GARY J. AGUIRRE
AGUIRRE LAW, APC
501 W Broadway, Suite 800
San Diego, CA 92101
Tel: (619) 400-4960
Fax: (619) 501-7072
gary@aguirrelawapc.com

Attorney for Plaintiff MARIA A. POMARES

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MARIA A. POMARES,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF VETERANS' AFFAIRS

Defendants.

Case No.: 21CV84 H (MSB)

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Date: November 14, 2022
Time: 10:30 a.m.
CTRM: Carter/Keep, 15A

The Hon. Marilyn L. Huff

[ORAL ARGUMENT REQUESTED]

[Briefing Schedule Set by Doc. No. 33]

MOTION

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, on November 14, 2022, at 10:30 a.m., in Courtroom 15A (Carter/Kemp), or as soon hereafter as the matter may be heard, Plaintiff's Motion for Summary Judgment will be heard.

Pursuant to Federal Rule of Civil Procedure 56, Maria A. Pomares (Plaintiff) moves for summary judgment on her claim for violation of the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

This Motion is based upon this Notice of Motion, the supporting Memorandum of Points and Authorities, Notice of Lodgment Exhibits 1-26, Request for Judicial Notice, Declaration of Gary J. Aguirre, and any other evidence or argument that the Court may permit.

Table of Authorities

Cases

Statutes

Rules

Regulations

Table of Contents

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff brings this motion for summary judgment on her claims for declaratory and injunctive relief to enforce three FOIA requests served on the Department of Veterans' Affairs ("VA"). (Declaration of Gary J. Aguirre filed herewith ["Aguirre Decl."] ¶¶ 2-4, Exs. 1-3). "FOIA cases typically and appropriately are decided on motions for summary judgment. (*ACLU v. CIA* (D.D.C. 2015) 105 F. Supp. 3d 35, 44.) Plaintiff's three FOIA requests sought records relating to unlawful conduct by staff within Veterans Benefits Administration ("VBA"), an agency within the VA.

The VA has withheld thousands of pages of responsive records. It has complicated judicial review by splitting Plaintiff's three FOIA requests into 13 separate requests, each with its own search, review, and appellate processes. (ECF No. 30, 16 (missing FOIA No. 21-01065-F) and Exs. A-N). It created 22 Vaughn indices. (*Id*., Exs. A-N). It delayed its release of records by conducting manual searches, despite Plaintiff's requests to conduct electronic searches required by 5 USC § 552(a)(3)(C). It claims the names of lower-level employees are exempt but then creates more than 300 categories of "lower-level" employees which include "CEOs." (NOL-499, 744, 906-07, 1292, and 1731-38).

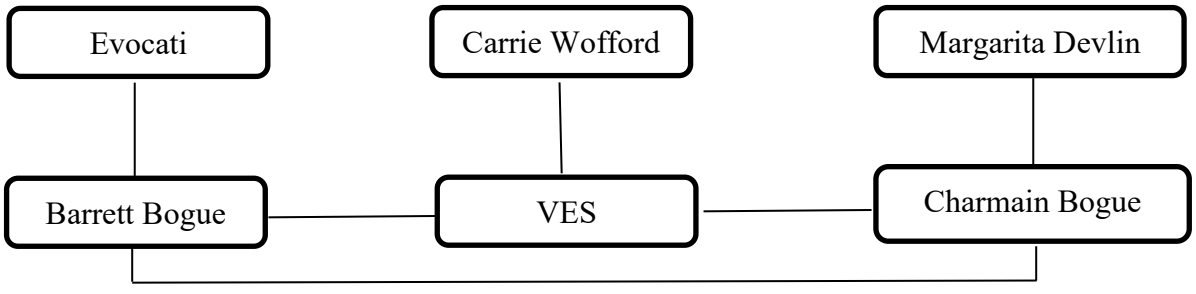
The VA's description of its searches for the records at the center of Plaintiff's requests are conclusory, speculative, and inadmissible. Its grounds for asserting FOIA exemptions grow thinner and thinner as the records sought are more likely to contain evidence of unlawful VA conduct. All the transcripts of witness interviews of the VA's Office of the Inspector General ("OIG") of the inquiry by Senator Charles Grassley and the allegations in this case have been withheld. (NOL-372). All OIG investigative files on the same subject have been withheld. In essence, the VA's response to Plaintiff's records requests is the FOIA version of circling its wagons.

The VA's assertion of Exemptions 6 and 7(C) puts in issue the public interest, which in turn puts in issue the VA's unlawful conduct. Plaintiff's FOIA requests sought records that would shed light on two categories of undisputed unlawful conduct: (1) violations of recusal, disclosure, and conflicts regulations and statutes, including criminal

violations, and (2) leaking of material nonpublic information affecting the stock price of a public company. On the first category, a report issued by the VA's OIG confirmed the person central to the three FOIA requests, former VBA Executive Director of Education Service, Charmain Bogue ("Bogue"), did in fact commit the ethical violations alleged in the First Amended Complaint ("FAC"). (ECF No. 6).

On the second category, VA records indisputably establish its staff leaked material nonpublic information about a public company during the trading day on March 9, 2020, with the knowledge it could trigger "general panic and insider trading." (Aguirre Decl., ¶ 5, Ex. 4). The open issue is whether VA staff also leaked nonpublic information about the same public company before March 9, 2020, the cause of an $800 million loss in market capitalization. The evidence points to VA leaks that began approximately ten trading days before its March 9 press release.

Plaintiff's FOIA requests sought records, among others, relating to communications between Bogue and Veterans Education Success ("VES") and its president, Carrie Wofford. (*Id*., Exs. 1-3). VES, a nongovernmental organization, had business before Bogue, including VES's recommendation that Bogue initiate enforcement proceedings against the same public company. (*Id*., ¶ 6, Ex. 5). Bogue's husband, Barrett Bogue, was employed by VES as its Senior Communications Advisor. (Req. for Judicial Notice ("RJN"), Ex. 6, 41). At the VBA, Bogue reported to Deputy Undersecretary for Benefits Margarita Devlin ("Devlin"). (*Id*., 45). These relationships are graphically presented below:



One stunning finding in the OIG report: all persons identified in the above chart refused to cooperate with the OIG investigation. Carrie Wofford and Barrett Bogue were

linked to VES. (*Id*., 41). Bogue and her supervisor, Devlin, also failed to cooperate with the investigation. (*Id*., at 45, see also Exs. 7 and 8).

Plaintiff's FOIA requests sought VA records relating to two types of ethics violations by Bogue: (1) Bogue's failure to recuse herself under 18 U.S.C. § 208 and 5 C.F.R. 2640.101 when her husband's employer (VES) had agency business before Bogue and (2) Bogue's failure to disclose VES employed her husband in her Public Financial Disclosure as required by 5 U.S.C. App. 4, §§ 101(a), (f)(3), 102. These allegations became findings when the VA's OIG issued its the 38-page report on March 24, 2022, after its one-year investigation. (RJN, Ex. 6).

