

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

BADER FAMILY FOUNDATION,	)	
1236 N. Stafford St., Arlington, VA 22201	)	
	)	
Plaintiff,	)	Civil Action No. 23-1202
v.	)	
	)	
OFFICE OF SCIENCE AND TECHNOLOGY	)	
POLICY	)	
Eisenhower Executive Office Building	)	
1650 Pennsylvania Avenue, NW	)	
Washington, DC 20504	)	
	)	
and	)	
	)	
NATIONAL SCIENCE FOUNDATION	)	
2415 Eisenhower Avenue, Alexandria, VA 22314	)	
	)	
Defendants.	)	

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff alleges as follows, against the defendants, Office of Science and Technology Policy (OSTP) and National Science Foundation (NSF):

- 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 two FOIA requests it submitted in March 2023 – one on March 3 to NSF, and the other on March 10 to OSTP -- seeking specified communications about how agencies plan to use indigenous knowledge in making scientific determinations. Indigenous knowledge includes oral and written knowledge, practices, and beliefs developed by tribes and Indigenous peoples.
- 3) On November 30, 2022, the heads of two White House offices -- the Office of Science and Technology Policy and the Council on Environmental Quality issued “Guidance for

Federal Departments and Agencies on Indigenous Knowledge”<sup>1</sup> – which told heads of federal departments and agencies that “Agencies should also include Indigenous Knowledge as an aspect of best available science.” *Id.* at 19. It further provided that “Indigenous Knowledge ... may be used in HISA [Highly Influential Scientific Assessment] documents.” *Id.* at 20.

- 4) Defendants have failed to provide plaintiff with either the records requested in its FOIA requests, or the determinations in response to plaintiff’s FOIA requests mandated by 5 U.S.C. § 552(a)(6)(A)(i).
- 5) FOIA generally 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)).
- 6) That 20 day deadline expired on March 31, 2023, for the earlier of plaintiff’s FOIA requests, and April 7, 2023, for the latter of plaintiff’s FOIA requests.
- 7) But by those dates, Defendants neither provided a determination about what records will be produced, nor produced any records in response to plaintiff’s requests.
- 8) Defendants still have provided no such determination, and still have provided no records in response to plaintiff’s requests.

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<sup>1</sup> This document can currently be found at <https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf>.

- 9) Due to Defendants' failure to provide any such determination, plaintiff has filed this lawsuit to compel them to comply with the law.

### **PARTIES**

- 10) The plaintiff, the Bader Family Foundation (BFF), is a non-profit, 501(c)(3) tax-exempt foundation. It also financially supports other non-profits, some of which study the way federal agencies use scientific information and whether they comply with laws against the use of unreliable information, such as the Information Quality Act (also known as the Data Quality Act).

- 11) Defendant Office of Science and Technology Policy is a Congressionally-established office within the executive branch that "advise[s] the President and others within the Executive Office of the President on the effects of science and technology on domestic and international affairs," located in Washington, D.C., next to the White House. It is a federal agency covered by FOIA, 5 U.S.C. § 552(f)(1), *see Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971). It has possession, custody, and control of the records Plaintiff seeks from it.

- 12) Defendant National Science Foundation is an independent agency of the United States government headquartered in Alexandria, Virginia. It, too, is a federal agency covered by FOIA, 5 U.S.C. § 552(f)(1), and it has possession, custody, and control of the records Plaintiff seeks from it.

### **JURISDICTION AND VENUE**

- 13) 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 also 28 U.S.C. § 1331, because the resolution of disputes under FOIA presents a federal question.

14) Venue is proper under 5 U.S.C. § 552(a)(4)(B) and also under 28 U.S.C. § 1391(e)(1), both because FOIA vests venue in this court, 5 U.S.C. § 552(a)(4)(B); and also because defendants are federal agencies, a defendant is located in Washington, D.C., and records sought from OSTP are located in Washington, D.C.

### **FACTUAL AND STATUTORY BACKGROUND**

15) Plaintiff submitted two FOIA requests, and defendants complied with neither of them.

16) Each FOIA request was jointly submitted by plaintiff and the blog *Liberty Unyielding*, and was sent by email.

#### **The NSF FOIA Request**

17) On March 3, 2023, plaintiff submitted a FOIA request to NSF requesting “All communications from November 1, 2021 to the date you process this request, with the Interagency Working Group on Indigenous Knowledge, or with the Interagency Working Group on Indigenous Traditional Ecological Knowledge, or with any interagency working group on indigenous knowledge created in 2021.”

18) On March 3, 2023, Gabriella Sanders in NSF’s Office of General Counsel acknowledged NSF had received the request in an email that stated, “Your Freedom of Information Act (FOIA) request has been received and logged as FOIA 2023-113F. Please reference this number in all communications regarding this request....Your request has been placed in the Simple Track based on the amount of work and/or time needed to process the request. The estimated response date to your request is March 30, 2023.”

#### **The OSTP FOIA Request**

19) On March 10, 2023, plaintiff submitted a FOIA request to OSTP requesting the following records:

1. All communications from November 1, 2021 to the date you process this request, with the Interagency Working Group on Indigenous Knowledge, or with the Interagency Working Group on Indigenous Traditional Ecological Knowledge, or with any interagency working group on indigenous knowledge created in 2021.

