

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.,

Plaintiff,

Case No. 17-C-229

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

DEFENDANT'S ANSWER TO COMPLAINT

The defendant, United States Department of Justice, by its undersigned counsel, hereby answers plaintiff's complaint as follows:

1. *This is an action under the Freedom of Information Act, 5 U.S.C. § 552, to order the production of agency records, requested by the Wisconsin Institute for Law & Liberty, Inc. ("WILL") on January 14, 2016, from the United States Department of Justice ("DOJ").*

Answer 1: Defendant admits the allegations of paragraph 1.

2. *This lawsuit challenges the failure of the DOJ to produce responsive records in a timely manner. The records request has been outstanding for over a year, and the DOJ has failed to justify its delay.*

Answer 2: Defendant admits that the plaintiff's lawsuit challenges the alleged failure of the DOJ to produce records in a timely manner, and that the records request has been outstanding for over a year. Defendant alleges, however, that unusual circumstances justify the delay.

Jurisdiction and Venue

3. *This court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B).*

Answer 3: Defendant admits the allegations of paragraph 3.

4. *Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).*

Answer 4: Defendant admits the allegations of paragraph 4.

Parties

5. *Plaintiff WILL is a non-stock corporation incorporated under the laws of Wisconsin with a business address of 1139 East Knapp Street, Milwaukee, Wisconsin 53202. WILL engages in strategic litigation and educational outreach to advance the public interest in the rule of law, individual liberty, constitutional government, and a robust civil society. WILL routinely disseminates information to the public through its website and other media outlets.*

Answer 5: Defendant lacks sufficient information or knowledge to form a belief as to the truth of the allegations in paragraph 5.

6. *Defendant DOJ is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1) with a business address of 950 Pennsylvania Avenue, NW, Washington, D.C. 20530.*

Answer 6: Defendant admits the allegations of paragraph 6.

WILL's FOIA Request

7. *On January 14, 2016, WILL transmitted, a FOIA request to the DOJ ("FOIA Request"). The FOIA Request is attached to the complaint as Exhibit A.*

Answer 7: Defendant admits that WILL sent a FOIA request dated January 14, 2016, to the Civil Rights Division, FOI/PA (Freedom of Information/Privacy Act) Branch, and that an accurate copy of the FOIA Request is attached to the complaint as Exhibit A.

8. *The DOJ received WILL's FOIA Request on January 14, 2016.*

Answer 8: Defendant admits the allegations of paragraph 8.

9. *In its FOIA Request, WILL asked for the following:*

1. *All communications within the United States Department of Justice ("DOJ") regarding the investigation into the Milwaukee Parental Choice Program ("MPCP" or "voucher" program) for allegations of discrimination against students with disabilities. This investigation was closed on December 23, 2015.*
2. *Since June 8, 2011 to the present, communications within the United States Department of Justice ("DOJ") regarding the Wisconsin school choice programs. This includes the Milwaukee Parental Choice Program ("MPCP"), Racine Parental Choice Program ("RPCP"), Parental Private School Choice Program ("PPSCP"), and Parental Choice Program ("PCP").*
3. *Since June 8, 2011 to the present, communications within the DOJ regarding the April 9, 2013 letter to Wisconsin Superintendent Tony Evers from the Educational Opportunities Section of the Civil Rights Division.*
4. *Since June 8, 2011 to the present, communications within the DOJ regarding the Wisconsin Department of Public Instruction ("DPI").*
5. *Since June 8, 2011 to the present, all communications between, to, and from any third party regarding the MPCP, PPSP, PCP, DPI and April 9, 2013 letter to Superintendent.*
6. *Since June 8, 2011 to the present, every discrimination complaint filed against a private school in the MPCP, RPCP, PPSCP, PCP.*
7. *Any records, including, but not limited to time sheets or communications within the office, that demonstrate how much time was spent on the U.S. Department of Justice's investigation into the Milwaukee Parental Choice Program.*
8. *Any communications regarding the December 23, 2015 letter from Attorney Colleen Phillips to Wisconsin State Superintendent of Public Instruction Tony Evers.*
9. *Any communications about federal requirements imposed on the Milwaukee Parental Choice Program.*

Answer 9: Defendant admits the allegations of paragraph 9.

