

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

BADER FAMILY FOUNDATION,	)	
1236 N. Stafford St., Arlington, VA 22201	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 21-2237
v.	)	
	)	
UNITED STATES COMMISSION	)	
ON CIVIL RIGHTS,	)	
1331 Pennsylvania Ave., NW, Suite 1150	)	
Washington, DC 20425	)	
	)	
Defendant	)	

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff alleges as follows, against Defendant U.S. Commission on Civil Rights (“USCCR”):

- 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 a January 30, 2021 FOIA request for “outgoing electronic communications” made by two USCCR officials (Catherine Lhamon and Katherine Culliton-Gonzalez) from July 1, 2020, to December 31, 2021. The FOIA request limited its reach by excluding all “communications between these individuals and anyone else within the U.S. Commission on Civil Rights.”
- 3) USCCR has refused to provide the requested records, claiming that “the request fails to describe the information sought.”
- 4) But the FOIA request clearly describes the records it seeks, listing the specific USCCR staff whose records are sought, and the specific time frame covered by the request. That permits such records to be easily identified and located.
- 5) Thus, USCCR has improperly withheld agency records.

- 6) That left plaintiff no choice but to file this lawsuit to obtain those records.

### **PARTIES**

- 7) The Bader Family Foundation (BFF) is a non-profit, tax-exempt 501(c)(3) organization.

It takes an interest in civil-rights policy. It supports non-profits that litigate against discriminatory policies and civil-rights violations. It supports non-profits that use freedom of information laws to shed light on the operations of government; non-profits that study and publish reports about discriminatory government programs; and non-profit media that publicize and write about such programs. BFF also has participated as amicus curiae in litigation involving civil-rights and constitutional issues.

- 8) The U.S. Commission on Civil Rights is an independent federal agency. *See* 42 U.S.C. § 1975. Its headquarters are located at 1331 Pennsylvania Ave., NW, Suite 1150, Washington, DC 20425.

### **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.
- 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 defendant USCCR is a federal agency.

### **FACTUAL AND STATUTORY BACKGROUND**

- 11) On January 30, 2021, a FOIA request was emailed to USCCR, a request that was later narrowed in scope, to limit its date range and cover only the outgoing communications of two officials.
- 12) The request sought the following records:

All incoming and outgoing electronic communications including, but not limited to, emails and text-messages (whether SMS, MMS, or iMessage) made to or by Catherine Lhamon from December 2016 through January 2021.

All incoming and outgoing electronic communications including, but not limited to, emails and text-messages (whether SMS, MMS, or iMessage) made to or by Katherine Culliton-Gonzalez from January 2018 through January 2021.

Note: You may exclude all communications between these individuals and anyone else within the U.S. Commission on Civil Rights.

- 13) USCCR acknowledged the above FOIA request on February 1, 2021, and assigned it a tracking number, #2021-18.
- 14) The acknowledgment was emailed by Angelia Rorison. FOIA Public Liaison, U.S. Commission on Civil Rights. In a February 1, 2021 email, she wrote, “This email is to acknowledge receipt of your FOIA request to FOIA@usccr.gov on Monday, February 1, 2021. The reference number for your request in communication with the US Commission on Civil Rights is #2021-18.”
- 15) The deadline for USCCR to issue a determination in response to plaintiff’s FOIA request was 20 working days after plaintiff’s request – that is, no later than March 2, 2021. *See* 5 U.S.C. § 552(a)(6)(A)(i).
- 16) That deadline came and went without any determination by USCCR about whether to comply with plaintiff’s FOIA request.
- 17) Under FOIA, an agency 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)).

