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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Jose Adalberto Zaldivar, Sr.,  
10 Plaintiff,

No. CV 14-01493-PHX-DGC (DMF)

v.

**ORDER**

12 United States Department of Veterans  
13 Affairs, et al.,

14 Defendants.  
15

16 Plaintiff Jose Adalberto Zaldivar, who is currently confined in the Arizona State  
17 Prison Complex-Eyman, brought this case pursuant to the Freedom of Information Act  
18 (FOIA) and the Privacy Act (PA). (Doc. 1.) Pending before the Court is a Motion for  
19 Summary Judgment filed by the Department of Veterans Affairs Regional Office—  
20 Phoenix (VARO) and the Department of Veterans Affairs Office of General Counsel  
21 (OGC).<sup>1</sup> (Doc. 49.) The Court will grant the Motion and terminate this action.

**I. Background<sup>2</sup>**

22 In his Complaint, Plaintiff alleged that he submitted six FOIA/PA requests to the  
23 VARO between 2002 and 2013, but that VARO failed to provide proper responses to  
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26 <sup>1</sup> The Court provided notice to Plaintiff pursuant to *Rand v. Rowland*, 154 F.3d  
27 952, 962 (9th Cir. 1998) (en banc), regarding the requirements of a response. (Doc. 52.)

28 <sup>2</sup> The full background of this action is set forth in the Court's October 27, 2015  
Order. (Doc. 34.)

1 these requests and the OGC denied an appeal filed by Plaintiff. (Doc. 1.) Plaintiff also  
2 alleged that the Veterans Affairs Office of Inspector General (OIG) failed to respond to  
3 his request for an appeals handbook. (*Id.*) On screening under 28 U.S.C. § 1915A(a), the  
4 Court determined that Plaintiff stated a claim and directed the OIG, the VARO, and the  
5 OGC to answer the claims in Counts One and Two of the Complaint, and dismissed the  
6 remaining claims and Defendants. (Doc. 9.) Subsequently, the OIG filed a Motion to  
7 Dismiss the claim against it for lack of jurisdiction (Doc. 20), and the VARO and the  
8 OGC filed a Partial Motion to Dismiss three claims based on the statute of limitations  
9 (Doc. 21).

10 On October 27, 2015, the Court granted both Motions to Dismiss, leaving only  
11 two remaining claims against the VARO and the OGC: (1) Plaintiff's April 26, 2012  
12 FOIA/PA request in Count One, and (2) Plaintiff's May 20, 2013 FOIA/PA request in  
13 Count Two. (Doc. 34.) The VARO and the OGC now move for summary judgment on  
14 the two remaining requests.

## 15 **II. Summary Judgment**

16 A court "shall grant summary judgment if the movant shows that there is no  
17 genuine dispute as to any material fact and the movant is entitled to judgment as a matter  
18 of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23  
19 (1986). Under summary judgment practice, the moving party bears the initial  
20 responsibility of presenting the basis for its motion and identifying those portions of the  
21 record, together with affidavits, which it believes demonstrate the absence of a genuine  
22 issue of material fact. *Id.* at 323. If the moving party meets its initial responsibility, the  
23 burden then shifts to the opposing party who must demonstrate the existence of a material  
24 factual dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

## 25 **III. Discussion**

26 Defendants argue that (1) Plaintiff did not exhaust his administrative remedies  
27 with respect to the April 26, 2012 request, (2) the agency's searches in response to both  
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1 requests were adequate, and (3) any redactions of the personal information of Plaintiff's  
2 former spouse in response to the May 30, 2013 request were proper. (Doc. 49.)

3 **A. April 26, 2012 Request**

4 **1. Relevant Facts**

5 By letter dated April 26, 2012, Plaintiff filed a FOIA/PA request with the VARO  
6 seeking the following information:

7 (1) The application for VA compensation for Plaintiff's "dependent spouse,"  
8 referred to as an "application for apportionment";

9 (2) A VA letter by Ms. LaCenia dated April 3, 2012;

10 (3) Correspondence in response to the application for apportionment;

11 (4) The address of the OIG;

12 (5) Notes, telephone calls, and inquiries regarding the application for  
13 apportionment;

14 (6) All documentation, applications, inquiries or requests made by letter or  
15 telephone regarding Plaintiff's VA compensation claim, including the names, addresses  
16 and phone numbers of the requesting part(ies);

17 (7) The names, addresses, and phone numbers of spouses and children entitled  
18 to dependency and indemnity compensation.

19 (Doc. 51 (Defs.' Statement of Facts ("DSOF")) ¶ 1; Doc. 51-2 at 2-8.)<sup>3</sup>

20 The VARO received Plaintiff's request on May 4, 2012 and responded on May 30,  
21 2012 by sending Plaintiff a copy of his entire claims file. The VARO explained that it  
22 did not include Plaintiff's military service treatment records (STR) because those had  
23 been provided to him on November 10, 2011 in response to a previous request. (Doc. 51  
24 ¶¶ 1, 2; Doc. 51-2 at 10.) The entire claims file and STR is over 3,000 pages, and,  
25 according to the VARO's FOIA/PA Officer, Marcelle Jeanisse, the VARO is the only  
26 location at the VA where "one would reasonably expect to find documents responsive to  
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28 <sup>3</sup> The citation refers to the document and page number generated by the Court's  
Case Management/Electronic Case Filing system.

