

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BADER FAMILY FOUNDATION,

Plaintiff,

V.

U.S. DEPARTMENT OF EDUCATION,

Defendant.

Civil Action No. 21-1741 (DLF)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF
ITS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendant should be ordered to comply with the Freedom of Information Act, by (1) conducting a more thorough search, including (a) searching the email account sgoldbl@law.columbia.edu; (b) searching for responsive records sent to or from fredwoerhle@gmail.com or Fred Woehrle; and (c) including additional search terms related to school discipline, such as adding the terms “suspension” or “expulsion,” or the term “discipline” being within three words of the word “school,” “policy,” or “policies”; (2) producing in unredacted form the records found in redacted form as exhibits 5 and 6 of the Declaration of Hans Bader (“Bader Declaration”), (3) producing the records shown in exhibits 2 & 3 of the Bader Declaration; (4) producing in unredacted form the May 7, 2021 5:36 PM email found in exhibit 8 of the Bader Declaration; and (5) submitting the records it has redacted for *in camera* review.

As is explained in Plaintiff’s Memorandum In Opposition to Defendant’s Motion for Summary Judgment (“Plaintiff’s Opposition Memorandum”), defendant improperly withheld material as exempt from release under FOIA Exemption 6. Defendant did that by inaccurately describing the nature of that redacted material, as plaintiff discovered by obtaining a copy of an unredacted email from its author, James P. Scanlan. Mr. Scanlan has submitted a declaration attaching the unredacted original.

Accordingly, the court should overturn the redaction, and order that record, shown in Exhibit 5 to the Bader Declaration, released in unredacted form.

Nor has Defendant conducted a thorough search for responsive records. It failed to search the private, non-official email account of a high-ranking agency official, Suzanne Goldberg, even after plaintiff’s counsel brought to defendant’s attention evidence that that email account,

sgolddb1@law.columbia.edu, contained responsive material. It appears that one responsive record is found there and nowhere else.

The court should order the release of that responsive record, which is shown in Exhibit 2 of the Bader Declaration. It should also order a search of the email account to which this record was sent, sgolddb1@law.columbia.edu.

Moreover, it failed to release copies of responsive records covered by plaintiff's request that are in Goldberg's email accounts, showing that it, at a minimum, failed to conduct an adequate search. Plaintiff is aware of a couple such examples that were never produced by Defendant (which are attached as Exhibits 2 & 3 to the Declaration of Hans Bader), and they could very well be the tip of the iceberg.

The court should order the release of those responsive records, which are shown in Exhibits 2 & 3 of the Bader Declaration. The court should also order a search for emails sent from the email account from which these records were sent, including fredwoerhle@gmail.com and "Fred Woehrle."

In light of its inaccurate and unreliable claims, defendant should be ordered to conduct another, more thorough search, and the court should conduct an *in camera* review of all redacted records, to see how many of them contain redacted material that is at variance with what defendant described redacting, or contain reasonably segregable material that should be released.

ARGUMENT

I. Defendant Improperly Withheld Non-Exempt Information – Acting Assistant Secretary Goldberg's Email Address -- Under Exemption 6, Mischaracterizing It to the Court. This redacted record, Exhibit 5 of the Bader Declaration, should be ordered released in unredacted form.

Defendant did not disclose to the Court that it redacted the private, non-official email address of any agency official, much less a high-ranking official. Instead, it falsely indicated that

it only redacted the “email addresses of non-federal employees.” Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment at 6; Declaration of Kristine Minami Decl. ¶ 20.

But, in fact, it redacted the email address of Suzanne Goldberg, the Acting Assistant Secretary of Civil Rights, sgoldb1@law.columbia.edu, from an email sent to her and other Education Department officials by Washington lawyer James P. Scanlan. *See* Declaration of James P. Scanlan (attaching that email in unredacted form); Declaration of Hans Bader, ¶ 5 & Ex. 5 (attaching that email in redacted form).

