

Feldesman Leifer LLP

Edward T. Waters (D.C. Bar No. 422461)

Ewaters@feldesman.com

Mindy B. Pava (D.C. Bar No. 995328)

mpava@feldesman.com

1129 20th Street NW, 4th Floor

Washington, DC 20036

(t) (202) 466-8960

Attorneys for Plaintiff

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

FELDESMAN LEIFER LLP,
1129 20TH Street, NW, 4th Floor
Washington, D.C. 20036
Tel: (202) 466-8960

Plaintiff,

v.

**ADMINISTRATION FOR CHILDREN
AND FAMILIES (ACF) WITHIN THE
U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES,**
FOIA Office
330 C Street, S.W., 4th Floor
Washington, D.C. 20201
Tel: (888) 747-1861

Defendant.

Civil No. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiff Feldesman Leifer LLP, of Washington, D.C., brings this Freedom of Information Act (“FOIA”) suit pursuant to 5 U.S.C. § 552 to compel Defendant, the Administration for Children and Families within the U.S. Department of Health and Human

Services (“HHS-ACF” or “Defendant”) to process and produce various requested documents relating to the U.S. Department of Health and Human Services’ (“HHS”) interpretation of the term “deficiency” as found in Section 637 of the Head Start Act since January 1, 2009. Plaintiff also requests other documents pertaining to HHS-ACF’s interpretation of other terms as those terms are used by Congress in the statutory definition of “deficiency,” as well as any documents pertaining to the development of the Risk Assessment Notification (“RAN”) review guidance or process. (See Exhibit 1, FOIA Request Letter.)

2. Because HHS-ACF has not publicly explained how it interprets the term “deficiency” when it makes deficiency findings in the context of a Head Start agency investigation, members of the public (and Head Start agencies) with an interest in how the deficiency determination process works have an incomplete understanding of the policies and procedures which govern such determinations.

3. As a result, Plaintiff first submitted a letter to the HHS-ACF’s FOIA Office making this request for documents on April 24, 2024. The letter was transmitted via e-mail to the address of FOIA@acf.hhs.gov. When Plaintiff received no response or tracking number, Plaintiff resubmitted the request via the HHS-ACF FOIA Office’s online portal on May 15, 2024. The HHS-ACF FOIA Office responded with an acknowledgement letter on May 21, 2024 and assigned the case number of 24-F-0286 to the request. The online portal listed Request 24-F-0286 as “received” at that time.

4. The May 21 acknowledgement letter stated that the request was being “processed as expeditiously as possible” and that processing time would depend “on the complexity of [the] request and whether sensitive records, voluminous records, extension search, and/or consultation with other HHS components or other executive branch agencies are involved.”

5. Nearly two months later, on July 11, 2024, Plaintiff followed up via email with the HHS-ACF FOIA Office and asked for a status update on the timetable for the request within two weeks. (See Exhibit 2, Status Update Letter.) On July 25, 2024, the two-week time period set forth in Plaintiff's letter passed, with no response from HHS-ACF's FOIA Office. The online portal still lists Request 24-F-0286 as "received"—the same status for more than two months without any movement.

6. FOIA requires federal agencies to promptly disclose requested records, see 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i), yet HHS-ACF has not responded to Plaintiff's FOIA request beyond assigning a case number, and also has not produced any documents as of the date of this filing. Plaintiff has a statutory right to the information it seeks and that HHS-ACF has failed to provide. Moreover, HHS-ACF has failed to respond to Plaintiff's reasonable request for a status update and has offered no information about the potential timing for processing Plaintiff's request.

JURISDICTION AND VENUE

7. The Court has jurisdiction over this action pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 (federal question).

8. Under 5 U.S.C. § 552(a)(6)(C), Plaintiff is deemed to have constructively exhausted all administrative appeals. HHS-ACF has failed to respond to Plaintiff's FOIA request within 20 days, as required by 5 U.S.C. § 552(a)(6)(a)(i). Although HHS-ACF assigned a case number to the request, the online portal shows no progress on Plaintiff's request since it was received in May 2024. Plaintiff sent a letter to HHS-ACF on July 11, 2024 requesting an update within 14 days, (see Exhibit 2, Status Update Request Letter) and HHS-ACF has failed to respond to that notice letter. Thus, Plaintiff has exhausted its administrative remedies.

9. Pursuant to 5 U.S.C. §552(a)(4)(B), this Court is authorized to grant injunctive relief ordering HHS-ACF's FOIA Office to respond to Plaintiff's FOIA request. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201. Thus, this Court may grant declaratory and injunctive relief pursuant to §§ 2201 and 2202.

10. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because this is a civil action in which Defendant is a federal agency, there is no real property involved in this action, and Plaintiff has its principal place of business in this District.

PARTIES

11. Plaintiff Feldesman Leifer, LLP, of Washington, D.C., is a law firm with more than 50 years of experience counseling and assisting recipients of federal grant funds, including entities that receive funds under the Head Start Act, across all U.S. states and territories. Feldesman has robust federal grants and regulatory practice groups and, in addition to legal services, Feldesman provides extensive training and education services to its client groups. The information sought through the FOIA request at issue here is necessary to ensure that Feldesman attorneys can provide accurate information and insight to clients and attendees of its educational services.

12. Defendant HHS-ACF is a component agency of the United States Department of Health and Human Services and thus is an "agency" subject to FOIA pursuant to 5 U.S.C. § 552(f) which has control over the records that Plaintiff seeks. Head Start and Early Head Start programs are administered by the Office of Head Start ("OHS"), within HHS-ACF.

LEGAL FRAMEWORK OF FOIA

13. FOIA requires that all federal agencies, upon request, must promptly provide copies of all non-exempt agency records if the request reasonably describes the nature of the records sought and conforms to agency regulations and procedures in requesting such records. 5 U.S.C. §

552(a)(3)(A). FOIA also mandates that all federal agencies in receipt of such requests shall make a final determination on the request within twenty (20) days after the receipt, unless the agency expressly provides notice to the requestor of “unusual circumstances” meriting additional time for a response. 5 U.S.C. § 552(a)(6)(A)(I).

14. FOIA further provides that a person shall be deemed to have constructively exhausted their administrative remedies if the agency fails to comply with the applicable time limitations provided by 5 U.S.C. § 552(a)(6)(A)(I)-(ii). See 5 U.S.C. § 552(a)(6)(C).

15. If a person has not been provided with their responsive records requested pursuant to FOIA, FOIA provides that person, after exhausting administrative remedies, may seek legal redress from federal district court to enjoin the agency from withholding the responsive records and to order the production of such records improperly withheld.

16. The federal agency from which the records have been requested has the burden to sustain its actions under FOIA. 5 U.S.C. § 552(a)(4)(B).

17. Pursuant to FOIA, a court may assess attorneys’ fees and litigation costs against the United States (and federal agency defendant) if the Plaintiff prevails in this action. 5 U.S.C. § 552(a)(4)(E).

FACTUAL ALLEGATIONS

A. Statutory Definition of “Deficiency”

18. The federal Head Start Act defines “deficiency” to mean:

- (A) a systemic or substantial material failure *of an agency* in an area of performance that the Secretary determines involves—
 - (i) a threat to the health, safety, or civil rights of children or staff. (emphasis added).

19. HHS-ACF requires that grantees immediately address deficiency findings that either

(1) involve a risk to the health and safety of program participants or staff, or (2) pose “a threat to the integrity of Federal funds” 42 U.S.C. § 9836a(e)(1)(B). For all other deficiencies, HHS-ACF may mandate correction either within 90 days of grantee notification or by the deadline set in an HHS-approved “quality improvement plan.” 42 U.S.C. § 9836a(e)(1)(B)(ii)-(iii).

20. A grantee’s failure to correct a deficiency can result in termination of its designation as a Head Start agency, which comes along with the loss of federal funding under the Head Start Act. 42 U.S.C. § 9836a(e)(1)(C).

21. When an incident occurs at a Head Start agency, the agency is required to make a report to the Office of Head Start. The Office of Head Start, under the authority of HHS-ACF, reviews the incident and the agency’s corrective action plan before determining whether to issue a deficiency finding. The imposition of a “deficiency” finding amounts to a decision that the agency provides substandard or inadequate services to Head Start children and families.

22. Because HHS-ACF oversees the Office of Head Start, which makes these all-important “deficiency” determinations, HHS-ACF, presumably then, maintains data and records pertaining to the interpretation of the definition of the term “deficiency.” HHS-ACF should also maintain data and records pertaining to the interpretation of the terms “systemic,” “substantial,” and/or “material” as those terms are used by Congress in the statutory definition of deficiency.

23. Further, HHS-ACF should maintain data and records concerning reporting provisions that require Head Start programs to “submit reports, as appropriate, to the responsible HHS official immediately or as soon as practicable, relating to any significant incidents affecting the health and safety of program participants.” See 45 C.F.R. § 1302.102(d)(1)(ii).

B. Plaintiff's FOIA Request Relating to Agency's Statutory Interpretations

24. On or about April 24, 2024, Plaintiff first submitted a letter to HHS-ACF's FOIA Office seeking all documents from January 1, 2009 forward in four distinct categories, marked in the letter as (1) through (4). (See Exhibit 1.) In general, the requested documents relate to HHS' interpretation of the term "deficiency" as found in Section 637 of the Head Start Act.

