

Douglas H. Wigdor

REDACTED

May 11, 2020

VIA EMAIL

Dan Schwager, Esq.
General Counsel
Office of the Secretary of the Senate
United States Senate
Washington, D.C. 20510

Re: Tara Reade

Dear Dan:

As you know, we represent Tara Reade in connection with her request for a copy of the request for counseling intake form that she submitted to the Office of Senate Fair Employment Practices (the “OSFEP”) in 1993 concerning her allegations of workplace discrimination and harassment against Vice President (then Senator) Joseph R. Biden, Jr. (the “Request for Counseling” or the “Request”). We write in response to your email dated May 8, 2020 (the “May 8, 2020 Correspondence”), appended hereto as Exhibit 1, in which you state that the Office of the Secretary of the Senate (the “Secretary”) has “no discretion” to reproduce a copy of Ms. Reade’s Request to her.

By way of brief background, you and I spoke on May 8, 2020 in connection with Ms. Reade’s request for a copy of her Request for Counseling. Ms. Reade has described her Request as an “intake form” that she recalls filling out at the Senate personnel office in 1993 after a disturbing interaction she had had with Vice President Biden, at whose Senate office she then worked. As Ms. Reade recalls, the Senate personnel office did not provide her with a copy of her Request, nor did Ms. Reade make a copy of this document. Significantly, it is our understanding that **no further action whatsoever** was taken in furtherance of Ms. Reade’s Request for Counseling – not even a follow-up phone call to her. Rather, as Ms. Reade recalls, within weeks of submitting her Request for Counseling, Vice President Biden’s then-Senate office inexplicably stripped Ms. Reade of her responsibilities, and soon after terminated her employment.

It bears noting that Vice President Biden has recently requested that the Secretary disclose information related to Ms. Reade’s Request for Counseling. See Exhibit 2. However, it is obvious that Vice President Biden’s belated request was disingenuous and sent knowing full well that the Senate (as it has) would defer to antiquated and vague rules and procedures to keep the contents of

Ms. Reade's Request hidden from the public eye,¹ and protect a former, over 30-year Senate member.

During our phone call, you specifically advised me that the Government Employee Rights Act of 1991, Title III of the Civil Rights Act of 1991, 2 U.S.C. § 1201 *et seq.* (the "GERA") prohibits the Secretary from reproducing a copy of Ms. Reade's Request to her. You then followed up by advising me in your May 8, 2020 Correspondence that your office has consulted with Senate Legal Counsel "who reviewed the relevant statute governing the records" of the OSFEP, *i.e.*, the GERA, and that Senate Legal Counsel has advised that the Secretary has "no discretion to disclose any such information." See Exhibit 1. You also advised that you "are not aware of any exceptions in law authorizing our office to disclose any such records that do exist, if any, even to original participants in a matter." Id.

We have reviewed the relevant provisions of the GERA, in particular Section 313 which pertains to the confidentiality of OSFEP's records (see 2 U.S.C. § 1213²), as well as OSFEP's Rules of Procedure at the time of Ms. Reade's Request for Counseling. See Authority and Rules of Senate Committees, 1993-94, published by the 103d Congress, Doc. No. 103-3 (the "Rules"). Your position that the Secretary is prohibited by statute from disclosing Ms. Reade's Request for Counseling is without merit and not supported by the express provisions of GERA or the applicable Senate rules.

Notwithstanding the utter lack of any statutory or legal basis authorizing the Secretary's refusal to disclose Ms. Reade's Request for Counseling which we detail below, the plain fact remains that *both* Ms. Reade and Vice President Biden have requested that Ms. Reade's Request be released. This begs the question: *whose "confidentiality" is being protected by the Secretary's refusal to disclose Ms. Reade's Request for Counseling?* Indeed, we are in a time when both the public and lawmakers demand transparency and accountability when it comes to complaints of workplace harassment, discrimination and retaliation. The Senate should not rely (albeit incorrectly) on draconian confidentiality provisions enacted decades ago to conceal the truth about Ms. Reade's

¹ Indeed, in a recent interview on MSNBC's "Morning Joe" program, Vice President Biden refused to permit his archives of Senate papers held at the University of Delaware to be searched simply to look for a copy of Ms. Reade's Request for Counseling. See <https://www.usatoday.com/story/news/politics/elections/2020/05/04/senate-secretary-replies-biden-request-release-tara-reade-record/3077373001/> (last accessed May 11, 2020).

² Ms. Reade's 1993 Request for Counseling was filed before the statute that replaced Section 313 of the GERA – 3 U.S.C. § 401 *et seq.* – came into effect in 1996, and thus her Request is governed by Section 313's provisions. See 3 U.S.C. § 471, Pub. L. 104-331, § 5(a), Oct. 26, 1996, 110 Stat. 4072.

allegations against Vice President Biden from the public. The Senate's position is particularly gratuitous where both Ms. Reade and Vice President Biden want this information released.

If further bears noting that Ms. Reade's Request for Counseling was written and submitted to the OSFEP *by her* – sheer common sense dictates that the Secretary, at minimum, reproduce to Ms. Reade a copy of a document that she herself authored and submitted to OSFEP.

