



DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Washington, D.C. 20420

In Reply Refer To: **FOIA Request 24-08178-F**

March 28, 2024

Della M Justice
Vice President for Legal Affairs
Veteran Education Success (VES)

allison@vetsedsuccess.org

Dear Della Justice:

This letter acknowledges receipt of your March 21, 2024, request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to the Department of Veterans Affairs (VA), Veterans Benefits Administration Central Office (VBACO) FOIA Office requesting the following records:

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 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

Your request was received in this office on March 22, 2024. Your FOIA request was assigned the tracking number at the top of this letter. Please include the tracking number in all future communications concerning this FOIA request.

As expressly authorized under the FOIA, the VBACO FOIA Office processes requests using multi-track processing which allows us to process requests on a first-in, first-out basis in either a simple or complex processing track. This allows us to respond to relatively simple requests more quickly than requests involving complex and/or voluminous records. We have placed your request in the “Complex” processing category. The simple processing track is the faster of the two tracks. The complex processing track is the slower of the two tracks. If you wish to discuss modifying the scope of your request in order to qualify for the faster processing track, please feel free to contact the FOIA Officer assigned to this request. Please refer to the FOIA number when inquiring about your request.

Expedited Processing

In your request letter, you asked for expedited processing of your FOIA request. Upon review of the submitted information, we are denying your request for expedited processing. The FOIA provides that an agency shall process a FOIA request on an expedited basis if the individual making the FOIA request demonstrates a compelling need for the information requested or the agency otherwise determines that the expedited processing request should be granted (5 U.S.C. § 552(a)(6)(E)(i)).

The FOIA states that a “compelling need” may exist in either of three situations. First, a compelling need exists when a FOIA requester’s failure to obtain records on an expedited basis “could reasonably be expected to pose an imminent threat to the life or physical safety of an individual,” 5 U.S.C. § 552(a)(6)(E)(v)(I). Under this test, the FOIA requester must demonstrate how failure to receive the requested records on an expedited basis places an identified individual at immediate risk of death or physical harm. Second, a compelling need may exist where, “with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity” (5 U.S.C. § 552(a)(6)(E)(v)(II)). Third, failure to release the information would spur substantial due process rights or harm substantial humanitarian interests.

Your expedited processing request fails to demonstrate how failure to obtain the requested records on an expedited basis poses an imminent threat to the life or physical safety of an individual. Nor did your FOIA request qualify for expedited processing under the second test as you have failed to demonstrate why there is an urgency to inform the public concerning actual or alleged Federal Government activity. For these reasons, we have denied your request for expedited processing of your FOIA request.

In addition, your request has stipulated an urgency for expedited processing based on your understanding that the regulation entitled Regulatory Change: AQ89: SAA Jurisdiction, dated January 2023 will be published in April 2024 and the consequent need for the public to be provided an opportunity to review or comment on the rule before it is published. As a result, I reached out to the VA Education Service to confirm the planned publication. Education service stated that the Regulatory Change: AQ89: SAA Jurisdiction will not be published.

For your information, please note that the unpublished records pertaining to Regulatory Change: AQ89: SAA Jurisdiction will most likely be subject to withholding under FOIA Exemption 5 5 U.S.C. § 552(b)(5) as pre-decisional records under the deliberative process.

Fee Waiver

The FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), places all FOIA requesters in one of three categories for fee purposes. The three categories of FOIA requesters are (1) commercial

use requesters; (2) educational institutions, noncommercial scientific institutions, and representatives of the news media; and (3) all other requesters. We have determined your request to be in the category of All Other. Our determination to classify this request as an All-Other request is based on the fact that this request is for non-profit usage.

As an all-other requester, VA FOIA implementing regulations found at 38 C.F.R. §1.561(c)(4) state that the requester will be charged the direct cost of searching for and reproducing records responsive to a request, except that the first two hours of search time and the first 100 pages of reproduction will be furnished without cost. Direct costs are calculated using the hourly wage of the employees performing the work plus sixteen percent (16%) of their hourly wage. VA FOIA regulation 38 C.F.R. §1.561(b)(9) defines search time as the process of looking for and retrieving records that are responsive to a request, including a line-by-line or page-by-page identification of responsive information within records. Search also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. Moreover, the “all other requester” will be charged the cost of searching for records even if there is ultimately no disclosure of records.

In your request, you also sought a fee waiver. Based on the analysis of the information presented in your request, we have determined that VBA is not required to waive the fees associated with producing records responsive to your FOIA request. Therefore, we are denying your fee waiver request.

The FOIA directs agencies to furnish documents without any charge or at a reduced fee if two requirements are met (5 U.S.C. § 552(a)(4)(A)(iii)). Both requirements must be met before fees can be waived. The first requirement is that “disclosure of the requested information is in 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 requirements are not satisfied, a fee waiver is not warranted under the statute. Further, the requester should address 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, the requester must demonstrate his or her entitlement to a fee waiver.

To waive the FOIA fees associated with producing the requested records, we must determine, based upon a review of the information submitted, that: (1) the records concern identifiable operations or activities of the agency; (2) the information in the documents is “likely to contribute significantly to the public’s understanding” of the agency’s operations and activities; and, (3) after disclosure to you, the records will be further disseminated to a reasonably broad audience of persons interested in the subject. we must also determine that (1) you do 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 you.”

We have determined your request does not contain sufficient justification to meet the public interest requirement per 38 C.F.R. § 1.561(n), as you have not provided specific details on your intended use of the requested records, how the requested information is likely to contribute significantly to the public's understanding of VBA's operations or activities. Finally, your request does not describe in any way how you plan to disseminate the information requested to members of the general public and therefore contribute to the general public's understanding of the operations of the government. For these reasons, your request for a fee waiver is denied.

The VBACO FOIA Office will search for records responsive to your FOIA request, maintained by VBA on or before March 22, 2024.

If you do not receive a response within 20 business days from the date of this letter, you may contact the VBA FOIA Public Liaison via email at FOIA.VBACO@va.gov.

Please be advised you may appeal the fee waiver determination made in this letter to:

Office of the General Counsel (024)
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
Fax: (202) 273-6388
Email: ogcfoiaappeals@va.gov

Should you choose to file an appeal, it must be postmarked or electronically transmitted no later than ninety (90) calendar days from the date of this letter. Please include a copy of this letter with your written appeal and clearly state why you disagree with the determinations set forth in this response.

You may also seek assistance and/or dispute resolution services for any other aspect of your FOIA request from VBA's FOIA Public Liaison and/or Office of Government Information Services (OGIS) as provided below:

VBA FOIA Public Liaison:
Email Address: FOIA.VBACO@va.gov
Fax: (202) 495-5567
VBA FOIA Office (20M3)
810 Vermont Avenue NW
Washington D.C. 20420

Office of Government Information Services (OGIS)

Email: ogis@nara.gov

Fax: (202) 741-5769

Mailing Address: Office of Government Information Services

National Archives and Records Administration

8601 Adelphi Road

College Park, MD 20740-6001

If you should have any further questions, please contact the VBA FOIA Public Liaison at FOIA.VBACO@va.gov.

Sincerely,



Olaiseh Wambui

VBACO FOIA Officer