

*Judge
Assigned to Steven Sharpe*

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STATE OF WYOMING
COUNTY OF LARAMIE

RODGER MCDANIEL and
GEORGE E. POWERS, JR.,

Plaintiffs,

vs.

WYOMING DEPARTMENT OF EDUCATION,
LINDA FINNERTY, Communication Director,
Wyoming Department of Education, and BRIAN
SCHROEDER, former Superintendent of Public
Instruction, Wyoming Department of Education

Defendant.

FILED
MAR 03 2023

DIANE SANCHEZ
CLERK OF THE DISTRICT COURT

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FEB 28 2023
DIANE SANCHEZ
CLERK OF THE DISTRICT COURT~~

IN THE DISTRICT COURT

FIRST JUDICIAL DISTRICT

Civil Action No. 2023-CV-0301262

COMPLAINT AND PETITION FOR ACCESS TO PUBLIC RECORDS

COMES NOW the Plaintiffs, Rodger McDaniel ("McDaniel") and George E. Powers, Jr. ("Powers") (collectively the "Plaintiffs") and for their Complaint against Defendants do hereby state and allege as follows:

1. The Plaintiffs are citizens of the State of Wyoming and are acting in their individual capacity as citizens of the State of Wyoming. Each Plaintiff is acting pro se.
2. The Defendants are more specifically described as follows:

- a. The Wyoming Department of Education ("WDE") is an agency of the State of Wyoming, which acts in furtherance of its statutory and other official functions and public purposes through the acts and omissions of its agents, officers and employees, including but not limited to the Superintendent of Public Instruction and the Communications Director of the WDE.
 - b. Linda Finnerty ("Finnerty") is and, at all times relevant to this matter, was the Communications Director of the WDE. All the alleged acts and omissions of Finnerty occurred while she was acting within the scope of her duties as an agent, officer and/or employee of the WDE. At all times relevant hereto, Finnerty was acting in furtherance of her official function and otherwise transacting public business as Communications Director of the WDE
 - c. Brian Schroeder ("Schroeder") was the Superintendent of Public Instruction from February 4, 2022 until January 2, 2023. All the alleged actions and omissions of Schroeder occurred while he was acting within the scope of his duties as Superintendent of Public Instruction and as an agent, officer and/or employee of the WDE. At all times relevant hereto, Schroeder was acting in furtherance of his official function and otherwise transacting public business as Superintendent of Public Instruction.
3. This Court has jurisdiction over the subject matter of this action pursuant to W.S. § 16-4-202(c)(v), § 16-4-203(f), § 16-4-205 and/or Article 5, Section 10 of the Wyoming Constitution.
 4. This Court has jurisdiction over the person of both Plaintiffs and all Defendants.

FACTUAL SUMMARY OF CLAIMS

5. On or before September 13, 2022, Schroeder conceived a plan to promote and organize a public meeting about the so-called “sexualization” of school children and gender issues in public education. In furtherance of this plan, Schroeder initiated contact with Elena Fishbein (Fishbein”), President of No Left Turns in Education (“NLTE”), regarding documents that Fishbein had sent to Attorney General Merrick Garland and that Schroeder had reviewed.
6. Following this initial contact Schroeder continued to develop and expand upon plans for this public meeting in coordination with Fishbein, NLTE, Moms for Liberty, other individuals and groups, acting in his capacity as Superintendent of Public Instruction and using WDE personnel and resources. Based on information and belief, these plans included conferences and communications, including but not limited to emails, text messages and other physical and electronic correspondence, regarding proposed agendas, speakers, locations and logistics for this planned public meeting. Schroeder communicated with WDE personnel regarding his plans and authorized WDE personnel to use state facilities, resources and state funds to develop, organize and stage the planned meeting. Schroeder specifically authorized WDE personnel to use state funds to defray travel, lodging and other expenses for representatives of NLTE and for other purposes in support of his plan.
7. On or about October 14, 2022, Schroder emailed forty-four (44) selected Wyoming legislators with an invitation to attend a meeting to be held in Cheyenne, Wyoming on October 25, 2022. *A copy of the invitation addressed to Wyoming State Senator Lynn Hutchings is attached hereto as Exhibit 1.*
8. On or about October 16, 2022, Plaintiffs learned of a flyer that had been published and circulated by unknown parties concerning an event, billed as a “press conference” to be