1 Plaintiff's April 26, 2012 request." (Doc. 51 ¶¶ 2-3; Doc. 51-3 at 3 ¶ 11.) Plaintiff  
2 received the VARO's response, totaling 2,476 pages, on June 21, 2012. (Doc. 66 ¶ 2;  
3 Doc. 65 ¶ 30.)

4 Before he received the VARO's response, Plaintiff, by letter dated June 4, 2012,  
5 filed an appeal with the VARO, asserting that he had not received any documents in  
6 response to his April 26, 2012 request. (Doc. 51 ¶ 4; Doc. 51-2 at 12-24.) The VARO  
7 noted on Plaintiff's appeal letter that the FOIA request had already been completed and  
8 took no further action on the appeal. (*Id.* ¶ 6.) Plaintiff does not dispute that this notation  
9 was made on his appeal but he denies "the validity of those reasons." (Doc. 66 ¶ 6.)

10 By letter dated June 13, 2012, the Disabled American Veterans, acting as  
11 Plaintiff's designated representative, requested Plaintiff's claims file "to include STR's  
12 and Apportionments." (Doc. 51 ¶ 7; Doc. 51-2 at 26.) The VARO "Triage Team" that  
13 processes incoming mail noted on the letter, "FOIA Request Complete 5/30/2012  
14 Already!!," and the VARO took no further action regarding the request. (Doc. 51 ¶ 8;  
15 Doc. 51-2 at 26.)

## 16 **2. Exhaustion**

### 17 **a) Legal Standard**

18 FOIA requires that, upon receipt of a FOIA request, an administrative agency shall  
19 "determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) . . .  
20 whether to comply with such request and shall immediately notify the person making  
21 such request of such determination and the reasons therefor, and of the right of such  
22 person to appeal to the head of the agency any adverse determination. . . ." 5 U.S.C.  
23 § 552(a)(6)(A)(i). Likewise, an agency must make a determination within 20 days of  
24 receipt of an appeal. 5 U.S.C. § 552(a)(6)(A)(ii). If an agency does not respond to a  
25 FOIA request within the applicable time period, the requester may file a lawsuit, but "this  
26 option lasts only up to the point that an agency actually responds. Once the agency has  
27 responded to the request, the petitioner may no longer exercise his option to go to court  
28 immediately. Rather, the requester can seek judicial review only after he has

1 unsuccessfully appealed to the head of the agency as to any denial and thereby exhausted  
2 his administrative remedies.” *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 61 (D.C. Cir.  
3 1990).

4 “Exhaustion of administrative remedies is generally required before filing suit in  
5 federal court so that the agency has an opportunity to exercise its discretion and expertise  
6 on the matter and to make a factual record to support its decision.” *Oglesby*, 920 F.2d at  
7 61 (citing *McKart v. United States*, 395 U.S. 185, 194 (1969)). When administrative  
8 remedies have not been exhausted prior to suit, a FOIA claim is subject to dismissal. *See*  
9 *Hidalgo v. FBI*, 344 F.3d 1256, 1258 (D.C. Cir. 2003) (noting that an appeal made before  
10 an agency has acted on a FOIA request deprives the agency of the “opportunity to  
11 consider the very issues that [the plaintiff] has raised in court”).

#### 12 **b) Analysis**

13 Defendants argue that Plaintiff did not comply with VA regulations by filing a  
14 proper appeal with the OGC within 60 days of an adverse determination, as required by  
15 38 C.F.R. § 1.559(b) and (d). (Doc. 49 at 6.) Rather, Plaintiff filed a “premature appeal”  
16 with the VARO, and he never filed a proper appeal with the OGC after receiving  
17 VARO’s timely response to the April 26, 2012 request. (*Id.* at 6-7.)

18 Plaintiff responds that he constructively exhausted his administrative remedies by  
19 filing a timely appeal to the VARO to the attention of “FOIA/Privacy Act Appeals  
20 Officer” by letter dated June 4, 2012. (Doc. 64 at 10.) Plaintiff asserts that he was  
21 unaware of 38 C.F.R. § 1.559 “due to circumstances beyond [his] control as to access to a  
22 meaningful adequate law library,” and that he was using a 2008 version of the  
23 regulations. (*Id.*; Doc. 65 at 7 ¶ 43(d).) As to VARO’s contention that it timely  
24 responded to Plaintiff’s FOIA request on May 30, 2012, Plaintiff says the agency  
25 responded by “flooding [him] with excessive documents without having to provide  
26 specific documents requested in the April 26, 2012 FOIA/Privacy Act Request, especially  
27 not having to answer to the phone conversation contact with VA Rep. Ms. LaCenia on  
28 April 26, 2012.” (*Id.*)

1           There is no dispute that the VARO received Plaintiff's FOIA request on May 4,  
2 2012, and responded by letter dated May 30, 2012, less than 20 business days after  
3 receiving the request, by providing Plaintiff with his entire claims file, minus the SRTs.  
4 Thus, the VARO timely responded to Plaintiff's FOIA request. Plaintiff's attempted  
5 appeal, claiming he did not receive a response, was filed before he received the VARO's  
6 response on June 21, 2012.<sup>4</sup> (Doc. 51-2 at 12-14; Doc. 66 ¶ 2.) Plaintiff does not claim  
7 that he filed any appeal challenging the adequacy of the VARO's response after he  
8 received it. By not filing an appeal on the VARO's actual response, Plaintiff deprived  
9 the agency of "an opportunity to exercise its discretion and expertise on the matter and to  
10 make a factual record to support its decision." *Oglesby*, 920 F.2d at 61.

