

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

STATE OF NEW JERSEY, OFFICE
OF THE ATTORNEY GENERAL,

Plaintiff,

v.

UNITED STATES DEPARTMENT
OF EDUCATION,

Defendant.

Civil Action No. 19-cv-18036

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

I. NATURE OF THE ACTION

1. The State of New Jersey, Office of the Attorney General (“Plaintiff”) brings this action under the Freedom of Information Act (“FOIA”) to compel the United States Department of Education (“Defendant”) to release records relating to Defendant’s recent pattern and practice of shutting down cooperation and information sharing with state law enforcement agencies in areas where federal and state regulators have historically worked hand-in-hand: protecting student borrowers from fraudulent and predatory practices by student loan servicers, for-profit schools, and other institutions in the higher education industry.

2. Since 2017, Defendant’s pattern and practice of eliminating or limiting once-routine information sharing with state law enforcement agencies has become notorious—the subject of criticism from state law enforcement officials,¹ unfavorable coverage in the national press,² and scrutiny in Congress.³

3. On August 27, 2018, after Defendant repeatedly failed to respond to correspondence from the New Jersey Attorney General and other attorneys general

¹ See Letter from New Jersey Attorney General Gurbir S. Grewal to Betsy DeVos, Secretary of the U.S. Department of Education (May 17, 2018), <https://nj.gov/oag/newsreleases18/2018-05-17-devos-letter-grewal.pdf>; Letter from New Jersey Attorney General Gurbir S. Grewal, Washington State Attorney General Bob Ferguson, *et al.*, to Betsy DeVos, Secretary of the U.S. Department of Education (July 13, 2018), <https://nj.gov/oag/newsreleases18/NJ-WA-Privacy-Act-Letter.pdf>; Letter from Colorado Attorney General Phil Weiser, New Jersey Attorney General Gurbir S. Grewal, Washington State Attorney General Bob Ferguson, *et al.*, to Betsy DeVos, Secretary of the U.S. Department of Education (Sept. 16, 2019) (on file with the Office of the New Jersey Attorney General).

² See, *e.g.*, Danielle Ivory, Erica L. Green & Steve Eder, *Education Department Unwinds Unit Investigating Fraud at For-Profits*, N.Y. Times (May 13, 2018), <https://www.nytimes.com/2018/05/17/business/betsy-devos-for-profit-colleges.html>; Erik Larson, *New Jersey Offers to Probe Fraud at For-Profit Colleges If Federal Government Won’t*, Bloomberg (May 18, 2018), <https://www.bloomberg.com/news/articles/2018-05-18/new-jersey-to-probe-fraud-at-for-profit-colleges-if-u-s-doesn-t>; Erik Ortiz, *Inside the Education Department’s effort to ‘obstruct’ student loan investigations*, NBC News (Sept. 9, 2019), <https://www.nbcnews.com/news/education/inside-education-department-s-effort-obstruct-student-loan-investigations-n1049576>.

³ See Letter from Diane Auer Jones, Principal Under Secretary, U.S. Department of Education, to United States Senator Patty Murray (June 24, 2019), <https://www.help.senate.gov/imo/media/doc/Enforcement%20Disclosure%2006-24-19%20.pdf>; Letter from Bonnie Watson Coleman, Member of Congress, to Betsy DeVos, Secretary of the U.S. Department of Education (March 29, 2019) (on file with the Office of the New Jersey Attorney General).

concerned about Defendant's abrupt and unexplained lack of cooperation with state law enforcement, Plaintiff filed two FOIA requests seeking information about Defendant's stonewalling.

4. Now, more than a full year later, Defendant has even failed to respond to Plaintiff's FOIA requests as required by law. Because Defendant has persisted in its refusals to cooperate with state law enforcement agencies, without ever adequately explaining its resistance, Plaintiff now seeks an order from this Court compelling Defendant to comply with its disclosure obligations under federal law.

II. JURISDICTION AND VENUE

5. This court has subject-matter jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

6. This court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C § 2201 *et seq.*

7. Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

III. PARTIES

8. Plaintiff is represented by Attorney General Gurbir S. Grewal, with a principal place of operation at 25 Market St., Trenton, NJ 08625.