Goldberg is a federal employee, not a “**non-federal employee.**” And that email address was prominently and publicly listed on Goldberg’s Columbia Law School web page, which touted her position as “acting assistant secretary” in the Education Department’s “Office for Civil Rights,” and listed “sgoldb1@law.columbia.edu” as her “CONTACT” email address (see Declaration of Hans Bader (“Bader Decl.”), ¶ 4 & Ex. 4 (reproducing relevant portions of the web page¹).

For the reasons given at pp. 2-6 of Plaintiff’s Opposition Memorandum, it is not private information of the sort that can be redacted under Exemption 6.

II. Defendant failed to conduct an adequate search for responsive Records, by not searching the sgoldb1@law.columbia.edu account, which it should be ordered to search, and by not searching for emails sent to or from fredwoerhle@gmail.com, which it should be ordered to search for.

As is explained in pp. 6-20 of Plaintiff’s Opposition Memorandum, Defendant failed to conduct an adequate search for responsive records. It failed to search Suzanne Goldberg’s Columbia email account, sgoldb1@law.columbia.edu, even after that account was brought to

¹ As of the date this brief was filed, that web page could be found at <https://www.law.columbia.edu/faculty/suzanne-goldberg>; *see Nebraska v. EPA*, 331 F.3d 995, 998 (D.C. Cir. 2003) (court can take judicial notice of web site).

defendant's attention as containing agency records. Bader Decl. ¶ 1 & Ex. 1. And it plainly failed to search for emails sent to or from "fredwoerhle@gmail.com" or "Fred Woerhle," *see* Bader Decl. ¶¶ 2-3 & Ex. 2 & 3, even though those terms were specifically included in plaintiff's FOIA request.² Thus, it failed to produce the two responsive records shown in Exhibits 2 & 3 of the Bader declaration, each of which were sent from fredwoerhle@gmail.com, and each of which expressly bear the words "From: Fred Woehrle (fredwoerhle@gmail.com)." *See* Bader Decl. ¶¶ 2-3, Ex. 2 & 3. Both fall within the scope of plaintiff's FOIA request in other ways as well. Both are dated "May 11, 2021" which is well within the covered date range for the FOIA request.³ Both contain the words "school discipline" (which is found in the subject line of each email), a term specified by the request.⁴ And both contain an email address of Suzanne Goldberg in their "To:" field, one saying "sgoldbl@law.columbia.edu," and the other suzanne.goldberg@ed.gov. Bader Decl., Ex. 2 & 3. Yet Defendant has not produced *any* emails at all to or "From: Fred Woehrle (fredwoerhle@gmail.com)."⁵ *See* Bader Decl. ¶10.

So it should be ordered to search the sgoldbl@law.columbia.edu email account. And it should be ordered to search for emails sent to or by "Fred Woehrle" or "fredwoerhle@gmail.com."

If Defendant had actually conducted a search of either of Suzanne Goldberg's email accounts using the search parameters and criteria it claims to have used, *see* Minami Decl. ¶6, it would have found the two emails to Suzanne Goldberg about school discipline found in Exhibits

² See Minami Decl. ¶ 4, Ex. A; Defendant's Statement of Material Facts As To Which There Is No Genuine Issue, ¶ 1 (FOIA request listed "fredwoerhle@gmail.com" and "Fred Woerhle" as covered senders/recipients and covered email addresses).

³ Defendant's Statement of Material Facts As To Which There Is No Genuine Issue, ¶ 1 (date range for FOIA request ran from January 20, 2021 to date agency processed the request), ¶ 3 ("On May 25, 2021, a search for responsive records was initiated," beginning the processing of the request).

⁴ Defendant's Statement of Material Facts As To Which There Is No Genuine Issue, ¶ 1.

2 & 3 of the Declaration of Hans Bader. *See* Bader Decl. ¶¶2-3 & Ex. 2-3. But Defendant did not produce *any* emails sent solely to Suzanne Goldberg’s email address, or sent from Suzanne Goldberg’s email address. Bader Decl. ¶10. Thus, defendant likely did not conduct any search of *either* of Suzanne Goldberg’s email accounts. *See* Bader Decl. ¶¶2-3, 10 & Ex. 2-3.