11           Because Plaintiff did not file an appeal with respect to the VARO's response to his  
12 April 26, 2012 FOIA request, he did not exhaust his administrative remedies.  
13 Accordingly, the Court will grant summary judgment to Defendants on Plaintiff's  
14 April 26, 2012 request in Count One for failure to exhaust administrative remedies.

### 15                           **3. Adequacy of the Search**

16           Alternatively, the Court will grant summary judgment to Defendants on the  
17 adequacy of the VARO's search for records in response to Plaintiff's FOIA/PA request.

#### 18                                   **a) Legal Standard**

19           FOIA requires that an agency responding to a request "demonstrate that it has  
20 conducted a search reasonably calculated to uncover all relevant documents." *Lahr v.*  
21 *Nat'l Transp. Safety Bd.*, 569 F. 3d 964, 986 (9th Cir. 2009) (quoting *Zemansky v. EPA*,  
22 767 F.2d 569, 571 (9th Cir. 1985)). Such a showing can be made by "reasonably  
23 detailed, nonconclusory affidavits submitted in good faith." *Zemansky*, 767 F.2d at 571.  
24 Such affidavits or declarations are entitled to "a presumption of good faith, which cannot  
25 be rebutted by purely speculative claims about the existence and discoverability of other  
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27           <sup>4</sup> Plaintiff asserts in his Complaint that the VARO's response is postmarked  
28 June 1, 2012, and he appears to allege that his delay in receiving the response was due to  
prison officials. (See Doc. 1 at 8-9.)

1 documents.” *Lawyers’ Comm. for Civil Rights of S.F. Bay Area v. U.S. Dep’t of*  
2 *Treasury*, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008). An agency “need not set forth  
3 with meticulous documentation the details of an epic search for the requested records.”  
4 *Id.* (quotation omitted). “[T]he issue to be resolved is not whether there might exist any  
5 other documents possibly responsive to the request, but rather whether the *search* for  
6 those documents was *adequate*.” *Citizens Comm’n on Human Rights v. FDA*, 45 F.3d  
7 1325, 1328 (9th Cir. 1995) (quotation omitted) (emphasis in original). In general, the  
8 sufficiency of a search is determined by the “appropriateness of the methods” used to  
9 carry it out, “not by the fruits of the search.” *Iturralde v. Comptroller of the Currency*,  
10 315 F.3d 311, 315 (D.C. Cir. 2003). The failure of an agency “to turn up a particular  
11 document, or mere speculation that as yet uncovered documents might exist, does not  
12 undermine the determination that the agency conducted an adequate search for the  
13 requested records.” *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004).

14         Once a search has been conducted, FOIA requires disclosure unless the records  
15 fall within one of nine narrow exemptions. *See* 5 U.S.C. § 552(b); *Minier v. CIA*, 88 F.3d  
16 796, 800 (9th Cir. 1996). These “limited exemptions do not obscure the basic policy that  
17 disclosure, not secrecy, is the dominant objective of the Act.” *Dep’t of Interior v.*  
18 *Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001) (internal citation omitted).  
19 The exemptions “have been consistently given a narrow compass,” and agency records  
20 that “do not fall within one of the exemptions are improperly withheld.” *Dep’t of Justice*  
21 *v. Tax Analysts*, 492 U.S. 136, 151 (1989) (quotation omitted).

22         “To carry their summary judgment burden, agencies are typically required to  
23 submit an index and ‘detailed public affidavits’ that, together, ‘identify [ ] the documents  
24 withheld, the FOIA exemptions claimed, and a particularized explanation of why each  
25 document falls within the claimed exemption.’” *Yonemoto v. Dep’t of Veterans Affairs*,  
26 686 F.3d 681, 688 (9th Cir. 2012). These submissions—commonly referred to as a  
27 *Vaughn* index—“must be from affiants who are knowledgeable about the information  
28 sought and detailed enough to allow the court to make an independent assessment of the

1 government’s claim of exemption.” *Id.* (internal quotation omitted). Whether by *Vaughn*  
2 index or by affidavit or some combination of the two, the government must “provide  
3 enough information, presented with sufficient detail, clarity, and verification, so that the  
4 requester can fairly determine what has not been produced and why, and the court can  
5 decide whether the exemptions claimed justify the nondisclosure.” *Fiduccia v. U.S.*  
6 *Dep’t. of Justice*, 185 F.3d 1035, 1043 (9th Cir. 1999). “To justify withholding, the  
7 government must provide tailored reasons in response to a FOIA request. It may not  
8 respond with boilerplate or conclusory statements.” *Shannahan v. IRS*, 672 F.3d 1142,  
9 1148 (9th Cir. 2012).