- 18) On March 26, 2021, long after the deadline had passed for issuing a determination, Rorison sent an email asking, “Would it be possible to narrow your request in scope”?
- 19) On March 26, 2021, Pilar McLaughlin, an employee of the USCCR, sent an email to the FOIA requester, complaining that the FOIA “request you submitted would result in a return of thousands of documents.” In addition, she stated, “we ask that you narrow your request. In narrowing your request, could you please: 1. identify the individual(s) with whom Lhamon communicated with and the subject matter of the communication; and, 2. identify the individual(s) with whom Culliton-Gonzalez communicated with and the subject matter of the communication.”
- 20) In response, the requester sent an April 8, 2021 email, narrowing the request. That email stated, “My preference is to narrow by time, rather than by recipient/subject. So I would like to amend it to 6 months for each individual, i.e. 7/1/2020 through 12/31/2020.”
- 21) In an April 12, 2021 email, the requester further narrowed the request through “the added restriction of asking for only OUTGOING emails from the two individuals for that 6-month period and, again, excluding all intra-agency emails.”
- 22) In an April 26, 2021 email, USCCR rejected the FOIA request. USCCR recognized that the request had been narrowed to cover only “outgoing emails (excluding intra-agency ones) sent by the two named individuals during the final 6 months of 2020.”
- 23) But it nevertheless denied the request, on the grounds that “the request fails to describe the information sought.”

- 24) In that email, sent by Angelia Rorison, USCCR stated: “The Revised Request, for outgoing emails from Catherine Lhamon and Katherine Culliton-Gonzalez for the period of July 1, 2020, through December 31, 2020, is denied because it fails to comply with the Commission’s FOIA regulations, specifically, the request failed to ‘contain a sufficiently specific description of the record requested with respect to names, dates, and subject matter...’ as required by 45 C.F.R. § 704.1(d)(1)(i)(B).”
- 25) In reality, the quoted regulation merely requires that a request “contain a sufficiently specific description of the record requested with respect to names, dates, and subject matter ***to permit such record to be identified and located.***” 45 C.F.R. § 704.1(d)(1)(i)(B) (boldface added).
- 26) The USCCR did not allege that it could not identify and locate the requested records.
- 27) USCCR did allege that “the Commission is a small federal agency” and that it had accordingly asked the requester to “narrow the scope” of his “request by identifying the individuals with whom the above individuals communicated and the subject matters of the communications.”
- 28) But the smallness of an agency does not render a FOIA request unspecific, even if a FOIA request’s breadth would be burdensome to a small agency. As this court has explained, “FOIA’s reasonable-description requirement does not doom requests that precisely describe the records sought, even if compliance might overwhelm an agency’s response team.” *Shapiro v. CIA*, 170 F. Supp. 3d 147 (D.D.C. 2016).
- 29) USCCR suggested that the original version of the FOIA request, prior to narrowing, “would result in a return of thousands of documents.” (See Paragraph 19, *ante*).

- 30) But the number of records covered by a FOIA request does not render it non-specific. A request encompassing over 1,000,000 computerized records was valid because "[t]he linchpin inquiry is whether the agency is able to determine 'precisely what records [are] being requested.'" *Yeager v. DEA*, 678 F.2d 315, 322, 326 (D.C. Cir. 1982).
- 31) Moreover, USCCR would merely have to electronically gather emails from two employees' email accounts to locate the responsive records. That is a far less burdensome, and more straightforward, task than looking through 803 separate files, which an appeals court found to be "reasonably described" and not "unreasonably burdensome." *Ruotolo v. Department of Justice*, 53 F.3d 4, 9-10 (2d Cir. 1995).
- 32) Moreover, FOIA requesters routinely request thousands of pages of emails from agency officials' email accounts, without limiting their requests to communications with specific "names" or "dates." And judges order such emails produced. *See, e.g., Leopold v. Department of State*, Civil Action No. 15-cv-123 (RC), Order dated May 27, 2015 (ECF No. 17) at 1 (ordering production of "55,000 pages of emails" from former agency employee's email account).
- 33) On July 10, 2021, the requester appealed USCCR's denial of the FOIA request, stating:
- On April 26, 2021, I received a ruling by Angela Rorison, FOIA Public Liaison for the U.S. Commission on Civil Rights, denying my revised FOIA request for the outgoing emails sent by Catherine Lhamon and Katherine Cuilliton-Gonzalez over the six (6) month period spanning from July 1, 2020 through December 31, 2020 (the "Revised Request"). According to Ms. Rorison, "[t]he Revised Request ... is denied because it fails to comply with the Commission's FOIA regulations, specifically, the request failed to 'contain a sufficiently specific description of the record requested with respect to names, dates, and subject matter...' as required by 45 C.F.R. ss704.1(d)(1)(i)(B)."