III. Defendant Used Narrow Search Terms That Improperly Exclude Many Records About School Discipline. It Should Be Ordered to Add Alternative Words for School Discipline and Conduct a New Search.

Plaintiff’s FOIA request was about school discipline. But the search terms Defendant used were inadequate, because they did not include common synonyms for school discipline, or typical forms of school discipline. The only search terms allegedly used in the administrative search were “Terms: ‘school discipline’ or ‘school disciplinary policies.’” Minami Decl. ¶ 6.

But the FOIA request sought records *about* “school discipline” or “school disciplinary policies,” not just records that *contained* these particular words. Many records about school discipline do not contain the word “school discipline,” but nevertheless obviously involve *forms* of school discipline, such as suspensions or expulsions, or involve common *synonyms* for school discipline, such as “student discipline,” “discipline by school officials” “disciplinary sanctions,” “pupil discipline,” “indiscipline,” “disciplinary consequences” or “disciplinary record.”⁵

⁵ See Plaintiff’s Memorandum In Opposition to Defendant’s Motion for Summary Judgment, at 18-20, citing, e.g., U.S. Department of Education, *Dear Colleague Letter: Harassment and Bullying: Background, Summary, and Fast Facts* (Oct. 26, 2010) (document interpreting civil rights laws on “student misconduct” and “responsibilities under ... the federal antidiscrimination laws enforced by the Department’s Office for Civil Rights (OCR),” that did not even include the words “school discipline”) (<https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201010.pdf>); *People Who Care v. Rockford Board of Education*, 111 F.3d 528, 537-38 (7th Cir 1997) (court ruling striking down provision regarding school discipline, but not using the words “school discipline”); *Coalition to Save Our Children v. State Board of Education*, 90 F.3d 752, 775 (3d Cir. 1996)(same); *cf.* Bader Decl. ¶¶ 2-3, Ex. 2 & 3 (responsive emails Defendant failed to produce do not mention “school discipline” in their bodies, only in their subject lines).

Defendant had a duty to conduct a search "reasonably calculated to uncover all relevant documents," *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). It also had a duty to "construe a FOIA request liberally," such as searching for records covered by Plaintiff's request even if they contain alternative terms for "school discipline." *See Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C.Cir.1995) (FOIA request seeking information "pertaining to" Perot reached "information about Perot" even if it "does not mention Perot's name"). It is not enough for an agency to choose narrow search terms that yield some responsive records. The search terms chosen must be reasonably calculated to capture "all" of them, *Weisberg*, 705 F.2d at 1351.

So Defendant should be ordered to conduct a new search, that also captures records that contain the terms "suspension" or "expulsion," or contain the term "discipline" within three words of the word "school," "policy," or "policies."

IV. Defendant improperly withheld the records shown as Exhibit 2 & 3 of the Bader Declaration, which it should be ordered to produce

As noted above, Defendant withheld at least two responsive records in their entirety, the emails shown in Exhibits 2 and 3 of the Bader Declaration. *See* Bader Decl. ¶¶ 2-3, Ex. 2 & 3. These records were not produced despite plainly falling within the scope of plaintiff's FOIA request. *See* Defendant's Statement of Material Facts As To Which There Is No Genuine Issue, ¶ 1 (FOIA request listed "fredwoerhle@gmail.com" as covered email address and "Fred Woerhle" as covered sender or recipient).

As is explained in Plaintiff's Opposition Memorandum at 13-15, Defendant is not entitled to withhold these records, even if plaintiff already received blind carbon copies of these emails from the sender. And Defendant is plainly withholding these records. FOIA's deadline of 20

working days to disclose these records has long since elapsed, creating a duty to release them now.⁶

These withheld emails were agency records subject to FOIA, because they addressed official Education Department business.⁷ They were addressed to “Acting Assistant Secretary Goldberg,” and their content was related to agency business, in that the emails responded to alleged remarks about school discipline made by a high-ranking government official, the Acting Assistant Secretary for Civil Rights. *See* Bader Decl., Ex. 2 & 3.

