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April 5, 2022

Delivery Via Email

Fairfax County School Board
c/o, John Foster, Division Counsel
8115 Gatehouse Road
Falls Church, Virginia 22042

Re: Freedom of Information Act Request 6097
Spooner v. Fairfax County School Board, GV-22004104-00

Dear Mr. Foster and Members of the School Board:

This letter is a follow-up to a hearing yesterday in the Fairfax County General District Court regarding the matters identified above.

A. Background Information

On November 17, 2021, I made a request under the Virginia Freedom of Information Act ("FOIA") for records relating to a presentation made by Ibram X. Kendi to personnel of the Fairfax County public school system on August 6, 2020, including the videotape of that session. My request for a copy of the videotape was denied on January 10, 2022. I then filed a petition in the Fairfax County General District Court, challenging the denial.

The basis for the School Board's decision was a contract between the Board and Kendi. The contract specified that the Board would not record the event without Kendi's permission and that Kendi would have all intellectual property rights in the portion of the event in which he appeared. An addendum to the contract stated that the Board could record the session, but only for its internal and archival purposes. The agreement further provided, however, that disclosure in response to a valid court order, or as otherwise provided by applicable law, would not violate Kendi's rights.

The basis for the Board's denial of my FOIA request was that Kendi's rights under the federal Copyright Act would be violated if the Board provided a copy of the videotape to me.

In the ensuing litigation, briefs have been filed by me and by the Board's attorney, and there have been two court hearings so far. At the most recent hearing, on April 4, the Honorable Judge Susan Stoney asked a number of questions about the Copyright Act's "fair use" doctrine. In essence, that doctrine provides that if a person's intended use of copyrighted material satisfies certain criteria, then the rights of the copyright holder are not violated by copying the material.

Judge Stoney indicated that the record was not sufficiently developed to permit the Court to resolve the fair-use issue. She therefore suggested that I write to the Board to clarify why I was seeking the Kendi videotape and what I intended to use it for. The Board could then decide whether, in its opinion, my intended use met the law's standards for fair use. If the dispute is not resolved by this process, there will be another court hearing on May 5, 2022.

B. Why I Have Requested the Kendi Videotape

I became interested in what is happening in our public schools during Virginia's gubernatorial race last year. There were claims by some that the schools were teaching the tenets of "Critical Race Theory" ("CRT"), and denials on the other side that any such thing was happening. I decided to investigate the facts for myself.

I began by educating myself about what CRT is. I read the writings of authors associated with CRT from its beginnings until today. One such author, who is prominent currently, is Ibram X. Kendi. In his book *How to Be an Antiracist* (2019) and elsewhere, he has espoused opinions including: that America's white majority is inherently racist, that systemic racism is pervasive, that race-neutral policies are racist policies, that government institutions have a duty to adopt policies leading to equal outcomes for all racial groups, not just equality of opportunity, that standardized tests are racist because they produce unequal outcomes, and that capitalism is racist because it leads to or sustains unequal incomes.

The next step in my research was to study the curricula of the Fairfax County public schools. I went to the school system's offices and read the social studies textbooks being used. I was impressed by them. They comprehensively and objectively cover the history of slavery and discrimination in America. But I was told that the textbooks are only one of many materials being used. When I obtained copies of those other materials via FOIA requests, I became concerned, because they incorporate many controversial concepts, including instructing children about "white privilege," "systemic racism," "identity," "power," and "equity/social justice."

I spent hundreds of hours on this research and decided I should share my findings with parents and other citizens of Fairfax County. For this reason, I started a website and blog called Fairfax Schools Monitor (fairfaxschoolsmonitor.com), where I have posted articles about what my research has revealed, together with copies of documents I have obtained during my investigation.

During my research I learned that the School Board had hired Kendi to speak at the kick-off session of the 2020-21 school year on the subject, "Cultivating an Anti-Racist School Community." I wanted to know why the Board decided to bring in such a controversial person to lecture school principals and administrators. I also wanted to know what school officials said about him when they introduced him at the kick-off session, what concepts he advocated during his presentation, and how school officials interacted with him during the Q&A segment of his appearance. I felt that these records would likely be revealing about the concepts the Board believed were important for teachers to teach, and for students to learn.

C. My Intended Use of the Kendi Videotape

If I obtain the videotape, I will need to view it to assess how newsworthy it is. If, as I anticipate, the content seems to be of educational value in providing a window to the School Board's educational policies, my intent is to make it available, either in full or in relevant excerpts, on my website, fairfaxschoolsmonitor.com. I would also write about the significance, if any, that it seems to have. These are my only intended uses.

I do not intend to use the video for any commercial purpose or for personal gain. I do not intend to sell it, or charge money to see, or raise money from it in other ways. My sole purpose is to help to educate the parents and other citizens of Fairfax County about what the Board is doing and about the policies it is pursuing. I believe the public has an overriding interest in being fully educated about what its elected officials are doing, particularly the officials who are establishing policies for educating our youth.

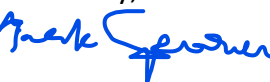
D. Conclusion

The Board will likely perceive that it has nothing to gain by making the videotape available to me, and it may well perceive that negative publicity will result from its release. The Board knows I'm a critic and that I'm unlikely to sing the Board's praises for its decision to spend \$20,000 taxpayer dollars for a one-hour session with someone who espouses the policies that Kendi does. But that's not a justification for withholding this record.

The Board stated in its agreement with Kendi that it would cooperate with him to shield the videotape from public scrutiny. But by resisting its release so far, the Board has more than satisfied any obligation it owes to him. The contract provides that it will not be violated if release of the videotape is required by applicable law. Here, the FOIA requires disclosure, and the Copyright Act does not prohibit it, as my intended use is a fair use.

An instructive court decision regarding fair use of a copyrighted videotape is *Caner v. Austry*, 16 F. Supp. 3d 689 (W.D. Va. 2014). That case, like this one, raised the question of whether a person's copying and publicizing a copyrighted video of a public figure for the purpose of education and criticism constituted a "fair use" under the criteria of the Copyright Act. The court determined that the criteria of fair use were satisfied. Application of the *Caner* court's analysis to my request for the Kendi videotape should lead to the same result.

If you have any further questions about my intended use of the videotape, please contact me promptly, and please let me know within seven days whether further litigation will be needed to resolve this issue.

Sincerely,


Mark Spooner

cc: Michael Kinney, Esq., via email