



October 1, 2018

**VIA ELECTRONIC MAIL**

Consumer Financial Protection Bureau  
Attention: Chief FOIA Officer  
1700 G Street NW  
Washington, DC 20552  
[CFPB\\_FOIA@consumerfinance.gov](mailto:CFPB_FOIA@consumerfinance.gov)

**Re: Freedom of Information Act Request**

Dear Chief FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 and Consumer Financial Protection Bureau (CFPB) implementing regulations, 12 C.F.R. Part 1070, American Oversight makes the following request for records.

On August 27, 2018, Seth Frotman tendered his resignation as Assistant Director & Student Loan Ombudsman for CFPB, citing troubling changes in the Bureau's priorities, resulting in a drastic about-face in federal protections for student loan borrowers.<sup>1</sup> Among other concerns, Assistant Director Frotman stated that, "late last year, when new evidence came to light showing that the nation's largest banks were ripping off students on campuses across the country by saddling them with legally dubious account fees, Bureau leadership suppressed the publication of a report prepared by Bureau staff."<sup>2</sup> Approximately two weeks later, members of the Senate issued a letter to Acting Director Mick Mulvaney, seeking further information on the concerns raised in Assistant Director Frotman's letter, including with respect to dubious student loan fees.<sup>3</sup> The signatories to this letter pointed to longstanding concerns about Acting Director Mulvaney's conflicts of interest and claims that the "politicization of the agency" was exacerbating "CFPB's recent pattern of siding with special interests."<sup>4</sup>

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<sup>1</sup> See Cory Turner, *Student Loan Watchdog Quits, Says Trump Administration 'Turned Its Back' On Borrowers*, NPR (Aug. 27, 2018, 10:25 AM), [https://www.npr.org/2018/08/27/642199524/student-loan-watchdog-quits-blames-trump-administration?utm\\_source=twitter.com&utm\\_medium=social&utm\\_campaign=npr&utm\\_term=nprnews&utm\\_content=20180827](https://www.npr.org/2018/08/27/642199524/student-loan-watchdog-quits-blames-trump-administration?utm_source=twitter.com&utm_medium=social&utm_campaign=npr&utm_term=nprnews&utm_content=20180827) (citing Ltr. from Seth Frotman, Asst. Dir. & Student Loan Ombudsman, to Hon. Mick Mulvaney, Acting Dir., CFPB (Aug. 27, 2018), available at <https://apps.npr.org/documents/document.html?id=4784891-Frotman-Letter>).

<sup>2</sup> See Frotman Ltr., *supra* note 1 at 2.

<sup>3</sup> Ltr. from Sherrod Brown et al. to Hon. Mick Mulvaney, Acting Dir., CFPB (Sept. 13, 2018), available at <https://assets.documentcloud.org/documents/4878499/Senate-Democrats-Letter-To-CFPB-About-Student.pdf>.

<sup>4</sup> See *id.* at 1.



American Oversight seeks records to shed light on whether and to what extent politicization of CFPB, in combination with any conflicts of interest on the part of Acting Director Mulvaney, may be interfering with the Bureau's efforts to protect student loan borrowers from predatory lending practices.

### **Requested Records**

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

The report concerning "legally dubious account fees" for student loans referenced in Seth Frotman's August 27, 2018 letter of resignation to CFPB Acting Director Mick Mulvaney. *See* Ltr. from Seth Frotman, Asst. Dir. & Student Loan Ombudsman, to Hon. Mick Mulvaney, Acting Dir., CFPB, at 2 (Aug. 27, 2018), available at <https://apps.npr.org/documents/document.html?id=4784891-Frotman-Letter> ("For example, late last year, when new evidence came to light showing that the nation's largest banks were ripping off students on campuses across the country by saddling them with legally dubious account fees, Bureau leadership suppressed publication of *a report prepared by Bureau staff.*") (emphasis added).

Please provide all responsive records from October 1, 2017, to October 1, 2018.

CFPB is in the best position to determine the individuals and CFPB components and offices that have records responsive to this request. However, American Oversight requests that CFPB search, at a minimum:

- (a) The immediate Office of the Director;
- (b) The front office of the Consumer Education and Engagement Division, including but not limited to Sheila Greenwood and Gail Hillebrand; and
- (c) The Office of Students and Young Consumers or any office that has assumed duties previously assigned to it.

American Oversight also requests that CFPB search any other individuals, components, or offices that CFPB determines are likely to contain responsive records.

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 CFPB 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.<sup>5</sup> **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.**<sup>6</sup>

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 CFPB’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.**<sup>7</sup> Furthermore, agencies that have adopted the National Archives and Records Administration (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

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<sup>5</sup> 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).

<sup>6</sup> 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)).

<sup>7</sup> 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>.

custodian may have deleted a responsive email from his or her email program, but CFPB's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that CFPB 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.”<sup>8</sup> 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.”<sup>9</sup> 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.”<sup>10</sup> 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.’”<sup>11</sup>

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.<sup>12</sup> 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, CFPB 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

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

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

<sup>10</sup> *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).

<sup>11</sup> *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)).

