

**Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE**

Jonathan Riches (025712)
Stacy Skankey (035589)
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
litigation@goldwaterinstitute.org

Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

BARRY GOLDWATER INSTITUTE FOR
PUBLIC POLICY RESEARCH,

Plaintiffs,

vs.

U.S. DEPARTMENT OF EDUCATION,

Defendants,

No. 2:24-cv-00314-SMM

**FIRST AMENDED COMPLAINT
FOR INJUNCTIVE AND
DECLARATORY RELIEF**

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), for declaratory, injunctive, and other appropriate relief and seeking the disclosure of agency records improperly withheld from Plaintiff Goldwater Institute (“Institute”) by Defendant U.S. Department of Education (“DOE”).

2. The Goldwater Institute is a free-market public policy research and litigation organization dedicated to advancing the principles of limited government, economic freedom, and individual liberty, with a focus on education, free speech, healthcare, property rights, and constitutional limits. The Institute regularly publishes scholarly articles, opinion pieces, blog posts, and interacts with the public regularly

1 through the news media and its own distribution channels discussing pressing issues of
2 public policy and of public interest and importance.

3 3. On October 31, 2023, the DOE issued a press release announcing a record
4 fine of \$37 Million against Grand Canyon University for alleged deceptive practices
5 related to its PhD programs.¹ This press release was widely discussed in the public and
6 garnered national media attention for, among other things, its unprecedented fine
7 amount.

8 4. The Institute submitted a public records request to the DOE under the
9 FOIA for documents meaningfully informative to the public on matters of public
10 concern and involving the activities of the federal government. Specifically, the request
11 sought records of the DOE's communications pertaining to fines under the Higher
12 Education Act as that relates to Grand Canyon University.

13 5. The DOE did not issue a response indicating a determination of whether it
14 will comply with the public records request within 20 business days, as required by the
15 FOIA.

16 6. The DOE failed to respond to the Institute's request within the statutory
17 time period.

18 7. The Institute then filed its Complaint for Injunctive and Declaratory Relief
19 ("Complaint") (Doc. 1) in this matter to compel the DOE to comply with the statutory
20 timeframe and produce the requested records.

21 8. After the Institute filed the Complaint, the DOE partially released
22 responsive records to the Goldwater Institute within the DOE's control and possession,
23 but the records have been heavily redacted as to be effectively withheld.

24
25
26
27 ¹ U.S. Department of Education (Oct. 31, 2023), <https://www.ed.gov/news/press-releases/us-department-education-office-federal-student-aid-fines-grand-canyon-university-377-million-deceiving-thousands-students>.
28

- c. Kristen Donoghue
- d. Susan Crim
- e. Lina Khan
- f. Michael Tankersley
- g. Rohit Chopra

- (2) Copies of records that indicate the total number of complaints submitted by members of the public to the DOE pertaining to GCU's disclosure of the cost of its doctoral programs from January 1, 2020 to the date of this request.

Id. (emphasis in original).

18. The Request sought expedited production and a fee waiver.

19. On December 5, 2023, the ED FOIA Service Center, Office of the Secretary, acknowledged the Request and assigned the request the number, 24-00550-F (the "Acknowledgment"). Attached hereto and incorporated herein, as Exhibit B.

20. The Acknowledgement denied expedited processing because the Institute purportedly did not qualify under one of the two required categories: "(1) Circumstances in which the lack of expedited treatment could pose an imminent threat to life or physical safety, or (2) You are a person primarily engaged in disseminating information and there exists an urgency to inform the public concerning actual or alleged Federal Government activity." *Id.* at 2.

21. The Acknowledgement advised that the current average request processing time for the DOE is 185 business days. *Id.*

22. The Acknowledgement did not state any unusual circumstances that would permit an extension, nor did it provide a date by which a determination is expected. *Id.*

23. On December 6, 2023, the Institute sent a letter to the DOE that the Acknowledgement was not a response under the FOIA. Attached hereto and incorporated herein, as Exhibit C.

