



January 2, 2018

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 makes the following request for records.

Background

Enforcement of federal civil rights laws ensures that ordinary individuals are protected from discrimination based on race, gender, sexual orientation, disability, nationality, religious beliefs and other characteristics. Within the education context, the Office for Civil Rights (OCR) is responsible for investigating and enforcing students' rights on a range of matters.

However, under the leadership of Acting Assistant Secretary of Civil Rights Candice Jackson, OCR has veered from its long-held commitment to robust civil rights enforcement in institutions of primary, secondary and higher education across the country.¹ OCR's position is not transparent on

¹ For example, in a July 6, 2017 memorandum to Regional OCR Directors, Ms. Jackson rescinded a May 13, 2016 guidance designed to protect transgender students from sex discrimination at schools. See Dep't of Educ. Office for Civil Rights, *Memorandum from Candice Jackson to Regional Directors on OCR Instructions to the Field re Complaints Involving Transgender Students* (June 6, 2017), <https://assets.documentcloud.org/documents/3866929/Trump-administration-s-guidance-to-Office-for.pdf> [hereinafter *Transgender Students Memo*]. In addition to rescinding the existing framework used to protect rights of transgender students, Ms. Jackson left enforcement in such cases to staff discretion, simply directing that "these cases" receive "individualized attention before reaching a dismissal conclusion." *Id.* at 2. As another example, early in her appointment, Ms. Jackson issued a memorandum stating that OCR would no longer investigate systemic violations unless an individual complaint raised systemic or class-wide issues. See Dep't of Educ. Office for Civil Rights, *Memorandum from Candice Jackson to Regional Directors on OCR Instructions to the Field re Scope of Complaints* (last visited Nov. 18, 2017),



other education-related civil rights matters. The public, many of whom are or were students, should have access to communications that detail OCR's current position on different civil rights issues.

Requested Records

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

All communications exchanged between Education (including its Office of Civil Rights) and Congress or congressional staff related to OCR's position on different civil rights issues. Such communications can include but are not limited to the following:

- Any communications, including letters, emails, faxes, or memoranda, from Congress or congressional staff to Education (including its Office of Civil Rights) requesting OCR's position on civil rights issues within the subject matter jurisdiction of OCR.²
- Any communications, including letters, emails, faxes, or memoranda, sent from Education (including its Office of Civil Rights) to Congress or congressional staff clarifying OCR's position on civil rights issues within the subject matter jurisdiction of OCR.

Please exclude from the search any correspondence from members of Congress coded as FSA-2.

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 Education uses FOIA questionnaires or certifications completed by individual

<https://assets.documentcloud.org/documents/3863019/doc00742420170609111824.pdf>

[hereinafter *Systemic Complaints Memo*]. The memo also relieved Regional OCR Directors of their responsibility to alert Headquarters in Washington, D.C., regarding all cases labeled sensitive. Typically, sensitive cases involve disproportionate disciplining of minority students, or mishandling of sexual assault investigations on college campuses. *Id.* at 1. The memo further emphasized that OCR's goal was to "swiftly address compliance issues." *Id.* at 2.

² More specifically, OCR has subject matter jurisdiction to investigate complaints involving Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Title II of the Americans with Disabilities Act of 1990, and the Boy Scouts of America Equal Access Act of 2001. *See Case Processing Manual (CPM)*, U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS *6-7 (Feb. 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> [hereinafter *CPM*].

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.³ **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 official systems or if officials have, through negligence or willfulness, failed to meet their obligations.**⁴

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.**⁵ Furthermore, agencies that have adopted the National Archives and

³ 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).

⁴ 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)).

⁵ 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>.

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.”⁶ 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.”⁷ Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”⁸ 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.’”⁹

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.¹⁰ 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

⁶ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁷ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁸ *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

⁹ *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)).

¹⁰ *Mead Data Central*, 566 F.2d at 261.

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 requests a waiver of fees associated with processing this request for records. First, 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 procedures by the general public in a significant way.¹¹ Second, the request is primarily and fundamentally for non-commercial purposes.¹²

Under the public interest requirement, FOIA requesters must satisfy four factors in sequence.¹³ American Oversight believes it has met these four factors for reasons set forth below.

The subject matter of the requested documents specifically relates to the operations or activities of the government because any department-wide policy or position OCR takes with respect to civil rights affects its enforcement and investigation agenda. Communications between Congress and Education (including its Office for Civil Rights) related to what OCR's position is on a particular civil rights issue bear directly on the operations and activities of a governmental entity. For example, on June 30, 2017, Senators Claire McCaskill and Kirsten Gillibrand wrote a letter to Secretary DeVos raising concerns about OCR's policy to limit investigations and enforcement of Title IX on college campuses as a way to clear the backlog of cases.¹⁴ The letter emphasized that limiting investigations and enforcement "does not uphold the Department's responsibility to enforce Title IX."¹⁵ While this particular letter was made public, it is possible that other members of Congress have sent letters, or more informal communications such as emails to Education asking for clarification on a position, to which Education has sent a response. These communications are vital to members of the public to understand the policies, agenda, and positions taken by Education on civil rights issues.

¹¹ 34 C.F.R. § 5.33(a)(1).

