



DEPARTMENT OF VETERANS AFFAIRS
Office of the General Counsel
Washington DC 20420

APR - 1 2011

In Reply Refer To 024F
Case No. 22168

Mr. Michael Wishnie
Supervising Attorney
Jerome N. Frank Legal Services Organization
P.O. Box 209090
New Haven, CT 06520

Dear Mr. Wishnie:

This letter is the final agency administrative decision by the Department of Veterans Affairs (VA) in response to your appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. In your FOIA appeal letter, dated December 16, 2010, you disputed a decision by the Board of Veterans Appeals ("BVA") to withhold certain documents from its production on the ground that those documents were "unreliable." The documents in question, and indeed the substance of your initial FOIA request, concerned data with regard to post-traumatic stress disorder (PTSD). Your initial FOIA request sought various statistical information with regard to PTSD claims based on military sexual trauma (MST). Your appeal letter also indicates that you interpreted certain statements by BVA regarding its information tracking methods to be a denial by BVA of your request for fact- and race-based statistical information regarding BVA claims. Based on the inference you drew, you also appealed BVA's apparent decision not to search for the information. BVA had not, however, denied these portions of your appeal. Rather, its determination letter directed you to BVA's website, where its appeals determinations are published. After carefully considering your appeal, we have determined that your appeal should be granted in part and denied in part.

Before we address the substance of your appeal, we will begin by briefly explaining BVA's record keeping procedure. BVA maintains an electronic database, the Veterans Appeals Control and Locator System ("VACOLS"), whereby it tracks certain information regarding claims appeals. VACOLS is the only electronic database in which BVA stores the relevant appeals-related data. In addition to VACOLS, BVA maintains a physical case file for each appeal that it receives. Thus, BVA also maintains a multitude of physical files concerning its cases. Lastly, BVA proactively maintains a published, searchable listing of its decisions, dating back to 1992, on its website at: <http://www.index.va.gov/search/va/bva.html>.

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Turning now to your appeal, we will first address the portions that we are denying. BVA, which according to its statutory mandate reviews benefits determinations on appeal (See 38 U.S.C. § 7104), does not maintain data regarding distributions of disability ratings. In your appeal, you argued that it was insufficient for BVA to simply state that it did not possess responsive information for certain information. While it may be true that a Federal agency has a FOIA obligation to conduct reasonable searches, it does not necessarily follow that each agency component to which a FOIA request is issued has an obligation to search for data that it reasonably knows it does not possess.

Agencies are permitted to make reasonable determinations with regard to which component does or does not maintain specified records and to rely on the attestation of a relevant agency official with knowledge of the type of records a particular agency component possesses in making those determinations. See American-Arab Anti-Discrimination Comm. V. DHS, 516 F. Supp. 2d 83, 87-88 (D.D.C. 2007) (finding sufficient agency's statement that it "does not maintain [requested] information" and ruling search "unnecessary" since [relevant agency official was] presumed able to familiarize himself with what statistics ICE does and does not maintain."). Accordingly, VA does not derogate its obligations under FOIA by determining that BVA does not possess information that it is not statutorily mandated to possess and for which its database does not possess any relevant data fields. Thus, we must deny your appeal insofar as it seeks from BVA data regarding disability ratings (Request Nos. 2, 3, 10, and 16). While we deny this request on behalf of BVA, we will readdress this request in connection with our determination regarding your appeal to VBA.

We now turn to the portions of your appeal that are granted in part. There is no data entry field in VACOLS for "military sexual trauma." VACOLS does, however, contain a field entitled "Special Contentions" and that provides checkboxes for those contentions. One such checkbox is "PTSD" and another is "Sexual Assault/Harassment." Thus, an appellant can indicate "PTSD" and/or "Sexual Assault/Harassment" as "Special Contentions" for a benefits appeal. However, BVA has no method for determining, without looking through each individual appeal file, whether the "Sexual Assault/Harassment" is "military sexual trauma", whether that "Sexual Assault/Harassment" is related to the "PTSD" "Special Contention", whether that "Sexual Assault/Harassment" occurred in the context of the appellant's service, or any other factor underlying the "Sexual Assault/Harassment" indication. BVA, citing the lack of reliability of that data as compared with your FOIA request, withheld that data. However, after further consideration, we have determined to release responsive statistical data generated from the "PTSD" and "Sexual Assault/Harassment" checkboxes within the "Special Contention" data field on VACOLS. We are therefore releasing one hard-copy page