However, examination of the cited regulation reveals that Ms. Rorison has ellipsed out from the regulation material language. The quoted provision actually requires, in full, that a request “contain a sufficiently specific description of the record requested with respect to names, dates, and subject matter *to permit such record to be identified and located.*”

The cited regulation does not require that correspondence be identified with particularity by counterparty, date, and subject matter; it requires only that correspondence be sufficiently described to allow responsive materials to be identified and located. There is no serious argument available that the Revised Request fails to meet this standard. The Revised Request allows responsive correspondence to be located. There are only two places such emails could be: the outboxes of Ms. Lhamon and Ms. Cuilliton-Gonzalez. The Revised Request allows identification of which emails within those folders are subject to the Revised Request: if they were sent in the specified time-period, they are. Indeed, the decision to omit the operational descriptor in the rejection of the Revised Request functionally admits as much – so it cannot be argued that the Revised Request does not meet the Commission’s promulgated standard.

Although the rejection cited no additional authority to support her contentious misreading of the Commission’s regulation, it is possible that her position amounts to a contention that the Revised Request’s level of specificity will implicate a large number of emails. If this was her intended theory, case law makes it untenable. Such an argument would, in effect, rely on *AFGE v. Dep’t of Comm.*, 907 F.2d 203 (D.C. Cir. 1990), but the request in that case is not comparable to the Revised Request. *AFGE* allowed an agency to reject a request as insufficiently specific for the agency to “identify the documents requested” because “it is clear that these requests are so broad as to impose an unreasonable burden upon the agency.” *Id.*, at 209. But that was accepted by the D.C. Circuit *only* because the requests would force the agency “to search virtually every file contained in over 356 branch and division offices, up to and including the director’s office.” *Id.*, at 206.

Respectfully, searching two email boxes, each sortable by date, for the correspondence sent over a particular date-range is not remotely in that ballpark. Indeed, the Courts of Appeals have refused to allow agencies to beg off from practicable requests far more cumbersome. *Ruotolo v. DOJ*, 53 F.3d 4, 9 (2d Cir. 1995) (although request would require 803 files to be searched by ‘begin[ning] with the most current ... and work[ing] backward in time,’ request was “reasonably described” and not “unreasonably burdensome.”)....It is perhaps instructive that, since the rejection of the Revised Request, the CDC...had no difficulty producing thousands of pages of external emails sent by its Director in response to FOIA requests.

Respectfully, the Commission’s obligations under FOIA are no different than were the CDC’s and the governing Commission regulation fully supports the enforceability of the Revised Request.

34) On August 9, 2021, the USCCR rejected the administrative appeal, on “the same basis as the April 26, 2021, FOIA Decision,” in a letter emailed by Mauro Morales, Staff Director of the U.S. Commission on Civil Rights.

35) In that letter, USCCR stated that the FOIA request was being denied because “an agency may deny a request .... where the request fails to describe the information sought.”

36) That letter further stated, “I am denying your administrative FOIA appeal because the Revised Request and subsequent appeal fail to specify the subject matter, or at a minimum some search terms and other individuals with whom the specified individuals may have communicated.”

37) Because USCCR did not comply FOIA’s deadline for issuing a determination in response to FOIA request #2021-18, it waived the right to collect any fees for processing plaintiff’s FOIA request. See 5 U.S.C. § 552(a)(6)(A)(viii).



38) Under FOIA, USCCR had a duty to issue a determination in response to the FOIA request within 20 working days after it received the request, that is, by no later than March 2, 2021.