The same FOIA requests sought agency records that would shed light on the extent to which the VA leaked nonpublic material facts about Bogue's decision to launch an investigation and enforcement proceeding against Career Education Corporation ("CEC"),[1] a publicly traded company. VA staff leaked their decision to bring enforcement proceedings against CEC during trading hours on March 9, before the VA issued its press release the same day at 5:59 p.m. (RJN, Ex. 9).

The open issue is: did VA staff also begin leaking that same decision ten trading days before the VA press release on March 9, as the chart on CDC's stock collapse and the evidence strongly imply? Remarkably, the OIG declined to investigate these potential violations despite the evidence before it. (RJN, Ex. 6, 4, n. 1). It is also withholding all its investigative files and transcripts of witness interviews of Bogue's ethics violations.

There is a connection between Bogue's ethical violations, the VA's investigation of CEC, and possible VA leaks. The evidence is undisputed that VES's January 21, 2020, letter launched the VA investigation of CEC, which in turn led to the VA's March 9, press release announcing its enforcement proceeding against CEC. In the weeks before the VA's March 9 press release, there were also open channels through which nonpublic

[1] The name of the company was changed from Career Education Corporation to Perdoceo Education Corporation effective January 1, 2020. The company's former name is used in this complaint, because the records requests and released records primarily use that name.

information could flow between (1) Bogue and Wofford and (2) Bogue and her husband, Barrett Bogue.

Turning to the VA's searches, they were deeply flawed for multiple reasons. First, the VA's declarations describing the search for Bogue's responsive records are complex, confusing, and inadmissible. They raise more questions than they answer. Among those unanswered questions is this one: the VA's search of Bogue's emails yielded "8,049 responsive pages." (Ex. H, ¶ 28). The VA then used some unidentified filters to reduce the universe of responsive emails to 166 pages, less than 2%. (*Id*., ¶¶ 29 and 32). The VA failed to explain the criteria it used to remove 7,883 pages of Bogue emails and provided no Vaughn index identifying them. (*Id*.). Further, the VA declarations describe no searches for key records that must exist, e.g., the OIG investigative files on Bogue, her immediate supervisor, and other high level VA officials.

Plaintiff has only recently discovered the VA maintains a second records system—Veterans Affairs Integrated Enterprise Workflow Solution ("VIEWS")—which it did not search to respond to Plaintiff's FOIA requests. (Aguirre Decl. ¶ 11, Ex. 10). It is not described in any VA regulations. It was operated for more than three years in violation of the Privacy Act. (*Id*., ¶¶ 12-13, Exs. 11 and 12).

On top of that, the VA is withholding thousands of pages of responsive records based on its flawed assertion of Exemptions 4, 5, 6, 7(C) and 7(E), including thousands of responsive pages in their entirety. The declaration justifying the VA's decision to withhold 2,164 pages is a single conclusory sentence: "My office provided notice to Mr. Aguirre that 2164 pages of investigation interview transcripts were reviewed and withheld in their entirety for this release." (Ex. A, ¶ 47). The Vaughn index justifying the same decision states: "release of these records would constitute an unwarranted invasion of personal privacy for the witnesses and third parties mentioned." (Ex. B, NOL-372). On its face, this Vaughn index fails to comply with controlling case law. Even if Exemptions 6 and 7(C) allow the VA to withhold a witness's protected privacy information, they do not empower the VA to withhold the witness's entire testimony.

II. PLAINTIFF'S FOIA REQUESTS WERE DRAFTED TO MINIMIZE THE BURDEN ON THE VA TO LOCATE AND RELEASE THE RECORDS

The VA claims it "thoroughly processed Plaintiff's multiple, voluminous Freedom of Information Act (FOIA) requests and narrowly applied appropriate exemptions." (ECF No. 30, 1:3-4). Every aspect of this statement is inaccurate.

First, Plaintiff's requests were drafted to minimize the VA's burden in locating the requested records. (Aguirre Decl., Exs. 1, 11 and 2, 16). The VA could locate all records described in Plaintiff's first request by simple electronic searches. Requests 1 through 5 sought emails—excluding internal VA emails—using two search terms. Requests 1 and 2 sought emails to or from 13 VA officials and nine external email domains. Requests 3 through 5 sought external emails of the same 13 VA officials that contained the name of a specific person, educational institution, or company. Finally, the sixth request sought all emails of the 13 VA officials containing a specific phrase on the subject line used by the VA to refer to the enforcement proceeding announced in its March 9, 2020, press release. It appears that the VA violated FOIA (5 USCS § 552(a)(3)(C)) by conducting (unnecessary) manual searches for the requested records.

The other two FOIA requests were equally simple. Plaintiff's second FOIA request on November 13, 2020, sought ***other*** FOIA requests relating to the enforcement proceeding announced by the VA in its March 9 press release. Plaintiff's third FOIA request on December 15, 2020, sought records relating to any audit or investigation by the VA's OIG in which Bogue was (1) a witness or (2) the subject of the investigation. The VA's declarations confirm it located all responsive documents by electronic searches.

So how did these searches become so complicated and require the VA to file ten declarations and 18 months to complete its release of records to Plaintiff? There are several reasons; none are Plaintiff's doing. First, the VA has a unique structure for responding to FOIA requests. It has multiple FOIA offices linked to different VA departments and offices. Consequently, when the VA received Plaintiff's three FOIA requests, it split them into 13 separate requests (ECF No. 30, 16 (missing FOIA No. 21-

01065-F) that have now yielded 22 Vaughn indices, each with its own searches, reviews, and administrative appeals. (Exs. A-N). It also conducted manual searches rather than electronic searches in violation of FOIA, which delayed the release of records.

There appears to be no simple rationale for the VA's decision to complicate FOIA requests in this way. Most federal agencies have a single FOIA office which processes FOIA requests. The VA's process places each FOIA office under the control of a department head who may have a personal interest in not releasing the records.

III. THE RELEASE OF THE RECORDS WOULD SERVE THE HIGHEST PUBLIC INTEREST

The VA has redacted or withheld thousands of pages of records on privacy grounds under Exemptions 6 and 7(C). This makes no sense. Plaintiff seeks no disciplinary records, performance evaluations, salary history, phone numbers, addresses, medical records, or personnel files. The only privacy interests at issue in this case are the names of the persons in the emails sent or received by VA, VES, and Evocati employees that relate to (i) the unlawful conduct found by the OIG in its report and (ii) the leaking of material nonpublic information about CEC.

The VA relies on *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989) to describe the procedural steps the court should follow: (1) determine whether a personal privacy interest is involved; (2) determine whether disclosure would serve the public interest; and (3) balance the personal privacy interest against the public interest. Assuming the existence of protectable privacy interests under Exemptions 6 and 7(C), which Plaintiff disputes, the Court must balance those privacy interests against the public interest. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004); *Ripskis v. Dep't of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984).

