

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

BADER FAMILY FOUNDATION,)	
1236 N. Stafford St., Arlington, VA 22201)	
)	
Plaintiff,)	
)	Civil Action No. 21-1741
v.)	
)	
UNITED STATES DEPARTMENT OF)	
EDUCATION,)	
400 Maryland Avenue, SW Washington, DC 20202)	
)	
Defendant)	

AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff alleges as follows, against Defendant U.S. Department of Education:

- 1) This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for improper withholding of agency records.
- 2) Plaintiff seeks to compel production under its May 21, 2021 FOIA request seeking certain emails between policymaking officials in the Education Department’s Office for Civil Rights and people outside the government who apparently have spoken or written to such officials about school discipline policy or school discipline’s racial or civil-rights implications.
- 3) These records are central to matters of timely, current political and legal deliberation, of great public interest and policy and legal significance, as recent press coverage and discussion of federal school-discipline policy shows.¹

¹ See, e.g., Jason Riley, *Classroom Chaos in the Name of Racial Equity is a Bad Lesson Plan*, Wall Street Journal, May 12, 2021, available at <https://www.wsj.com/articles/classroom-chaos->

- 4) Defendant has failed to provide plaintiff with either the records requested, or the determination in response to plaintiff's FOIA request mandated by 5 U.S.C. § 552(a)(6)(A)(i). FOIA requires an agency to provide a determination of the number of responsive records it intends to release or withhold within 20 working days after receiving the request. As the D.C. Circuit explained, agencies must "inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions" within the statutory deadline of 20 working days. (*CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013)).
- 5) That deadline passed no later than June 22, yet defendant still has provided no determination about what records will be produced, nor has it produced any records in response to plaintiff's request.
- 6) Due to defendant's failure to provide any such determination, plaintiff has filed this lawsuit to compel it to comply with the law.

PARTIES

- 7) The Bader Family Foundation (BFF) is a non-profit, 501(c)(3) tax-exempt foundation that focuses heavily on educational issues. It supports non-profits that use freedom of information laws to shed light on the operations of government; supports non-profits that study and publish reports about government policies related to school-discipline and civil-rights policy; and supports non-profit media that publish stories about such

in-the-name-of-racial-equity-is-a-bad-lesson-plan-11620771445; Ashe Schow, *Biden Administration Expected To Bring Back Obama-Era School Discipline Rules, Which Led To Racial Quotas*, Daily Wire, May 12, 2021, available at <https://www.dailywire.com/news/biden-administration-expected-to-bring-back-obama-era-school-discipline-rules-which-led-to-racial-quotas>; Will Flanders, *Joe Biden Plans to Revive School Rules Punishing Kids According to Skin Color*, The Federalist, May 21, 2021, available at <https://thefederalist.com/2021/05/21/joe-biden-plans-to-revive-school-rules-punishing-kids-according-to-skin-color/>.

policies. BFF also has participated as amicus curiae in litigation involving civil-rights and constitutional issues in the educational context. A BFF trustee, Hans Bader, has published about subjects related to the requested records in the media,² and been quoted in the media about them.³ Bader is a former employee of the Education Department's Office for Civil Rights.⁴

- 8) United States Department of Education is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1), and is headquartered at 400 Maryland Avenue, SW, Washington, D.C. 20202. Defendant has possession, custody, and control of the records to which Plaintiff seeks access.

JURISDICTION AND VENUE

- 9) This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), because this action is brought in the District of Columbia, and 28 U.S.C. § 1331, because the resolution of disputes under FOIA presents a federal question.

² See, e.g., Hans Bader, *Education Department may investigate schools even if they have colorblind discipline rules and practices*, Liberty Unyielding, June 6, 2021, available at <https://libertyunyielding.com/2021/06/06/education-department>; Bader, *Dem AGs Urge Biden to Implement Race and Gender Quotas for School Discipline*, CNS News, June 8, 2021, <https://cnsnews.com/commentary/hans-bader/dem-ags-urge-biden-implement-race-and-gender-quotas-school-discipline>.

³ See, e.g., Mark Keierleber, *Biden Administration to Renew Focus on Racial Disparities in School Discipline*, Yahoo News, June 15, 2021, www.yahoo.com/now/biden-administration-renew-focus-racial-111500565.html; Jackson Walker, *Education Department eyes racial quotas in school discipline, expert warns*, College Fix, June 2, 2021 (www.thecollegefix.com/education-department-eyes-racial-quotas-in-school-discipline-expert-warns).

⁴ See George Will, *'Alice in Wonderland' coercion*, Oklahoman, May 26, 2013, available at <https://www.oklahoman.com/article/3833883/george-f-will-alice-in-wonderland-coercion> ("Hans Bader" is a "former OCR lawyer").

- 10) Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because the records are located in Washington, D.C., and because defendant is a federal agency.

FACTUAL AND STATUTORY BACKGROUND

- 11) On May 21, 2021, plaintiff submitted the FOIA request described above to defendant.

- 12) Plaintiff requested the following records:

Emails about school discipline or school disciplinary policies sent or received by Carolyn Seugling or any presidential appointee or political appointee or Schedule C employee in the Office for Civil Rights during the covered date range, that were also sent or received by any of the following people or email accounts: Michael Turnage Young, Diane Smith Howard, Ames Simmons, Katherine Dunn, Russell Skiba, Olatunde Johnson, Cierra Kaler-Jones, James Scanlan, Fred Woehrle, jps@jpscanlan.com, fredwoerhle@gmail.com or skiba@indiana.edu. The covered date range is from January 20, 2021 to the earlier of the following dates: the date you process this request, or June 18, 2021. Emails are covered regardless of whether they are in an official Education Department email account, or an Education Department employee's non-official or private email account.