held by Schroeder on October 25, 2022, at the Emerson Building in Cheyenne Wyoming (the “Event”). A true and accurate copy of this flyer is attached as **Exhibit 2**.

9. Upon learning of the plans for this Event, McDaniel sent a written request for public records to the WDE on October 16, 2022. *A true and accurate copy of McDaniel’s public record request is attached as Exhibit 3.*
10. Upon learning of the plans for this Event, Powers sent an email request for information about the Event to Schroeder through the WDE’s “askthesuperintendent” portal on October 16, 2022. Thereafter, when no response was received, Powers repeated his requests in an email to Finnerty on October 19, 2022. *A true and accurate copy of this email is attached as Exhibit 4.*
11. Finnerty acknowledged receipt of McDaniel’s public record request on October 20, 2023, when she wrote: “

I am in receipt of your public records request. You are requesting copies of any correspondence, emails, text messages, contracts or other written information relating to the appearance of Dr. Elana Fishbein in Cheyenne on or about October 25. You also requested any information detailing the source of funds used to pay her expenses or honoraria or any other cost for her to come to Wyoming.

12. On or about October 19, 2022, the WDE issued a statement to the public media regarding the Event. Although the Schroeder and the WDE had previously represented that state funds and state facilities would be used to promote and produce the Event, the WDE now represented that “no state funds will be used in connection with this event.” The statement read as follows:

Statement Regarding October 25, 2022 Event:

Superintendent Schroeder strongly believes that parents are the sole authority when it comes to teaching their children about sex and gender

identity. Further, the Superintendent is greatly concerned about the actions of teachers who are circumventing parental authority and imposing their personal views of sex and gender ideology on children without parental consent or notification. Even further, the Superintendent intends to give voice to the vast majority of Wyoming parents who believe that school libraries are not the place for sexually graphic material.

Although the Superintendent believes it is well within his duties as State Superintendent, he has decided to separate the press conference from the Wyoming Department of Education. No state funds will be used in connection with this event and the final venue for the press conference is yet to be determined.

The Superintendent wants the focus of the discussion to be on the issue of parental authority and standing up against the inappropriate sexualization of Wyoming's children.

This statement contained material misrepresentations of fact. State funds had already been committed to defray expenses incurred in connection with the Event.

13. Thereafter Powers and Schroeder exchanged additional emails regarding the Event on October 20, October 21, October 25, October 26, and October 29, 2022. *A true and accurate copy of the email string generated by this exchange is attached as Exhibit 5.*

14. The Event occurred on October 25, 2022 at Little America. Schroeder was the host of the Event and made opening remarks, which included the following statement:

According to Wyoming Statute 21-2-201, the general supervision of the public schools shall be entrusted to the state superintendent. The issue that we're addressing here today clearly falls under the general supervision of the Superintendent of Public Schools here in Wyoming.

This Event was planned, organized, promoted, sponsored and staged by Schroeder and the WDE in furtherance of Schroeder's official function and the transaction of public business as Superintendent of Public Instruction.

