

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)

DECLARATION OF HANS BADER

I, Hans Bader, counsel for plaintiff, declare:

1. Defendant has not produced any emails forwarded to Suzanne Goldberg's Education Department email account in this lawsuit, or any emails forwarded from her sgoldb1@law.columbia.edu email account.
2. Yet the Declaration of Suzanne Goldberg filed yesterday states in ¶5 that "[t]o the best of my knowledge, I have forwarded any emails I have received at my sgoldb1@law.columbia.edu email account regarding the aforementioned matter [the responsive emails about school discipline] from my sgoldb1@law.columbia.edu email account to my Department email account." ECF No. 23-2, ¶5.
3. But if the responsive emails actually had been forwarded to her Department email account, they would logically have been produced to plaintiff from that account in response to plaintiff's FOIA request, because defendant claims Goldberg's Department email account was searched. *See* Declaration of Kristine Minami (ECF No. 12-3), ¶6 (saying administrative search of Department email accounts included that of "Suzanne Goldberg").

4. But no such forwarded emails were produced by defendant. Such responsive emails about school discipline exist, and examples are found in Exhibits 1 & 2 (pp. 6-7 and pg. 12) of the November 19, 2021 Bader Declaration (ECF No. 14-2). But they were not produced by defendant in response to plaintiff's FOIA request. Instead, those emails were provided to me by their senders. *See* Bader Decl. ¶2 & Ex. 1 & 2 (ECF No. 14-2). Those responsive emails were not produced by defendant in this lawsuit.¹
5. The declarations of Kristin Delbridge and Suzanne Goldberg fail to answer the Court's question about "whether Goldberg's school email account was used, *even sporadically*, for official business." (ECF No. 22 at 12) (emphasis added).
6. The Court instructed, "The Department shall supplement the record with a sworn declaration that provides specific information addressing whether Goldberg's school email account was used, even sporadically, for official business." ECF No. 22 at 12.
7. But the declarations of Delbridge and Goldberg merely address whether the email account was used for official business *about school discipline*, not whether it was used for official business *in general*. *See* ECF No. 23-1 & ECF No. 23-2.
8. Goldberg states in ¶4, "I have not used my non-government email address (sgoldb1@law.columbia.edu) to conduct agency business *concerning school discipline and/or school disciplinary policies*." (emphasis added). ECF No. 23-2, ¶4.
9. Delbridge states in ¶10 only that "Ms. Goldberg has now attested that she has not used her Columbia email address to conduct agency business *concerning the topics in*

¹ The remaining email attached to that Bader Declaration that was sent to sgoldb1@law.columbia.edu was sent by attorney James P. Scanlan to *both* Education Department email accounts *and* Goldberg's sgoldb1@law.columbia.edu account (and produced from the former accounts), so it was not forwarded to Goldberg's Department email account, either. *See* ECF No. 14-2, at 18-20 (Ex. 5).

this litigation and that she forwards emails that she recognizes as relating to her Agency work *in this area* to her Department email address.” (emphasis added).

10. The failure of defendant to address whether the sgolddb1@law.columbia.edu email account was used for official business, despite being asked to do so, indicates that it was in fact used for official business. An adverse inference can be drawn against defendant from its evasive failure to provide the information sought by the court.²

I declare under penalty of perjury that the foregoing is true and correct, pursuant to 28 U.S.C. § 1746. Executed on October 5, 2022.



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² See, e.g., *Gray v. Great American Recreation Ass'n.*, 970 F.2d 1081, 1082 (2d Cir.1992) (adverse inference can be drawn when a litigant fails to provide the information sought); Wigmore, *Evidence In Trials At Common Law*, § 285 (Chadbourn rev. 1979) (The nonproduction of available evidence “permits the inference that its tenor is unfavorable to the party's cause”); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) (adverse inference can be drawn from “the production of weak evidence when strong is available”).