10 Ultimately, the threshold issue on a motion for summary judgment is whether the  
11 agency’s explanations are full and sufficiently specific to afford the FOIA requester a  
12 meaningful opportunity to contest, and the district court an adequate foundation to  
13 review, the soundness of the withholding. *See Wiener v. FBI*, 943 F.2d 972, 977-79 (9th  
14 Cir. 1991) (noting that specificity is the defining requirement of the *Vaughn* index).

15 **b) Analysis**

16 In his Declaration, FOIA/PA Officer Jeanisse explains that the VARO provided  
17 Plaintiff “the entirety of his claims folder minus his” STRs, which were provided to  
18 Plaintiff on November 20, 2011. (Doc. 51-3 at 3, ¶ 9.) Jeanisse avers that other than  
19 Plaintiff’s claims file, “there is no other location in which one would reasonably expect to  
20 find documents responsive to Plaintiff’s April 26, 2012 request.” (*Id.*)

21 Plaintiff responds that the VARO “assumes that there is no requirement that an  
22 agency search all possible sources when it believes all responsive documents are likely to  
23 be located in one place—Plaintiff’s ‘entire claim file.’” (Doc. 65 at 12.) Plaintiff  
24 contends that his request was for specific documents, particularly a phone conversation  
25 with Ms. LaCenia, and that specific document “was not included in the 2476 pages  
26 Plaintiff was flooded with.” (*Id.*) Because this and other documents he sought were not  
27 produced, Plaintiff argues that the VARO’s response was inadequate. (*Id.*)  
28



1 Defendants have met their burden of showing that they conducted a search for  
2 documents that was “reasonably calculated to uncover all relevant documents” by  
3 presenting Jeanisse’s Declaration about where he conducted the search and that it is the  
4 most likely location for documents responsive to Plaintiff’s request. *See Lahr*, 569 F. 3d  
5 at 986; *Zemansky*, 767 F.2d at 571. Jeanisse states that Plaintiff’s entire claims file was  
6 sent to Plaintiff, except for his STRs, which had been provided to Plaintiff previously.  
7 (Doc. 51-3 at 3 ¶ 9.) Jeanisse does not assert that any documents were withheld from  
8 Plaintiff or that the VARO claimed any exemptions. Jeanisse’s Declaration is entitled to  
9 a presumption of good faith, and Plaintiff has not rebutted that presumption. Plaintiff  
10 appears to speculate that other documents exist, but he has not shown how Jeanisse’s  
11 search was inadequate or even that there were any other locations where responsive  
12 documents might be found. Therefore, the Court finds that the VARO’s search for  
13 records was adequate. *See Citizens Comm’n on Human Rights*, 45 F.3d at 1328;  
14 *Iturralde*, 315 F.3d at 315; *Wilbur*, 355 F.3d at 678. Accordingly, the Court will grant  
15 summary judgment to Defendants on the adequacy of the search.

16 **B. May 20, 2013 Request**

17 Defendants argue that the search for records in response to Plaintiff’s May 20,  
18 2013 request was adequate and that any redactions made to the documents produced were  
19 permitted under FOIA and the PA.

20 **1. Relevant Facts**

21 By letter dated May 20, 2013, which the VARO date stamped as received on  
22 July 17, 2013, Plaintiff filed a FOIA/PA request seeking copies of the following:

- 23 (1) A VA letter awarding benefits to Mrs. Zaldivar dated sometime before  
24 June 27, 2002;
- 25 (2) A letter from Mrs. Zaldivar to the VA from around or before January 10,  
26 2002 regarding the reopening of her case;

1 (3) A “Report of Contact,”<sup>5</sup> VA Form 119, from Mrs. Zaldivar to the VARO  
2 prior to April 19, 2002 regarding a letter from a bank;

3 (4) The “law providing VA benefits”;

4 (5) Mrs. Zaldivar’s Report of Contact to the VARO, attention “Chris,” dated  
5 January 1, 2002, thanking someone for their “kind assistance on the phone today”;

6 (6) A “financial status to re-open the request for apportionment that [Ms.  
7 Zaldivar] filed in April”;

8 (7) A Report of Contact, VA Form 119, regarding Mrs. Zaldivar’s letter to the  
9 VARO dated December 26, 2001 in which she said she had called and requested a form;

10 (8) A complete and unredacted copy of an e-mail provided on June 21, 2012  
11 and “other e-mail and phone contact messages not previously released.”

12 (Doc. 51 ¶ 9; Doc. 51-2 at 28-33.)

