



June 21, 2017

VIA ELECTRONIC MAIL

FOIA Public Liaison
U.S. Department of Education
Office of Management
Office of the Chief Privacy Officer
400 Maryland Avenue SW, LBJ 2E320
Washington, DC 20202-4536
EDFOIAManager@ed.gov

Re: Freedom of Information Act Request

Dear FOIA Public Liaison:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations for the Department of Education (Education), 34 C.F.R. Part 5, American Oversight makes the following request for records.

In January 2017, Jerry Falwell, Jr., president of Liberty University, announced that the Trump administration had approached him to lead a higher education task force it planned to form, though the composition and mission of the task force remained unclear and the White House declined to provide details.¹ According to recent reports, the White House has now confirmed that Mr. Falwell will be part of a White House education task force and provided Joshua Raffel from the Office of American Innovation as Mr. Falwell's White House point of contact.² These reports further show that participation in such a task force is only one of Mr. Falwell's multiple efforts to influence federal higher education policy. In addition to accepting a role on the inchoate White House task force, Mr. Falwell has stated that he and others at Liberty University have shared position papers with the White House, via Andrew Bremberg, director of the Domestic Policy Council, and with the Department of Education.³

¹ Sarah Pulliam Bailey and Nick Anderson, *Falwell Says Trump Administration Has Tapped Him to Lead a Higher-Ed Panel*, WASH. POST, Jan. 31, 2017, https://www.washingtonpost.com/news/grade-point/wp/2017/01/31/falwell-says-trump-administration-has-tapped-him-to-lead-a-higher-ed-panel/?utm_term=.35de3eccc7ca; Valerie Strauss, *Evangelical Leader Falwell: It Was Steve Bannon's Idea That I Lead Education Task Force*, WASH. POST, Feb. 23, 2017, https://www.washingtonpost.com/news/answer-sheet/wp/2017/02/23/evangelical-leader-falwell-it-was-steve-bannons-idea-that-i-lead-education-task-force/?utm_term=.18fbb9a2e534.

² Goldie Blumenstyk, *A Task Force With Falwell is Happening, White House Says*, CHRONICLE OF HIGHER ED., June 11, 2017, <http://www.chronicle.com/article/A-Task-Force-With-Falwell-Is/240315>.

³ *Id.*



In February of this year, several senators sent a letter to the Department outlining possible conflicts of interest between Mr. Falwell's role at Liberty University and a potential role shaping regulations affecting, among other topics, educational institution access to federal dollars.⁴ Similar concerns arise whether Mr. Falwell expresses his perspectives or provides advice through the White House task force, through position papers, or by other means. The American public has a compelling need for transparency around the nature and scope of his influence on federal policy and regulation.

American Oversight seeks information to shed light on Mr. Falwell's role in federal higher education policymaking and regulatory review.

Requested Records

American Oversight requests that Education produce the following within twenty business days:

1. All communications between Betsy DeVos, James Manning, or any other political appointees or SES staff in the Office of the Secretary, the Office of the Deputy Secretary, or the Office of the Under Secretary to or from Jerry Falwell, Jr., his representatives, or other officers, employees, or representatives of Liberty University.
2. All position papers or policy or regulatory analyses or recommendations received by the Department of Education prepared, sent, or distributed by Jerry Falwell, Jr., his representatives, or other officers, employees, or representatives of Liberty University.
3. All communications between Betsy DeVos, James Manning, or any other political appointees or SES staff in the Office of the Secretary, the Office of the Deputy Secretary, or the Office of the Under Secretary to or from Andrew Bremberg, Joshua Raffel, or any other officials within the White House Office of Domestic Policy or Office of American Innovation relating to position papers or communications from Jerry Falwell, Jr., his representatives, or other officers, employees, or representatives of Liberty University.
4. All calendars or calendar entries reflecting any meetings between Betsy DeVos, James Manning, or any other political appointees or SES staff in the Office of the Secretary, the Office of the Deputy Secretary, or the Office of the Undersecretary and Andrew

⁴ Letter from Patty Murray, United States Senator, et al. to Betsy DeVos, Secretary, U.S. Department of Education (Feb. 23, 2017), <https://www.help.senate.gov/imo/media/doc/Falwell%20Task%20Force%20Letter%202-23-17.pdf> (noting that "Liberty University received \$766 million in grants and loans under Title IV of the Higher Education Act, and was the third-largest recipient of federal student loans in the United States"). The letter drew on Senate HELP Committee data analysis. Senate HELP Committee Analysis of Data From the U.S. Department of Education, Federal Student Aid Data Center, Title IV Program Volume by School. Accessed February 8, 2017, <https://studentaid.ed.gov/sa/about/data-center/student>.