24. The Institute stated that the DOE must comply with the statutory timeline under the FOIA. *Id.*

25. On December 13, 2023, the DOE sent the Institute an email stating it conducted a search that located approximately 7,000 records of responsive documents

1 and fees for the search were calculated to be \$2,099.34 (the “Fee Estimate”). Attached
2 hereto and incorporated herein, as Exhibit D.

3 26. This Fee Estimate advised that until the DOE received notification of the
4 Institute’s willingness to pay the search fees, the pending search and review of
5 documents would cease. *Id.*

6 27. On December 14, 2023, the Institute responded to the Fee Estimate asking
7 the DOE for clarification if the Institute’s fee waiver was denied and arguing why the
8 fee waiver should be approved. Attached hereto and incorporated herein, as Exhibit E.

9 28. On December 19, 2023, the DOE sent a letter asserting that the Institute
10 did not request a fee waiver. Attached hereto and incorporated herein, as Exhibit F.

11 29. The letter stated that until the Institute agreed to pay the search fees the
12 pending search and review of documents would cease. *Id.*

13 30. On December 20, 2023, the Institute responded again, reasserting the same
14 arguments from the December 14 letter, asking the DOE if the fee waiver was denied
15 and asserting that the fee waiver should be approved. Attached hereto and incorporated
16 herein, as Exhibit G.

17 31. On December 22, 2023, the DOE granted the Institute’s waiver of all fees.
18 Attached hereto and incorporated herein, as Exhibit H.

19 32. The Institute never agreed to pay for the search fees in the Fee Estimate
20 because the fee waiver was granted.

21 33. On January 12, 2024, the Institute sent a letter to the DOE demanding a
22 response to the Request. Attached hereto and incorporated herein, as Exhibit I.

23 34. On January 16, 2024, the DOE sent an email on its position of the timeline
24 for issuing a response. Attached hereto and incorporated herein, as Exhibit J.

1 35. The DOE believed their response was tolled on December 10, 2023, when
2 the DOE provided the Fee Estimate,² until December 22, 2023, when the fee waiver was
3 granted. *Id.*

4 36. The email stated the DOE’s “initial determination” would be provided the
5 same day. *Id.*

6 37. On January 16, 2024, the DOE sent the Institute a letter titled “20 Day
7 Status Notification” (the “Notification”). Attached hereto and incorporated herein, as
8 Exhibit K.

9 38. The Notification stated that there were unusual circumstances requiring an
10 extension to the 20-day statutory timeline. *Id.* The unusual circumstance alleged was the
11 Request would result “in a large amount of responsive records.” *Id.* As such, the DOE
12 would not be able to respond to the Request within the 20-day statutory requirement. *Id.*

13 39. The Notification stated the DOE could not give an estimated completion
14 date for when the Request would be completed. *Id.*

15 40. The Notification repeated the Acknowledgement’s statement that the
16 average processing time for a request is 185 business days. *Id.*

17 41. The Notification omitted information on how to appeal this alleged
18 determination. *Id.*

19 42. On February 14, 2024, Plaintiff filed its Complaint (Doc. 1).

20 43. On April 15, 2024, the DOE emailed the Institute an interim response and
21 documents responsive to item 1 of the Request (“First Interim Response”). Attached
22 hereto and incorporated herein, as Exhibit L.

23 44. The First Interim Response included 802 pages, with bates labels ED 24-
24 00550-F (Apr. 15, 2024)_000802 to ED 24-00550-F (Apr. 15, 2024)_000802.

25
26
27 ² The DOE did not provide the Fee Estimate on December 10, 2023, but rather it was
28 provided on December 13, 2023. There were no communications between the Institute
and the DOE on December 10, 2023.

1 45. The documents that were produced in the First Interim Response were
2 heavily redacted.