13 When Plaintiff did not receive a response to his request, he filed an appeal with the  
14 VARO by letter dated July 15, 2013, asserting that he construed the failure to respond as  
15 “a denial of [his] good-faith effort to obtain the relevant documents.” (Doc. 51-2 at 35-  
16 36.) The VARO did not respond to this appeal letter and decided to file it with Plaintiff’s  
17 claim file because it was an “invalid NOD [Notice of Disagreement]” on a pending FOIA  
18 request and so no action was necessary. (Doc. 51 ¶ 11.) Plaintiff states that his request  
19 was “specifically written as an ‘appeal,’ not a Notice of Disagreement,” and the VARO  
20 did not notify Plaintiff that they decided to take no action by filing it as a NOD letter.  
21 (Doc. 65 at 9 ¶ 51.)

22 By letter dated December 18, 2014, Veterans Service Center Manager D. Luzi  
23 responded to Plaintiff’s request. (Doc. 51-2 at 41-42.) According to Plaintiff, Luzi’s  
24 response enclosed copies of the following:

25 (1) An unredacted three-page letter dated September 15, 2001 from the VARO  
26 to Plaintiff advising him that Mrs. Zaldivar had requested an apportionment;

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27  
28 <sup>5</sup> Defendants explain that Reports of Contacts are internal VA forms in which VA  
employees summarize conversations. (Doc. 51 ¶ 9(c).)

1 (2) An unredacted three-page letter dated December 26, 2001 from Mrs.  
2 Zaldivar containing a “Notice of Disagreement”;

3 (3) An unredacted one-page letter dated April 24, 2001 from Mrs. Zaldivar to  
4 the VARO “(Re: 345/Team 3)” requesting an application for apportionment;

5 (4) A two-page letter dated September 15, 2001 from the VARO to Mrs.  
6 Zaldivar, with her address redacted, requesting information and enclosing two forms;

7 (5) A two-page letter dated December 21, 2001 from the VARO to Mrs.  
8 Zaldivar, with her address redacted, denying a claim for apportionment;

9 (6) A one-page letter dated January 10, 2002 from Mrs. Zaldivar to the VARO,  
10 “Team 3/CM (Chris),” with her social security number redacted as well as information  
11 below her signature and name;<sup>6</sup>

12 (7) A two-page “Financial Status Report” dated June 11, 2002 and signed by  
13 Mrs. Zaldivar with her social security number, address, telephone number, and names and  
14 addresses of current and former employers redacted;<sup>7</sup>

15 (8) An unredacted one-page letter dated April 4, 2002 from DM Federal Credit  
16 Union to VA regarding a “joint owner of account”; and

17 (9) One page of e-mails between Mrs. Zaldivar (with her e-mail address  
18 redacted) and VA personnel between June 28, 2002 and March 31, 2003.  
19 (Doc. 65 at 9-10; Doc. 65-4 at 21 to Doc. 65-5 at 8.)

20 The December 18, 2014 response stated that under the PA and FOIA Exemption  
21 (b)(6), the agency could not provide Rebecca J. Zaldivar’s personal information such as  
22 her address, social security number, and telephone number because such disclosure  
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24 <sup>6</sup> Defendants assert that the redacted information below Mrs. Zaldivar’s signature  
25 cannot be described because only a redacted copy exists in the VA files. (Doc. 51  
26 ¶ 12(f).) Plaintiff responds that this letter “in its entirety was disclosed in the VARO’s  
27 May 30, 2012 release of records. (Doc. 65 at 10, citing Ex. R (Doc. 65-4 at 4).)

28 <sup>7</sup> Plaintiff asserts that this same document was released “in its entirety” with the  
May 30, 2012 disclosure from the VARO. (Doc. 65 at 10, citing Ex. S (Doc. 65-4 at 11-  
15.)

1 “would be an unwarranted invasion of her personal privacy” and so the information was  
2 withheld. (Doc. 51-2 at 41.)

3 By letter dated January 20, 2015, Plaintiff filed an Appeal with the OGC.  
4 (Doc. 51 ¶ 19; Doc. 51-2 at 44-47.) Plaintiff’s letter stated that he was appealing the  
5 response to his May 20, 2013 request and the “July 15, 2013 Appeal due to the untimely  
6 response.” (Doc. 51-2 at 45.) Plaintiff also said he was appealing “the adverse  
7 determination in its entirety of December 18, 2014 from D. Luzi” because the documents  
8 VARO produced had been released previously and were not new or the ones he  
9 requested. (*Id.*) Plaintiff asserted that he “was very specific as to the documents being  
10 sought” and “since no specific documents requested nor the regulations talked about, in  
11 state civil proceedings by Ms. Rebecca Zaldivar and her attorney were provided, I will  
12 continue my request through the civil complaint filed with the U.S. District Courts.” (*Id.*  
13 at 45-46.) Plaintiff said that one page of a two-page email was missing from the  
14 documents released, that Mrs. Zaldivar’s letter does not satisfy his request for a Report of  
15 Contact, that her personal information such as her social security number and telephone  
16 number are a matter of public record and were “supplied by Ms. Rebecca Zaldivar as an  
17 adverse party to various court proceedings,” and that the “disclosure of documents  
18 submitted by Rebecca Zaldivar are strictly for impeachment purposes as they relate to  
19 subject matter of any direct testimony given by her in civil court (state) proceedings.”  
20 (*Id.* at 46-47.)