Congress created FOIA as the public's vehicle to ferret out the truth. "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB* v. *Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978). "Free people are, of necessity, informed; uninformed people can never be free."

Sen. Judiciary Comm., Freedom of Information, 88th Cong., 1st Sess. 3 (1963) (remarks of Sen. Edward Long).

In relation to Exemption 6, the VA's memorandum states: "With regards to its Exemption 6 withholdings, Defendant withheld limited portions of private information, properly balancing the individual privacy interests and considering any public interest." (ECF No. 30, 18:4-6). It also states: "Defendant has submitted some of the records which were produced in response to Plaintiff's request for emails to show that the redactions were narrowly applied." (*Id*., n. 4). These conclusory statements sharply conflict with the facts established by the evidence before this Court. The VA has ***withheld, in their entirety,*** 2,164 pages of OIG transcripts of witness interviews under Exemptions 6 and 7(C) in their entirety (Ex. A ¶ 47; Ex B. at NOL-372). Additionally, under Exemption 6, the VA withheld or redacted 301 pages of VES records (Aguirre Decl. Ex. 13), more than 300 pages of Bogue's emails (*Id*., Ex. 14), aside from 7,900 pages for which no description exists, over 29 pages of Evocati emails (*Id*., Ex. 15), and 293 pages for VBA Chief of Staff Andrea Lee ("Lee"), VBA Deputy Chief of Staff Brandye Terrell ("Terrell") and Devlin. (Ex. H, ¶¶ 10-14; 20-23). It gets worse: the VA asserts Exemptions 6 and 7(C) in withholding the text of 38 C.F.R. 0.735-12(b). (*Id*., Ex. 16).

While there is a presumption in favor of withholding law enforcement records under Exemption 7(C), probative evidence of official misconduct can rebut this presumption. *SafeCard Services, Inc. v. S.E.C.*, 288 U.S. App. 926 F.2d 1197, 1206 (D.C. Cir. 1991). "[T]he requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Nat'l Archives & Records Admin. v. Favish,* 541 U.S. 157, 174 (2004). See also *Aguirre v. SEC,* 551 F.Supp.2d 33, 56 (D.D.C. 2008).

There are two types of improper and unlawful conduct by the VA on the record before the Court. First, the VA's OIG found that during the period Bogue's spouse worked for VES, Bogue participated in VES-related matters without considering whether her recusal was required in light of the potential appearance of a conflict of interest—a

violation of government ethics rules." (RJN, Ex. 6). Second, the OIG found Bogue "failed to abide by the terms of that approval in a matter involving an MOU between VBA and a nongovernmental entity used to support a data-sharing project involving VES." (*Id*., 35). The OIG also found: "This included two instances in early 2019 when Ms. Bogue was directly asked by her spouse to address VES's data requests to the Education Service that had gone unanswered." (*Id*.).

Bogue tried to defend her conflict violations by claiming she relied on the advice of her supervisors: "According to Ms. Bogue, in May 2019, she received advice from her supervisors allowing her to participate in VES-related matters because VES did not have a contract or memorandum of understanding (MOU) with VA, so long as she treated VES like any other entity appearing before the Education Service." (*Id*., 35). However, the OIG found:

> [Bogue] failed to abide by the terms of that approval in a matter involving an MOU between VBA and a nongovernmental entity used to support a data-sharing project involving VES. This too resulted in a violation of the apparent conflict rule because she did not evaluate whether her impartiality could reasonably be questioned in this instance.

(*Id*.). More broadly, the OIG found "Bogue's Interactions with the VES President Violated the Apparent Conflict Rule." (*Id*., 44-45 and 48-49).

The OIG report stopped short of finding Bogue had "violated the prohibition on using her public office for private gain." (*Id*., 36). The OIG was unable to make this finding because Bogue, her husband, VES's president, Wofford, refused to cooperate with the OIG investigators. (*Id*., 41). At her first interview, Bogue disputed the relevance of some questions, refused to answer others, and repeated nonresponsive answers. (*Id*., 60).

Bogue grew less cooperative with time. She "refused to complete a follow-up interview with the OIG." (*Id*., 36). The OIG made this explicit finding on Bogue's refusal to cooperate:

> Federal law and VA policy require agency employees to cooperate with OIG investigations, including providing testimony, subject to their Fifth Amendment right against self-incrimination. Ms. Bogue's refusal to

> participate in the remainder of her follow-up interview was in direct contravention of her duties as a VA employee.

(*Id*.). Bogue's conduct had a predictable result: it "hindered the OIG's investigation and, by extension, its efforts to fulfill its statutory oversight mission." (*Id*.). Bogue resigned when she faced an OIG Kalkines demand: cooperation or termination. (*Id*., Ex. 17).

Bogue was not alone. Her refusal to cooperate with the OIG investigation was contagious. Barrett Bogue (her husband), VES, and Carrie Wofford (VES's President), all refused to comply with OIG interview requests. On Barrett Bogue and VES, the OIG report stated: "Mr. Bogue and the VES president refused to speak with the OIG." (*Id*., 53). It had the expected consequences: "The OIG cannot substantiate the existence of an actual conflict of interest because of insufficient evidence caused in part by Mr. Bogue's and VES's refusal to fully cooperate." (*Id*. 43). And the contagion went up the VA's supervisory chain: Bogue's immediate supervisor, Devlin, refused to be interviewed by OIG investigators in April 2021. (*Id*., 45; Ex. 7). Devlin left the VA three months later.

Second, it is indisputable that VA staff disclosed material nonpublic information during the trading hours on March 9, despite a warning that it would cause "general panic, and insider trading." (*Id*., Ex. 4). The disclosure violates the spirit of the Securities and Exchange Commission's Regulation Fair Disclosure.

The VA's OIG did not investigate evidence presented by Senator Grassley that VA staff leaked its decision to file an enforcement proceeding against CEC in the weeks before its March 9 press release, causing investors to lose $800 million between January 21, and March 18, 2020. (*Id*., ¶¶ 19 and 20, Exs. 18 at 19). By leaking its decision during trading hours, the VA showed its insensitivity to the impact on the financial markets.

The dynamic that led to the collapse of CEC's stock was the letter from Aniela Szymanski of VES to Bogue on January 21, 2020. (*Id*., ¶ 6, Ex. 5). The VES letter proposed that Bogue use her power to put four for-profit schools and a public company out of business. Its first sentence went straight to this point: "We are writing to bring information to your attention troubling complaints alleging misleading advertising and

enrollment practices by schools, *making those schools ineligible for educational benefits under 38 U.S.C. § 3696* (emphasis added)." (*Id*., 25). The VES letter took credit for creating the evidence: "our staff has gathered evidence that these schools aggressively recruit veterans and other GI Bill beneficiaries, making it especially important that VA take appropriate action to address their behavior." (*Id*.)