25. Plaintiff also requested other documents pertaining to HHS' interpretation of other terms, as those terms are used by Congress in the statutory definition of "deficiency," as well as any documents pertaining to the development of the Risk Assessment Notification ("RAN") review guidance or process. (See Exhibit 1.) The letter was transmitted via e-mail to the address of FOIA@acf.hhs.gov.

26. When Plaintiff received no response or tracking number, Plaintiff resubmitted the request via the HHS-ACF FOIA Office's online portal on May 15, 2024. The HHS-ACF FOIA Office responded with an acknowledgement letter on May 21, 2024 and assigned the case number of 24-F-0286 to the request. The online portal listed Request 24-F-0286 as "received."

27. Plaintiff allowed nearly two months to pass before following up. On July 11, 2024, Plaintiff sent an email to HHS-ACF requesting a status update on the FOIA request and asking to receive such update within 14 days. (Exhibit 2.) The 14-day period expired on July 25, 2024, without any status update being conveyed by HHS-ACF's FOIA Office.

28. As of the date of this filing, Plaintiff has not received any agency response to the letter sent by counsel, nor any records responsive to the FOIA request. The online portal still lists Request 24-F-0286 as "received," with no further update as to the agency's progress in fulfilling Plaintiff's request.

CLAIMS FOR RELIEF

29. Plaintiff realleges, as if fully set forth herein, paragraphs 1-28 inclusive.

30. Defendant HHS-ACF has violated FOIA by failing to provide Plaintiff with all non-exempt FOIA records for Plaintiff's FOIA request, designated as Request No. 24-F-0286.

31. By failing to provide Plaintiff with all non-exempt responsive records relating to the FOIA request described above, Defendant HHS-ACF has denied Plaintiff's right to this information, as provided by the Freedom of Information Act.

32. Defendant HHS-ACF has violated FOIA by failing to perform an adequate and timely search reasonably calculated to locate all responsive records relating to Plaintiff's FOIA request.

33. By failing to perform an adequate search and/or failing to communicate with Plaintiff pertaining to any results of any potential records searches, Defendant HHS-ACF has denied Plaintiff's right to this information provided by law under the Freedom of Information Act.

34. Unless enjoined by this Court, Defendant HHS-ACF will continue to violate Plaintiff's legal rights to be provided with copies of the records which it has requested in the FOIA request described above.

35. Plaintiff is directly and adversely affected and aggrieved by Defendant HHS-ACF's failure to provide responsive records to its FOIA request described above.

36. Pursuant to 5 U.S.C. § 552(a)(4)(E), Plaintiff is entitled to reasonable costs of litigation, including the attorneys' fees expended in prosecuting this action.

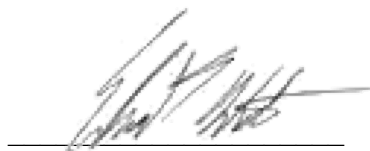
REQUEST FOR RELIEF

WHEREFORE, Plaintiff Feldesman Leifer LLP respectfully requests that this Court enter judgment on its behalf, providing the following relief:

1. Declare that Defendant HHS-ACF has violated FOIA by failing to provide Plaintiff with any responsive documents and non-exempt records responsive to its FOIA request;
2. Direct by injunction that Defendant HHS-ACF perform an adequate search for records responsive to Plaintiff's FOIA request and provide Plaintiff with all non-exempt responsive records;
3. Grant Plaintiff's costs of litigation, as provided by FOIA, 5 U.S.C. § 552(a)(4)(E);
and
4. Provide all other such relief as the Court deems just and proper.

Dated: July 30, 2024

Respectfully submitted,



Feldesman Leifer LLP

Edward T. Waters (D.C. Bar No. 422461)

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Mindy B. Pava (D.C. Bar No. 995328)

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Attorneys for Feldesman Leifer LLP

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CERTIFICATE OF SERVICE

I certify that, on the 30th day of July, 2024, I served the foregoing “Complaint for Declaratory and Injunctive Relief” upon all parties of record by depositing a true copy in the United States mail, postage pre-paid, as well as via Certified Mail, return receipt requested, in envelopes addressed as follows:

Administration for Children and Families (ACF)
FOIA Office
330 C Street, SW, 4th Floor
Washington, D.C. 20201

Matthew M. Graves
United States District Attorney for the District of Columbia c/o Civil Process Clerk
601 D Street, NW
Washington, D.C. 20530

Merrick Garland
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

/s/ Edward T. Waters