21 On April 20, 2015, the OGC issued its Final Agency Decision in response to  
22 Plaintiff’s appeal. (Doc. 51-2 at 59-63.) The OGC Decision noted that the FOIA Officer  
23 who conducted the search did not locate any Reports of Contact with the subject matters  
24 described by Plaintiff, but “in an attempt to be as responsive as possible, the FOIA  
25 Officer located the above-referenced documents disclosed to you which disclosures of  
26 information were closely related to the subjects of your requests.” (*Id.* at 61.) The  
27 Decision described the FOIA Officer’s search of “thousands of pages of records” in  
28 Plaintiff’s file, including a page-by-page search that took long hours to conduct, but still

1 no Reports of Contacts as described by Plaintiff were located. (*Id.* at 62.) The Decision  
2 affirmed the determination that “there are no other records located within the Phoenix  
3 VARO responsive to your request.” (*Id.*)

4 As to the exemptions claimed by the VARO, the Decision states that Mrs.  
5 Zaldivar’s social security number was properly withheld under FOIA Exemptions (b)(3)  
6 and (b)(6) and 38 U.S.C. § 5701, and that her physical and email addresses, telephone  
7 number, and names and locations of her current and former employe[r]s” were properly  
8 withheld under FOIA Exemption (b)(6). (*Id.* at 62.) The OGC also found that the  
9 information withheld under the PA was “about Mrs. Zaldivar and pertains only to her,”  
10 and that an agency “cannot disclose any record which is contained in a Privacy Act-  
11 protected file to any person except pursuant to a written request by, or with the prior  
12 written consent of, the individual to whom the record pertains, unless one of twelve  
13 exceptions applies (5 U.S.C. 552a(b)(1)-(1)).” (*Id.* at 63.)

14 As to Plaintiff’s July 15, 2013 appeal letter to VARO, OGC advised Plaintiff that  
15 “pursuant to VA regulations, the [OGC] is the only appellate authority for FOIA and  
16 Privacy Act appeals (38 C.F.R. 1.559(b)).” (*Id.* at 60.)

## 17 **2. Adequacy of the Search**

18 In his Declaration, Jeanisse describes the search he conducted in response to  
19 Plaintiff’s May 20, 2013 FOIA request, the documents sent to Plaintiff, and the  
20 information redacted. (Doc. 51-3 at 1-7.) Jeanisse states that he did “a page-by-page  
21 review of Plaintiff’s entire claims file with the VA, which encompassed thousands of  
22 pages of records” and took many hours. (*Id.* at 6 ¶ 22.) Jeanisse further avers that “other  
23 than [Plaintiff’s] claims file, there is no other location in which one would reasonably  
24 expect to find documents responsive to Plaintiff’s May 20, 2013 request.” (*Id.*) Jeanisse  
25 asserts that he was not able to locate all of the specific documents Plaintiff requested but  
26 tried to be as responsive as possible, and so disclosed several documents that “were  
27 closely related to the specific documents requested.” (*Id.*) Jeanisse also prepared a two-  
28 page *Vaughn* Index describing the information redacted and the FOIA and Privacy Act

1 exemptions that allow the withholding of that information. (*Id.* ¶ 23; Doc. 51-4 at 1-2.)  
2 According to Jeanisse, “[t]hese were the only matters withheld from Plaintiff in response  
3 to this request.” (Doc. 51-3 ¶ 23.)

4 Defendants argue that the search for documents in this case “was diligent and was  
5 conducted using the only location that could reasonably be expected to contain the  
6 requested documents.” (Doc. 49 at 10.) Although Plaintiff asserted in his appeal to the  
7 OGC that documents exist that were not found during the VARO’s search, Defendants  
8 argue that the standard is whether the search conducted was adequate, “not whether  
9 responsive documents might possibly exist.” (*Id.*, quoting *Citizens Against UFO*  
10 *Secrecy, Inc. v. DOD*, 21 Fed. App’x 774, 775 (9th Cir. 2001).)

11 Plaintiff responds that his request “stems from a divorce hearing based on  
12 Plaintiff[’s] ex-spouse attempting to force funds from Plaintiff (Exhibit Z) after his  
13 conviction but before he was sentenced.” (Doc. 65 at 12.) Plaintiff asserts that the  
14 “closely related documents” provided by the VARO do not fulfill his FOIA/Privacy Act  
15 request and that the VARO’s search for responsive records “remain[s] elusive.” (Doc. 64  
16 at 12.) Plaintiff contends that the “VARO’s release of documents dated May 30, 2013  
17 revealed three contact notes” from June 7, 2001, June 30, 2001 and April 24, 2002, yet  
18 the “VARO claims none exist.” (Doc. 64 at 12-13, citing Doc. 65-6 at 23, 25 and 27.)  
19 Plaintiff states that he “merely seeks the disclosure of information and documents  
20 relevant to the testimony of Ms. Zaldivar in civil and criminal trial hearings.” (*Id.* at 13,  
21 citing *Vaughn v. Rosen*, 484 F.2d 82, n.23 (D.C. Cir. 1973).)

