

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CAUSE OF ACTION INSTITUTE,

Plaintiff,

v.

U.S. DEPARTMENT OF VETERANS
AFFAIRS,

Defendant.

Civil Action No. 20-997 (BAH)

Chief Judge Beryl A. Howell

MEMORANDUM OPINION

Plaintiff Cause of Action Institute (“COA”), a “non-profit strategic oversight group advocating for economic freedom and individual opportunity advanced by honest, accountable, and limited government,” Compl. ¶ 6, ECF No. 1, challenges the response of defendant, the U.S. Department of Veterans Affairs (“VA”), to a request submitted pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for records related to pilot market assessments created by a VA contractor in preparation for VA’s implementation of the congressionally mandated Market Area Health System Optimization (“MAHSO”) analysis, part of a broader national plan to improve the delivery of health care to veterans, *see* Compl., Ex. 1, Letter from John E. McGlothlin, Counsel, COA, to VA FOIA Service (Jan. 16, 2019) (“FOIA Request”), ECF No. 1-1. Specifically, plaintiff alleges in a single claim that VA unlawfully withheld records responsive to plaintiff’s FOIA Request. Compl. ¶¶ 24–30; *see also* Pl.’s Mem. P. & A. Opp’n Def.’s Mot. Summ. J. & Supp. Pl.’s Cross-Mot. Summ. J. (“Pl.’s Opp’n”) at 1, ECF No. 17-1.

Pending before the Court are the parties’ cross-motions for summary judgment. Def.’s Mot. Summ. J. (“Def.’s Mot.”), ECF No. 16; Pl.’s Opp’n Def.’s Mot. Summ. J. & Cross-Mot.

Summ. J. (“Pl.’s Mot.”), ECF No. 17. For the reasons set forth below, VA’s Motion for Summary Judgment is granted and plaintiff’s Cross-Motion for Summary Judgment is denied.

I. BACKGROUND

Pertinent background underlying plaintiff’s FOIA Request is briefly described, followed by review of the FOIA Request and VA’s responses thereto, both before and after initiation of this lawsuit.

A. Pertinent Background

“VA maintains a complex of medical facilities dedicated to Veteran health care that is managed by the Veterans Health Administration (VHA),” including “approximately 140 [VA] Medical Centers and nearly 1700 outpatient centers,” as well as Residential Treatment Facilities and Community Living Centers. Def.’s Mot., Ex. 2, Decl. of Christine M. Stuppy, MBA (“Stuppy Decl.”) ¶ 4, ECF No. 16-3. VA’s facilities are organized into eighteen geographic regions, “known as Veterans Integrated Services Networks (VISNs),” that together “serve 96 geographic markets.” *Id.* In December 2014, Congress directed that the Secretary of VA develop and deliver to Congress “a report including . . . a national realignment strategy that includes a detailed description of realignment plans within each [VISN], including an updated Long Range Capital Plan to implement realignment requirements” (the “National Realignment Strategy”). Consolidated and Further Continuing Appropriations Act, 2015 (“2015 Act”), Pub. L. No. 113-235, § 235, 128 Stat. 2130, 2566 (2014); *see also* Stuppy Decl. ¶ 5. The report was also required to provide “an explanation of the process by which” VA developed its National Realignment Strategy and “a cost vs. benefit analysis of each planned realignment.” 2015 Act § 235.

The VA MISSION Act of 2018 (“MISSION Act”), Pub. L. No. 115-182, 132 Stat. 1393 (2018), imposed additional procedural requirements on VA’s development of its realignment

strategy, *see id.* tit. II, subtit. A, § 203, 132 Stat. at 1446. This statute obligates the VA Secretary to “publish in the Federal Register and transmit to the Committees on Veterans’ Affairs of the Senate and the House of Representatives” the proposed and final criteria “to be used by [VA] in assessing and making recommendations regarding the modernization or realignment of [VHA] facilities.” *Id.* § 203(a)(1); *see also id.* § 203(a)(3). The deadline for publication of the final criteria is May 31, 2021. *Id.* § 203(a)(3). By January 31, 2022, the Secretary must “publish in the Federal Register and transmit,” *id.* § 203(b)(1), to Congress and the Asset and Infrastructure Review Commission (“AIR Commission”) created by the MISSION Act, *see id.* § 202, “a report detailing the recommendations regarding the modernization or realignment of facilities of the [VHA] on the basis of the final criteria” previously submitted by the agency, *id.* § 203(b)(1). The MISSION Act sets out a list of “factors” that the Secretary must consider in making recommendations, *id.* § 203(b)(2), and requires the agency to “assess the capacity of each [VISN] and medical facility . . . to furnish hospital care or medical services,” including through “a commercial health care market assessment of designated catchment areas . . . conducted by a non-governmental entity” and “consult[ation] with veterans service organizations and veterans,” *id.* § 203(b)(3), which assessments must be submitted with the agency’s recommendations, *id.* § 203(c), but does not otherwise limit VA’s discretion to develop its recommendations.

