

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PROJECT ON PREDATORY STUDENT LENDING OF THE LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant. Civil Action No. 18-1642 Electronically Filed Document

COMPLAINT FOR INJUNCTIVE RELIEF

INTRODUCTION

1. For over two years, the Project on Predatory Student Lending (“Project”) has been seeking documents from the Department of Justice (“Department” or “DOJ”) regarding the Government’s lawsuit against Education Management Corporation, a nationwide chain of for-profit colleges that allegedly exploited students, violated federal law, and lied to the government to secure \$11 billion in federal funding. These documents will help former students who were misled by the colleges seek loan relief; they will enable taxpayers—who fund the federal government’s trillion-dollar student loan program—to understand the extent and duration of Education Management’s alleged misconduct; they will allow the public to evaluate the Government’s settlement with Education Management; and they will enable the public to assess what, if any, steps may be taken to prevent similar misconduct in the future.

2. In June 2016, the Project submitted a request under the Freedom of Information Act, 5 U.S.C. § 552 et seq., to the United States Department of Justice seeking documents produced to the Government in discovery in its lawsuit against Education Management. Months

later—long after its statutory deadline for responding to the Project’s request had expired—the Government responded to the Project’s request and refused to produce any documents whatsoever. The Government offered the Project—and this Court—a series of conflicting reasons for why it was withholding the documents.

3. After the Department changed its explanation for withholding multiple times, the Project sought to better understand the Department’s processing of its FOIA request. So in March 2018, the Project filed a second FOIA request, this time for all agency records related to the processing of the Project’s first FOIA request.

4. Although FOIA requires that requests be processed within 20 days, it has now been over seven months since the Project submitted this second FOIA request. The Department has not only failed to produce any records; it has failed to even make a determination about whether it will comply with the request. This failure violates the statute. *See* 5 U.S.C. § 552(a)(6)(C)(i).

5. Accordingly, the Project brings this action under FOIA, seeking to compel the Department to respond to the Project’s March 2018 FOIA request and promptly produce the records it has improperly withheld.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

7. Venue is proper in the Western District of Pennsylvania pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1)(B), because the withheld records are located in this district.

PARTIES

8. Plaintiff requestor the Project on Predatory Student Lending is part of the Legal Services Center of Harvard Law School, a nonprofit civil legal services organization located in Jamaica Plain, Massachusetts. The Project provides free, high-quality legal representation to low-income student loan borrowers who have been harmed by the predatory practices of—and carry unmanageably high debt loads from attendance at—schools owned by Education Management and other for-profit higher education companies.

9. Defendant Department of Justice is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1).

STATEMENT OF FACTS

10. In 2011, the United States government, along with several states, sued Education Management Corporation—a nationwide chain of for-profit colleges—alleging that the company had violated federal law and then lied to the government about it in order to receive billions of dollars in federal funding. Joint Complaint in Intervention by the United States of America, and the States of California, Florida, Illinois, and Indiana (“Joint Complaint”) ¶¶ 1, 6-11, 36-168, 271, *United States ex rel. Washington v. Educ. Mgmt. LLC*, No. 2:07-cv-461 (W.D. Pa. Aug. 8, 2011), ECF No. 128. Following extensive discovery, the parties settled the case in late 2015. *See* U.S. Dep’t of Justice, Office of Pub. Affairs, *For-Profit College Company to Pay \$95.5 Million to Settle Claims of Illegal Recruiting, Consumer Fraud and Other Violations* (Nov. 16, 2015) (“DOJ Settlement Press Release”), <https://www.justice.gov/opa/pr/profit-college-company-pay-955-million-settle-claims-illegal-recruiting-consumer-fraud-and>.

11. In June 2016, the Project on Predatory Student Lending submitted a FOIA request to the Department of Justice seeking certain documents in DOJ’s possession that had originally

been produced by Education Management to DOJ during the litigation. *See* FOIA request from Amanda M. Savage, Attorney, Project, to Susan B. Gerson, Assistant Director of FOIA/Privacy Unit, Executive Office for United States Attorneys (“EOUSA”), DOJ (Jun. 20, 2016), attached as Ex. A. The Project sought these records to better understand the government’s enforcement of the law governing for-profit colleges’ student recruitment, and to aid former students harmed by Education Management and other for-profit higher education companies’ predatory recruitment practices.