The VES letter pressed the VA to include VES in the proceedings against CEC by: (i) including all complaints collected by VES from veterans; (ii) modifying its GI Bill tool to reflect student disagreement with the school's response to a VA complaint; (iii) uploading all complaints collected by VES into Consumer Sentinel, which is used by law enforcement; and (iv) explaining why the VA did not report all 1,189 complaints VES submitted. (*Id*.) In short, VES proposed to co-opt the VA's power and use it as its own.

On March 9, 2020, at 5:59 p.m., after the market closed, the VA issued its press release announcing its intention to do exactly what VES had pressed it to do: choke off four schools' and CEC's income flow. (RJN, Ex. 9). The VA's press release was not news to those who sold CEC stock short that day. During trading hours on March 9, the market traded 1.640 million shares of CEC stock, roughly 370 percent of its daily average volume. Traders also sold short 512,000 shares, roughly 350 percent of its average daily short sale volume. The price of CEC stock fell ten percent on March 9 and 58 percent from January 21, when VES delivered its letter to the VA, to March 18, when it found its low, an $800 million loss in market capitalization. (*Id*., ¶¶ 19-21; Exs. 18-20).

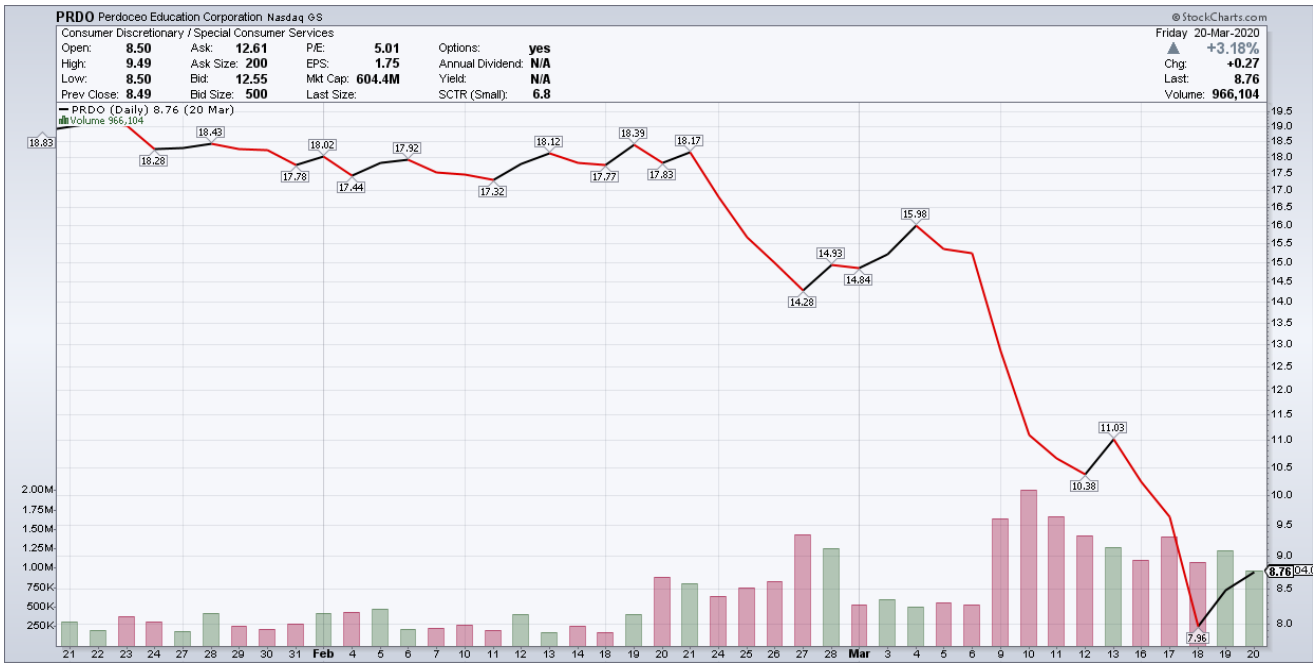
The VA leaked its decision to some, including VES, during trading hours on March 9. During the trading day, at 2:26 p.m. E.T., VES tweeted its own press release ***before*** the VA's press release at 5:59 p.m. (*Id*., ¶ 22, Ex. 21). The press release VES published on its website identified CEC and stated the VA had "notified military and veterans service organizations today" of its impending enforcement action. (Aguirre Decl., ¶ 23, Ex. 22).

It is undisputed that VA staff leaked its decision during the trading day, despite a clear warning from James Ruhlman, VA's Deputy Director for Program Management in Education Service ("Ruhlman"): "Since some of the schools are owned by publicly traded

corporations, and because the actions will potentially impact thousands of GI Bill beneficiaries, we're keeping the information 'close hold' in order to prevent misinformed leaks, general panic, and insider trading." (*Id*., Ex. 4). The VA withheld under Exemption 6 the name of the VA official who received Ruhlman's email and countermanded his guidance not to leak the VA's decision during trading hours. (*Id*., ¶ 24, Ex. 23).

The unknown is whether VA staff's leak began ***before*** March 9, 2020. The VA staff decision to leak its decision during the trading hours on March 9, despite Ruhlman's warning, confirms its indifference to the unfair impact those leaks would have on investors. The VA's disclosure of market-moving information may have been innocent. But the leaks still undermine the integrity of the capital markets, as the Securities and Exchange Commission explained in its release, Final Rule: Selective Disclosure and Insider Trading as follows: "Investors who see a security's price change dramatically and only later are given access to the information responsible for that move rightly question whether they are on a level playing field with market insiders." (https://www.sec.gov/rules/final/33-7881.htm).

The chart below shows the fall of the price of CEC's stock from $18.83 to $7.96 between January 21 and March 18, 2020 (Aguirre Decl. ¶¶ 30-31):



The sharp fall in the price of CEC's stock ten trading days before the VA's announcement is typical of stock movements before a public announcement where nonpublic material facts have been leaked. VES knew in January 2020 that the VA was considering an enforcement proceeding pursuant to 38 U.S.C. 3696 ("Enforcement Proceeding") against CEC. The email communications between VES and Bogue continued from January 21 and March 9, 2020. (*Id*., Ex. 14). Hence, VES employees, including Wofford, had access to market-moving facts.

Those facts have high value to those willing to use them. It is much like knowing which horse will win the race before it starts. VES may have relationships with market players with this skill set. (*Id*., Ex. 13). For this reason alone, the names of those who exchanged emails with VES, Bogue, Evocati, and Ruhlman cannot be protected under Exemptions 6 or 7(C).

