



August 30, 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 and the implementing regulations for the Department of Education (Education), 34 C.F.R. Part 5, American Oversight and the Lawyers' Committee for Civil Rights Under Law make the following request for records.

On August 1, 2017, the *New York Times* reported that the Department of Justice (DOJ) “is preparing to redirect resources of the Justice Department’s civil rights division toward investigating and suing universities over affirmative action admissions policies deemed to discriminate against white applicants.”¹ DOJ has reportedly begun to recruit lawyers to participate in this project, including by circulating an announcement to attorneys in DOJ’s Civil Rights Division describing an opportunity to work on “investigations and possible litigation related to intentional race-based discrimination in college and university admissions.”² This initiative reflects a major policy shift, with signs of inappropriate partisan political meddling. Media reports indicate that political appointees at DOJ will lead this effort, because “career staffers who specialize in education issues refused to work on the project out of concerns it was contrary to the office’s long-running approach to civil rights in education opportunities.”³ The extent and nature of collaboration between DOJ

¹ Charlie Savage, *Justice Dept. to Take on Affirmative Action in College Admissions*, N.Y. TIMES, Aug. 1, 2017, <https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html>.

² Sari Horwitz & Emma Brown, *Justice Department Plans New Project to Sue Universities over Affirmative Action Policies*, WASH. POST, Aug. 1, 2017, https://www.washingtonpost.com/world/national-security/justice-department-plans-new-project-to-sue-universities-over-affirmative-action-policies/2017/08/01/6295eba4-772b-11e7-8f39-eeb7d3a2d304_story.html?utm_term=.4bb20f9e9d70.

³ *Id.*



and Education on this initiative is not yet clear,⁴ though DOJ reportedly may use data from the Department of Education to support its work.⁵

Non-partisan policy expertise—not a partisan political agenda—should drive the federal government’s approach to civil rights and access to education. All Americans deserve fair educational opportunities, but shifts in government policy and pending lawsuits against Harvard University and the University of North Carolina make clear that policies promoting access to opportunity are under siege. The Lawyers’ Committee represents student intervenor-defendants in the University of North Carolina case and represents students with “amicus-plus” status in the Harvard University case. American Oversight and the Lawyers’ Committee seek information to shed light on the federal government’s approach to civil rights enforcement in college and university admissions, including changes to that approach under the current administration, partisan goals motivating those changes, and the influence of outside interests on government enforcement policy and practice.

Requested Records

American Oversight and the Lawyers’ Committee request that Education produce the following within twenty business days:

Any list, tracking sheet, report, or other record reflecting open investigations into complaints alleging racial discrimination in postsecondary education admissions, including the institution under investigation. For purposes of this request, a list, tracking sheet, report, or other record is responsive if the investigations it reflects were open at the time the list, tracking sheet, report, or other record was generated, regardless of whether those investigations remain open at the time of the search. If identical copies of a list, tracking sheet, report, or other responsive document were distributed to multiple offices or individuals, providing one of the identical copies is sufficient. If multiple, distinct versions of such a list, tracking sheet, report, or other record were created during the period covered by the requested search, one copy of each distinct version should be provided.

Education should search all offices necessary to identify one copy of each distinct version of a list, tracking sheet, report, or other record covered by this request, including any office responsible for maintaining or generating such a list, tracking sheet, report, or other record reflecting open investigations into complaints alleging racial discrimination in postsecondary education admissions and any office likely to request or receive a copy of such a record. The search should include at least records in the accounts or custody of:

- the Secretary
- the Under Secretary
- the Assistant Secretary for Postsecondary Education
- the Deputy Assistant Secretary for Higher Education Programs

⁴ *Id.* (“A spokeswoman for the Education Department did not immediately respond late Tuesday night to inquiries about whether the agency would play a role in the effort to challenge affirmative action on college campuses.”).

⁵ Savage, *supra* note 1.