Upon submission, the agency’s recommendations will be subject to review by the AIR Commission, *see id.*, which may only change the recommendations if, among other mandatory findings, it “determines that the Secretary deviated substantially from the final criteria” published by VA, *id.* § 203(c)(2)(B)(i). By the end of January 2023, the AIR Commission will “transmit to the President a report containing [its] findings and conclusions based on a review and analysis of the recommendations made by the Secretary, together with the Commission’s

recommendations.” *Id.* § 203(c)(2)(A). Within two weeks of receiving the report, by February 15, 2023, the President must “transmit to the Commission and to the Congress a report containing the President’s approval or disapproval of the Commission’s recommendations,” *id.* § 203(d)(1), and VA then “shall begin to implement” the approved recommendations, *id.* § 204(a).

VA determined that, to formulate its National Realignment Strategy, a study was necessary of all ninety-six VISN markets, known as the MAHSO analysis. Stuppy Decl. ¶ 5. The agency entered a contract with PricewaterhouseCoopers (“PWC”), an outside consulting firm, “to develop a uniform methodology to perform market assessments . . . on healthcare markets within the VISNs,” with the goal of generating “a consistent method of conducting market assessments across all 96 [VISN] markets” (the “market assessment methodology”). *Id.* ¶ 6. This contract (the “Pilot Study Contract”) was assigned VA Contract No. VA101F-17-C-2843. *See id.*; Def.’s Mot., Ex. 1, Decl. of Barbara Swailes (“Swailes Decl.”) ¶ 15, ECF No. 16-2. As part of the contract, PWC was to test the market assessment methodology “in three diverse markets by conducting pilot market assessments.” Stuppy Decl. ¶ 6. PWC completed the three pilot market assessments, which utilized an “eight-step draft methodology,” *id.* ¶ 8, in Spring 2017 and provided to VA “deliverables that memorialized the work,” consisting of the three pilot market assessments and a briefing document on each assessment, *id.* ¶ 7; *see also* Swailes Decl. ¶¶ 13, 15.

B. The FOIA Request

On January 16, 2019, plaintiff submitted the FOIA Request at issue to VA. FOIA Request at 1; Def.’s Statement of Material Facts Not in Genuine Dispute (“Def.’s SMF”) ¶ 1, ECF No. 16-4; Pl.’s Statement of Undisputed Material Facts (“Pl.’s SMF”) ¶ 1, ECF No. 17-2. The Request sought “[a]ll records, including but not limited to email communications and

reports, relating to the results of The Pilot Study Contract (VA Contract No. VA101F-17-C-2843).” FOIA Request at 1. The Request included in its scope “any information produced by the Department of Veterans Affairs or provided by the contractor conducting the pilot studies, which were designed to define processes and outputs for an ‘ideal healthcare delivery system,’” from “December 6, 2016 to the present.” *Id.* VA received the FOIA Request that same day and assigned it a tracking number. Swailes Decl. ¶ 5; Def.’s SMF ¶ 1.

C. Processing of the Request and Procedural History

The FOIA Request was initially referred to the VA Office of Procurement Policy Services’ FOIA Office for processing, Swailes Decl. ¶ 5, and in February 2019, that office informed plaintiff that it had forwarded the FOIA Request to the VA Construction Facility and Management (“CFM”) FOIA Office “for file search and direct response” to plaintiff,” *id.* ¶ 6; *see also id.*, Ex. B, Email from Patricia Litewski, FOIA Officer, Procurement Policy Services, VA, to John McGlothlin, Counsel, COA (Feb. 15, 2019, 9:54 AM), ECF No. 16-2; Pl.’s SMF ¶ 6; Def.’s Resp. Pl.’s Statement of Undisputed Material Facts (“Def.’s Resp. SMF”) ¶ 6, ECF No. 19-1. The CFM FOIA Office soon determined that the Pilot Study Contract had been handled by VHA rather than CFM, and thus transferred the FOIA Request to the VHA Central Office FOIA Office (“VHA FOIA Office”) for further processing. Swailes Decl. ¶ 7. Plaintiff was informed of the transfer in March 2019. *Id.* ¶¶ 8, 9; *see also id.*, Ex. C, Letter from Michael B. Sarich, Director, VHA FOIA Off., to John McGlothlin, Counsel, COA (Mar. 8, 2019), ECF No. 16-2; *id.*, Ex. D, Letter from Michael B. Sarich, Director, VHA FOIA Off., to John McGlothlin, Counsel, COA (Mar. 15, 2019), ECF No. 16-2.

At the time of the transfer, the VHA FOIA Officer sent record search inquiries to VHA’s Office of Policy and Planning (“OPP”), Office of Healthcare Transformation (“OHT”), and Office of Capital Asset Management, Engineering, and Support (“OCAMES”). Swailes Decl.

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