9. Defendant United States Department of Education is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1), and is headquartered at 400

Maryland Avenue, SW, Washington, D.C. 20202. Defendant has possession, custody, and control of records to which Plaintiff seeks access.

IV. STATUTORY FRAMEWORK

10. FOIA provides every person with a right to request and receive federal agency records. *See* 5 U.S.C. § 552(a)(3)(A).

11. In an effort to encourage open government, FOIA imposes strict deadlines on agencies to provide responsive documents to FOIA requests. *See id.* § 552(a)(6)(A).

12. An agency generally must comply with a FOIA request by issuing a determination within 20 business days after receipt of the request. *Id.* § 552(a)(6)(A)(i).

13. In particular, within 20 business days after receiving a request, an agency must immediately notify the requester of its determination as to whether it will disclose the requested documents, state its reasons for such determination, and inform the requester of her right to appeal an adverse determination. *Id.*

14. An agency may be entitled to one ten-day extension of time to respond to a request if it provides written notice to the requester explaining that “unusual circumstances” exist that warrant additional time. *Id.* § 552(a)(6)(B).

15. Once an agency has determined that it will comply with a request, “the records shall be made promptly available.” *Id.* § 552(a)(6)(C)(i).

16. An agency's failure to comply with timing requirements is a constructive denial and satisfies the requester's requirement to exhaust administrative remedies. *Id.* § 552(a)(6)(C)(i).

17. A FOIA requester who exhausts administrative remedies may petition the court for injunctive and declaratory relief from the agency's continued withholding of public records. *See id.* § 552(a)(4)(B).

V. FACTUAL ALLEGATIONS

18. On August 27, 2018, Plaintiff filed two FOIA requests with Defendant.

19. Defendant subsequently identified one of Plaintiff's FOIA requests with the tracking number 18-02708-F. A true and correct copy of the FOIA request subsequently designated 18-02708-F is attached hereto as Exhibit A.

20. Defendant subsequently identified the other of Plaintiff's FOIA requests with the tracking number 18-02714-F. A true and correct copy of the FOIA request subsequently designated 18-02714-F is attached hereto as Exhibit B.

Request 18-02708-F

21. Request 18-02708-F pertains to a Privacy Act Systems of Records Notice ("SORN") published by Defendant in the Federal Register in June 2018. *See Privacy Act of 1974; System of Records*, 83 Fed. Reg. 27587 (June 13, 2018).

22. On July 13, 2018, New Jersey Attorney General Gurbir S. Grewal and 19 other attorneys general submitted comments in response to the SORN.⁴ Their comments opposed the Department’s decision to eliminate the “routine use” covering disclosure of records for use by other law enforcement agencies from the SORN for the Customer Engagement Management System. The attorneys general urged the Department to “reverse its decision to limit the Department’s disclosure of certain student loan information to law enforcement agencies, including our offices, for use in protecting their constituents from illegal, unfair, abusive, or deceptive practices by actors in the higher education industry.” As the attorneys general explained, “[n]o good reason exists for this abrupt policy change, which can only leave student loan borrowers worse off.” The attorneys general concluded their comments by asking “the Department to recommit to its historic law enforcement partnerships by restoring its policy on routine disclosures of student loan information for use by State Attorneys General and other law enforcement agencies.”

23. After receiving no response, Plaintiff submitted Request 18-02708-F, seeking:

⁴ Letter from New Jersey Attorney General Gurbir S. Grewal, Washington State Attorney General Bob Ferguson, *et al.*, to Betsy DeVos, Secretary of the U.S. Department of Education (July 13, 2018), <https://nj.gov/oag/newsreleases18/NJ-WA-Privacy-Act-Letter.pdf>.