Bremberg, Joshua Raffel, or Jerry Falwell, Jr., his representatives, or other officers, employees, or representatives of Liberty University. For calendar entries created in Outlook or similar programs, the documents should be produced in “memo” form to include all invitees, any notes, and all attachments. Please do not limit your search to Outlook calendars—we request the production of any calendar—paper or electronic, whether on government-issued or personal devices—used to track or coordinate how these individuals allocate their time on agency business.

5. Any logs or other records tracking incoming and outgoing telephone calls made or received by Betsy DeVos, James Manning, or any other political appointees or SES staff in the Office of the Secretary, the Office of the Deputy Secretary, or the Office of the Undersecretary to or from Andrew Bremberg or Joshua Raffel, or to or from Jerry Falwell, Jr., his representatives, or other officers, employees, or representatives of Liberty University, or anyone placing or receiving telephone calls on behalf of those individuals.

Please provide all responsive records from January 20, 2017, to the date the search is conducted.

In addition to the records requested above, American Oversight also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

American Oversight seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.⁵ **It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been moved to**

⁵ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

official systems or if officials have, through negligence or willfulness, failed to meet their obligations.⁶

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered Education’s prior FOIA practices unreasonable. **In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.⁷ Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files.** For example, a custodian may have deleted a responsive email from his or her email program, but Education’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that Education use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. American Oversight is available to work with you to craft appropriate search terms. **However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.**

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”⁸ If it is your position that any portion of the requested records is exempt from disclosure, American Oversight requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”⁹ Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing

⁶ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

⁷ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

⁸ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

the sought-after information.”¹⁰ Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”¹¹

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.¹² Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should institute a preservation hold on information responsive to this request. American Oversight intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, Education is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and Education can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.33(a), American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government operations and activities by the general public in a significant way.¹³ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁴

¹⁰ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹¹ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

¹² *Mead Data Central*, 566 F.2d at 261.

¹³ 34 C.F.R. § 5.33(a)(1).

¹⁴ 34 C.F.R. § 5.33(a)(2).

Disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”¹⁵ Public interest in how Ms. DeVos is running the Department is strong,¹⁶ as is public interest in Mr. Falwell’s official or unofficial role in shaping policy surrounding higher education.¹⁷ The American people deserve to know whether any outside individuals or institutions have an outsized influence on our educational policy. Moreover, because neither Education nor the White House has provided details about the scope or nature of Mr. Falwell’s involvement, the requested disclosure will significantly enhance the public’s understanding of key government operations and activities surrounding higher education.¹⁸

This request is primarily and fundamentally for non-commercial purposes.¹⁹ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight’s financial interest. American Oversight’s mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information it gathers, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight will also make materials it gathers available on our public website and promote their availability on social media platforms, such as Facebook and Twitter.²⁰ One example of American Oversight’s demonstrated public disclosure of documents and creation of editorial content is in its recently launched “Audit the Wall” effort, where the organization is gathering and analyzing information and commenting on public releases of information related to the administration’s proposed construction of a barrier along the U.S.-Mexico border.²¹

Accordingly, American Oversight qualifies for a fee waiver.

¹⁵ 34 C.F.R. § 5.33(a)(1), (b)(1)-(4).

¹⁶ See, e.g., Andrew Kreighbaum, *Reset of Rules Aimed at For-Profits Begins*, INSIDE HIGHER ED., June 14, 2017, https://www.insidehighered.com/news/2017/06/14/education-department-hit-pause-two-primary-obama-regulations-aimed-profits?utm_source=ihe&utm_medium=editorial-site&utm_content=breakingnews; Josh Mitchell, *Trump Administration to Scrap Obama-Era Rules on For-Profit Colleges*, WALL ST. J., June 14, 2017, <https://www.wsj.com/articles/trump-administration-to-scrap-obama-era-rules-on-for-profit-colleges-1497458305>; Erica L. Green, *To Understand Betsy DeVos’s Educational Views, View Her Education*, N.Y. TIMES, June 10, 2017, <https://www.nytimes.com/2017/06/10/us/politics/betsy-devos-private-schools-choice.html>; Ryan Kilpatrick, *Education Secretary Betsy DeVos Withdraws Obama-Era Student Loan Protections*, FORTUNE, Apr. 12, 2017, <http://fortune.com/2017/04/12/betsy-devos-student-loans-obama/>.

¹⁷ See, e.g., *supra* notes 1-2.

¹⁸ 34 C.F.R. § 5.33(b)(4).

¹⁹ 34 C.F.R. § 5.33(c)(1)-(2).

²⁰ American Oversight currently has over 10,900 page likes on Facebook, and over 32,600 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited June 21, 2017); American Oversight (@weareoversight), TWITTER (last visited June 21, 2017).

²¹ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Beth France at foia@americanoversight.org or (202) 869-5264. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

A handwritten signature in blue ink that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Austin R. Evers
Executive Director
American Oversight