3 46. The First Interim Response claims it withheld records or portions of
4 records according to FOIA Exemptions 4, 5, 6, 7(A), and 7(C). *Id.*

5 47. The DOE did not provide any further basis regarding the information
6 withheld or the basis for the withholding. *Id.*

7 48. The exempted portions of the records resulted in nearly the entirety of the
8 responsive records being redacted, such that the documents have been effectively
9 withheld.

10 49. On April 22, 2024, the DOE emailed the Institute a second interim
11 response without documents responsive to item 2 of the Request (“Second Interim
12 Response”). Attached here to and incorporated herein, as Exhibit M.

13 50. The Second Interim Response claims there are “no records responsive”
14 and “the precise number of such complaints ... [are] not tracked,” but then goes on to
15 state the DOE has additional information regarding documents in its possession that
16 identify “750 related complaints.” *Id.*

17 51. The DOE states it has “*in its possession* accounts from doctoral students
18 complaining about issues related to the cost, time, or number of credits required to
19 obtain a degree at GCU. Those accounts come from *written complaints* submitted to the
20 Department, oral complaints made to Department employees, and borrower defense to
21 repayment applications from students alleging related substantial misrepresentations by
22 GCU.” *Id.* (emphasis added).

23 52. Despite having written complaints in its possession, the DOE has withheld
24 these documents from production.

25 53. Based on the DOE’s failure to adequately respond to the Institute’s
26 Request and improper withholding of documents under the claimed FOIA exemptions,
27 the Institute seeks judicial relief to compel the production of records responsive to the
28 Request.

COUNT I
Failure to Respond Within the Statutory Time Period
(5 U.S.C. § 552(a)(6)(A), (B))

54. Plaintiff re-alleges and incorporates the preceding paragraphs.

55. An agency response is due within 20 business days after a public records request is made. 5 U.S.C. § 552(a)(6)(A)(i); 34 C.F.R. § 5.21(c).

56. An agency's response notifies the requester of the agency's determination, whether the agency will comply with the request. *Id.*

57. Failure to comply with the time limits constitutes exhaustion of the requester's administrative remedies for purposes of judicial action to compel disclosure. 5 U.S.C. § 552(a)(6)(C); 34 C.F.R. § 5.21(c). *See also Harjo v. U.S. Citizenship & Immigr. Servs.*, 811 F.3d 1086, 1092 (9th Cir. 2016) (when an agency fails to give a determination within the statutory timeframe, the requester can proceed directly to district court).

58. The DOE's response was due 20 business days after the DOE's Acknowledgement.

59. As early as December 6, 2023, the Institute put the DOE on notice that it would enforce the 20-day statutory provision.

60. Only after the Institute sent a final demand on January 12, 2024, did the DOE send a response.

61. That response, however, was legally deficient because it did not state whether a determination had been made regarding the Request, nor did it provide a time by which the requested records would be produced.

62. On January 16, 2024, the DOE stated that an "initial determination" would come the same day, and the Notification was supplied that same day.

63. The Notification was received 27 business days after the Acknowledgement.

The DOE's Response Was Not Tolled.

64. An agency is permitted to toll the 20-day period only when: (1) it seeks additional information from the requester; or (2) if necessary to clarify issues regarding the fee assessment. 5 U.S.C. § 552(a)(6)(A)(ii).

65. The DOE may make one request for additional information, tolling the 20-day period until they receive additional information. 34 C.F.R. § 5.40(d). *See also* 34 C.F.R. § 5.32(h) (DOE may toll while clarifying issues regarding fee assessment).

66. The agency's receipt of the requester's response to the agency's request ends the tolling period. 5 U.S.C. § 552(a)(6)(A)(ii)(II).

