



FIRE

Foundation for Individual
Rights and Expression

February 14, 2023

Sent *Via* USPS Priority Express Mail and Email

David Robinson

Chief Campus Counsel

University of California, Berkeley

Office of the Chancellor

200 California Hall, # 1500

Berkeley, California 94720-1500

dmrobinson@berkeley.edu

Re: Unfulfilled public records request from March 2021

Dear Mr. Robinson:

The Foundation for Individual Rights and Expression (FIRE)¹ writes in the interest of avoiding litigation over a request issued nearly two years ago under the California Public Records Act (PRA) to the University of California, Berkeley. I trust that you are the appropriate recipient for this letter. If you are not, I respectfully request that you direct this letter to the appropriate individual.

I. FIRE Issues Unfulfilled Request for Public Records.

The relevant request relates to the Life Sciences Initiative Committee's use of diversity statements in the faculty hiring process from January 2018 to March 2021.

On March 8, 2021, FIRE issued a request for the following records under the PRA (Cal. Gov't Code §§ 7920.000–7931.000):

- (1) Copies of all statements on contributions to diversity, equity, and inclusion (“diversity statements”) as they were submitted to the Life Sciences Initiative Committee by candidates applying for faculty

¹ Formerly known as the Foundation for Individual Rights in Education, FIRE changed its name on June 6, 2022, to reflect its expanded mission of protecting free expression beyond colleges and universities.

positions at UC Berkeley, from 2018 to the date of this request (as described in this document: https://ofew.berkeley.edu/sites/default/files/life_sciences_initiative_year_end_report_summary.pdf).

- (2) Copies of any records sufficient to indicate which statements were included in an application that was advanced for further review and which were not.
- (3) Copies of any forms or instructions provided to candidates concerning the requirement of completing and submitting a diversity statement as part of the application process.
- (4) Copies of any policies, rules, regulations, guidance, or rubrics concerning the internal review process for evaluating candidates' diversity statements. This request does not seek deliberations over candidates' qualifications.²

The same day, Berkeley's Public Records Office sent an automated reply acknowledging the request and noting that COVID-19 had affected the office's ability to process requests as quickly as normal.³ The Office provided an estimated production time of 10 weeks for all new requests.

As of June 2021, FIRE had still not received any records, nor any additional correspondence from Berkeley. That month, Senior Program Officer Aaron Terr followed up on FIRE's March 8 request by email, asking the Office to provide a date by which it would provide a substantive response.⁴ Berkeley responded with the same automatic email it sent on March 8.⁵

On August 31, Mr. Terr emailed Liane Wong, Berkeley's Records and Subpoena Coordinator, to ask for a date by which it would provide a substantive response.⁶ Ms. Wong never responded. On September 29, 2021, Mr. Terr emailed

² A copy of FIRE's March 8, 2021 public-records request is attached as Exhibit A.

³ A copy of Berkeley's March 8, 2021 response is attached as Exhibit B.

⁴ A copy of FIRE's June 1, 2021 follow-up email is attached as Exhibit C.

⁵ A copy of Berkeley's June 1, 2021 response is attached as Exhibit D.

⁶ A copy of FIRE's August 31, 2021 follow-up email to Liane Wong is attached as Exhibit E.

you directly to inquire about the status of the request,⁷ but never received a response. Mr. Terr emailed Ms. Wong once again on December 1, 2021⁸—more than eight months after FIRE initially filed its request. Again, Ms. Wong failed to reply.

II. Berkeley has violated—and continues to violate—the Public Records Act.

Berkeley failed to follow the PRA procedures an agency must follow when it receives a request for public records.

Upon receiving a request for public records, the Act requires an agency to “determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor” within 10 days. Cal. Gov’t Code § 7922.535(a). Once an agency determines that a request seeks public records within its possession, it must state the estimated time and date when those records will be made available. *Id.*

Now, nearly two years after FIRE issued its initial request, Berkeley has still not made a determination as to whether it has disclosable public records in its possession, nor provided FIRE with a meaningful estimated time and date for record production. Berkeley’s two automatically generated replies estimated that production for all new requests would occur within 10 weeks, but Berkeley failed to provide FIRE with an updated estimate each time its estimated timeframe elapsed.