10. *WILL identified itself as an educational institution and representative of the news media as those terms are used in 5 U.S.C. § 552(a)(4)(A)(ii)(II) and requested that fees charged for the request be limited to the “direct costs” of “reasonable standard charges for document duplication” under 5 U.S.C. § 552(a)(4)(A)(ii)(II); (iv).*

Answer 10: Defendant admits that in its FOIA Request, WILL identified itself as an educational institution and representative of the news media, and advised DOJ that “you are limited to charging ‘direct costs’ of ‘reasonable standard charges for document duplication’ fees” under 5 U.S.C. § 552(a)(4)(A)(ii)(II); (iv).

11. *On January 19, 2016, the DOJ acknowledged receipt of the FOIA Request. That response is attached to the Complaint as Exhibit B.*

Answer 11: Defendant admits the allegations of paragraph 11.

12. *In that response, the DOJ checked a box next to the following two paragraphs:*

As a result of the large number of Freedom of Information and Privacy Acts requests received by the Civil Rights Division, some delay may be encountered in processing your request. In an attempt to treat each requester fairly, we have adopted a policy of processing requests in the approximate order of receipt. Please be assured that your request is being handled as equitably as possible. We appreciate your patience and will provide you with a response at the earliest possible date.

Please note that the Civil Rights Division utilizes multi-track processing in which processing ranges from faster tracks for requests (seeking access to documents already processed for prior requests) to much slower tracks for complex requests involving voluminous amounts of responsive documents or extensive consultation. At your option, you may wish to call the number below and limit the scope of your request to enable your request to be handled in the most expeditious manner available to fulfill your interests.

Answer 12: Defendant admits the allegations of paragraph 12.

13. *After six months of inaction, WILL sent a follow-up letter to the DOJ seeking an update on the status of its request and noting that “FOIA also requires that unless ‘unusual circumstances’ are present, you must determine within 20 business days whether to comply with this request and must immediately inform me of your determination and the need for a time extension.” That letter is attached to the Complaint as Exhibit C.*

Answer 13: Defendant admits the allegations of paragraph 13.

14. *In October, 2016, an attorney at WILL called the number provided in the DOJ’s response to ask for an update on WILL’s request. She was told merely that the request was still being processed and had not yet been responded to.*

Answer 14: Defendant lacks sufficient information or knowledge to form a belief as to the truth of the allegations in paragraph 14.

15. *To date, WILL’s FOIA Request has been outstanding for 393 days.*

Answer 15: Defendant admits the allegations of paragraph 15.

WILL Has Constructively Exhausted its Administrative Remedies

16. *The preceding paragraphs are incorporated as if fully set forth herein.*

Answer 16: Defendant incorporates its responses to the preceding paragraphs.

17. *The DOJ has failed to make a determination regarding WILL’s FOIA Request within the time period prescribed by 5 U.S.C. § 552(a)(6)(A)(i).*

Answer 17: Defendant admits that it did not produce records responsive to WILL’s FOIA request within the time limits set forth in 5 U.S.C. § 552(a)(6)(A)(i), but alleges that unusual circumstances justified the delay.

18. *Therefore, WILL has constructively exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).*

Answer 18: Defendant admits that WILL has exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

Count I
Violation of FOIA: Failure to Comply with Statutory Deadlines

19. *The preceding paragraphs are incorporated as if fully set forth herein.*

Answer 19: Defendant incorporates its responses to the preceding paragraphs.

20. *The DOJ has failed to provide written notice of any unusual circumstances or otherwise request an extension for its response under 5 U.S.C. § 552(a)(6)(B).*

Answer 20: Defendant denies the allegations of paragraph 20, and alleges that on January 19, 2016, DOJ notified WILL as follows:

As a result of the large number of Freedom of Information and Privacy Acts requests received by the Civil Rights Division, some delay may be encountered in processing your request. In an attempt to treat each requester fairly, we have adopted a policy of processing requests in the approximate order of receipt. Please be assured that your request is being handled as equitably as possible. We appreciate your patience and will provide you with a response at the earliest possible date.