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of data (Exhibit A) that, to the best of our ability based on the caveat noted above, responds to your Request Nos. 4, 5, 11, and 12. We are also releasing electronic spreadsheets (titled "APsexh_nonptsd2REDACTED.xls" and "APptsd_with_sexh_docket# REDACTED.xls", and enclosed on a CD marked "Exhibit B") that contain information that, again to be best of our ability, further responds to Request Nos. 4, 5, 11 and 12. From the aforementioned spreadsheet, however, we are redacting personally identifiable information under FOIA Exemption 6 (5 U.S.C. § 552(b)(6)).

Exemption 6 protects records the release of which would lead to a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6). The redacted portions of the spreadsheet contain names and claim numbers of individual appellants, and those individuals have a significant interest in protecting the privacy of that information. While the release of this information may be permissible if it would serve an articulable and significant public interest, you have not identified a public interest in this information that would outweigh the individuals' privacy interests. Indeed, as you seek primarily statistical information, you have not indicated any interest in receiving individually identifiable information. Overall, the balance weighs in favor of protecting the privacy of the individuals involved, and we find that the redacted information is protected under FOIA Exemption 6.

Regarding your requests for fact-specific information (Request Nos. 6-9 and 13-15), your request for an itemization of each type of "non-MST-related PTSD" appeal filed, approved and/or rejected (Request No. 17), and your request for a race-based breakdown of data (Request No. 18), VACOLS does not contain any fact- or race-specific data entry fields and also does not itemize different types of PTSD appeals. As noted above, "PTSD" is listed in VACOLS as a "Special Contention" for an appeal. VACOLS does not, however, contain any sub listings for PTSD or any other indicator that would enable BVA to determine what the "PTSD" indicator is related to. Thus, BVA does not maintain data from which it could generate statistics that would respond to your requests insofar as they seek statistical information related to specific case facts, types of PTSD, or race. As noted above, BVA does maintain physical files. Thus, in order for BVA to determine statistical information specific to race, type of PTSD, or fact pattern, its representatives would have to physically search every single file that BVA maintains for the tens of thousands of appeals decisions it has made between FY2006 and FY2010. Such action would necessarily be overly burdensome and unnecessary therefore. See Sephton v. FBI, 365 F. Supp. 2d 91, 101 (D. Mass. 2005) (explaining that FOIA does not require review of "every single file that might conceivably contain responsive information"); Garcia v. DOJ, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002) ("The agency is not expected to take extraordinary measures to find the requested records."); Schrecker v. DOJ, 217 F. Supp. 2d 29, 35 (D.D.C.

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2002) (finding "that to require an agency to hand search through millions of documents is not reasonable and therefore not necessary"); Blackman v. DOJ, No. 00-3004, slip op. at 5 (D.D.C. July 5, 2001) (declaring request that would require a manual search through 37 million pages to be "unreasonable in light of the resources needed" to process it); O'Harvey v. Office of Workers' Comp. Programs, No. 95-0187, slip op. at 3 (E.D. Wash. Dec. 29, 1997) (finding request to be unreasonably burdensome because search would require agency "to review all of the case files maintained by the agency" and "would entail review of millions of pages of hard copies"), aff'd sum nom. O'Harvey v. Comp. Programs Workers, 188 F.3d 514 (9th Cir. 1999) (unpublished table decision).

A search through BVA files for responsive information is not required by FOIA because it would compel BVA to "become an ad hoc investigator[] for requesters whose requests are not compatible with [BVA's] own information retrieval systems." See Blakey v. DOJ, 549 F. Supp. 362, 366-67 (D.D.C. 1982), aff'd, 720 F.2d 215 (D.C. Cir. 1983) (unpublished table decision); see also Frank v. DOJ, 941 F. Supp. 4, 5 (D.D.C. 1996) (stating that agency is not required to "dig out all the information that might exist, in whatever form or place it might be found, and to create a document that answers plaintiff's questions"); Trenerry v. Dep't of the Treasury, No. 92-5053, 1993 WL 26813, at *3 (10th Cir. Feb. 5, 1993) (holding that agency not required to provide personal services such as legal research); Satterlee v. IRS, No. 05-3181, 2006 WL 3160963, at *3 (W.D. Mo. Oct. 30, 2006) (finding that request was improper where it would require agency to "conduct legal research" and answer questions "disguised as . . . FOIA request").