12. DOJ did not make a determination on this FOIA request for months. When the Department finally did respond to the request, it denied the request in its entirety. *See* Full Denial Letter from Thomas D. Anderson, Acting Assistant Director, EOUSA, DOJ, to Amanda M. Savage, Attorney, Project (Sept. 6, 2016), attached as Ex. B. As grounds for its denial, DOJ cited four FOIA exemptions that permit agencies to withhold specific kinds of information—implicitly representing that, as the law requires, the agency had searched its records for responsive documents, examined them, and identified reasons it believed were legally sufficient for withholding each document in its entirety. *See id.* DOJ also stated that in denying the Project’s request, it had “taken . . . into account” the blanket protective orders that had been entered at the beginning of discovery during its lawsuit. *Id.*

13. Because of the Department’s statement that it had relied on the blanket protective orders to deny the Project’s FOIA request, the Project moved to intervene in the lawsuit against Education Management for the sole purpose of seeking a ruling clarifying that those orders—entered at the beginning of discovery without any showing of good cause to keep any particular document secret—are not a sufficient basis to withhold documents under FOIA. *See* Mot. Intervene at 1, *U.S. v. Education Management LLC*, No. 07-cv-00461 (W.D. Pa. Dec. 16, 2016),

ECF No. 456. The orders, in fact, expressly state that they should not be construed as a judicial finding that nondisclosure is warranted. *See* Protective Order at 11, *U.S. v. Education Management LLC* No. 07-cv-00461 (W.D. Pa. Apr. 12, 2013), ECF No. 257; Protective Order at 5, *U.S. v. Education Management LLC*, No. 07-cv-00461 (W.D. Pa. Apr. 12, 2013), ECF No. 255.

14. The Project also filed an administrative appeal of DOJ's denial of its FOIA request. FOIA Appeal from Amanda M. Savage, Attorney, Project, to Melanie A. Pustay, Director of Office of Information Policy ("OIP"), DOJ (Dec. 2, 2016), attached as Ex. C. DOJ did not respond to the Project's administrative appeal within the timeframe required by the statute.

15. Therefore, in February 2017, the Project filed a lawsuit against DOJ, seeking to compel the Department to respond to its administrative appeal and produce the documents it was impermissibly withholding. Compl., *Project on Predatory Student Lending of the Legal Services Center of Harvard Law School v. U.S. Dep't of Justice*, No. 17-cv-00210 (W.D. Pa. Feb. 14, 2017), ECF No. 1.

16. The same day the Project filed that lawsuit, DOJ finally responded to the administrative appeal. Letter from Sean R. O'Neill, Chief of Administrative Appeals Staff, OIP, DOJ, to Amanda M. Savage, Attorney, Project (sent via electronic mail on Feb. 15, 2017), attached as Ex. D. DOJ continued to refuse to produce any documents responsive to the Project's request. *See id.* But this time, DOJ provided two entirely different reasons—reasons that contradicted the rationale the Department had provided in its initial denial. Whereas initially, the Department stated that it had determined that the requested records contained information subject to specific FOIA exemptions—indicating that the Department had located and reviewed the

requested records—on appeal, the Department asserted that it was not required to search for the requested documents at all. *See id.* The Department asserted that, in its view, the documents were not agency records subject to FOIA in the first place and that, even if they were, searching for them would be unduly burdensome. *See id.* In other words, although DOJ’s initial FOIA denial indicated that it had searched for and reviewed the documents the Project requested, its response to the Project’s administrative appeal made clear that it had not done so.

17. DOJ has never provided any justification for asserting in its initial FOIA denial that *every* document the Project sought contained information subject to four specific FOIA exemptions when, in fact, it had not reviewed *any* document the Project sought.

18. By the time DOJ sent its response to the Project’s administrative appeal, there were two strands of litigation underway related to DOJ’s denial of the Project’s request: (1) the Project’s motion to intervene in the Government’s lawsuit against Education Management for the sole purpose of seeking clarification that the Government could not rely on the blanket protective order in that case to deny the Project’s FOIA request; and (2) the separate FOIA lawsuit filed by the Project challenging the Government’s denial of its request—a lawsuit that challenged the applicability of the FOIA exemptions the Government initially purported to have relied on and then, after receiving the Government’s response to its administrative appeal, challenged the agency’s assertions that the documents were not agency records and that a search would be unduly burdensome.

19. In opposing the Project’s motion to intervene, DOJ repeatedly stated that it had “independent reasons *other than* the protective orders” entered in the Education Management litigation to withhold *every* document sought by the Project—that is, it represented that *none* of the documents the Project sought were being withheld solely because of the protective orders.

Surreply Opp'n Mot. Clarification at 2, *U.S. v. Education Management LLC*, No. 07-cv-00461 (W.D. Pa. Feb. 28, 2017), ECF No. 492 (emphasis added); Resp. Opp'n Mot. Intervene at 5, 14-16, *U.S. v. Education Management LLC*, No. 07-cv-00461 (W.D. Pa. Feb. 3, 2017), ECF No. 479; Surreply Opp'n Mot. Intervene at 4-5, *U.S. v. Education Management LLC*, No. 07-cv-00461 (W.D. Pa. Feb. 28, 2017), ECF No. 49. The independent reasons DOJ asserted were sufficient to justify withholding all of the documents would be litigated in the FOIA lawsuit. *See* Surreply Opp'n Mot. Intervene at 4-5, *U.S. v. Education Management LLC*, No. 07-cv-00461 (W.D. Pa. Feb. 28, 2017), ECF No. 491. DOJ argued, therefore, that the Project's motion to intervene to seek clarification of the protective orders was not yet ripe: If the Government won the FOIA lawsuit, it contended, the protective order litigation would be moot because the agency would be entitled to withhold all of the documents for reasons other than the protective orders. *See id.*

20. Based on the Government's representations that it was not withholding *any* of the requested documents solely because of protective orders, the Project agreed to wait to determine whether any clarification or modification of the protective order was necessary until after the FOIA lawsuit was completed. Tr. of Status Conference at 32-33, *U.S. v. Education Management LLC*, No 07-cv-00461 (W.D. Pa. Mar. 20, 2017), ECF No. 496.