The high public interest in the release of these records is confirmed by the decision of the Ranking Member of the U.S. Senate Committee on the Judiciary, Senator Charles E. Grassley, to request an inquiry into Bogue's ethics violations and the VA's release of market sensitive information, the same unlawful conduct alleged in this case. On April 2, 2021, Senator Grassley sent two letters to the VA, one to its secretary and one to the OIG. (*Id*., Exs. 18 and 19). Grassley's press release described their content as follows:

> In his letter to the VA, Grassley requests records relating to ethics determinations related to current and former senior officials at the VA, the steps the VA takes to protect retail investors by safeguarding market-sensitive information, any internal investigations of such information leaking, and the VA's attempts to block information released through FOIA requests relating to these matters.

(*Id*. ¶ 25, Ex. 24). These letters incorporated an exhibit from the original complaint as source of the information driving his inquiry. (*Id*., Exs. 18 and 19).

IV. THE JONES, BELLAMY AND MARTIN VAUGHN INDICES ARE INSUFFICIENT

An agency bears the burden of justifying its exemptions. 5 U.S.C. § 552(a)(4)(B). To satisfy this burden, an agency "must offer oral testimony or affidavits that are 'detailed

enough for the district court to make a *de novo* assessment of the government's claim of exemption.'" *Maricopa Audubon Soc. v. U.S. Forest Service*, 108 F.3d 1089, 1092 (9th Cir 1997) (quoting *Doyle v. FBI*, 722 F.2d 554, 555-56 (9th Cir. 1983)). "The agency must disclose as much information as possible without thwarting the purpose of the exemption claimed." *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir. 1995). The document should "afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate opportunity to review, the soundness of the withholding." *Fiduccia v. United States DOJ*, 185 F.3d 1035, 1042 (9th Cir. 1999) (quoting *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991)). "The *Vaughn* index lacks any description of the documents, and the mere file names do not provide WRLC sufficient information to make an 'intelligent judgment.'" (*W. Res. Legal Ctr. v. Nat'l Oceanic & Atmospheric Admin.* 2020 U.S.Dist.LEXIS 217925, at *33.) "Further, an affidavit 'may be necessary to verify the agency has nothing more in its possession than what it has described.' *Id.* at 1043." (*Id*., at *32, quoting from *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991)).

A. <u>The VA Failed to Meet Its Burden in Withholding 7,883 Pages of Bogue Emails</u>

In her declaration, FOIA Officer Quanisha Jones ("Jones") describes a three-step process in locating and releasing Bogue's emails: (1) the electronic search of VBA's email database using Plaintiff's search terms yielded 8,049 pages (Ex. H ¶ 28); (2) Jones's review reduced the universe from 8,049 to just 166 responsive pages (*Id*., ¶¶ 29 and 32), and (3) her application of exemptions further reduced the universe from 166 to 143 pages (*Id*.), which were released to Plaintiff, 30 in their entirety and 113 partially redacted. (*Id*.).

Two questions arise: (1) what criteria did Jones used in creating the universe of 8,049 pages? (2) what criteria did Jones apply in reducing 8,049 pages to 166 pages? If Jones used Plaintiff's search terms to locate the 8,049 emails, and removed 7,883 pages using some unknown criteria, those emails should have been released or posted to a Vaughn index. The VA did neither. Consequently, the VA did not meet its burden.

B. The VA's Vaughn Index Failed to Meet Its Burden in Withholding an Unknown Number of Devlin, Terrell and Lee Emails.

Jones also conducted the search for Devlin's, Lee's and Terrell's emails. (Ex. H, ¶ 7). The same deficiencies that exist in her search and Vaughn index for the Bogue emails also exist in her search for the Lee, Terrell and Devlin emails. Again, Jones begins with a larger universe (886 pages), which she reduces to 293 using unknown criteria. (*Id*., ¶¶ 10-14, 20-23). Jones then redacts the names on most of the emails on the theory they were "lower-level employees" or under Exemption 6. Her Vaughn index is essentially useless, because it links few of the released pages to either Lee, Terrell or Devlin, e.g., just one email for Devlin. These tactics utterly frustrate the objectives of FOIA.

C. The VA's Vaughn Index Failed to Meet Its Burden in Withholding 316 Pages of Evocati Records in Their Entirety

The VA allowed Evocati, Barrett Bogue's consulting company, to withhold in their entirety 316 of the 403 pages of records subpoenaed by the OIG. (Exs. A, ¶¶ 44-48; B NOL-367). This is the description of the withheld Evocati records in the Vaughn index: "Records obtained from third party Evocati, LLC via OIG subpoena." (NOL-367). This description falls far short of satisfying the Ninth Circuit decisions cited above. In addition, the Ninth Circuit imposes heightened disclosure obligations on an agency that withholds an entire document. *Fiduccia,* 185 F.3d 1035, 1043. In that case, a *Vaughn* index "of considerable specificity" informs the requester of "what the agency possesses but refuses to produce." (*Id.*)

D. The VA's Vaughn Index Failed to Meet Its Burden in Withholding 2,164 Pages of OIG Transcripts in Their Entirety

The VA's Vaughn index provides even less information on the 2,164 pages of transcripts of witness interviews conducted by the OIG. (Ex. B, NOL-372). The declaration of Ruthlee Gowins-Bellamy ("Bellamy") describes these records as follows: "My office provided notice to Mr. Aguirre that 2164 pages of investigation interview transcripts were reviewed and withheld in their entirety for this release." (Ex. A, ¶ 47).

The Vaughn index describes the same records as "Investigation interview transcripts." (*Id*.). These statements provide no clue what information is being withheld and therefore do not meet Ninth Circuit standards for a Vaughn index. *Fiduccia,* 185 F.3d 1035, 1043.

V. THE VA DID NOT CONDUCT A REASONABLE SEARCH

The VA's declarations do not satisfy its burden to prove it conducted a search reasonably calculated to uncover all relevant documents. *Zemansky v. U.S. Environmental Protection Agency,* 767 F.2d 569, 571 (9th Cir. 1985). See also: *Yonemoto v. Dep't of Veterans Affairs,* 648 F.3d 1049, 1057 (9th Cir. 2011). Fed. Rule Civ. P. 56 requires the VA's declarations to state "facts that would be admissible evidence" and be "competent to testify on the matters stated." In a FOIA case, the affidavits must be detailed, ***nonconclusory***, and "not impugned by evidence of bad faith*." Citizens Comm'n on Human Rights*, 45 F.3d at 1328. "A district court assesses the adequacy of an agency's search against a standard of reasonableness, construing all facts in the light most favorable to the FOIA requestor." (*Id*.). "The burden is on the agency to establish that all reasonably segregable portions of a document have been segregated and disclosed." (*Hamdan v. United States DOJ* 797 F.3d 759, 766 (9th Cir. 2015))

A. The VA Declarations Failed to Establish It Conducted a Reasonable Search for Bogue's Responsive Emails

The VA's declarations and Vaughn indices do not establish that it conducted a reasonable search for Bogue's emails. The VA offers two declarations and three narratives to describe its searches for Bogue's emails responsive to Plaintiff's November 9, 2020, FOIA request. In a declaration laced with inadmissible conclusions and speculation, Eugene Martin ("Martin") tries to trace how the VA searched for Bogue's responsive emails in December 2020, the first of the searches. Martin had no role in that search. Nor did he supervise any employee who conducted the search. His explanation how VBA's FOIA office conducted its search faces a further challenge, because "FOIAX did not contain a copy of the records as they were released when FOIA Officer 2 was reviewing the underlying FOIA requests and the records provided by FOIA Officer 1." (Ex. K, ¶

14). According to Martin the VA's Office of Information Technology "was able to provide access to VBA to the site in February 2022." (*Id*.).