- Steven Menashi, Deputy General Counsel for Postsecondary Service and Acting General Counsel
- the Assistant Secretary for Civil Rights
- Brandon Sherman, Special Assistant to the Assistant Secretary
- Chelsea Henderson, Confidential Assistant to the Assistant Secretary
- the Deputy Assistant Secretary for Enforcement
- the Director of the Program Legal Group
- the Deputy Director of the Program Legal Group
- the Enforcement Directors
- any other political appointee or SES employee in the Office of the Secretary, the Under Secretary, the Office of the Assistant Secretary for Postsecondary Education, the Office of Higher Education Programs, or the Office of Civil Rights

The search should include any individuals serving in the roles listed above in either an acting or a permanent capacity. 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 and the Lawyers’ Committee also request 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 and the Lawyers’ Committee seek 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.⁶ **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 and the Lawyers’ Committee have a right to records contained in those files even if**

⁶ 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).

material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.⁷

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.⁸ 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 and the Lawyers’ Committee 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 and the Lawyers’ Committee are 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.”⁹ If it is your position that any portion of the requested records is exempt from disclosure, American Oversight and the Lawyers’ Committee request 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.”¹⁰ Moreover, the *Vaughn* index “must

⁷ 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)).

⁸ 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>.

⁹ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹⁰ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”¹¹ 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.’”¹²

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.¹³ 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 and the Lawyers’ Committee intend 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 and the Lawyers’ Committee welcome 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, we 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, please also provide responsive material on a 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 and the Lawyers’ Committee request 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.¹⁴ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁵

¹¹ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹² *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)).

¹³ *Mead Data Central*, 566 F.2d at 261.

¹⁴ 34 C.F.R. § 5.33(a)(1).

¹⁵ 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.”¹⁶ Major shifts in DOJ’s approach to affirmative action policies have occurred in secret and come to light only through reporting by the *New York Times*.¹⁷ At DOJ, these changes appear to have occurred at the behest of political leadership and over the strong objections of career civil servants.¹⁸ Little public information is available to inform the public about the Department of Education’s role in DOJ’s program, nor can the public discern from currently available information whether similar shifts in civil rights enforcement policy or practices are underway at Education or what influence outside individuals or groups are exerting on these government policies, procedures, or practices. The American people deserve to know whether partisan political agendas are overriding long-standing agency commitments to protecting civil rights and educational opportunity. Because Education has not been forthcoming on these issues, the requested disclosure will significantly enhance the public’s understanding of key government operations and activities surrounding higher education admissions.¹⁹ Moreover, reported “outrage” after the *New York Times* report underscores the public’s interest and investment in this subject,²⁰ and (as described further below) American Oversight and the Lawyers’ Committee will convey information obtained through this request to the general public via its website and social media accounts.²¹

This request is primarily and fundamentally for non-commercial purposes.²² 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 gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.²³ American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example, after receiving records regarding an ethics waiver received by a

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

¹⁷ Savage, *supra* note 1.

¹⁸ Horwitz & Brown, *supra* note 2.

¹⁹ 34 C.F.R. § 5.33(b)(4).

²⁰ Lydia Wheeler, *Outrage Erupts over Report DOJ Will Target Affirmative Action*, THE HILL (Aug. 2, 2017, 12:05 PM), <http://thehill.com/regulation/administration/344948-outrage-erupts-over-report-doj-will-target-affirmative-action>.

²¹ 34 C.F.R. § 5.33(b)(3).

²² 34 C.F.R. § 5.33(c)(1)-(2).

²³ American Oversight currently has over 11,200 page likes on Facebook, and over 33,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited Aug. 29, 2017); American Oversight (@weareoversight), TWITTER (last visited Aug. 29, 2017).

senior DOJ attorney,²⁴ American Oversight promptly posted the records to its website and published an analysis of what the records reflected about DOJ's process for ethics waivers.²⁵ As another example, American Oversight has a project called "Audit the Wall," 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.²⁶

Similarly, the Lawyers' Committee is a 501(c)(3) nonprofit organization and does not have a commercial purpose and the release of the information requested is not in the Lawyers' Committee's financial interest. The Lawyers' Committee was founded in 1963 and is committed to full and fair enforcement of federal civil rights laws and ensuring equal justice under law for all. Educational Opportunities is one of the Lawyers' Committee's core areas and the organization has had a longstanding commitment to fighting for diversity in college admissions. The Lawyers' Committee will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. The Lawyers' Committee will also make materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.

Accordingly, American Oversight and the Lawyers' Committee, both independently and collectively, qualify for a fee waiver.

Conclusion

We share a common mission to promote transparency in government. American Oversight and the Lawyers' Committee look 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 the request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,



Austin R. Evers
Executive Director
American Oversight



Kristen Clarke
President and Executive Director
Lawyers' Committee for Civil Rights Under Law

²⁴ *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco>.

²⁵ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents>.

²⁶ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.