15. Speakers, who appeared at the Event by prior invitation of Schroeder, included a) three parents of school children from Jackson, Casper and Cheyenne, b) three representatives of NLTE, including Fishbein, and c) three members of the Wyoming legislature.
16. Schroeder spoke to members of the news media after the “press conference” portion of the Event and reportedly told representatives of The Cowboy Daily and/or the Casper State Tribune that the planning for this event had begun four to six weeks earlier with the help of unnamed members of the “Moms for Liberty.” Schroeder also stated to media representatives that the original plan to use state funds for the Event had been changed and that the Event was funded only by a combination of private contributions from unnamed persons and his personal funds.
17. At the conclusion of the “press conference” portion of the Event, Schroeder met with unknown persons for an additional meeting at which Schroeder, legislators, parents, Fishbein and two of her associates had further discussions and interactions concerning strategy, policy, the law and future legislation.
18. On October 25, 2023 Schroeder responded by email to a request from Powers’ for information concerning the identity of any persons who may have made any private contributions or donations to pay for the expenses of the Event. Although Schroeder said that he would check to see whether he could “divulge” that information, he later wrote on October 29, 2023, and said, “By way of follow-up, I did check on that and have learned that I am not required to reveal who the private donors are. Given this was a private event, I will respect the requested anonymity of donors who are contributing to defray the costs of this event.” Schroeder offered no further explanation why this requested information would be privileged and non-disclosable. See Exhibit 5.

19. On November 10, 2022, the WDE responded to McDaniel's October 16 request for public records. *A copy of the WDE response (without attachments) is included and incorporated in the email string attached hereto as Exhibit 6.* Although planning for the Event had started on or before September 13, 2023, the earliest public record produced by the WDE in response to McDaniel's request was an email of October 11, 2022 from Finnerty to Schroeder transmitting the concerns and recommendations of the senior staff at WDE regarding the planning for the Event. *A copy of this email is attached as Exhibit 7.*
20. Included in the attachments produced by the WDE was an October 12, 2023 email regarding the Event that Schroeder had sent from his WDE email address to his personal email address, bschroeder081858@gmail.com. Attached to this email was a copy of a public record document from the WDE file, to wit: Finnerty's email of October 11, 2022 (*see Exhibit 7, supra*). *A copy of Schroeder's email is attached as Exhibit 8.*
21. On November 23, 2022, the WDE supplemented its response to include two text messages. *A copy of this supplemental response is included in the email string previously attached as Exhibit 6, supra.*
22. On December 2, 2022, McDaniel sent a letter to Finnerty and the WDE, explaining why the WDE responses to his request for public records were inadequate, incomplete and non-compliant with the requirements of the Wyoming Public Records Act ("WPRA"), W.S. §§ 16-4-201 *et seq.* McDaniel provided a detailed explanation of the materials that needed to be collected and produced regarding the planning, organizing and funding for the Event, including but not limited to public records that were located or stored on Schroeder's private email and text messaging accounts. *A copy of McDaniel's letter is attached as Exhibit 9.*

23. Finnerty acknowledged receipt of McDaniel's letter on December 6, 2023 and said that the WDE would "respond accordingly."

24. On January 1, 2023, Finnerty responded on behalf of the WDE to McDaniel's letter. *A copy of Finnerty's response (without attachments) is attached as Exhibit 10.*

25. Once again, the response of the WDE to the request for public records was inadequate, incomplete and non-compliant with the requirements of the Wyoming Public Records Act ("WPRA"), W.S. §§ 16-4-201 *et seq.* Specific failures included, but may not be limited to the following:

- a. Despite a specific request for any public records concerning the Event that may have been on Schroeder's private email and text messaging accounts, the WDE simply said that it did not have access to Schroeder's personal email or text accounts. This statement was false. Any public records in these locations were in the custody and control of the WDE at the time this request was made and at the time of the WDE's responses.
- b. Although Schroeder had represented that the Event had been organized with the assistance and participation of Moms for Liberty, there were no documents reflecting communications with representatives of Moms for Liberty.
- c. Although Schroeder had scheduled and participated in at least two video conferences with Fishbein and possibly with other representatives of NLTE and although three representatives of NLTE attended the Event, there were no records of any communications between Schroeder and any representative of NLTE.
- d. There were no documents regarding any communications within the WDE concerning the contradictory communications that had been issued by the WDE

regarding the Event or regarding the decision of the WDE to alter its public posture concerning the funding and sponsoring of the Event as reflected in the statement issued on October 19, 2022. *See ¶ 12, supra.*