Not only has Berkeley violated the PRA by declining to follow statutorily mandated procedures in a timely manner, but it has also failed to make records responsive to FIRE’s request “promptly available,” as required by the Act. *See* Cal. Gov’t Code § 7922.530(a). Responsive records are presumed to be subject to required disclosure. *City of San Jose v. Superior Ct.*, 389 P.3d 848, 852 (Cal. 2017) (holding PRA creates “a presumptive right of access to any record created or maintained by a public agency that relates in any way to the business of the public agency”). If Berkeley believes certain information is exempt from disclosure, the university must justify withholding it, either by showing that the information is subject to one of the Act’s express exceptions or that disclosing the information would not serve the public interest. *Id.* § 7922.000. Since Berkeley has not made any

⁷ A copy of FIRE’s September 29, 2021 email to you is attached as Exhibit F.

⁸ A copy of FIRE’s December 1, 2021 follow-up email to Liane Wong is attached as Exhibit G.

attempt to justify withholding information, its failure to disclose presumptively public records constitutes a violation of the PRA.

We would prefer to resolve this matter promptly without the need for further action. However, we caution that FIRE is committed to using all of the resources at its disposal to see this matter to a just conclusion and to uphold the public's "fundamental and necessary right" to access "information concerning the conduct of the people's business." Cal. Gov't Code § 7921.000. This is not an idle threat. FIRE encountered similar issues concerning PRA compliance with the University of California, Los Angeles in 2018, and we ultimately obtained a judgment in our favor in that matter after months of motions practice and discovery. *See Stipulated Judgment, FIRE v. Regents of the Univ. of Cal.*, Case No. 19STCP01033 (Cal. Super. Ct. Oct. 20, 2020). We hope to avoid litigation, but we will not be ignored.

We look forward to receiving the following by close of business on Tuesday, March 7: (1) complete responsive records to our outstanding request and (2) the same records sought in our outstanding request for the period of March 9, 2021, through the present. We trust that Berkeley will take this opportunity to comply with its obligations under the California Public Records Act.

Sincerely,



Greg Greubel*
Attorney



Kelley Bregenzer **
Staff Attorney

FOUNDATION FOR INDIVIDUAL RIGHTS
AND EXPRESSION

510 Walnut St., Suite 1250

Philadelphia, PA 19106

Tel: (215) 717-3473

Greg.Greubel@thefire.org

Kelley.Bregenzer@thefire.org

David Robinson
February 14, 2023
Page 5 of 5

** This attorney is a member of the
California, Iowa, Pennsylvania, and New
Jersey bars.*

***This attorney is a member of the
New York bar.*

cc: Liane Wong, Public Records and Subpoena Coordinator *via* email
(lianewong@berkeley.edu)

Enclosures

Exhibit A

CPRA Request from the Foundation for Individual Rights in Education



Aaron Terr <aaron.terr@thefire.org>
to pra@berkeley.edu

Mar 8 2021

Dear Public Records Officer:

This is a request for the following records pursuant to the California Public Records Act (Gov. Code § 6250 *et seq.*).

Records Requested:

1. Copies of all statements on contributions to diversity, equity, and inclusion (“diversity statements”) as they were submitted to the Life Sciences Initiative Committee by candidates applying for faculty positions at UC Berkeley, from 2018 to the date of this request (as described in this document: https://ofew.berkeley.edu/sites/default/files/life_sciences_initiative_year_end_report_summary.pdf).
2. Copies of any records sufficient to indicate which statements were included in an application that was advanced for further review and which were not.
3. Copies of any forms or instructions provided to candidates concerning the requirement of completing and submitting a diversity statement as part of the application process.
4. Copies of any policies, rules, regulations, guidance, or rubrics concerning the internal review process for evaluating candidates’ diversity statements. This request does not seek deliberations over candidates’ qualifications.

In all of the records requested, any candidates’ names should be redacted.