21. However, when the Government moved for summary judgment in the FOIA lawsuit, it stated that it was withholding documents—thousands of them—solely because of the blanket protective orders entered in the Education Management litigation (and argued that this withholding was permissible because of these orders). *See* Mem. Supp. Mot. Summ. J. at 5, *Project on Predatory Student Lending of the Legal Services Center of Harvard Law School v. U.S. Dep't of Justice*, No. 17-cv-00210 (W.D. Pa. Nov. 17, 2017), ECF No. 42. DOJ's previous

statements to the Project—and to this Court—that none of the documents sought by the Project were being withheld solely because of the protective orders were apparently false.

22. Given the multiple conflicting assertions DOJ made about its reasons for withholding documents responsive to the Project’s FOIA request, the Project decided to submit a second FOIA request seeking all records regarding the processing of its first FOIA request and the appeal of that request. This second FOIA request was sent to the Executive Office for United States Attorneys (EOUSA) on March 23, 2018. FOIA Request from Amanda M. Savage, Attorney, Project, to Hirsh D. Kravitz, FOIA, Records, and E-Discovery Office, Civil Division, DOJ; Kevin Krebs, FOIA/Privacy Unit, EOUSA, DOJ; and Douglas Hibbard, OIP, DOJ (Mar. 23, 2018), attached as Ex. E.¹

23. The Project requested a fee waiver because its request was not made in the furtherance of any commercial interest and was likely to contribute significantly to public understanding of the operations and activities of the government. *Id.* at 2.

24. On April 18, 2018, EOUSA acknowledged receipt of the request but provided no determination of whether or when the agency would comply with it. *See* Letter from EOUSA to Amanda M. Savage, Attorney, Project (Apr. 18, 2018), attached as Ex. F.

25. Since then, the Project has repeatedly contacted EOUSA in an effort to get a response to its FOIA request. In some instances, it has refused to provide an estimate of when the Project might expect a response to its FOIA request at all, and in others it has provided estimated response timelines, but then has failed to meet them without any explanation.

26. As of the filing of this complaint, it has been over seven months since DOJ received the Project’s March 2018 FOIA request. DOJ still has not notified the Project of a

¹ FOIA requests were also sent to two other divisions of DOJ—the Civil Division and the Office of Information Policy (OIP). These requests are not at issue here.

determination as to whether it will comply with that request, let alone provided the Project any documents.

27. Because DOJ has failed to comply with the time limit provided by FOIA, the Project is deemed to have exhausted its administrative remedies with respect to its March 2018 FOIA request. *See* 5 U.S.C. § 552(a)(6)(C)(i).

CAUSE OF ACTION

Violation of the Freedom of Information Act

28. The Project realleges and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.

29. DOJ's failure to make a determination with respect to the Project's March 2018 FOIA request within the applicable time limit violates FOIA, 5 U.S.C. § 552(a)(6)(A)(i).

30. DOJ's failure to release responsive, non-exempt records violates FOIA, 5 U.S.C. § 552(a)(3)(A).

31. Pursuant to FOIA, the Project is entitled to injunctive relief and other remedies.

REQUEST FOR RELIEF

WHEREFORE, the Project respectfully requests that this Court:

A. Order DOJ to conduct a reasonable search for records responsive to the Project's March 2018 FOIA request;

B. Order DOJ to promptly produce all responsive records pursuant to 5 U.S.C. § 552(a)(4)(B) or otherwise justify its withholding in reference to statutory exemptions;

C. Order DOJ to grant a full fee waiver to the Project;

D. Award the Project its costs and reasonable attorneys' fees pursuant 5 U.S.C. § 552(a)(4)(E); and

E. Grant any other and further relief as the Court may deem just and proper.

Respectfully submitted,

PROJECT ON PREDATORY STUDENT
LENDING

/s/ Stephen J. Emedi

Eileen M. Connor (application for admission *pro hac vice* to be submitted)

MA 690938

Toby R. Merrill (application for admission *pro hac vice* to be submitted)

MA 601071

Stephen J. Emedi (application for admission *pro hac vice* to be submitted)

AZ 029814

Legal Services Center of Harvard Law School

122 Boylston Street

Jamaica Plain, MA 02130

semedi@law.harvard.edu

Phone: (617) 522-3003

Fax: (617)522-0715

Jennifer Bennett (application for admission *pro hac vice* to be submitted)

CA 296726

Public Justice

475 14th Street, Suite 610

Oakland, CA 94612

jbennett@publicjustice.net

Phone: (510) 622-8150

Fax: (202) 232-7203

Dated: December 7, 2018

Counsel for Plaintiff