¹² 34 C.F.R. § 5.33(a)(2).

¹³ *D.C. Technical Assistance Org. Inc., v. U.S. Dep't of Hous. and Urban Dev.*, 85 F. Supp. 2d 46, 48-49 (D.D.C. 2000) (requested documents will contribute to "greater understanding of government activities").

¹⁴ See Letter from Senators McCaskill and Gillibrand to Education Secretary Betsy DeVos (June 30, 2017), <https://www.gillibrand.senate.gov/imo/media/doc/Letter%20to%20DeVos%20on%20OCR%20Scope.pdf>.

¹⁵ *Id.* at 1.

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 As discussed previously, major shifts in OCR’s policies on federal civil rights have occurred and possibly continue to occur in secret.¹⁷ The public has little information to assess what tangible impact these policies are having on civil rights enforcement and investigation. The requested records have the potential to shed light on whether OCR is committed to enforcement, investigation, and serving the public through educational presentations. And, given that a large percentage of the nation’s population will, have, or currently attend educational institutions, the records have the potential to reveal whether OCR is performing its functions, another issue that directly bears on all students’ right to an education free of discrimination.

American Oversight’s objective is to reveal to the public at large any data it receives related to OCR’s current activities apart from investigation and enforcement. American Oversight has the capacity to disseminate this information as it posts all records to its public websites and publishes analyses of its records. In the past, we have successfully informed the public of specific government activities and operations. As an example, American Oversight obtained Education Secretary DeVos’s calendar entries,¹⁸ which The New York Times and CNN relied on to report on the Secretary’s priorities within the Education Department.¹⁹

Disclosure will contribute to a greater understanding on the part of the public at large. As taxpayers and school goers, the public is entitled to communications between Education and Congress that highlight what OCR’s position is on different civil rights issues under its subject matter jurisdiction. Having such knowledge would allow members of the public to learn how Education is expending taxpayer resources, and also make informed decisions on whether they should submit a complaint to OCR or pursue other avenues to report civil rights violations.

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

¹⁷ See Moriah Balingit & Danielle Douglas-Gabriel, *Inside Betsy DeVos’s Efforts to Shrink the Education Department*, WASH. POST, Nov. 8, 2017, https://www.washingtonpost.com/local/education/inside-betsy-devoss-efforts-to-shrink-the-education-department/2017/11/08/fc03884c-ba64-11e7-be94-fabb0f1e9ffb_story.html?utm_term=.16a7165d2181; Emma Brown, *Education Dept. Closes Transgender Student Cases As It Pushes to Scale Back Investigations*, WASH. POST, June 17, 2017, https://www.washingtonpost.com/local/education/education-dept-closes-transgender-student-cases-as-it-pushes-to-scale-back-civil-rights-investigations/2017/06/17/08e10de2-5367-11e7-91eb-9611861a988f_story.html?utm_term=.27adfdac7da4;

¹⁸ See *Influence & Access at the Department of Education*, AMERICAN OVERSIGHT (Oct. 27, 2017), <https://www.americanoversight.org/investigation/influence-access-at-the-department-of-education>; *Unexcused Absences: DeVos Calendars Show Frequent Days Off*, AMERICAN OVERSIGHT (Oct. 27, 2017), <https://www.americanoversight.org/unexcused-absences-devos>.

¹⁹ See Eric Lipton, *Betsy DeVos’s School Schedule Shows Focus on Religious and Non Traditional Schools*, N.Y. TIMES, Oct. 27, 2017, <https://www.nytimes.com/2017/10/27/us/politics/betsy-devos-work-schedule-education.html>; Gregory Wallace et al., *What Betsy DeVos’s Schedule Tells Us About Her Agenda*, CNN (Oct. 29, 2017 12:22 PM), <http://www.cnn.com/2017/10/28/politics/devos-schedules-education/index.html>.

Disclosure will “significantly” contribute to the public’s understanding of government activities or operations related to OCR’s policies, and current positions on different civil rights. As noted, the subject of this request is a matter of public interest, and the public’s understanding of the government’s activities would be enhanced through analysis and publication of these records.²⁰

This request is primarily and fundamentally for non-commercial purposes.²¹ 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.²² 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 senior DOJ attorney,²³ 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.²⁴ 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.²⁵

Accordingly, American Oversight qualifies for a fee waiver.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with Education 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,

²⁰ Erica L. Green, *Education Dept. Says It Will Scale Back Civil Rights Investigations*, N.Y. TIMES, June 16, 2017, https://www.nytimes.com/2017/06/16/us/politics/education-department-civil-rights-betsy-devos.html?_r=0; James S. Murphy, *The Office of Civil Rights’s Volatile Power*, THE ATLANTIC, Mar. 13, 2017, <https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072/>; Brown, *supra* note 17.

²¹ 34 C.F.R. § 5.33(c)(1)–(2).

²² American Oversight currently has over 11,700 page likes on Facebook, and over 38,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited Jan. 2, 2018); American Oversight (@weareoversight), TWITTER (last visited Jan. 2, 2018).

²³ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-franciscocompliance>.

²⁴ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

²⁵ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

please contact Pooja Chaudhuri 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,

A handwritten signature in blue ink, appearing to read "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