



U.S. Department of Veterans Affairs
Office of General Counsel
Information and Administrative Law Group

810 Vermont Avenue NW
Washington DC 20420
www.va.gov/ogc

March 22, 2024

In Reply Refer to: 024
FOIA Request: 24-08247-F

Veterans Education Success
Attn: Ms. Allison Muth, Senior Attorney
Suite 200
1501 K Street NW
Washington, DC 20005
Email: allison@vetsedsuccess.org

Dear Ms. Muth:

This letter is in response to your March 21, 2024 Freedom of Information Act (FOIA) request, to the Department of Veterans Affairs (VA), Veterans Benefits Administration's FOIA Office. You requested a copy of the following records be provided to Veterans Education Success:

I request that a copy of the following documents in the possession of the U.S. Department of Veterans Affairs (VA) be provided to Veterans Education Success. Requests for communications include, but are not limited to, communications to, from, and/or with the Veterans Benefits Administration (VBA) Education Service staff and communications to, from, and/or with the VA Office of General Counsel.

1. All communications to, from, or referencing persons outside of VA, including any and all individuals, schools, colleges, universities, trade schools, institutions of higher learning, associations, corporations, or State Approving Agencies, relating to the Notice of Proposed Rulemaking (NPRM), RIN 2900-AQ89-Proposed Rule-State Approving Agency Jurisdiction Rule (hereinafter AQ89 SAA Jurisdiction).
2. All documents, including, but not limited to, internal communications at VA and communications to or from persons outside of VA, relating to the VBA Education Service's PowerPoint presentation titled: Regulatory Change: AQ89: SAA Jurisdiction, dated January 2023, (hereinafter PowerPoint presentation) and/or any draft versions, revisions, or edits of the PowerPoint presentation.
3. All communications, including internal communications at VA and communications to or from persons outside of VA, between January 1, 2019 and March 21, 2024:
 - a. Referencing the definition of "independent study" in 38 C.F.R. § 21.4267(b).
 - b. Relating to changes to the definition of "independent study" in 38 C.F.R. § 21.4267(b).
 - c. Relating to unaccredited online programs' eligibility for VA education benefits.
 - d. Relating to changes to the definition of "distance learning" in 38 C.F.R. § 21.9505.

- e. Relating to defining the new term “standard curriculum” discussed in the PowerPoint presentation.
 - f. Relating to changes to the definition of “resident training” in 38 C.F.R. § 21.7520(b)(22).
4. All documents, including, but not limited to, internal communications at VA and communications to or from persons outside of VA, relating to the legality and/or propriety of using the AQ89 SAA Jurisdiction rulemaking to, as described in the PowerPoint presentation, “change the definition of ‘independent study’ to clarify that simply because a program is online that does not automatically mean it is ‘independent study.’”
 5. All communications, including internal communications at VA and communications to or from persons outside of VA, relating to the impetus for deviating from the NPRM in AQ89 SAA Jurisdiction, Document No. 2021-21496.
 6. All documents, including, but not limited to, internal communications at VA and communications to or from persons outside of VA, relating to the policy implications of changing “the definition of ‘independent study’ to clarify that simply because a program is online that does not automatically mean it is ‘independent study.’”
 7. All documents, including, but not limited to, internal communications at VA and communications to or from persons outside of VA, relating to the policy implications of changing the definition of Distance Learning in 38 C.F.R. § 21.9505 , as described in the PowerPoint presentation, by removing the phrase “to support regular and substantive interaction between the students and the instructor, synchronously or asynchronously.”
 8. All documents, including, but not limited to, internal communications at VA and communications to or from persons outside of VA, relating to the Education Services’ Regulatory Impact Analysis for AQ89(P) dated October 14, 2021, any draft versions, revisions, or edits of the Analysis, and any subsequent analyses addressing the removal of online programs as a subset of Independent Study.
 9. To the extent not already requested above, all documents relating to any oral communications between January 1, 2019, and March 21, 2024, including, but not limited to, internal communications and communications to, from, with, or referencing persons outside of VA, pertaining to changing the definition of “independent study” and/or pertaining to unaccredited online programs’ becoming eligible for VA education benefits.

On March 21, 2024, your request was received by the Veterans Benefits Administration’ FOIA Office and assigned FOIA tracking number **24-08247-F**. On March 22, 2024, your request was split and transferred to the Office of General Counsel’s FOIA Office for processing.

The FOIA, 5 U.S.C. § 552(A)(4)(a)(II), places all FOIA requesters in one of three categories for fee purposes. The five categories of FOIA requesters are commercial use requesters; educational institutions, noncommercial scientific institutions, and representative of the news media; and all other requesters. I have determined your request to be an all-other requester.