See 5 U.S.C. § 552(a)(6)(A)(i).

39) But no determination was issued until April 26, 2021, and USCCR did not even raise questions about the scope of the request until March 26, 2021, long after the deadline for issuing a determination had passed.

40) In *Bensman v. National Park Service*, 806 F. Supp. 2d 31 (D.D.C. 2011) this Court noted that 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).

41) 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.

42) Production of the requested records will make them available to the public, providing a public benefit. When agencies produce records to BFF or its counsel, those records are posted on the internet in whole or in part, and quoted in blog posts linking to those records.<sup>1</sup>

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<sup>1</sup> 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>) (posting agency records); Bader, *Biden administration knew its racial preferences were illegal*, Liberty Unyielding, Aug. 19, 2021, (<https://libertyunyielding.com/2021/08/19/agriculture-secretary-knew-bidens-racial-preferences-were-unconstitutional>) (posting Agriculture Department emails released to BFF).

- 43) Thousands of people read such blog posts,<sup>2</sup> and thousands more read news stories that link to the released records,<sup>3</sup> making them widely available.
- 44) On August 18, 2021, the requester, Mr. McCord, assigned the FOIA request to the Bader Family Foundation.
- 45) An assignment of FOIA rights is “valid and enforceable, and therefore the plaintiff has statutory standing to assert the claims.” *See National Security Counselors v. CIA*, 898 F.Supp.2d 233, 259 (D.D.C. 2012).
- 46) In a document titled “Assignment of FOIA Rights,” the requester agreed to assign FOIA request 2021-18 and all rights under it to the Bader Family Foundation. The document was signed by both the requester, as the assignor, and Hans Frank Bader, as trustee of the Bader Family Foundation, the assignee.
- 47) On August 20, 2021, McCord emailed the “Assignment of FOIA Rights” to the USCCR, carbon copying Hans Bader. The assignment was attached to an email message specifically noting the “assignment of rights.”
- 48) McCord’s email was acknowledged on August 20, 2021 in an email by Angelia Rorison on behalf of the USCCR.

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<sup>2</sup> Those blog posts are found at Liberty Unyielding and other web sites. The Liberty Unyielding blog has thousands of readers each month, according to Similarweb. *See* <https://www.similarweb.com/website/libertyunyielding.com> (listing monthly visitors).

<sup>3</sup> *See, e.g.,* Ashe Schow, *Biden Administration Knew Its Racial Preferences For COVID Relief Were Unconstitutional, Went Ahead Anyway*, Daily Wire, Aug. 21, 2021 (news story quoting from and linking to records released in response to a Bader Family Foundation lawsuit), <https://www.dailywire.com/news/biden-administration-knew-its-racial-preferences-for-covid-relief-were-unconstitutional-went-ahead-anyway>. This story had many readers. Similarweb notes that the Daily Wire had over 20 million visits to its web site in July 2021, a higher number than the Boston Globe or Baltimore Sun. *See* <https://www.similarweb.com/website/dailywire.com/>.

49) Rorison, who is FOIA Public Liaison for the USCCR, wrote to McCord, “This email is to acknowledge receipt of your message. I will forward your message and document to our Office of General Counsel for review.”

50) That email was carbon copied to Hans Bader and [foia@usCCR.gov](mailto:foia@usCCR.gov).

51) On the evening of August 20, 2021, Hans Bader sent an email to Rorison and McCord, stating, *inter alia*, “I hereby confirm that the Bader Family Foundation is the assignee of FOIA Request No. 2021-18, and has been assigned that request (pursuant to the Assignment of FOIA Rights .... to the Bader Family Foundation).”

52) Bader’s email was carbon copied to [foia@usCCR.gov](mailto:foia@usCCR.gov).