Moreover, the emails addressed remarks Goldberg allegedly made at an “event,” “Examining Disparities in School Discipline and the Pursuit of Safe and Inclusive Schools,” that was sponsored by “OCR,” that is, by the Office for Civil Rights, which is headed by the Assistant Secretary for Civil Rights. *See* Bader Decl., Ex. 2 & 3; U.S. Department of Education, *Assistant Secretary, Office for Civil Rights* (“OCR is headed by the Assistant Secretary for Civil Rights.”) (<https://www2.ed.gov/about/offices/list/ocr/frontpage/asstsec/ocr-as01.html>).⁸

Thus, Defendant has improperly withheld agency records in not producing these emails, and should be ordered to produce them.

⁶ *See Amended Complaint*, ¶¶14-15; *Answer*, ¶¶14-15 (FOIA request was submitted on May 21, 2021; no determination was issued by June 30, when plaintiff sued); Defendant’s Statement of Material Facts As To Which There Is No Genuine Issue, ¶ 8 (“final determination” issued on August 30, 2021); *see also* 5 U.S.C. § 552(a)(6)(A)(i) (20 day deadline); *CREW v. FEC*, 711 F.3d 180, 186-88 (D.C. Cir. 2016) (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).

⁷ *See, e.g., Brennan Ctr. for Just. at N.Y. Univ. Sch. of L. v. DOJ*, No. 17-6335, 2019 WL 2717168, at *2 (S.D.N.Y. June 28, 2019) (rejecting defendant's position that certain emails were personal records because “[t]he emails, which concern voting integrity, and which were received and created by CRT employees who enforce voting law, ‘reflect substance related to, and therefore shed[] light on’ the conduct of their official duties.”).

⁸ *See Nebraska v. EPA*, 331 F.3d 995, 998 (D.C. Cir. 2003) (court can take judicial notice of agency’s web site).

V. Defendant Improperly Withheld the Name of an Intended Panelist, by Redacting an Email. It Should Be Ordered to Release That Email, Exhibit 6 of the Bader Declaration, in Unredacted Form.

As explained on pp. 20-24 of Plaintiff’s Opposition Memorandum, Defendant improperly redacted the name of a person it invited to be on a public May 11 panel discussion about school discipline and civil-rights policy that was held by the Education and Justice Departments.⁹

Courts will not allow agencies to withhold people’s names when knowing their names may shed light on who is influencing agency policy. *See, e.g., People for the Am. Way Found v. National Park Service*, 503 F.Supp.2d 284, 306 (D.D.C. 2007) Here, knowing the panelists’ names would shed light on Education Department policymaking, and could indicate whose views about school discipline the Education Department agrees with. That’s especially true, given the fact that the Education Department told the panelists it invited, “The Office for Civil Rights and Civil Rights Division have invited you as panelists because of your expertise in issues related to school discipline and climate.” Bader Decl., Ex. 6 (April 28, 2021 5:26 PM email).

VI. Defendant Wrongly Redacted A Cell Phone Number in An Employee’s Signature Block

Defendant wrongly redacted the cell phone number used for work purposes by Monique Dixon, the Deputy Assistant Secretary for Policy in the Office for Civil Rights. *See* Minami Decl. ¶ 20 (Dixon’s cell phone number was redacted), ¶ 7 (“Monique Dixon” was one of “the political appointees working in OCR”).

This was not sensitive information, which is precisely why Dixon shared it with the public, by using it in the signature block of her email – using it in the course of her work. *See* Bader Decl. ¶ 11 & Ex. 8. The whole point of including such a number in your signature block is

⁹ This redaction occurs in an April 28, 2021 5:26 PM email from Carolyn Seugling. For “Panel Three,” on “Addressing Disparities in Discipline.”

to share it with the public, and enable members of the public to call you on it, rather than keeping the number private for purely personal use.

Such cell phone numbers in signature blocks are subject to disclosure under FOIA, not exempt under Exemption 6. *See Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (“no privacy interest” in telephone numbers used for work); *Brown v. FBI*, 873 F.Supp.2d 388, 402 (D.D.C. 2012) (“Work telephone numbers are different from personal information that would be protected ... such as 'place of birth, date of birth, date of marriage, employment history, and comparable data.'”).¹⁰ There is no protectable privacy interest in information that is routinely shared with everyone.