Fee waiver request: This records request is made on behalf of the Foundation for Individual Rights in Education (FIRE), a nonprofit and nonpartisan organization that works to preserve civil liberties in higher education. We request a waiver of any fees or costs associated with this request. See Gov. Code § 6253(e) (“a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter”); *N. Cty. Parents Org. v. Dep’t of Educ.*, 23 Cal. App. 4th 144, 146 (1994) (agency may waive fees for CPRA request pursuant to statutory language granting agencies power to adopt requirements that allow for “greater access to records than prescribed by the minimum standards set forth in this chapter”).

This request concerns a matter of public interest, namely the criteria used for the evaluation of candidates for faculty positions at a tax-supported public institution. The records are not sought for a commercial or personal interest, but rather for the purpose of providing the public with information concerning civil liberties in higher education.

If a fee waiver is not granted, please apprise me if the estimated costs will exceed \$30. Please also provide a W-9 form.

Request for Privilege Log: If any otherwise responsive documents are withheld on the basis that they are privileged or fall within a statutory exemption, please provide a privilege log setting forth (1) the subject matter of the document; (2) the person(s) who sent and received the document; (3) the date the document was created or sent; and (4) the basis on which the document is withheld.

Please note that this request does not seek a search of faculty or student email accounts or records. These requests should in no way be construed to include a review or search of email accounts, websites, or other forms of data or document retention which are controlled by students, alumni, or faculty members, nor by governmental or advisory bodies controlled by the same. Any search should be limited to documents held by the administration and/or its staff members, including records created or maintained by persons acting in the capacity of administrators or staff members.

If I can be of assistance in interpreting or narrowing this request, please don't hesitate to ask.

Sincerely,

Aaron Terr
Program Officer, Individual Rights Defense Program and Public Records
Foundation for Individual Rights in Education (FIRE)
510 Walnut Street, Suite 1250
Philadelphia, PA 19106
(215) 717-3473
aaron.terr@thefire.org

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Exhibit B

Reduced Operations Due to Coronavirus Pandemic Re: CPRA Request from the Foundation for Individual Rights in Education



UC Berkeley Public Records Office <pra@berkeley.edu>
to aaron.terr@thefire.org

Mar 8 2021

This email acknowledges your Public Record Act request. Please note that the Coronavirus and associated preventative steps (e.g. office closures and/or non-essential UC staff to work remotely) are affecting our office's ability to obtain and review responsive records as quickly as usual. Our estimated date of production for all new requests is ten weeks, although we are sometimes able to provide records in a shorter timeframe. Thank you for your patience during this time. We will be in contact with you as soon as practicable regarding your request.

Public Records Office
University of California, Berkeley

--

Regards,

Liane Wong
Public Records Coordinator

Public Records Office
University of California, Berkeley

Exhibit C

Reduced Operations Due to Coronavirus Pandemic Re: CPRA Request from the Foundation for Individual Rights in Education



UC Berkeley Public Records Office <pra@berkeley.edu>

Mar 8 2021

This email acknowledges your Public Record Act request. Please note that the Coronavirus an...



Aaron Terr <aaron.terr@thefire.org>

Jun 1 2021

to UC Berkeley Public Records Office

Hello,

I am following up on my records request submitted on March 8, 2021.

Is there a date by which I can expect to receive a substantive response?

Thank you,

--

Aaron Terr

Program Officer, Individual Rights Defense Program and Public Records

Foundation for Individual Rights in Education (FIRE)

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Public Records Office
University of California, Berkeley

--

Regards,

Liane Wong
Public Records Coordinator

Public Records Office
University of California, Berkeley

Exhibit E

CPRA Request from the Foundation for Individual Rights in Education



Aaron Terr <aaron.terr@thefire.org>

Mar 8 2021

Dear Public Records Officer: This is a request for the following records pursuant to th...



Aaron Terr <aaron.terr@thefire.org>

Aug 31 2021

to lianewong@berkeley.edu

Dear Liane Wong:

I am following up on the public records request below that I submitted on March 8, 2021. Is there a date by which I can expect to receive a substantive response to this request?

Thank you.