Given his utter lack of personal knowledge how FOIA Officers 1 and 2 searched for Bogue's emails, Martin gallantly tries to fill the gap with shear speculation. He admits his utter lack of any personal knowledge: "Based on my familiarity with the records, ***it is reasonable to conclude*** that [Former FOIA Officer 1] … did not apply redactions to the underlying records that had been released under 20-06724-F." (*Id*., ¶ 17). Martin also concluded, based on his review of the records, that an error by FOIA Officer 2 "did not impact the proper processing of the request." (*Id*. ¶ 67). Martin states "former FOIA Officer 1" issued an IAD (initial agency decision) on December 22, 2020, (Ex. X) which dealt with Bogue's responsive emails. (*Id*., ¶ 65). Martin explains VBA located Bogue's emails, applied Exemptions 5 and 6 and then released records as described in Exhibit X. (*Id*.). Plaintiff respectfully submits the Martin declaration should be stricken.

The "FOIA Officer 1" Martin refers to in his declaration is Stephanie Tucker, who left the VA in June 2021. (*Id*., ¶ 6). Plaintiff's counsel had email exchanges with Tucker at exactly the time described by Martin relating to her search for Bogue's emails. In her December 10, 2020, email, Tucker shared a fact Martin does not mention in his declaration: "Once review of the records has been completed, your request will be sent to VBA's Office of General Counsel for final review… [T]this is an added step since your request has been designated as a Substantial Interest (SI) because you are seeking communication of a senior level official." (Aguirre Decl. ¶ 26, Ex. 25). Tucker's statement was true on the surface, since the VA's FOIA regulations authorize the VA to extend the period to respond to a FOIA request when another agency has "a substantial interest in the subject matter of a request." (38 C.F.R. § 1.556(c)(iii)). However, no record shows any other agency's interest in the Bogue records. Nor does the regulation extend the period when a FOIA requester seeks a "communication of a senior level official."

On December 11, 2020, Plaintiff's counsel inquired of Tucker about the grounds on which the VA was holding up the release of Bogue's emails:

> I understand form our phone call yesterday that the decision to transfer this request to "tier 3" is because it involves upper or senior management, which will delay the release of these records. As you know, I disagreed with any extension of time for this request, since it involves an electronic search of records that did not appear to be subject to any exemption. I also understand you have nearly completed your review, so there should be little justification for delay, absent the late decision to transfer this matter to Tier 3.
>
> Aside from the statement of my position above, I would like to clarify the situation. I understand from our call yesterday that the senior official involved is Charmain Bogue. She was explicitly identified in the request, which also included even more senior officials whose records have already been released. So, I am puzzled by this late decision, which I understand from you will delay the release of the records.

(*Id*. ¶ 27, Ex. 26). Tucker did not respond. (*Id*.). Plaintiff's counsel followed up requesting a response on December 15. (*Id*.). Tucker did not respond. (*Id*.). On December 22, Tucker released 463 pages of Bogue's emails; 213 were completely redacted; 100 were news clips; and the remaining 150 pages had significant redactions. (*Id*., ¶ 28). This was essentially a nonproduction of Bogue's emails, ***seemingly at the intervention of the OGC.***

There is a second entry point on the search for Bogue's emails, which is just as bizarre as Martin's explanation. Jones describes a second, convoluted cycle in the search. It began on July 22, 2021, when Jones requested a search of Bogue's emails using terms proposed by Plaintiff eight months earlier, in her November 9, 2020, request. (*Id*., Ex. 2). Jones used the same terms Tucker used in her December 2020 search. In her declaration, Jones explains her search yielded 8,049 responsive pages. (Ex. H ¶ 28). All these pages were responsive to specific search terms, e.g., an email from Bogue's email address to Wofford's email address. Consequently, these emails should have been released or posted to a Vaughn index. The VA did neither. There is also the puzzling issue of the disparate yield of the Tucker search (463 pages), and the Jones search (8,049 pages).

Jones reviewed the emails and reduced the pages from 8,049 to the 166. (Ex. H ¶¶ 29 and 32) She then applied Exemptions 4, 5 and 6 and released 143 pages of unredacted and redacted pages. (*Id*.). Jones's declaration raises two questions: (1) what criteria did she use in selecting the 8,049 pages that comprised the first universe of Bogue emails?

(2) what criteria did Jones use in reducing the 8,049 emails to 166?

Jones offers only this statement how she reduced the 8,049 pages to 166: "Due to the volume of records received, I had to review them in batches." (*Id*.) She describes "a page-by-page and line-by-line review" in reducing the universe from 8,049 to 166 pages, before withholding or redacting any records under FOIA exemptions. Jones is silent on any criteria she applied in reducing Bogue's responsive emails from 8,049 pages to 166. After that, she filtered the 166 pages again by applying Exemptions 4, 5 and 6 and released 143 pages of redacted and unredacted emails.

If Jones did a manual search for Bogue's emails, as she seems to describe, the search violated FOIA. Plaintiff requested the VA to conduct electronic searches:

> I have drafted the requests below so the persons conducting the searches may locate the requested records (emails) with electronic searches (rather than manual searches) using the search terms, email addresses, and domain names specified below. I therefore request the VA "to make reasonable efforts to search for the records in electronic form or format," as required by 5 USCS § 552(a)(3)(C).

(Aguirre Decl. Ex. 1, 11; Ex. 2, 16). Section 552(a)(3)(C) mandates: "an agency ***shall make*** reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system (emphasis added)." Jones's declaration, though unclear, seems to describe a manual search rather than the electronic one required by 5 USC § 552(a)(3)(C).

Another factor may also shed light on the VA's need to conduct a second search for Bogue's responsive emails eight months after it received Plaintiff's FOIA request. Deputy Undersecretary for Benefits Devlin, Bogue's immediate supervisor in VBA, refused the OIG's request for an interview. (*Id*., Exs. 7 and 6, 45). She left VBA in July 2021. Other than Tucker's search and her release of 463 pages, VBA did not conduct any search for Bogue's emails until July 2021, shortly after Devlin left VBA. The VA offers no explanation why its office delayed eight months before doing a serious search for

Bogue's emails and then produced only 143 of the 8,049 pages responsive to the search terms provided by Plaintiff. Nor has the VA released any identifiable Devlin emails.