22 Plaintiff appears to challenge the adequacy of the search for documents responsive  
23 to his May 20, 2013 request, but only obliquely. Plaintiff argues that the “closely related  
24 documents” do not fulfill his request, but that does not demonstrate that the VARO’s  
25 search for records was inadequate. Plaintiff cites to three Reports of Contact that he says  
26 VARO disclosed to him “by letter dated May 30, 2013,”<sup>8</sup> but he does not explain why

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27  
28 <sup>8</sup> There is no VARO letter dated May 30, 2013 in the record, and it is possible  
Plaintiff meant that VARO provided these documents in its May 30, 2012 response to his

1 these three documents are significant. Plaintiff's May 20, 2013 request sought three  
2 Reports of Contact with Mrs. Zaldivar dated December 26, 2001, January 1, 2002 and  
3 sometime prior to April 19, 2002, but VARO did not locate those documents. The three  
4 Reports of Contact Plaintiff says were previously disclosed are dated June 7, 2001,  
5 June 30, 2001, and April 24, 2002, and do not appear to be the documents he sought in  
6 his May 20, 2013 request. Therefore, it is not clear if Plaintiff is arguing that because  
7 three Reports of Contact were released to him, there must be others, or if he is arguing  
8 something else altogether. Nevertheless, the prior release of Reports of Contacts does not  
9 support that VARO's search was inadequate.

10 Defendants have met their burden of showing that they conducted a search for  
11 documents that was "reasonably calculated to uncover all relevant documents" by  
12 presenting Jeanisse's Declaration about where he conducted the search and the methods  
13 he used. *See Lahr*, 569 F. 3d at 986; *Zemansky*, 767 F.2d at 571. Jeanisse's Declaration  
14 is entitled to a presumption of good faith, and Plaintiff has not rebutted that presumption.  
15 Plaintiff appears to speculate that other documents exist, but he has not shown or even  
16 argued how Jeanisse's search was inadequate. Therefore, the Court finds that VARO's  
17 search for records was adequate. *See Citizens Comm'n on Human Rights*, 45 F.3d at  
18 1328; *Iturralde*, 315 F.3d at 315; *Wilbur*, 355 F.3d at 678. Accordingly, the Court will  
19 grant summary judgment to Defendants on the adequacy of the search.

### 20 **3. Exemptions**

21 VARO argues that it properly redacted certain information about Plaintiff's former  
22 wife pursuant to FOIA Exemption (b)(6) and the PA. (Doc. 49 at 10-11.)

#### 23 **a) FOIA Exemption (b)(6)**

##### 24 **(1) Legal Standard**

25 FOIA Exemption (b)(6) exempts "personnel and medical files and similar files the  
26 disclosure of which would constitute a clearly unwarranted invasion of personal privacy."  
27 5 U.S.C. § 552(b)(6). To determine whether a record is properly withheld under  
28

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April 26, 2012 request.

1 Exemption (b)(6), the court “must balance the privacy interest protected by the  
2 exemptions against the public interest in government openness that would be served by  
3 disclosure.” *Lahr*, 569 F.3d at 973. Exemption (b)(6) “requires that the invasion of  
4 privacy be ‘clearly unwarranted’” and that disclosing the information “‘would constitute’  
5 an unwarranted invasion of privacy.” *Id.* (quoting *U.S. Dept. of Justice v. Reporters*  
6 *Comm. for Freedom of the Press*, 489 U.S. 749, 755-56 (1989)). When the government  
7 “has identified a cognizable privacy interest, ‘the only relevant public interest in the  
8 FOIA balancing analysis is the extent to which disclosure of the information sought  
9 would shed light on an agency’s performance of its statutory duties or otherwise let  
10 citizens know what their government is up to.’” *Id.* (quoting *Bibles v. Or. Natural Desert*  
11 *Ass’n*, 519 U.S. 355, 355-56 (1997)).

## 12 (2) Analysis

13 Defendants assert that the only information redacted by the VARO under  
14 Exemption (b)(6) is the “private contact information of Plaintiff’s ex-spouse and her  
15 social security number.” (Doc. 59 at 13, citing *Vaughn* Index.) They argue that “this is  
16 wholly private information and sheds no light on the VA’s conduct.” (*Id.*)

17 Plaintiff responds that “any redaction of the personal information of Plaintiff’s ex-  
18 spouse has been waived.” (Doc. 64 at 13.) Plaintiff asserts that the “VARO voluntarily  
19 surrendered documents in its May 30, 2012 disclosure in its entirety, without redactions,  
20 as clean copies” and that Mrs. Zaldivar “has also released documents on her own behalf  
21 as exhibits when the need arises.” (*Id.* at 13-14, citing Doc. 65 ¶¶ 30, 52 and Exs. H, P-  
22 S.) Plaintiff does not say specifically what information has previously been released, but  
23 argues that Mrs. Zaldivar “has never exercised her right to privacy or confidentiality nor  
24 has VARO produced such document on record,” and so Mrs. Zaldivar “has waived her  
25 right to non-disclosure under the Privacy Act.” (*Id.* at 14.)