67. The Fee Estimate did not request additional information or seek to clarify issues regarding the fee assessment.

68. The Fee Estimate is a demand for payment of search fees.

69. The 20-day statutory period was not tolled from December 10 to December 22, 2023.

70. The tolling period, if any, ended when the Institute responded to the DOE's request the following day.

71. Even with the DOE's alleged tolling, the DOE's response to the Request was due by January 18, 2024.

72. The DOE responded to the Request after the Complaint (Doc. 1) was filed.

73. After 132 days from the Acknowledgment, the DOE produced the First Interim Response with highly redacted documents, only responding to item 1 of the Request.

74. After 139 days from the Acknowledgement, the DOE responded with the Second Interim Response, alleging that there were no responsive documents to item 2 of the Request.

75. The DOE did not respond to the Request within the statutory time period under 5 U.S.C. § 552(a)(6)(A), (B).

The DOE's Notification Was Not a Response.

76. A determination must notify the requester whether the agency is complying with the request. 5 U.S.C. § 552(a)(6)(A)(i).

77. An agency may give notice of the “unusual circumstances” requiring an extension to the public records request. 5 U.S.C. 552(a)(6)(B)(iii); 34 C.F.R. § 5.21(e). *See also Harjo*, 811 F.3d at 1092.

78. A notice of unusual circumstances must include a permitted and defined reason for an unusual circumstance and the date on which a determination is expected. 5 U.S.C. 552(a)(6)(B) (emphasis added).

79. The DOE stated it would provide an “initial determination” on January 16, 2024, and sent the Notification that same day.

80. The Notification did not indicate whether the Request had been approved, denied, or partially approved or denied.

81. The Notification did not include the basic information necessary to qualify as a response.

82. The Notification omits a date when a determination is expected and provides a generic 185-day processing timeline.

83. The Notification was not received within the 20-day statutory time period.

84. The DOE did not respond to the Request within the statutory time frame.

85. The Institute has exhausted its remedies. 5 U.S.C. § 552(a)(6)(C); 34 C.F.R. § 5.21(c).

86. The DOE responded to the Request after 132 and 139 days, with its First Interim Response and Second Interim Response, respectively.

87. The DOE's failure to respond to the Institute's Request within the statutory timeline violates the FOIA, 5 U.S.C. § 552(a)(6)(A), (B), and the DOE's corresponding regulations.

COUNT II
Production Under the FOIA (5 U.S.C. § 552(a))

88. Plaintiff re-alleges and incorporates the preceding paragraphs.

89. The DOE failed to respond to the Institute’s request within the statutory time period. 5 U.S.C. § 552(a)(6)(A), (B).

90. The DOE failed to adequately respond to the Institute’s request by redacting large portions of the documents, effectively withholding the documents.

91. The DOE claimed it withheld and redacted large portions of the documents pursuant to FOIA Exemptions 4, 5, 6, 7(A), and 7(C).

92. FOIA Exemptions 5 and 7(A) were used to redact nearly the entirety of the records.

93. An agency shall withhold information *only* if “the agency reasonably foresees that disclosure would harm an interest protected by an exemption.” 5 U.S.C. § 552(a)(8)(A).

94. FOIA Exemptions are to be narrowly construed. *FBI v. Abramson*, 456 U.S. 615, 630 (1982).

95. FOIA Exemptions 5 and 7(A) were improperly applied by the DOE.

96. FOIA Exemptions 5 and 7(A) were not narrowly construed by the DOE.

Exemption 5

97. Exemption 5 withholds only records that are “inter-agency or intra-agency memorandums or letters” part of a “deliberative process.” 5 U.S.C. § 552(b)(5).

98. Documents properly withheld under Exemption 5 are “predecisional” generated before the agency’s final decision, and “deliberative” made to help the agency form its position. *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S. 261, 268 (2021).

99. Exemption 5 exempts only “those documents that are normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

1 100. Several of the records withheld appear to not be “inter-agency” or “intra-
2 agency” records.