- a. Records concerning the System of Records Notice for the Student Loan Ombudsman Records System, which is now called the Customer Engagement System (“CEMS”), or the Common Services for Borrowers (“CSB”) system, which is now part of the CEMS. This request specifically includes, but is not limited to:
 - i. Records reflecting communications about modifying the routine uses for the system of records;
 - ii. Records from on or after June 13, 2018, reflecting communications about comments received in response to the System of Records Notice published in the Federal Register on June 13, 2018;
 - iii. Records reflecting communications between the Department of Education and the Bureau of Consumer Financial Protection (“BCFP”) or Consumer Financial Protection Bureau (“CFPB”) relating to the System of Records Notice published in the Federal Register on June 13, 2018;
 - iv. Records reflecting communications between the Department of Education and any student loan servicer relating to the System of Records Notice published in the Federal Register on June 13, 2018;
 - v. Records reflecting communications comparing the former Routine Use “Disclosure for Use by Other Law Enforcement Agencies” (former Routine Use #2 in 18-11-11) with the Routine Use “Enforcement Disclosure” (current Routine Use #2, formerly Routine Use #3 in 18-11-11);
 - vi. Records reflecting communications comparing the former Routine Use “Disclosure for Use by Other Law Enforcement Agencies” (former Routine Use #2 in 18-11-11) with the Privacy Act provision codified at 5 U.S.C. § 552a(b)(7);
 - vii. Records relating to the Department of Education’s decision to no longer disclose any records under the former Routine Use “Disclosure for Use by Other Law Enforcement Agencies” (former Routine Use #2 in 18-11-11); and
 - viii. Records from on or after June 1, 2018, reflecting any communications between the Department of Education and any representative of any press or news organization relating to the System of Records Notice published in the Federal Register on June 13, 2018.

24. By letter dated August 27, 2018, the Department acknowledged receipt of Request 18-02708-F. A true and correct copy of that letter is attached hereto as Exhibit C.

25. By letter dated September 28, 2018, Defendant sent Plaintiff an initial determination letter stating that Request 18-02708-F had been forwarded to the Department's Federal Student Aid office. The letter further indicated that the Department was unable to provide an estimated completion date, and that the Department intended to provide records on a rolling basis as they became available. A true and correct copy of that letter is attached hereto as Exhibit D.

26. Despite the fact that the statutory deadline had passed, Defendant's September 28, 2018 letter did not constitute the "determination" required by 5 U.S.C. § 552(a)(6).

27. As of the date of this filing, the Department has not produced any records in response to Request 18-02708-F. Nor has it objected to the request or identified any ground for withholding responsive material as exempt from production under FOIA.

28. Thus, Defendant has violated FOIA by failing to provide Plaintiff with the determination required by FOIA within the statutory time frame, and by failing to make the responsive records "promptly available." *See* 5 U.S.C. § 552(a)(6)(C)(i).

29. Plaintiff has constructively exhausted its administrative remedies.

Request 18-02714-F

30. Request 18-02714-F pertains to a letter sent by the New Jersey Attorney General to Education Secretary Betsy DeVos on May 17, 2018. In that letter, Attorney General Grewal invited cooperation on investigations of for-profit colleges and other educational institutions suspected of fraud and other predatory conduct, to dispel reports that Defendant had “effectively killed investigations into possibly fraudulent activities at several large for-profit colleges.”⁵

31. After receiving no response to the Attorney General’s letter, Plaintiff submitted Request 18-02714-F, seeking:

- a. Records reflecting the Department of Education’s internal communications relating to the New Jersey Attorney General’s letter dated May 17, 2018, whether substantive or not, including any records reflecting the Department’s routing of the correspondence.
- b. Records reflecting any communications between the Department of Education and any representative of any educational institution, or trade association or organization, relating to the New Jersey Attorney General’s letter dated May 17, 2018.
- c. Records reflecting any communications between the Department of Education and any representative of any press or news organization relating to the New Jersey Attorney General’s letter dated May 17, 2018.

⁵ Letter from New Jersey Attorney General Gurbir S. Grewal to Betsy DeVos, Secretary of the U.S. Department of Education (May 17, 2018), <https://nj.gov/oag/newsreleases18/2018-05-17-devos-letter-grewal.pdf>.

32. By letter dated August 28, 2018, Defendant acknowledged receipt of Request 18-02714-F. A true and correct copy of that letter is attached hereto as Exhibit E.

33. By letter dated August 30, 2018, Defendant sent Plaintiff an interim response to Request 18-02714-F. A true and correct copy of that letter is attached hereto as Exhibit F. No records were produced. The letter stated that the Office of the Secretary had undertaken a search and could not locate any documents responsive to the request. The letter further indicated that Defendant would continue to process the request, and that the request would remain open until Defendant provided a response concerning outstanding responsive documents from the Office of Communication and Outreach and the Federal Student Aid office.