- e. Although McDaniel made a specific request for any and all communications concerning any emails that had been exchanged between Schroeder and Powers following Powers' initial email of October 16, 2022 (*see Exhibit 5, supra*), the WDE falsely stated "The Superintendent did not respond to that email, it stopped with the forward." Finnerty and the WDE should have known that this statement was false, since Finnerty was copied on several of the emails exchanged between Powers and Schroeder. Moreover, although Schroeder had reported that he communicated with others concerning Powers' emails, no records of any such communication or consultation were provided.
- f. There were no records produced relating to the funding or the event through the use of state funds or through other private sources. In fact, the WDE falsely represented that "There are no further records for this request." In fact, Finnerty knew or should have known that this representation was false, since she had approved the use of state funds to purchase plane tickets for the NLTE representatives on November 1, 2023. Finnerty had also approved charges for motel reservations that had been made for NLTE representatives on November 30, 2023.
- g. There were no materials or records regarding the invitations and communications that Schroeder had with the parents, who appeared and spoke at the Event. Again, the WDE falsely represented that it did not have access to such materials.

- h. There were no records or materials relating to the luncheon and meeting of Schroeder, representatives of NLTE, parents and legislators that followed on the heels of the “press conference” portion of the Event. The WDE represented that it did not have access to such materials.

26. On January 23, 2023, McDaniel and Powers sent a joint letter to the WDE. *A copy of this letter with attachments is attached as Exhibit 11.* McDaniel and Powers provided the WDE with a detailed description and analysis of the prior communications relating to the requests for public records and information about the event. They directed specific attention to the numerous gaps in the responses of the WDE as well as to misstatements and misrepresentations contained in the WDE responses. McDaniel and Powers set a deadline of February 6, 2023 for any further response.

27. The WDE did not respond before the February 6, 2023 deadline had lapsed. Powers and McDaniel sent a follow up email on February 7, 2023. Thereafter Finnerty contacted Powers and sent an email promising further responses on or before February 10, 2023. *A copy of the email string exchanged between Powers and Finnerty is attached as Exhibit 12.*

28. On February 10, 2023, Finnerty and the WDE responded to the letter from McDaniel and Powers. *A copy of this response is attached as Exhibit 13.* This response was notable for several reasons:

- a. Although the WDE had previously represented that no state funds had been used to pay for the Event and had denied having any records or information about how the Event had been funded, this response included some limited financial records relating to the event and documenting that state funds had in fact been used to fund

expenses incurred in connection with the event. However, the WDE and Schroeder still have not produced any records regarding the expenses incurred in connection with the rental of facilities at Little America or other expenses incurred in connection with the event.

- b. The WDE had previously represented that it did not have access to any public records that may have been sent to or from Schroeder's personal email and/or text message accounts. However, when McDaniel and Powers challenged that assertion and cited the WDE's failure to give timely notice concerning any alleged lack of access as required by W.S § 16-4-202(b), the WDE offered this explanation for its failure:

On the third page of your recent letter to the Department, you appear to take issue with the fact that the Department did not notify you or Mr. McDaniel that records were not in its custody and control as required by Wyo. Stat. Ann. § 16-4-202(b). Specifically, you are referring to records that may be stored on former Superintendent Brian Schroeder's personal cell phone and email account. As an initial matter, the Department cannot opine about whether any records stored in those locations constitute public records under the public records act because no current Department employee, or its counsel, has been provided any records or has been able to make that assessment.

At the time of that request, and until January 2, 2023, any public records in those locations were in the custody and control of the Superintendent of Public Instruction. The Superintendent is legally indistinguishable from the Department, so the records were, in fact, in the Department's custody and control at that time and no obligation to notify you under that statutory provision arose.