- 13) In response, plaintiff received a May 21 reply email from defendant acknowledging receipt of plaintiff's FOIA request, and assigning it a tracking number. The email from the Department of Education's Office of the Executive Secretariat stated that "Request #21-01704-F has been assigned to the request you submitted. In all future correspondence regarding this request, please reference FOIA tracking number 21-01704-F. Please refer to the FOIA tracking number to check the status of your FOIA request at the link provided below: <https://foiaexpress.pal.ed.gov/app/CheckStatus.aspx>."

- 14) This email demonstrated that defendant received plaintiff's FOIA request on May 21.

- 15) But defendant did not provide a determination in response to the FOIA request.
- 16) The deadline for defendant to issue a determination in response to plaintiff's FOIA request was 20 working days after defendant received plaintiff's request – that is, by no later than June 22, 2021.⁵ (*See* 5 U.S.C. § 552(a)(6)(A)(i)).
- 17) That deadline came and went without any determination by it about whether to comply with plaintiff's FOIA request.
- 18) Instead, on June 21, 2021, defendant sent an email attaching a “20 Day Status Notification.” In that attached letter, it stated that “At this time, we are unable to provide an estimated completion date, but intend to provide records on a rolling basis as they become available.”
- 19) Under FOIA, an agency's determination must “inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions” within the statutory deadline of 20 working days. (*CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013)).
- 20) Defendant provided no such information to plaintiff, and it thus has not provided the determination required by FOIA.
- 21) Accordingly, defendant has improperly withheld agency records.
- 22) Due to defendant's failure to comply with the statutory deadline, plaintiff has exhausted administrative remedies, and can now sue.⁶

⁵ As reflected in the “20 Day Status Notification” plaintiff received, 20 working days had apparently passed by June 21, notwithstanding the Juneteenth holiday, which was observed by some, but not all, federal employees. If Juneteenth is treated as a non-working day, then the deadline was June 22.

⁶ *See CREW v. FEC*, 711 F.3d 180, 189 (D.C. Cir. 2016) (holding that “if an agency does not adhere to certain statutory timelines in responding to a FOIA request, the requester is deemed by statute to have fulfilled the exhaustion requirement”).

- 23) FOIA provides that a requester is "deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions." 5 U.S.C. § 552(a)(6)(C)(i).
- 24) Since defendant did not comply with FOIA's deadlines, it has waived the right to collect any fees for processing plaintiff's FOIA request.
- 25) In *Bensman v. National Park Service*, 806 F. Supp. 2d 31 (D.D.C. 2011) this Court noted: "[The effect of] the 2007 Amendments was to impose consequences on agencies that do not act in good faith or otherwise fail to comport with FOIA's requirements. See S. Rep. No. 110-59. To underscore Congress's belief in the importance of the statutory time limit, the 2007 Amendments declare that '[a]n agency shall not assess search fees... if the agency fails to comply with *any time limit*' of FOIA" (emphasis added).
- 26) Moreover, it would be inappropriate to charge any fees for an additional reason: the records sought in plaintiff's FOIA request are of great public interest, and producing them would be of public benefit.
- 27) Production of the requested records will make them available to the public, providing a public benefit. When agencies produce records to undersigned counsel, he posts them on the internet, and includes a hyperlink to them in his blog posts at the Liberty Unyielding

blog and other blogs that reproduce his blog posts.⁷ Thousands of people read such blog posts, making the records widely available.⁸

FIRST CLAIM FOR RELIEF

Duty to Produce Records – Declaratory Judgment

28) Plaintiff re-alleges paragraphs 1-27 as if fully set out herein.

29) Defendant is improperly withholding agency records.

30) The records are urgently needed by an individual engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity.

31) Plaintiff asks this Court to enter a judgment declaring that:

- a. Plaintiff is entitled to the records described in its FOIA request, and any attachments thereto;
- b. Defendant's processing of plaintiff's FOIA request described above is not in accord with the law, and does not satisfy Defendant's obligations under FOIA;
- c. Defendant has a duty to produce the records responsive to plaintiff's FOIA request;
- d. Defendant has a duty to produce them without charging any fees.

SECOND CLAIM FOR RELIEF

Duty to Produce Records – Injunctive Relief

32) Plaintiff re-alleges paragraphs 1-31 as if fully set out herein.

⁷ See, e.g., Hans Bader, *Court orders release of records related to claim global warming causes severe winter cold*, Liberty Unyielding, March 18, 2016 (<https://libertyunyielding.com/2016/03/18/court-orders-release-of-records-related-to-claim-global-warming-causes-severe-winter-cold>).

⁸ For example, Liberty Unyielding has thousands of readers. Between December 2020 and May 2021, it had between 90,000 and 290,000 readers, according to Similarweb. See <https://www.similarweb.com/website/libertyunyielding.com>.

- 33) Plaintiff is entitled to injunctive relief compelling defendant to produce the records described in plaintiff's FOIA request, without charging any fees.
- 34) Plaintiff asks the Court to issue an injunction ordering defendant to produce to plaintiff, within 10 business days of the date of the order, the records sought in plaintiff's FOIA request described above, and any attachments thereto.

THIRD CLAIM FOR RELIEF
Costs And Fees – Injunctive Relief

- 35) Plaintiff re-allege paragraphs 1-34 as if fully set out herein.
- 36) Pursuant to 5 U.S.C. § 552(a)(4)(E), the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
- 37) This Court should enter an injunction ordering the defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for its attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 30th day of June, 2021,

/s/ Hans F. Bader
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