Plaintiff submits the VA's declarations do not satisfy its burden to prove it conducted a search reasonably calculated to uncover all relevant documents. *Zemansky v. U.S. Environmental Protection Agency,* 767 F.2d 569, 571 (9th Cir. 1985). See also: *Yonemoto v. Dep't of Veterans Affairs,* 648 F.3d 1049, 1057 (9th Cir. 2011). Fed. R. Civ. P. 56 requires the VA declarations state "facts that would be admissible evidence" and be "competent to testify on the matters stated." In a FOIA case, the affidavits must be detailed, ***nonconclusory*****,** and "not impugned by evidence of bad faith*." Citizens Comm'n on Human Rights*, 45 F.3d at 1328. "A district court assesses the adequacy of an agency's search against a standard of reasonableness, construing all facts in the light most favorable to the FOIA requestor." (*Id.*). "The burden is on the agency to establish that all reasonably segregable portions of a document have been segregated and disclosed." (*Hamdan v. United States DOJ* 797 F.3d 759, 766 (9th Cir. 2015)).

B. <u>The VA Declarations Failed to Establish It Conducted a Reasonable Search for Devlin's Responsive Emails</u>

Plaintiff's November 9, 2020, FOIA request used the same language in seeking Devlin's and Bogue's responsive emails. (Aguirre Decl. Ex. 1). Jones states she conducted the search for Devlin's responsive emails. (Ex. H, ¶ 7). However, Jones does not state what the search yielded. Nor does her Vaughn index describe any responsive Devlin emails. The OIG obviously believed Devlin was a witness with percipient knowledge, since its staff sought to interview her, which she rejected. (Aguirre Decl. Exs. 7 and 6, 45). Consequently, there should also be portions of the OIG investigative files relating to Devlin. The lack of any explanation relating to the search for Devlin's emails and OIG records establishes the VA failed to conduct a reasonable search.

C. <u>The VA Declarations Failed to Establish It Conducted a Reasonable Search for the OIG Investigative Files</u>

Plaintiff's December 15, 2020, FOIA request sought records relating to OIG

inquiries (1) in which Bogue was the subject or a witness and (2) "to the handling of material nonpublic information." (*Id*., Ex. 3). The OIG conducted a yearlong investigation. Bellamy's declaration states 2,164 pages of OIG transcripts were withheld (Ex. A, ¶ 47). They are identified in her Vaughn index. (Ex. B, NOL-372). The OIG investigation must have generated files. Yet, none have been identified or released other than the VES and Evocati records.

D. The VA's Search Was Not Reasonable Because It Excluded VIEWS

Plaintiff has only recently discovered the VA maintains a second records system: Veterans Affairs Integrated Enterprise Workflow Solution ("VIEWS"). Plaintiff has been advised by the VA's counsel that the VA did no search VIEWS for responsive records. (Aguirre Decl. Ex. 10).

The VA appears to have operated VIEWS since 2018, according to its filing with the National Archives and Records Administration ("NARA"). (RJN. Ex. 11). It is unclear how VIEWS complied with applicable codes and regulations. Plaintiff could find no reference to VIEWS in Chapter 1, Title 38, of the Code of Federal Regulations, the Chapter and Title that apply to the VA. The Privacy Act requires "any new or updated System of Records must be published in the Federal Register for notice and public comment before implementation. *See* 5 U.S.C. § 552a(e)(4)(D), (e)(11)." (*Brennan v. Dickson,* 45 F.4th 48 (D.C.Cir. 2022)). Such a filing with the Federal Register is described as a "System of Records Notices" or "SORNs." The VA did not file its SORNs on VIEWS with the Federal Register until May 20, 2022. (RJN, Ex. 12).

The VA describes VIEWS in its SORNs as follows:

> The purpose of this system is to permit VA to identify and respond to individuals and/or organizations who have submitted correspondence or documents to VA. The system of records also contains documents generated within VA that may contain the names, addresses and other identifying information of individuals who conduct business with VA.

This description clearly applies to the OIG investigation of the communications between VES and Bogue. Indeed, even the OIG investigation would be included in VIEWS.

No correspondence from VA FOIA staff mentions or refers to VIEWS. None explains why the VA did not search VIEWS for records responsive to Plaintiff's FOIA requests. None of the VA's ten declarations and 22 Vaughn indices refer to VIEWS. As discussed below, the records sought by Plaintiff's requests fall squarely within the records maintained through VIEWS. Consequently, a reasonable search for responsive records should have included a search of VIEWS.

Plaintiff expects the VA to argue that the search would be repetitive of the search conducted in the individual email folders maintained for the designated VA staff whose emails are sought. That of course assumes VA staff, particularly Bogue and Devlin, did not double delete their emails when they learned Senator Grassley had opened an inquiry or learned of Plaintiff's FOIA requests and the filing of this action. Further, posting the VA records on VIEWS where they are accessible to VA employees may constitute a waiver of some of the exemptions asserted by the VA in withholding responsive records. In any case, none of the VA's correspondence addressed its reasons for not conducting a search of VIEWS. Plaintiff will address the VA's explanations in her reply.

VI. THE VA FAILED TO MEET ITS BURDEN IN WITHHOLDING AND REDACTING RECORDS UNDER FOIA EXEMPTIONS

A. The VA Failed to Prove the Evocati Records It Withheld under Exemption 4 Are Protected.

"The party seeking to withhold information under Exemption 4 has the burden of proving that the information is protected from disclosure under FOIA" (*Frazee v. United States Forest Serv.,* 97 F.3d 367, 371(9th Cir. 1996)). Exemption 4 allows an agency to withhold "trade secrets and commercial or financial information obtained from a person as privileged or confidential." 5 U.S.C. § 552(b)(4). The district courts in the Ninth Circuit have followed the two-pronged test from *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) for determining whether records are "confidential" under Exemption 4. (*JCI Metal Prods. v. U.S. Dep't of the Navy*, 2010 U.S.Dist.LEXIS 74409, at *9.) The second prong allows an agency to withhold records if their disclosure

would likely "cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks*, 498 F.2d at 770.

The VA does not address Exemption 4 anywhere in its brief. The closest the VA comes to justifying its withholding of Evocati records is this statement in Bellamy's declaration: "My office disagreed with b(4) exemption requests on six pages of Evocati, LLC records …" (Ex. A, ¶ 46). Bellamy's Vaughn index provides no VA position on withholding Evocati records, except for this: "The explanation and justification for all b(4) redactions is provided in attachment B, within correspondence from Evocati, LLC attorneys (See Exhibit 41)." (Ex. B, ¶ NOL-367).

The Evocati attorneys describe the business records withheld by the VA as follows: "The documents identified in section 1 of Attachment A should be considered 'commercial or financial' because they are entirely comprised of confidential information directly related to the commercial endeavors of Evocati, LLC." (NOL 343). Hence, the VA is relying upon Evocati's reliance on the second prong of *National Parks* in withholding 316 pages of Evocati records in their entirety.