My determination to classify this request as an all-other request is based on your failure to fall into either the commercial or educational institutions, noncommercial scientific institution, or news media.

As an "all other" requester, VA FOIA implementing regulations found at 38 C.F.R. § 1.561 state that the requester will be charged search fees for all time spent searching for responsive records, except the first two hours of search time are fee and for the cost of reproduction of the records only, excluding the charges for the first 100 pages. 38 C.F.R. § 1.561(d)(2) states when a duplication fee applies, the FOIA Officer will charge a fee of 15 cents per one-sided page for a paper photocopy of a record and for other forms of duplication, including electronic copies, the FOIA Officer will charge the direct costs of that duplication. 38 C.F.R. § 1.561 (e)(5) states whenever a total fee calculated under (d) of this section is less than \$25, no fee will be charged. Moreover, the "all other" requester will be charged the cost of searching for and the cost of reproduction of the records even if there is ultimately no disclosure of records.

Based on the analysis of the information you presented in your fee waiver request, I have determined that OGC is not required to waive the fees associated with producing records responsive to your FOIA request.

Agencies are to apply the statutory test for fee waivers neutrally to all FOIA requesters to determine whether they qualify for FOIA fee waivers. The factors in determining whether an Agency should waive the fees associated with a particular FOIA request are stated in the statute, 5 U.S.C. § 552(a)(4)(a)(iii), "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester."

The statutory fee waiver standard contains two basic requirements, both of which must be met before fees can be waived. The first requirement is that "disclosure of the requested information is the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government." The second requirement is that the "disclosure of the information is not primarily in the commercial interest of the requester." Where one or both of these requirements is not satisfied, a fee waiver is not warranted under the statute. Further, the requester should address both of the statutory requirements in sufficient detail for the agency to make an informed decision as to whether it can appropriately waive fees. In this regard, it is the requester's responsibility to provide sufficient evidence to demonstrate his or her entitlement to a fee waiver.

To waive the FOIA fees associated with producing the requested records, I must determine, based upon a review of the documents and the materials submitted by requester, that the records in question: (1) concern OGC's operations or activities, (2) the information in the documents is "likely to contribute" to an understanding of OGC's operations and activities, (3) after disclosure to the requester, the information in the documents will contribute to the "public understanding" of OGC's operations, and (4) the contribution to the public's understanding will be "significant". I must also determine that (1) the requester does not have a commercial interest that would be furthered by the requested disclosure, or, if so, (2) the magnitude of the identified commercial interest of the requester is not sufficiently large, in comparison with the public interest in disclosure, that the disclosure would be "primarily in the commercial interest of the requester."

I have determined your request does not contain sufficient detail to meet the public interest requirement, as you did not specify how this information is likely to contribute significantly to the public's understanding of OGC's operations or activities in the emails of the individuals that you are requesting. There has been many requests pertaining to this information and the policies that have been made available to the public. Your request also does not describe how you are in a position to disseminate the information requested to members of the general public and therefore contribute to the general public's understanding. For these reasons, your request for a fee waiver is denied.

FOIA Mediation

For any questions regarding the processing of this request, you have the right to seek assistance from the VA FOIA Public Liaison or the Office of Government Information Services (OGIS). As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services. Similarly, as part of the FOIA Improvement Act of 2016, VA established a FOIA Public Liaison to offer mediation services. You may contact OGIS and the VA Public Liaison in any of the following ways:

Office of Government Information Services:

E-mail Address: ogis@nara.gov

Fax: 202-741-5769

National Archives and Records Administration

Room 2510

8601 Adelphi Road

College Park, MD 20740-6001

VA FOIA Public Liaison:

Name: Darryl L. Webb

E-mail: vacofoiaservice@va.gov

Appeal Rights

Please be advised that should you desire to do so; you may appeal the determination made in this response to:

Office of General Counsel (024)

Department of Veterans Affairs

810 Vermont Avenue, N.W.

Washington, D.C. 20420

E-mail: ogcfoiaappeals@va.gov

If you should choose to file an appeal, please include a copy of this letter with your written appeal and clearly indicate the basis for your disagreement with the determination set forth in this response. Please be advised that in accordance with VA's implementing FOIA regulations at 38 C.F.R. § 1.559, your appeal must be postmarked no later than ninety (90) days of the date of this letter.

Sincerely,

Greg Draves
FOIA/Privacy Officer
Office of General Counsel