Sincerely,
Aaron Terr

----- Forwarded message -----

From: **Aaron Terr** <aaron.terr@thefire.org>

Date: Mon, Mar 8, 2021 at 11:21 AM

Subject: CPRA Request from the Foundation for Individual Rights in Education

To: <pra@berkeley.edu>

Dear Public Records Officer:

This is a request for the following records pursuant to the California Public Records Act (Gov. Code § 6250 *et seq.*).

Records Requested:

1. Copies of all statements on contributions to diversity, equity, and inclusion (“diversity statements”) as they were submitted to the Life Sciences Initiative Committee by candidates applying for faculty positions at UC Berkeley, from 2018 to the date of this request (as described in this document: https://ofew.berkeley.edu/sites/default/files/life_sciences_initiatve_year_end_report_summary.pdf).
2. Copies of any records sufficient to indicate which statements were included in an application that was advanced for further review and which were not.
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4. Copies of any policies, rules, regulations, guidance, or rubrics concerning the internal review process for evaluating candidates’ diversity statements. This request does not seek deliberations over candidates’ qualifications.

In all of the records requested, any candidates’ names should be redacted.

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This request concerns a matter of public interest, namely the criteria used for the evaluation of candidates for faculty positions at a tax-supported public institution. The records are not sought for a commercial or personal interest, but rather for the purpose of providing the public with information concerning civil liberties in higher education.

If a fee waiver is not granted, please apprise me if the estimated costs will exceed \$30. Please also provide a W-9 form.

Request for Privilege Log: If any otherwise responsive documents are withheld on the basis that they are privileged or fall within a statutory exemption, please provide a privilege log setting forth (1) the subject matter of the document; (2) the person(s) who sent and received the document; (3) the date the document was created or sent; and (4) the basis on which the document is withheld.

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Exhibit F



Aaron Terr <aaron.terr@thefire.org>
to dmrobinson@berkeley.edu

Sep 29 2021

Dear David Robinson:

I am writing to follow up on the below public records request submitted on March 8, 2021, on behalf of the Foundation for Individual Rights in Education. I initially received an automated response stating that the estimated time of production would be 10 weeks. It has now been almost 30 weeks, and I have not received a substantive response. On August 31, I reached out to the Public Records Coordinator to inquire about the status of the request, but that email went unanswered.

Can you please update me on the status of the request and let me know a date by which I can expect to receive any responsive records?

Thank you.

Sincerely,
Aaron Terr

----- Forwarded message -----

From: **Aaron Terr** <aaron.terr@thefire.org>
Date: Tue, Aug 31, 2021 at 9:48 AM
Subject: Fwd: CPRA Request from the Foundation for Individual Rights in Education
To: <lianewong@berkeley.edu>

Dear Liane Wong:

I am following up on the public records request below that I submitted on March 8, 2021. Is there a date by which I can expect to receive a substantive response to this request?

Thank you.

Sincerely,
Aaron Terr

----- Forwarded message -----

From: **Aaron Terr** <aaron.terr@thefire.org>
Date: Mon, Mar 8, 2021 at 11:21 AM
Subject: CPRA Request from the Foundation for Individual Rights in Education
To: <pra@berkeley.edu>

Dear Public Records Officer:

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If a fee waiver is not granted, please apprise me if the estimated costs will exceed \$30. Please also provide a W-9 form.

Request for Privilege Log: If any otherwise responsive documents are withheld on the basis that they are privileged or fall within a statutory exemption, please provide a privilege log setting forth (1) the subject matter of the document; (2) the person(s) who sent and received the document; (3) the date the document was created or sent; and (4) the basis on which the document is withheld.

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Sincerely,

Aaron Terr
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Exhibit G



Aaron Terr <aaron.terr@thefire.org>
to lianewong@berkeley.edu

Dec 1 2021

Hello,

I am following up again on the below public records request, as it has been over 8 months since I submitted the request, and I still have not received a substantive response.

Can you please update me on the status of this request and when I can expect to receive responsive records?

Thank you.

Sincerely,
Aaron Terr

On Tue, Aug 31, 2021 at 9:48 AM Aaron Terr <aaron.terr@thefire.org> wrote:

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