As of January 2, 2023, however, Brian Schroeder no longer occupied the office of Superintendent of Public Instruction. To the extent his personal accounts or devices contain public records, those records are not in the custody and control of the Department. [Emphasis supplied.]

- c. The WDE has acknowledged and admitted that any public records stored on Schroeder's personal accounts were in fact public records and that such records were within the WDE's custody and control at the time of the request and at the time of its response. The WDE ignored its duty to identify, secure and produce these public records, when they were within their custody and control. WDE has no excuse for not collecting and including these materials in its earlier responses. The WDE cannot excuse its failure to identify and secure these materials in response to prior public record requests.
- d. Aside from the limited financial records that were belatedly produced more than three months after McDaniel's original request documenting that WDE had funded travel and lodging expenses for the NLTE representatives, the WDE did not produce any additional materials concerning the Event. The WDE also failed to address the numerous other false representations in the WDE's prior responses as well as the other issues raised in the January 23, 2022 letter.

29. All the materials and records that have been requested by McDaniel and Powers in their communications with Schroeder and the WDE are "public records," as defined by W.S. § 16-4-201(a)(v).

30. W.S § 16-4-203(a) states that the "custodian of any public records shall allow any person the right of inspection of the records or any portion thereof" unless the records fall within the exceptions set forth in the WPRA.

31. W.S § 16-4-202(b) states:

If the public records requested are not in the custody or control of the governmental entity to whom application is made, the designated public records person shall notify the applicant within seven (7) business days from the date of acknowledged receipt of the request of the unavailability of the

records sought and provide the name and contact information of the appropriate designated public records person if known.

32. W.S. § 16-4-202(c) states:

If the public records requested are in the custody and control of the governmental entity to whom application is made, the following shall apply:

(i) If the records are in active use or in storage, therefore not available at the time an applicant asks to examine them, the designated public records person shall immediately forward the request to the custodian or authorized person having personal custody and control of the public records and shall notify the applicant of this situation within seven(7) business days from the date of acknowledged receipt of the request;

(ii) If a public record is readily available, it shall be released immediately to the applicant so long as the release does not impair or impede the governmental entity's ability to discharge its other duties;

(iii) All public records shall be released not later than thirty (30) calendar days from the date of acknowledged receipt of the request unless good cause exists preventing release as authorized by paragraph (iv) of this subsection;

(iv) If good cause exists preventing release within the time period specified in paragraph (iii) of this subsection, the public records shall be released on a specified date mutually agreed to by the applicant and the governmental entity. If a release date cannot be agreed upon, the applicant may file a complaint with the ombudsman as provided by paragraph (v) of this subsection;

(v) The applicant may at any time file a complaint with an ombudsman designated by the governor or may petition the district court for a determination as to whether the custodian has demonstrated good cause. In determining whether good cause existed, the ombudsman or district court may consider whether the records are privileged or confidential by law or whether release of the records impairs or impedes the governmental entity's ability to discharge its other duties. The ombudsman or the district court shall review the records in camera and determine whether redaction of privileged or confidential information would permit release of the records.

29. W.S. § 16-4-203(f) states:

(f) Any person aggrieved by the failure of a governmental entity to release records on the specified date mutually agreed upon pursuant to W.S. 16-4-202(c)(iv) or by the failure of a governmental entity to comply with an order of the ombudsman pursuant to W.S. 16-4-202(c)(v) may:

(i) Apply to the district court of the district wherein the record is found for an order to direct the custodian of the record to show cause why he should not permit the inspection of the record and to compel production of the record if applicable.