53) The “Assignment of FOIA Rights” signed by Bader and McCord states, *inter alia*:

**WHEREAS**, the Assignor .... submitted a request pursuant to the Freedom of Information Act with the U.S. Commission on Civil Rights (the “Commission”), which the Commission labeled Request 2021-18 (the “Request”);

**WHEREAS**, the Assignor has determined that it would be appropriate and desirable to assign the Request and any rights under it to the Assignee; and

**WHEREAS**, the Assignor has agreed to convey, transfer, and assign to the Assignee all rights he has or may have in such Request, and the Assignor and the Assignee have agreed to make such a transfer, pursuant to this Agreement;

**NOW THEREFORE**, in consideration of the foregoing and the mutual covenants and agreements set forth below, and any other consideration, the receipt and adequacy of which is hereby acknowledged, the parties hereby agree as follows:

1. Assignment. In accordance with this agreement, the Assignor hereby transfers, grants, conveys, assigns, and relinquishes exclusively to the Assignee any and all rights, title, and interest he now has or may hereafter acquire, in perpetuity or for the longest period otherwise permitted by law, in and to any Intellectual Property arising from or related to the Request (the “FOIA Rights”). For the purposes of this Agreement, the assigned FOIA Rights expressly include: (a) any proprietary information pertaining to the Request; (b) all rights of any kind whatsoever of the Assignor related to the Request, including all rights to appeal rulings on the Request and to seek judicial review of such rulings and appeals and any related rights accruing under any of the foregoing provided by applicable law of any jurisdiction, by international treaties and conventions or otherwise throughout the world; (c) any and all claims with respect to any of the foregoing, including claims for damages and injunctive relief, with

the right but without any obligation to sue for such legal and equitable relief and to collect, or otherwise recover, any such damages.

2. Further Assurances. The Assignor will assist the Assignee in every reasonable way to enforce the rights and protection associated with the FOIA Rights. The Assignor will preserve documentation and other evidence that is in his possession and that pertains to the Request and the FOIA Rights until he delivers such documentation and other evidence to the Assignee.

3. Recordation. The Assignor will notify the Commission of this Assignment and authorizes the Assignee to notify any Court of this Assignment....

4. Consideration. The Assignor confirms that he has received consideration for the Assignment, including at least \$1.00.

5. Representations and Warranties. The Assignor represents and warrants that: (a) he has not abandoned the FOIA Rights; (b) prior to the effective date of this Agreement, he has exclusive right, title, and interest in the FOIA Rights and the Request and the Assignee shall, pursuant to this Agreement, obtain all right, title, and interest in the FOIA Rights and the Request, free and clear of any liens, encumbrances, or claims; (c) he has not sold, assigned, or transferred the FOIA Rights or the Request to any person or entity other than the Assignee; (d) he has all requisite power, authority, and capacity to execute, deliver, and perform his obligations under this Agreement; and (e) this Agreement is the legal, valid, and binding Agreement of the Assignor and all necessary consents have been obtained to effectuate this Agreement.

### **FIRST CLAIM FOR RELIEF**

#### **Duty to Produce Records – Declaratory Judgment**

54) Plaintiff re-alleges paragraphs 1-53 as if fully set out herein.

55) Defendant is improperly withholding agency records.

56) 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. USCCR's processing of plaintiff's FOIA request described above is not in accordance with the law, and does not satisfy SBA's obligations under FOIA;
- c. USCCR has a duty to produce the records covered by plaintiff's FOIA request;
- d. USCCR has a duty to produce them without charging any fees.

**SECOND CLAIM FOR RELIEF**  
**Duty to Produce Records – Injunctive Relief**

- 57) Plaintiff re-alleges paragraphs 1-56 as if fully set out herein.
- 58) Plaintiff is entitled to injunctive relief compelling USCCR to produce the records described in plaintiff's FOIA request, without charging any fees.
- 59) Plaintiff asks the Court to issue an injunction ordering USCCR 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**

- 60) Plaintiff re-allege paragraphs 1-59 as if fully set out herein.
- 61) 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.
- 62) 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 deems proper.

Respectfully submitted this 23rd day of August, 2021,

/s/ Hans F. Bader  
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