34. By letter dated October 3, 2018, Defendant sent a second interim response to Request 18-02714-F. The letter stated that the Department would continue to process the request, and that the request would remain open until the Department provided Plaintiff with a response regarding outstanding responsive documents from the Federal Student Aid office. Attached to the letter were two pages of responsive documents. The letter, together with the accompanying records, is attached hereto as Exhibit G.

35. The records produced on October 3, 2018, include correspondence on which personnel within the Office of the Secretary were copied. Thus, the records

produced so far demonstrate the inadequacy of whatever search Defendant conducted of the Office of the Secretary in the days before Defendant's interim response on August 30, 2018.

36. None of Defendant's responses constitutes the "determination" required by 5 U.S.C. § 552(a)(6).

37. As of the date of this filing, the Department has not produced all of the records in its possession, custody, or control that are responsive to Request 18-02714-F. Nor has it objected to the request or identified any ground for withholding responsive material as exempt from production under FOIA.

38. Thus, the Department has violated FOIA by failing to provide the determination required by FOIA within the statutory time frame, and by failing to make the responsive records "promptly available." *See* 5 U.S.C. § 552(a)(6)(C)(i).

39. Plaintiff has constructively exhausted its administrative remedies.

VI. CLAIMS FOR RELIEF

Count One: Failure to Respond to Request 18-02708-F Within Statutory Timeframe

40. Plaintiff re-alleges and incorporates by reference the foregoing paragraphs as if fully set forth herein.

41. Defendant has violated FOIA by failing to make a determination and produce all nonexempt records responsive to Request 18-02708-F within the statutory timeframes, in violation of 5 U.S.C. § 552.

**Count Two: Failure to Produce Responsive Records
for Request 18-02708-F**

42. Plaintiff re-alleges and incorporates by reference the foregoing paragraphs as if fully set forth herein.

43. Defendant failed to disclose and produce records responsive to Plaintiff's requests, in violation of Plaintiff's rights to those records under FOIA, including but not limited to 5 U.S.C. § 552(a)(3).

44. Defendant failed to disclose and produce records responsive to Plaintiff's requests without a legal basis for withholding such records, in violation of FOIA, including but not limited to 5 U.S.C. § 552(a)(3)(A) and (a)(6)(A).

45. Plaintiff is entitled to its reasonable attorneys' fees and costs under 5 U.S.C. § 552(a)(4)(F).

46. Defendant has violated FOIA by failing to make a determination and produce all nonexempt records responsive to Request 18-02714-F within the statutory timeframes, in violation of 5 U.S.C. § 552.

**Count Three: Failure to Respond to Request 18-02714-F
Within Statutory Timeframe**

47. Plaintiff re-alleges and incorporates by reference the foregoing paragraphs as if fully set forth herein.

48. Defendant has violated FOIA by failing to make a determination and produce all nonexempt records responsive to Request 18-02708-F within the

statutory timeframes, in violation of 5 U.S.C. § 552.

**Count Four: Failure to Produce Responsive Records
for Request 18-02714-F**

49. Plaintiff re-alleges and incorporates by reference the foregoing paragraphs as if fully set forth herein.

50. Defendant failed to disclose and produce records responsive to Plaintiff's requests, in violation of Plaintiff's rights to those records under FOIA, including but not limited to 5 U.S.C. § 552(a)(3).

51. Defendant failed to disclose and produce records responsive to Plaintiff's requests without a legal basis for withholding such records, in violation of FOIA, including but not limited to 5 U.S.C. § 552(a)(3)(A) and (a)(6)(A).

52. Plaintiff is entitled to its reasonable attorneys' fees and costs under 5 U.S.C. § 552(a)(4)(F).

53. Defendant has violated FOIA by failing to make a determination and produce all nonexempt records responsive to Request 18-02714-F within the statutory timeframes, in violation of 5 U.S.C. § 552.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. Find that Defendant's failure to timely respond or disclose records was unlawful;

2. Order Defendant to search for and disclose the requested records in their entirety and make copies promptly available to Plaintiff;
3. Enjoin Defendant from withholding any and all responsive records;
4. Award Plaintiff its attorneys' fees and other litigation costs; and
5. Grant Plaintiff any other relief this Court deems appropriate.

Respectfully submitted,

GURBIR S. GREWAL
Attorney General of New Jersey

Date: September 17, 2019

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