3 101. Several of the records withheld do not appear to be “antecedent to the
4 adoption of agency policy.” *Jordan v. United States Dep’t of Justice*, 591 F.2d 753, 772-
5 73 (D.C. Cir. 1978).

6 102. Several of the records withheld do not appear to be “a direct part of the
7 deliberative process that make recommendations or express opinions on legal or policy
8 matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

9 103. Documents supporting a final agency decision are not exempt under
10 Exemption 5. *U.S. Fish & Wildlife Serv.*, 592 U.S. at 268.

11 104. Several of the requested records appear to be records that are post-
12 decisional.

13 105. The redacted portions use Exemption 5 as a basis for withholding nearly
14 all the responsive documents.

15 106. The redacted portions of the records provide no context or information
16 showing that Exemption 5 was properly applied.

17 107. The records were not properly withheld under Exemption 5.

18 ***Exemption 7(A)***

19 108. Exemption 7(A) withholds only those “records or information compiled
20 for law enforcement purposes, but only to the extent that the production of such law
21 enforcement records or information (A) could reasonably be expected to interfere with
22 enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A).

23 109. The agency has provided no showing that the requested records could be
24 reasonably expected to interfere with enforcement proceedings.

25 110. Exemption 7(A) applies only to pending enforcement proceedings. *Lewis*
26 *v. I.R.S.*, 823 F.2d 375, 379 (9th Cir. 1987).

111. As such, “reliance on Exemption 7(A) may become outdated when the proceeding at issue comes to a close.” *Citizens for Resp. & Ethics in Washington v. U.S. Dep’t of Just.*, 746 F.3d 1082, 1097 (D.C. Cir. 2014).

112. On October 31, 2023, the DOE announced the conclusion of their investigation into GCU. *See* fn. 1, *supra*.

113. The DOE improperly withheld records under Exemption 7(A) after the conclusion of the agency’s investigation.

114. There is no interest protected by Exemptions 5 and 7(A) that would be harmed by disclosure. 5 U.S.C. § 552(a)(8)(A).

115. The DOE’s failure to release the documents requested by the Institute violates the FOIA, 5 U.S.C. § 552(a)(3), 5 U.S.C. § 552(a)(6), and the DOE’s corresponding regulations.

REQUESTED RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- a. Expedite consideration of this Complaint pursuant to 28 U.S.C. § 1657;
- b. Declare that Defendant improperly failed to respond to Plaintiff’s FOIA Request within the statutory time period, under 5 U.S.C. § 552(a)(6)(A), (B);
- c. Declare that Defendant’s failure to disclose the records requested by Plaintiff violates the FOIA and that the records sought by Plaintiff must be disclosed pursuant to 5 U.S.C. § 552;
- d. Order Defendant to immediately and expeditiously provide Plaintiff copies of the requested records;
- e. Enjoin Defendant from withholding records and order Defendant to disclose the requested records in their entirety and make copies available to Plaintiff;
- f. Enter a finding that personnel employed by Defendant acted arbitrarily and capriciously in withholding public records from Plaintiff as provided in 5 U.S.C. § 552(a)(4)(F);

- 1 g. Award Plaintiff costs and reasonable attorneys' fees in this action, as provided in
2 5 U.S.C. § 552(a)(4)(E); and
3 h. Grant such other and further relief as this Court may deem just and proper.

4 **RESPECTFULLY SUBMITTED** this 3rd day of May, 2024 by:

5
6 /s/ Stacy Skankey

Jonathan Riches (0257120)

7 Stacy Skankey (035589)

8 **Scharf-Norton Center for Constitutional Litigation**
9 **at the GOLDWATER INSTITUTE**

10 *Attorneys for Plaintiff*

11 **CERTIFICATE OF SERVICE**

12 Document Electronically Filed and Served on all counsel of record by ECF this
13 3rd day of May 2024.

14
15 /s/ Kris Schlott

Kris Schlott, Paralegal
16
17
18
19
20
21
22
23
24
25
26
27
28