<sup>12</sup> *Mead Data Central*, 566 F.2d at 261.

duplication costs. By working together at the outset, American Oversight and CFPB 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 12 C.F.R. § 1070.22(e)(1), 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 procedures by the general public in a significant way.<sup>13</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.

American Oversight requests a waiver of fees as disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government.<sup>14</sup> The request relates to identifiable operations and activities of the federal government, namely CFPB's efforts with respect to protecting student loan borrowers.<sup>15</sup> Disclosure of the requested records will be "meaningfully informative" about these matters, because the report cited in Assistant Director Frotman's resignation letter referencing "legally dubious [student loan] account fees" has not been made available to the public, nor has CFPB leadership informed the public about such fees or its efforts, if any, to protect student loan borrowers from them.<sup>16</sup> For similar reasons, the requested disclosures will enhance the public's understanding to a significant extent.<sup>17</sup> Predatory lending practices with respect to student loans have been the subject of significant public attention and reporting, and therefore the requested records will contribute to the "understanding of a reasonably broad audience of persons interested in the subject" of the requested records.<sup>18</sup> And (as described further below) American Oversight

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<sup>13</sup> 12 C.F.R. § 1070.22(e).

<sup>14</sup> 12 C.F.R. § 1070.22(e)(1)(iii)(A), (2)(i)-(iv).

<sup>15</sup> 12 C.F.R. § 1070.22(e)(2)(i).

<sup>16</sup> 12 C.F.R. § 1070.22(e)(2)(ii).

<sup>17</sup> 12 C.F.R. § 1070.22(e)(2)(iv).

<sup>18</sup> 12 C.F.R. § 1070.22(e)(2)(iii). *See also, e.g.*, Turner, *supra* note 1; Annie Nova, *Timing of Student Loan Watchdog's Resignation 'Couldn't Be Worse,' Advocates Say*, CNBC (Aug. 27, 2018, 2:52 PM), <https://www.cnbc.com/2018/08/27/student-loan-watchdogs-resignation-leaves-borrowers-vulnerable.html>; Andrew Harris & Daniel Flatley, *After Delaying Obama-Era Protections, Betsy DeVos Loses Student Loan Lawsuit Brought by 19 States*, TIME, Sept. 13, 2018, <http://time.com/5394679/betsy-devos-loses-student-loan-lawsuit/>; Alicia Adamczyk, *What the Department of Ed's Latest Student Loan Changes Mean for You*, LIFEHACKER (Mar. 15, 2018,

will convey information obtained through this request to the general public via its website and social media accounts.

This request is primarily and fundamentally not for commercial purposes.<sup>19</sup> 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 commercial 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 will use the information gathered, 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 its website and promote their availability on social media platforms, such as Facebook and Twitter.<sup>20</sup> 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.<sup>21</sup> As another example, American Oversight has received records relating to expenditures for office renovations at numerous agencies and has worked with media outlets to publicize its findings.<sup>22</sup>

Accordingly, American Oversight qualifies for a fee waiver.

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2:00 PM), <https://twocents.lifehacker.com/what-the-department-of-eds-latest-student-loan-changes-1823794846>; Daniel Rivero, *The Debt Trap: How the Student Loan Industry Betrays Young Americans*, THE GUARDIAN (Sept. 6, 2017 6:00 AM), <https://www.theguardian.com/money/2017/sep/06/us-student-debt-loans-navient-sallie-mae>; Stacy Cowley & Jessica Silver-Greenberg, *Loans 'Designed to Fail': States Say Navient Preyed on Students*, N.Y. TIMES, Apr. 9, 2017, <https://www.nytimes.com/2017/04/09/business/dealbook/states-say-navient-preyed-on-students.html>.

<sup>19</sup> 12 C.F.R. § 1070.22(e)(1)(iii)(B), (3)(i)-(ii).

<sup>20</sup> American Oversight currently has approximately 11,900 page likes on Facebook, and approximately 45,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Oct. 1, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight?lang=en> (last visited Oct. 1, 2018).

<sup>21</sup> *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

<sup>22</sup> See, e.g., Brady Dennis & Juliet Eilperin, *Scott Pruitt's \$25,000 Soundproof Phone Booth? It Actually Cost More Like \$43,000*, WASH. POST, Mar. 14, 2018, [https://www.washingtonpost.com/news/energy-environment/wp/2018/03/14/scott-pruitts-25000-soundproof-phone-booth-it-actually-cost-more-like-43000/?utm\\_term=.c5479a61c62d](https://www.washingtonpost.com/news/energy-environment/wp/2018/03/14/scott-pruitts-25000-soundproof-phone-booth-it-actually-cost-more-like-43000/?utm_term=.c5479a61c62d); Glenn Thrush, *Emails Contradict Ben Carson's Claims About \$31,000 Dining Set for Office*, N.Y. TIMES, Mar. 14, 2018, <https://www.nytimes.com/2018/03/14/us/ben-carson-dining-table.html>.

## Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with CFPB 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 Katherine Anthony at [foia@americanoversight.org](mailto:foia@americanoversight.org) or 202-897-3918. 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, reading "Austin R. Evers". The signature is fluid and cursive, with a long horizontal line extending to the left.

Austin R. Evers  
Executive Director  
American Oversight