption 6, 5 U.S.C. § 552 (b)(6).

If you need any further assistance or would like to discuss any aspect of your request, please do not hesitate to contact me at (315) 263-3653 or by email at angela.pluff@va.gov.

Sincerely,



Angela Pluff, RHIA
VHA FOIA Officer

Enclosure: 13 PDF Documents