

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

PROTECT THE PUBLIC’S TRUST)
712 H Street, N.E.)
Suite 1682)
Washington, D.C. 20002,)
)
Plaintiff,)
)
v.)
)
U.S. DEPARTMENT OF EDUCATION)
400 Maryland Avenue, S.W.)
Washington, D.C. 20202,)
)
Defendant.)
_____)

Civil Case No. 1:22-cv-01808

COMPLAINT

1. Plaintiff Protect the Public’s Trust brings this action against the U.S. Department of Education under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the Declaratory Judgement Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

- 2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.
- 3. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

4. Plaintiff Protect the Public’s Trust (“PPT”) is an unincorporated association of retired and former public servants and concerned citizens that is dedicated to restoring public trust in government by promoting the fair and equal application of the rules and standards of

ethical conduct to all public servants. *See* D.C. Code § 29–1102(5). Consistent with Justice Brandeis’s aphorism that “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman,” PPT seeks to promote transparency and broadly disseminate information so that the American people can evaluate the integrity and ethical conduct of those who act in their name. Louis Brandeis, *OTHER PEOPLE’S MONEY AND HOW BANKERS USE IT* (1914), <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v>.

5. Defendant U.S. Department of Education (“Education” or “the Department”) is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1). The Department has possession, custody, and control of records responsive to Plaintiff’s FOIA request.

STATEMENT OF FACTS

6. On June 2, 2021, PPT submitted a FOIA request (attached as Exhibit A) to the Department seeking the following records from the Department’s Office of the General Counsel:

From November 23, 2020 through the date this request is processed, all waivers, impartiality determinations, or any other guidance issued to political appointees of the Biden Administration exempting them from any part of their obligations as defined in relevant laws, regulations, rules, and/or the Biden Administration’s Ethics Pledge. This request also includes any records and communications between employees of the Office of the General Counsel, as well as any records and communications between the Office of the General Counsel and any political appointees regarding waivers or impartiality determinations.

7. As Attorney General Garland has made clear, FOIA is “a vital tool for ensuring transparency, accessibility, and accountability in government” whose “‘basic purpose . . . is to ensure an informed citizenry,’ which is ‘vital to the functioning of a democratic society [and] needed to check against corruption and to hold the governors accountable to

the governed.” Merrick Garland, *Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines 1* (Mar. 15, 2022),

<https://www.justice.gov/ag/page/file/1483516/download> (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)) (“Garland Memo”).

8. The release of these documents is in the public interest because they will help the public understand which high-level Department officials have potential conflicts of interest, how the Department is addressing those conflicts, and whether officials are following the rules.
9. On June 2, 2021, the Department confirmed receipt of Plaintiff’s request and assigned it tracking number 21-01780-F.
10. On June 8, 2021, the Department denied Plaintiff’s request for a fee waiver.
11. On June 30, 2021, Defendant sent a “20 Day Status Notification” to Plaintiff, which purported to be an “initial determination letter” and advised Plaintiff “Due to the unusual circumstances that exist with your FOIA requests as defined by U.S.C. § 552(a)(6)(B)(i)(ii), the Department will not be able to respond by the 20 day statutory requirement.” This letter is attached as Exhibit B.
12. On October 29, 2021, Plaintiff reached out to the Department regarding the status of request 21-01780-F.
13. On November 2, 2021, the Department responded “I will reach out to the office that is conducting the search for an update.”
14. On November 26, 2021, Plaintiff again reached out to the Department regarding the status of request 21-01780-F, as well as two other pending FOIA requests.

15. On November 26, 2021, the Department responded “I’ll look into the status of these three requests and provide you an update once I have gathered information regarding their status.”
16. On April 14, 2022, Plaintiff again reached out to the Department regarding the status of request 21-01780-F. This time, the only response was an automatically generated out of office message.
17. On June 10, 2022, Plaintiff reached out yet again regarding the status of request 21-01780.
18. On June 13, 2022, the Department responded “I’ve reached out to the assigned program office for a substantive update on your request and will share with you their response.”
19. There has been no further update from the Department, and the Department has not provided any responsive documents.
20. As the Garland Memo makes clear, “Timely disclosure of records is also essential to the core purpose of FOIA.” Garland Memo at 3.
21. At this time, it has been more than a year since Plaintiff submitted its FOIA request. This is well beyond the statutory period for federal agencies to make a determination with respect to a FOIA request. 5 U.S.C. § 552(a)(6)(A)-(B).
22. At this time, notwithstanding the Department referring to its June 30, 2021 letter as an “initial determination,” the Department has still not made a determination of whether it will comply with Plaintiff’s request. *See Citizens for Responsibility and Ethics in Washington v. FEC*, 711 F.3d 180 (D.C. Cir. 2013). While the Department has indicated that it has begun conducting a search for responsive records, it has not indicated that it is processing those records, has not produced responsive documents to the Plaintiff, has not

communicated to the Plaintiff the scope of the documents it intends to produce and withhold, along with the reasons for such withholding, and has not informed Plaintiff of its ability to appeal any adverse portion of its determination beyond offering “the right to seek assistance and/or dispute resolution services” related to the Department’s June 30, 2021 letter informing Plaintiff that the Department would not be meeting its statutory obligation to produce documents in a timely fashion.

23. Given these facts, it appears that absent litigation the Department has not and does not intend to meet its statutory obligations to provide the requested records.
24. Through the Department’s failure to make a determination within the time period required by law, PPT has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I

Violation of FOIA, 5 U.S.C. § 552 **Wrongful Withholding of Non-Exempt Responsive Records**

25. PPT repeats and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
26. PPT properly requested records within the possession, custody, and control of the Department.
27. The Department is an agency subject to FOIA, and therefore has an obligation to release any non-exempt records and provide a lawful reason for withholding any materials in response to a proper FOIA request.
28. The Department is wrongfully withholding non-exempt agency records requested by PPT by failing to produce non-exempt records responsive to its request.

29. The Department is wrongfully withholding non-exempt agency records requested by PPT by failing to segregate exempt information in otherwise non-exempt records responsive to the PPT FOIA request.
30. The Department's failure to provide all non-exempt responsive records violates FOIA.
31. Plaintiff PPT is therefore entitled to declaratory and injunctive relief requiring Defendant to promptly produce all non-exempt records responsive to its FOIA request and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

Protect the Public's Trust respectfully requests this Court:

- (1) Assume jurisdiction in this matter, and maintain jurisdiction until the Department complies with the requirements of FOIA and any and all orders of this Court.
- (2) Order Defendant to produce, within ten days of the Court's order, or by other such date as the Court deems appropriate, any and all non-exempt records responsive to PPT's FOIA request and indexes justifying the withholding of all or part of any responsive records withheld under claim of exemption.
- (3) Enjoin the Defendant from continuing to withhold any and all non-exempt responsive records.
- (4) Award the costs of this proceeding, including reasonable attorney's fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E).
- (5) Grant PPT other such relief as the Court deems just and proper.

Dated: June 24, 2022

Respectfully submitted,

PROTECT THE PUBLIC'S TRUST
By Counsel:

/s/Gary M. Lawkowski

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