2. All drafts of Guidance for Federal Departments and Agencies on Indigenous Knowledge, a memorandum for heads of federal departments and agencies that was dated on or around November 30, 2022.

3. All communications in October, November, or December of 2022 about guidance for federal departments and agencies on indigenous knowledge.

20) The OSTP FOIA team sent an email on April 7, 2023 acknowledging that OSTP had received plaintiff's FOIA request and that it had been "submitted to the Office of Science and Technology Policy (hereinafter 'OSTP') on March 10, 2023." It indicated that plaintiff's FOIA request had been assigned the control number OSTP-FOIA # 23-021.

#### **FOIA's Deadline Has Passed**

21) FOIA, in 5 U.S.C. § 552(a)(6)(A)(i), requires an agency to make a determination in response to a FOIA request within 20 working days from its date of receipt.

22) But Defendants did not make a determination about what records will be produced in response to plaintiff's requests within 20 business days from its date of receipt.

23) March 31, 2023 was 20 working days after the date that NSF acknowledged receiving plaintiff's FOIA request.

24) April 7, 2023 was 20 working days after the date that OSTP acknowledged receiving plaintiff's FOIA request.

25) No determination in response to either of plaintiff's FOIA requests was made by April 7, 2023.

- 26) Nor has any determination been made about what records will be produced, as of the date this lawsuit was filed.
- 27) Nearly two months have passed since Defendants received plaintiff's FOIA requests.
- 28) 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. (*CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013)).
- 29) Defendants provided no such information to plaintiff, even though plaintiff's requests reasonably described the records they sought.
- 30) Instead, Defendants have improperly withheld agency records.
- 31) Due to Defendants' failure to comply with the statutory deadline, plaintiff has exhausted administrative remedies, and can now sue.
- 32) 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); *see CREW v. FEC*, 711 F.3d 180, 189 (D.C. Cir. 2013).
- 33) Each of Plaintiff's FOIA requests contained a request for a fee waiver, explaining in the subject line of the email containing the FOIA request that a "fee waiver [was] requested" and further explaining in the body of the FOIA request that fees should "not be charged for anything other than duplication (and also not for the copying costs of the first 100 pages of duplication) because Liberty Unyielding is a blog that qualifies as news media."
- 34) Neither defendant has responded to plaintiff's request for a fee waiver.

35) Since defendants did not comply with FOIA’s deadlines for issuing a determination, they have waived the right to collect fees, such as search fees, for processing plaintiff’s FOIA requests.

36) In *Bensman v. National Park Service*, 806 F.Supp.2d 31 (D.D.C. 2011), this Court noted that “the 2007 [FOIA] Amendments ... impose consequences on agencies that .... fail to comport with FOIA’s requirements....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.” *See also* 5 U.S.C. § 552(a)(4)(A)(viii)(I).

37) Moreover, it would be inappropriate to charge fees for an additional reason: the records sought in plaintiff’s FOIA requests are of public interest, and producing them would be of public benefit. When responsive records are produced to plaintiff in FOIA lawsuits, they are disseminated to the Liberty Unyielding blog, which publicly posts such records, and thus makes them available to the public, sometimes resulting in news coverage by media entities with large readerships.<sup>2</sup>

### **FIRST CLAIM FOR RELIEF**

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

38) Plaintiff re-alleges paragraphs 1-37 as if fully set out herein.

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<sup>2</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 (quoting & linking to records posted by the Liberty Unyielding blog that were produced in a Bader Family Foundation FOIA lawsuit) (available at <https://www.dailywire.com/news/biden-administration-knew-its-racial-preferences-for-covid-relief-were-unconstitutional-went-ahead-anyway>). Daily Wire stories have many readers. Similarweb states that the Daily Wire had 19.9 million visits to its web site in January 2023, a higher number than the Boston Globe and Baltimore Sun. *See* <https://www.similarweb.com/website/dailywire.com/>.

39) Defendants are each improperly withholding agency records (both OSTP and NSF).

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

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

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

41) Plaintiff re-alleges paragraphs 1-40 as if fully set out herein.

42) Plaintiff is entitled to injunctive relief compelling Defendants to issue a determination in response to plaintiff's FOIA requests (both OSTP and NSF);

43) Plaintiff is entitled to injunctive relief compelling Defendants to produce the records described in plaintiff's FOIA requests, without charging any fees.

44) Plaintiff asks the Court to issue an injunction ordering Defendants to produce to plaintiff, within 10 business days of the date of the order, the records sought in plaintiff's FOIA requests, and any attachments thereto.

**THIRD CLAIM FOR RELIEF**  
**Costs And Fees – Injunctive Relief**

45) Plaintiff re-alleges paragraphs 1-44 as if fully set out herein.

46) 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.

47) This Court should enter an injunction ordering Defendants to pay reasonable attorney fees and other litigation costs reasonably incurred in this case (an injunction against each of the Defendants, OSTP and NSF).

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

Respectfully submitted this 1st day of May, 2023,

          /s/ Hans F. Bader            
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