26 Plaintiff has not identified what public interest would be served by the disclosure  
27 of Mrs. Zaldivar’s contact information and social security number. Even assuming Mrs.  
28 Zaldivar had disclosed the information in some other proceeding or the agency did not



1 assert the exemption in a prior release of records, such disclosure still fails to shed light  
2 on how the agency performed its statutory duties in Plaintiff's case. *See, e.g., Fiduccia,*  
3 185 F.3d at 1047 (holding that the privacy interests of the individuals involved  
4 outweighed the FOIA purpose of disclosure even though the information may have been  
5 disclosed in "various courthouses"). Nor does Plaintiff's citation to an Eighth Circuit  
6 case discussing FOIA Exemption (b)(5) compel disclosure of the information withheld by  
7 VARO under Exemption (b)(6). *See North Dakota v. Andrus*, 581 F.2d 177 (8th Cir.  
8 1978) (holding that the government waived its right to assert Exemption (b)(5), which  
9 exempts from disclosure certain "inter-agency or intra-agency memorandums or letters,"  
10 because the government had previously disclosed the documents to counsel in a separate  
11 litigation). The *Andrus* case involved the government's waiver of its own right to assert  
12 Exemption (b)(5), whereas here the government is asserting Exemption (b)(6) as to the  
13 disclosure of Mrs. Zaldivar's information. Moreover, to the extent Plaintiff claims he has  
14 already received the documents he is complaining were not disclosed in their entirety, his  
15 request for records would be moot.

16 Accordingly, the Court will grant summary judgment to Defendants on claimed  
17 FOIA Exemption (b)(6).

## 18 **b) Privacy Act Exemption**

### 19 **(1) Legal Standard**

20 The Privacy Act governs the disclosure of, access to, and amendment of records  
21 on individuals that are maintained by federal agencies." *Lane v. Dep't of Interior*, 523  
22 F.3d 1128, 1138-39 (9th Cir. 2008) (citing 5 U.S.C. § 552a). Thus, "an individual may  
23 'gain access to his [or her] record' upon request, *id.* § 552a(d)(1), and a cause of action  
24 arises if an agency refuses to comply with a request, *id.* § 552a(g)(1)(B)." *Id.* at 1139.  
25 On the other hand, the PA prohibits disclosure of "any record" to any person or agency  
26 unless there is a written request by or written consent of the individual to whom the  
27 record pertains," subject to certain exceptions. *Id.* The government "need not show that  
28 it produced every responsive document, but only that the *search* for those documents was

1 *adequate.*” *Id.* (quoting *Zemansky*, 767 F.2d at 571) (emphasis in original). The  
2 government may show that its search was adequate by providing “reasonably detailed,  
3 nonconclusory affidavits submitted in good faith.” *Zemansky*, 767 F.2d at 571 (quoting  
4 *Weisberg v. United States Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)).

## 5 (2) Analysis

6 Defendants argue that the information Plaintiff claims he should have access to—  
7 the redacted contact information and social security number of his ex-spouse—“are not  
8 records pertaining to [Plaintiff],” even if the information can be found in his claim file.  
9 (Doc. 49 at 14.) They assert that Plaintiff’s “filings alone demonstrates his desire to  
10 retaliate against his ex-spouse since being convicted of numerous counts of sexual abuse  
11 and sexual contact with a minor in a proceeding where his ex-spouse was the ‘key  
12 prosecution witness.’” (*Id.*, citing Doc. 51 ¶ 21, Doc. 51-2 at 65-66, Doc. 1 ¶ 20.)  
13 Defendants argue that Plaintiff’s situation “is on all fours” with the situation in  
14 *DePlanche v. Califano*, 549 F. Supp. 685, 693-98 (W.D. Mich. 1982), a case in which a  
15 father sought access to a social security benefits file accessible by the father’s social  
16 security number that contained the address of his minor children. The court in  
17 *DePlanche* denied access to the address, finding that the information was not the father’s  
18 record within subsection (a)(4) or information pertaining to him under subsection (d)(1)  
19 of the Privacy Act. *Id.* at 694-96.

20 Plaintiff responds generally that his former wife “has waived right to non-  
21 disclosure under the Privacy Act and VARO’s release of documents surrendered  
22 documents as clean copies makes VARO’s rights waived as well in protecting the  
23 information.” (Doc. 64 at 13-14.) Plaintiff does not argue that the information withheld  
24 under the PA pertains to him and not to his wife, or that she has consented to such  
25 disclosure. The Court accordingly will grant summary judgment to Defendants on the  
26 withholding of the information relating to Plaintiff’s former spouse under the Privacy  
27 Act.

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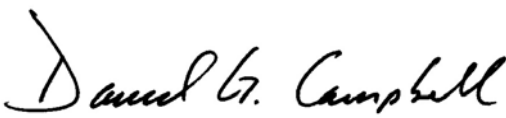
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**IT IS ORDERED:**

(1) The reference to the Magistrate Judge is withdrawn as to Defendants' Motion for Summary Judgment (Doc. 49).

(2) Defendants' Motion for Summary Judgment (Doc. 49) is **granted**, and this action is terminated with prejudice. The Clerk of Court must enter judgment accordingly.

Dated this 22nd day of August, 2016.



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David G. Campbell  
United States District Judge