30. W.S. § 16-4-203(f) states:

(f) Any person aggrieved by the failure of a governmental entity to release records on the specified date mutually agreed upon pursuant to W.S. 16-4-202(c)(iv) or by the failure of a governmental entity to comply with an order of the ombudsman pursuant to W.S. 16-4-202(c)(v) may:

(i) Apply to the district court of the district wherein the record is found for an order to direct the custodian of the record to show cause why he should not permit the inspection of the record and to compel production of the record if applicable.

31. W.S. § 16-4-205 states:

Any person who knowingly or intentionally violates the provisions of this act is liable for a penalty not to exceed seven hundred fifty dollars (\$750.00). The penalty may be recovered in a civil action and damages may be assessed by the court.

32. The Defendants have failed or otherwise refused to provide Plaintiffs with access to public records without good cause and are in violation of the WPRA. Moreover, the failure of the WDE, Schroeder and Finnerty to provide the requested public records has been done knowingly and intentionally. Defendants' refusal to provide Plaintiffs with access to the responsive public records justifies an award of penalties and damages in addition to an order requiring Defendants to immediately produce full and complete responses to the Plaintiffs' request without further delay or cost to Plaintiffs.

33. The WDE has admitted that it had legal access and control over any public records that may have been generated and/or stored on any private email or text account of Schroeder. In responding to Plaintiffs' requests for public records, the WDE had a duty to access and review those accounts and a duty collect and produce any responsive public records in preparing its responses to Plaintiffs' requests.

34. Schroeder had a duty a) to preserve any public records on his private accounts b) to cooperate with the WDE representatives assigned to collect and produce the responsive public records and c) to provide access to his private accounts sufficient to enable the WDE to discharge its duties under the WPRA.

WHEREFORE Plaintiffs pray that this Court enter its order granting judgment in favor of the Plaintiffs and awarding Plaintiffs relief as follows:

a) an order requiring Defendants to fully and properly produce all responsive public records relating to the Event, including but not limited to all public records generated and/or maintained by the WDE, Finnerty and/or by Schroeder on any public or private electronic account for email and/or text messages;

b) an order requiring the Defendants all responsive records relating to any communications by any Defendant with any person or organization regarding the Event, including but not limited to communications with employees, representatives or agents of the WDE, employees, representatives or agents of NLTE, employees, representatives or agents of the Moms for Liberty, members of the Wyoming Legislature;

c) an order requiring the Defendants to produce complete records of all expenses incurred in connection with the Event and all funds used to pay those expenses, including all state funds as well as all private funds and/or donations;

d) an order requiring Defendants to produce all other materials responsive to the requests outlined in the original request of McDaniel as well as the subsequent correspondence from McDaniel and Powers;

e) an award of penalties and damages caused by Defendants' knowing or intentional failure to produce public records in compliance with the WPRA; and

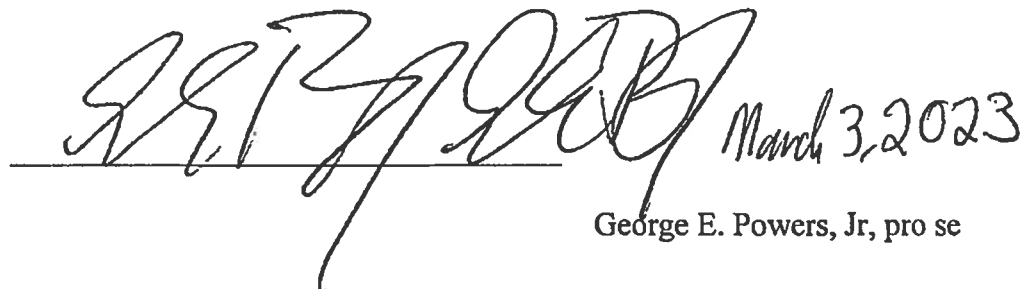
f) awarding Plaintiffs their costs incurred in pursuing this action; and

g) awarding such other and further relief as may be just and proper in the premises.

DATED this 27th day of February 2023.



Rodger McDaniel, pro se



George E. Powers, Jr, pro se