Lastly, FOIA does not require a search through each of BVA's files for specific fact patterns and for race-related data because, as noted above, BVA has already disclosed this information by proactively publishing each of its decisions on its website. Thus, the publication of searchable BVA opinions on its website satisfies BVA's FOIA obligations with regard to any requestor who seeks information concerning those opinions, and VA has no further legal obligations under FOIA to search through fact patterns of cases that it has already made publicly available to FOIA requestors. See 5. U.S.C. § 552(a)(3)(A) (excluding from subsection (a)(3) those records which are "made available" under subsections (a)(1) or (a)(2)); see also DOJ v. Tax Analysts, 492 U.S. 136, 152 (1989) ("Under subsection (a)(3) . . . an agency need not make available those materials that have already been disclosed under subsections (a)(1) and (a)(2)."); Schwarz v. U.S. Patent & Trademark Office, 80 F.3d 558, 558 (D.C. Cir. 1996) (unpublished table decision) (finding that agency was not required to disclose records from patent files in response to a subsection (a)(3) request because patent files are available for public inspection and copying under subsection (a)(2)); Crews v. IRS, No. 99-8388, 2000 U.S. Dist. LEXIS 21077, at *16 (C.D. Cal. Apr. 26, 2000) (declaring that policy

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statements and administrative staff manuals made available under subsection (a)(2) are not required to be made available in response to subsection (a)(3) requests); cf. Reeves v. United States, No. 94-1291, 1994 WL 782235, at *1-2 (E.D. Cal. Nov. 16, 1994) (dismissing lawsuit because FOIA requests sought publicly available agency regulations).

Nevertheless, in an effort to be abundantly helpful, and to go beyond our legal obligation under the FOIA, BVA has created an electronic spreadsheet that, together with the other disclosed spreadsheets, should aid Plaintiffs in finding information responsive to Request Nos. 6-9, 13-15, 17 and 18. The third spreadsheet, titled "PTSD Docket ## 2006-2010.xls" (enclosed on a CD marked "Exhibit C"), contains a listing of the docket numbers for all PTSD case appeals from FY2006 through FY2010. This listing should direct you to the relevant cases on BVA's website and enable you to review the fact patterns of those cases for information that satisfies your needs with regard to Request Nos. 6-19, 13-15, 17 and 18 (insofar as Request 18 pertains to "race").


The FOIA requires us to advise you that if you believe the VA erred in this decision, you have the right to file a complaint in an appropriate United States District Court. We regret that we could not be more helpful.

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. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001

E-mail: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free: 1-877-684-6448

Sincerely yours,


Will A. Gunn
for General Counsel

Enclosures

**Board of Veterans' Appeals
 Appeals with Sexual Harassment Contention
 From: 10/01/05 To: 09/30/10**

03/01/2011

<u>FY</u>	<u>Appealed Issue</u>	<u>Allowed</u>	<u>Denied</u>	<u>Remanded</u>	<u>Other</u>	<u>Total</u>
FY 06						
	PTSD	36	44	65	1	146
	Non-PTSD	9	8	16	1	34
		45	52	81	2	180
FY 07						
	PTSD	43	58	78	5	184
	Non-PTSD	9	12	26	2	49
		52	70	104	7	233
FY 08						
	PTSD	38	56	97	3	194
	Non-PTSD	11	10	17	1	39
		49	66	114	4	233
FY 09						
	PTSD	59	57	102	0	218
	Non-PTSD	20	14	32	0	66
		79	71	134	0	284
FY 10						
	PTSD	67	45	106	0	218
	Non-PTSD	18	9	30	0	57
		85	54	136	0	275
Totals:		310	313	569	13	1,205

Exhibit A