Here is roughly how it looks in the email from which it was redacted, in a May 7, 2021 5:36 PM email that was sent to people both inside and outside the government:

Monique L. Dixon
Deputy Assistant Secretary for Policy
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202
Mobile: (b)(6)
Email: Monique.Dixon@ed.gov

See Bader Decl., Ex. 8.

In short, Dixon included this cell phone number as a matter of course in her emails, rather than treating it as private information whose release would be an unwarranted invasion of privacy. Even if releasing it had some *de minimis* impact on Dixon’s privacy, that would not be grounds to redact it. Private information must implicate a “significant privacy interest” to trigger

¹⁰ *See also Kleinert v. BLM*, 132 F.Supp.3d 79 (D.D.C. 2015) (finding that defendant did not meet its burden to support use of Exemption 6 to withhold email addresses because “[t]he disclosure of names and addresses is not inherently and always a significant threat to the privacy of those listed; whether it is a significant or a de minimis threat depends upon the characteristic(s) revealed . . . and the consequences likely to ensue” (*quoting Nat’l Ass’n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 877 (D.C. Cir. 1989)).

protection, not just any privacy interest. *Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008) (quoting *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989)).

VII. The Court Should Order *In Camera* Review of the Redacted Records Given the Demonstrated Unreliability of Defendant's Claims and Evidence of Possible Bad Faith

As explained in pp. 5-6 of Plaintiff's Opposition Memorandum, the court should conduct an *in camera* review of all withheld or redacted records, to see how many of them contain redacted material that is at variance with what defendant described redacting, or contain reasonably segregable material that should have been released. The fact that the agency falsely characterized the redacted material (Suzanne Goldberg's email address) removed from Exhibit 5 of the Bader Declaration is evidence of unreliability and possible bad faith.¹¹ The agency's failure to produce the responsive records shown in Exhibits 2 & 3 of the Bader Declaration is also evidence of sloppiness, and possible bad faith.

As the D.C. Circuit has explained, "in camera review may be particularly appropriate when either the agency affidavits are insufficiently detailed to permit meaningful review of exemption claims or there is evidence of bad faith on the part of the agency." *Quiñon v. FBI*, 86 F.3d 1222, 1228 (D.C. Cir. 1996).¹² "If the [Vaughn Index] categories remain too general, the

¹¹ See *Landmark Legal Foundation v. EPA*, 959 F.Supp.2d 175, 182 (D.D.C. 2013) (evidence that the agency made inaccurate claims about documents "rebut the presumption of good faith" on the part of the agency, defeating summary judgment).

¹² See also *Islamic Shura Council of S. Cal. v. FBI*, 635 F.3d 1160, 1166 (9th Cir. 2011) ("If the [agency's] affidavits are too vague, the court 'may examine the disputed documents in camera to make a first hand determination of their exempt status.'"); *Spirko v. USPS*, 147 F.3d 992, 997 (D.C. Cir. 1998) ("If the agency fails to provide a sufficiently detailed explanation to enable the district court to make a de novo determination of the agency's claims of exemption, the district court then has several options, including inspecting the documents in camera.").

district court may also examine the disputed documents in camera to make a first hand determination." *In re DOJ*, 999 F.2d 1302, 1310 (8th Cir. 1993) (en banc).

Because the agency's claims are unreliable, it has not met its burden of proving that the records contain no unprivileged material. The "burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records' or have not been 'improperly' 'withheld.'" *Department of Justice v. Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *see also Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973) ("the burden is on the agency to prove de novo in trial court that the information sought fits under one of the exemptions to the FOIA"); *Goland v. CIA*, 607 F.2d 339, 352 (D.C.Cir.1978)(agency must demonstrate that "each document that falls within the class requested either has been produced, is unidentifiable, or is . . . exempt").

CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment should be granted.

Respectfully submitted,

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