Please note that the Civil Rights Division utilizes multi-track processing in which processing ranges from faster tracks for requests (seeking access to documents already processed for prior requests) to much slower tracks for complex requests involving voluminous amounts of responsive documents or extensive consultation. At your option, you may wish to call the number below and limit the scope of your request to enable your request to be handled in the most expeditious manner available to fulfill your interests.

21. *The DOJ has failed to demonstrate that unusual circumstances exist sufficient to justify a 373-day extension of time under 5 U.S.C. § 552(a)(6)(B).*

Answer 21: Defendant denies the allegations of paragraph 21.

22. *The DOJ's failure to make a determination whether to comply with WILL's FOIA Request within the statutory time limit violates 5 U.S.C. § 552(a)(6)(A)(i) and (B)(i).*

Answer 22: Defendant denies the allegations of paragraph 22.

Count II

Violation of FOIA: Unlawful Withholding of Agency Records

23. *The preceding paragraphs are incorporated as if fully set forth herein.*

Answer 23: Defendant incorporates its responses to the preceding paragraphs.

24. *As a result of the DOJ's failure to make a determination within the statutory time limit, WILL and the public have been denied access to records to which they are lawfully entitled under 5 U.S.C. § 552(a)(3)(A).*

Answer 24: Defendant denies the allegations of paragraph 24.

25. *The DOJ's delay of 393 days violates the FOIA's requirement that records be provided to the requester "promptly." 5 U.S.C. § 552(a)(3)(A).*

Answer 25: Defendant denies the allegations of paragraph 25.

26. *WILL is entitled to injunctive relief compelling the immediate disclosure of the requested agency records.*

Answer 26: Defendant denies the allegations of paragraph 26.

Count III

Violation of FOIA: Failure to Grant a Fee Reduction

27. *The preceding paragraphs are incorporated as if fully set forth herein.*

Answer 27: Defendant incorporates its responses to the preceding paragraphs.

28. *In its FOIA Request, WILL requested a fee reduction under 5 U.S.C. § 552(a)(4)(A)(ii)(II).*

Answer 28: Defendant admits that in its FOIA Request, WILL advised DOJ that “you are limited to charging ‘direct costs’ of ‘reasonable standard charges for document duplication’ fees” under 5 U.S.C. § 552(a)(4)(A)(ii)(II); (iv).

29. *The DOJ failed to make a determination on WILL’s fee reduction request.*

Answer 29: Defendant admits that it did not respond to the sentence in WILL’s FOIA Request stating that “you are limited to charging ‘direct costs’ of ‘reasonable standard charges for document duplication’ fees.”

30. *WILL is entitled to injunctive relief providing for a fee reduction in this matter as a consequence of the DOJ’s failure to make a determination on the fee reduction request.*

Answer 30: Defendant denies the allegations of paragraph 30.

31. *WILL is also entitled to injunctive relief providing for a complete fee waiver in this matter because the DOJ failed to comply with the statutory time limits and failed to provide written notice to WILL of any unusual circumstances and more than 10 days have elapsed since the 20-day deadline expired. 5 U.S.C. § 552(a)(4)(A)(viii).*

Answer 31: Defendant denies the allegations of paragraph 31.

AFFIRMATIVE DEFENSES

1. Unusual circumstances justified an extension of time to respond to WILL’s FOIA request. 5 U.S.C. § 552(a)(6)(B).

2. The complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12 (b)(6).

3. On April 20, 2017, DOJ provided a partial response to WILL's FOIA Request. To that extent, the allegations of Count II are moot.

4. Since DOJ has not attempted to charge WILL a fee of any kind, the allegations of Count III are not ripe for adjudication.

5. DOJ will not charge direct costs to WILL in connection with its responses to the FOIA Request; therefore, the allegations of Count III are moot.

Dated at Milwaukee, Wisconsin this 24th day of April, 2017.

Respectfully submitted,

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