Turning to the relevant law, Section 313, states, in pertinent part, that “[a]ll *counseling* shall be strictly confidential except that the Office and the employee may agree to notify the head of the employing office of the allegations.” See 2 U.S.C. § 1213(a) (emphasis added). While the term “counseling” is not defined in the statute, OSFEP's Rules expressly distinguish between the “Commencement of Procedures” (see Rule 4) and OFSEP's “Counseling Procedures” (see Rule 5). To that end, Rule 5 defines “counseling” as the “period for discussion, evaluation and guidance aimed at assisting the employee to resolve the matter at issue” (Rule 5.1), and advises that “counseling *commences* with a request for counseling filed under Rule 4.” Rule 5.2 (emphasis added). However, since it is our understanding that OFSEP took absolutely no action – and certainly did not engage in any “discussion, evaluation [or] guidance aimed at assisting [Ms. Reade] to resolve the matter” – in furtherance of Ms. Reade's Request for Counseling once it was submitted, no *counseling* ever occurred. As such, Ms. Reade's Request for Counseling falls outside of the scope of “counseling” records that are purportedly “confidential” pursuant to Section 313 or the Rules.

Notably, while Rule 5.5 states that “information or records relating to the *counseling* of an employee under this Rule shall not be disclosed to anyone outside the Office in whole or in part or by way of summary” (Rule 5.5 (emphasis added)), no where in the Rules, including anywhere in Rule 4, is it stated that an employee's mere *request for counseling* is confidential, much less that it cannot be reproduced to the complaining employee.


Likewise, Section 313 further states that “[t]he records and decisions of hearing boards, and the decisions of the Select Committee on Ethics, may be made public if required for the purpose of judicial review under section 1209³ of this title.” See 2 U.S.C. § 1213(e). However, because Ms. Reade's Request for Counseling did not proceed past the initial request filing stage and, therefore, never reached any “hearing board” or the “Select Committee on Ethics,” her Request for Counseling also does not constitute a “record” of a “hearing board” or “decision of the Select Committee on Ethics” which would arguably be “confidential” pursuant to 2 U.S.C. § 1213(e).

³ Section 1209 pertains to an aggrieved party's ability to petition the United States Court of Appeals for the Federal Circuit for a review of a “final decision” made by the OSFEP's Select Committee on Ethics. 2 U.S.C. § 1209(a). Here, Ms. Reade's Request for Counseling never reached the “counseling” stage, much less a “final decision” by the Select Committee on Ethics, rendering Section 1209 inapplicable.

Accordingly, because there is in fact no prohibition in the law against reproducing Ms. Reade's Request for Counseling to her, your claim that you "are not aware of any exceptions in law authorizing [y]our office to disclose any such records ... even to original participants in a matter" is, with all due respect, disingenuous. To put it simply, there is no basis, either in law, equity or common sense, for the Secretary to refuse to reproduce a copy of Ms. Reade's Request for Counseling to her.

As such, we respectfully renew Ms. Reade's request for the immediate production of a copy of her 1993 Request for Counseling filed with OSFEP. Please do not hesitate to contact me if you have any questions.

Sincerely,



Douglas H. Wigdor

Enc.

Exhibit 1

REDACTED

From: Schwager, Dan (Secretary) <REDACTED >
Sent: Friday, May 8, 2020 1:34 PM
To: Douglas Wigdor <REDACTED >
Subject: This afternoon's phone call

Doug,

Thanks for your call this afternoon. As we discussed, our office has consulted with Senate Legal Counsel, who reviewed the relevant statute governing the records of the Office of Senate Fair Employment Practices: the Government Employee Rights Act of 1991, title III of the Civil Rights Act of 1991, Pub. L. No 102-166, 105 Stat. 1088-1099. Based on the law's strict confidentiality requirements (Section 313) and the Senate's own direction that disclosure of Senate Records is not authorized if prohibited by law (Senate Resolution 474, 96th Congress, Section 3(a)), Senate Legal Counsel advises that the Secretary has no discretion to disclose any such information. We're also advised by Senate Legal Counsel that disclosing even the existence of such specific records would amount to a prohibited disclosure under the Government Employee Rights Act of 1991. Furthermore, we are not aware of any exceptions in law authorizing our office to disclose any such records that do exist, if any, even to original participants in a matter.

You also asked about the how that office operated with regard to records, and so I'm attaching the rules and procedures of the Office as published by the Senate in the 103rd Congress.

Again, thank you for reaching out to us in lieu of our conversation with your client in response to her phone call this past Monday. Please do let me know if you have any further questions.

Best regards,

- Dan

Dan Schwager
General Counsel
Office of the Secretary of the Senate
United States Senate
REDACTED

Exhibit 2

JOSEPH R. BIDEN, JR.

May 1, 2020

Julie E. Adams
Secretary of the Senate
United States Senate
Washington, D.C. 20510

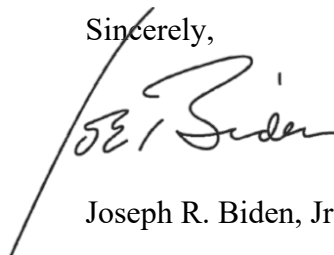
Dear Secretary Adams,

I am writing to request your assistance in determining whether 27 years ago a staff member in my United States Senate office filed a complaint alleging sexual harassment. According to public reports, the staff member, Ms. Tara Reade, has stated that in 1993 she filed such a complaint with the office responsible for enforcing Senate employees' rights in the workplace.

We had understood that the Senate stores records from this office, and from this period, in the National Archives. The Archives now states that the records would have remained under the control of the Senate.

Accordingly, I request that you take or direct whatever steps are necessary to establish the location of the records of this Office, and once they have been located, to direct a search for the alleged complaint and to make public the results of this search. I would ask that the public release include not only a complaint if one exists, but any and all other documents in the records that relate to the allegation.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe Biden", is written over a diagonal line that extends from the bottom left towards the top right.

Joseph R. Biden, Jr.