



December 20, 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.

Borrower Defense to Loan Repayment (“borrower defense”) provides critical protection to students who are deceived or defrauded by schools that charge them tuition for worthless credits and credentials. Under Secretary DeVos, Education has shown its indifference to the plight of these students by delaying implementation of a 2016 version of the rule and seeking to replace that rule with a more restrictive one. Moreover, a report by the U.S. Department of Education Office of the Inspector General (OIG) identified a number of weaknesses in Education’s procedures for assessing and processing borrower defense applications.¹ Education has even improperly used earnings data from the Social Security Administration as part of its effort to reduce relief for defrauded students.² Under these circumstances, Education’s commitment to protecting American students is in doubt.

American Oversight seeks records to shed light on Education’s activities involving borrower defense to loan repayment.

¹ Office of the Inspector General, U.S. Department of Education, Federal Student Aid’s Borrower Defense to Repayment Loan Discharge Process, Dec. 8, 2017, <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2018/i04r0003.pdf>.

² Danielle Douglas-Gabriel, *Judge Rejects DeVos’s Interpretation of Order to Halt Partial Student Debt Relief Plan*, WASH. POST, June 20, 2018, https://www.washingtonpost.com/news/grade-point/wp/2018/06/20/judge-rejects-devoss-interpretation-of-order-to-halt-partial-student-debt-relief-plan/?utm_term=.b569ad7ba342.



Requested Records

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

1. Any decision memoranda, directives, guidance, or similar records related to permanent or term employee or contractor staffing levels for the Borrower Defense Unit, including such records related to changes in such staffing levels, changes to contract terms, or renewals or terminations of contracts affecting staffing levels in the Borrower Defense Unit. This search should include all locations likely to contain such records but must include, at a minimum, the Office of the Secretary, the Office of the Under Secretary, Federal Student Aid, the Office of Post-Secondary Education, and the Borrower Defense Review Panel.
2. All communications emails, email attachments, calendar invitations, and calendar entries) sent or received by political appointees* in the Office of the Secretary, the Office of the Under Secretary, Federal Student Aid, or the Office of Post-Secondary Education or any employee working on or for the Borrower Defense Review Panel related to staffing levels in the Borrower Defense Unit. This request includes communications regarding both permanent or term employees and contractors.
3. All communications (including but not limited to memoranda, emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), calendar invitations, and calendar entries) sent or received by political appointees in the Office of the Secretary, the Office of the Under Secretary, Federal Student Aid, or the Office of Post-Secondary Education or any employee working on or for the Borrower Defense Review Panel related to the scope of Borrower Defense Unit research. This request includes all records related to the instruction “not to continue developing new memoranda on additional categories of claims at the direction of the Acting Under Secretary and the Review Panel” described by the Office of the Inspector General.³

*“Political appointee” should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a Non-career SES, any Schedule C employees, or any persons hired under Temporary Non-career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

American Oversight requests 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

³ See Letter from Kathleen S. Tighe, Inspector General, U.S. Dep’t of Education to Hon. Richard Durbin, United States Senator, June 6, 2018, <https://www.durbin.senate.gov/imo/media/doc/Letter%20to%20Senator%20Durbin%20-%20June%202018.pdf>.

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 are subject to the Federal Records Act and FOIA.⁴ **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.**⁵

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.**⁶ Furthermore, agencies that have adopted the National Archives and

⁴ 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).

⁵ 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)).

⁶ 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,

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 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.”⁷ 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.”⁸ 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.”⁹ 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.’”¹⁰

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.¹¹ 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

“Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

⁷ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁸ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁹ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).

¹⁰ *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)).

¹¹ *Mead Data Central*, 566 F.2d at 261.

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 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. 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.¹² Moreover, the request is primarily and fundamentally for non-commercial purposes.¹³

Americans owe more than \$1 trillion in student debt, and student loan debt loads directly affect both students and parents (who often co-sign loans) and indirectly affect home buying behavior and other key components of the national economy.¹⁴ More than one hundred thousand students have filed claims for relief from debt incurred in connection with fraudulent or deceptive educational programs,¹⁵ showing that additional information on processes affecting the rights of such students will improve the “understanding of the public at large, as opposed to an individual or a narrow segment of interested persons.”¹⁶ Because little information is available about the decisions Education officials have made with regard to student access to these protections, the requested disclosure will significantly enhance the public’s understanding of key government operations and activities surrounding Education’s fulfillment responsibility to protect students.¹⁷ And (as described further below) American Oversight will convey information obtained through this request to the general public via its website and social media accounts.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

¹² 34 C.F.R. § 5.33(a)(1).

¹³ 34 C.F.R. § 5.33(a)(2).

¹⁴ Josh Mitchell & Maya Jackson-Randall, *Student-Loan Debt Tops \$1 Trillion*, WALL ST.J. (Mar. 22, 2012, 12:46 PM), <https://www.wsj.com/articles/SB10001424052702303812904577295930047604846>.

¹⁵ Andrew Kreighbaum, *Obama Student Loan Rule to Take Effect*, INSIDE HIGHER ED, Oct. 17, 2018, <https://www.insidehighered.com/news/2018/10/17/more-year-later-obama-student-loan-rule-takes-effect>.

¹⁶ 34 C.F.R. § 5.33(b)(3).

¹⁷ 34 C.F.R. § 5.33(b)(4).

¹⁸ 34 C.F.R. § 5.33(b)(3).

¹⁹ 34 C.F.R. § 5.33(c)(1)-(2).

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.²⁰ One example of American Oversight's demonstrated public disclosure of documents and creation of editorial content is in its "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 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.²²

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 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) 897-2465. 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,



Austin R. Evers
Executive Director
American Oversight

²⁰ American Oversight currently has over 12,100 page likes on Facebook, and approximately 49,600 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited December 20, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited December 20, 2018).

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

²² 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; 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>.