Evocati's analysis of the relevant case law cites only one Ninth Circuit decision, *GSA v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969), which does not deal with its contention the records are confidential under the second prong of *National Parks*. Evocati also relies heavily on *Critical Mass Energy Project v. Nuclear Reg. Comm'n*, 975 F.2d 871 (D.C. Cir. 1992), which has never been incorporated into Ninth Circuit FOIA law. (*Edelman v. United States SEC,* U.S. Dist. LEXIS 159382, at *15, fn. 4 (S.D.Cal. 2017)) ("As the SEC acknowledges, the Ninth Circuit 'has never addressed or adopted the *Critical Mass* test' despite multiple opportunities to do so."). Further, nothing in the Evocati letter or the VA's declarations explains how the disclosure of the Evocati records would "cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks*, 498 F.2d at 770.

Most significantly, Evocati uses the same conclusory language to describe almost all the records it withholds: "confidential information about Evocati, LLC's services and

Methods." (NOL-348-353). It offers the same conclusory terms as the "Reason for Withholding Under Exemption 4" the records: "Commercial and confidential business communication." (*Id.*). Under controlling Ninth Circuit case law, "Conclusory and generalized allegations of competitive harm are insufficient to show that requested information is 'confidential' under the second prong of the National Parks…" (*GC Micro Corp. v. Defense Logistics Agency* 33 F.3d 1109, 1113 (9th Cir. 1994)). Further, the VA must "show that there is (1) actual competition in the relevant market, and (2) a likelihood of substantial competitive injury if the information were released." *Lion Raisins v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1079 (9th Cir. 2004). Neither the VA nor Evocati have made such showing. The conclusions in the VA's Vaughn index and the Evocati letter may not be considered under *GC Micro*, 33 F.3d at 1113. Hence, the VA has not met its burden of establishing that the Evocati records are protected under Exemption 4.

Finally, the Evocati records lie at the heart of the OIG's findings that Bogue violated conflict and disclosure rules defined in the Code of Federal Regulations, including her failure to disclose her husband's businesses, which include (1) his relationship with Evocati and VES and (2) Evocati's and VES's relationship with each other. Further, Bogue, her husband, Wofford and VES refused to cooperate with the OIG investigation. (Aguirre Decl., Ex. 6, 41). Nonetheless, the VA granted Exemption 4 to virtually all the records subpoenaed from Evocati, Mr. Bogue's company, including its agreements with VES and VES staff. (NOL-367). It is unclear from these facts whether the VA was seeking to protect Evocati's "confidential business information" or itself.

B. <u>The VA Failed to Prove the Records It Withheld under Exemption 7(E) Are Protected</u>.

Although the VA asserts Exemption 7(E) in withholding 2,164 pages of transcripts of OIG interviews (Ex. B, NOL-372), its motion contains no argument or authorities to support that decision. Exemption 7(E) protects information compiled for law enforcement purposes from disclosure to the extent it "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law

enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). To establish this exemption, "the Government must show that the technique that would be disclosed under the FOIA request is a technique unknown to the general public." *Pully v. Internal Revenue Serv.*, 939 F.Supp. 429, 438 (E.D. Va. 1996) (citing *Malloy v. Dep't of Justice*, 457 F.Supp. 543, 545 (D.D.C. 1978)); *see Wilkinson v. Fed. Bureau of Investigation*, 633 F.Supp. 336, 349 (C.D. Cal. 1986) (to justify withholding under Exemption 7(E), "the government will have the burden of proving that these techniques are not generally known to the public.").

Further, the VA may submit affidavits to satisfy its burden that records come within an exemption, but it "may not rely upon conclusory and generalized allegations of exemptions." *Kamman v. IRS*, 56 F.3d 46, 48 (9th Cir. 1995) (quoting *Church of Scientology v. Dep't of the Army*, 611 F.2d 738, 742 (9th Cir. 1980)). That is exactly what the VA did with this conclusory justification for withholding the 2,164 pages of OIG transcripts: "These records were compiled for law enforcement purposes. Release of these records could result in interference with future law enforcement proceedings by allowing third parties to intimidate witnesses." (NOL-371). Hence, the records must be released.

C. The VA Failed to Prove Its Withholding and Redaction of Records Is Protected under Exemptions 6 and 7(C).

The VA argues that it may withhold and redact records on privacy grounds under Exemptions 6 and 7(C). The threshold issue is whether the VA has met its burden of proving that the records have any protectable privacy interests under Exemptions 6 and 7(C). (*Reporters Committee*, 489 U.S. at 773).

Plaintiff seeks no disciplinary records, performance evaluations, salary history, phone numbers, addresses, medical records, or personnel files. The only privacy issue raised by any of Plaintiff's FOIA requests is whether the names of those who sent or received emails are protectable under Exemptions 6 and 7(C). At first glance, the VA takes a reasonable position: only the names of "lower-level employees" are protectable

on privacy grounds. But it then defines 310 categories of "lower-level employees," which include a "national president and CEO," "Executive Vice President and Director of Government Relations," a 'CEO," a "Senior Director of Veterans and Military Regulatory Affairs," and even "Veterans Service Organization." (NOL-499, 744, 906-07, 1292, 1731-38).

The VA cites no case in which any court has used such a sweeping definition of "lower-level employees" entitled to have their name protected under Exemptions 6 and 7(C). This scope of name protection is even boarder than the agencies sought in the two cases cited below, where the courts concluded the disclosure of employee names was not protected by Exemption 6. (*Gordon v. FBI,* 388 F.Supp.2d 1028, 1040-1041(N.D.Cal. 2005)) ("While several cases have held that an employee has a privacy interest in his name *and home address*. TSA does not cite a single case in which a court has permitted a non-law enforcement agency to uniformly redact government employees' names from otherwise disclosable documents pursuant to exemption 6 (citations omitted)." (*Austin Sanctuary Network v. United States Immigr. & Customs Enf't, 2022* U.S. Dist. LEXIS 171033, at *99. (S.D.N.Y. 2022)) ("The problem is that two of ICE's withholdings [of names] are improper on their face and, with respect to the remainder, ICE has not justified the names it has withheld in a manner that permits the Court to conduct the balancing that Exemptions 6 and 7(C) require.).

VII. CONCLUSION

The unlawful conduct by VA staff is indisputable. But there are unknowns: to what level of VA staff, the degree of the wrongful conduct, and participation of third parties. There is a remedy. In the words of Justice Brandeis: "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." For U.S. agencies, that light is FOIA. For obvious reasons, the VA switched off FOIA's light when it focused on Bogue and those close to her. Plaintiff respectfully requests this Court to switch it back on.

Dated: October 3, 2022.

Respectfully submitted,

AGUIRRE LAW, APC

s/Gary J. Aguirre

GARY J. AGUIRRE
Attorney for Plaintiff