



March 28, 2019

**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](mailto: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.

In early 2017, the Consumer Financial Protection Bureau (CFPB) brought suit against Navient Corporation and its corporate affiliates for allegedly failing to meet student loan borrowers needs in a systematic and illegal manner.<sup>1</sup> CFPB has also alleged that Education has obstructed its efforts to hold Navient accountable by preventing the disclosure of relevant documents.<sup>2</sup> And Navient has claimed that a “common interest privilege” protects certain attorney-client privileged information that has been shared with Education.<sup>3</sup>

American Oversight seeks records with the potential to shed light on Education’s relationship with Navient Corporation, and to show whether and to what extent Education may be acting to assist Navient in its defense against an important CFPB enforcement action.

**Requested Records**

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

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<sup>1</sup> *CFPB Sues Nation’s Largest Student Loan Company Navient for Failing Borrowers at Every Stage of Repayment*, CONSUMER FIN. PROT. BUREAU, Jan. 18, 2017, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment/>.

<sup>2</sup> Jillian Berman, *CFPB Says Department of Education Is Obstructing Suit Against Student Loan Giant*, MARKETWATCH (July 15, 2018, 5:21 PM), <https://www.marketwatch.com/story/cppb-says-department-of-education-is-obstructing-suit-against-student-loan-giant-2018-07-13>.

<sup>3</sup> Plaintiff’s Letter Regarding Discovery, *Consumer Financial Protection Bureau v. Navient Corporation et al.*, Case No. 3:17-cv-00101-RDM (M.D. Pa. Jan. 25, 2019), ECF No. 199.



1. Any common interest agreement or joint defense agreement executed between the U.S. Department of Education and Navient Corporation, or its corporate affiliates or subsidiaries, which Education believes extends protection, or may extend protection, to communications with Navient or its attorneys regarding the litigation in *Consumer Financial Protection Bureau v. Navient Corporation et al.*, Case No. 3:17-cv-00101-RDM (M.D. Pa filed Jan. 18, 2017) or investigations or actions commenced by the attorney general of any state or the District of Columbia.
2. All records memorializing or reflecting the existence, scope, or terms of any common interest agreement or joint defense agreement between the U.S. Department of Education and Navient Corporation, or its corporate affiliates or subsidiaries, which Education believes extends protection, or may extend protection, to communications with Navient or its attorneys regarding the litigation in *Consumer Financial Protection Bureau v. Navient Corporation et al.*, Case No. 3:17-cv-00101-RDM (M.D. Pa filed Jan. 18, 2017) or investigations or actions commenced by the attorney general of any state or the District of Columbia.

Please provide all responsive records from January 1, 2017, through the date of the search.

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 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.<sup>4</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**

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<sup>4</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).

moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.<sup>5</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 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.<sup>6</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 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.”<sup>7</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>8</sup> Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing

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<sup>5</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>6</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>.

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

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

the sought-after information.”<sup>9</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>10</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>11</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, 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, 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.<sup>12</sup> Second, the request is primarily and fundamentally for non-commercial purposes.<sup>13</sup>

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

<sup>10</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>11</sup> *Mead Data Central*, 566 F.2d at 261.

<sup>12</sup> 34 C.F.R. § 5.33(a)(1).

<sup>13</sup> 34 C.F.R. § 5.33(a)(2).

Under the public interest requirement, FOIA requesters must satisfy four factors in sequence.<sup>14</sup> American Oversight 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 as the request seeks records reflecting an agreement between Education and private corporation and its corporate affiliates. The requested records have the potential to shed light on federal government activities that may have been undertaken to aid a private corporation in avoiding legally liability in an enforcement action brought by another federal agency.

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.”<sup>15</sup> As described above, public reporting has suggested that Education has sided with Navient in obstructing another federal agency’s enforcement action against the corporation for alleged failures to serve student borrowers.<sup>16</sup> Records reflecting or memorializing any common interest agreement Education may have with Navient being used in that enforcement action can increase public awareness of the scope, extent, and intent of Education’s engagement with Navient in that litigation.

Disclosure will “significantly” contribute to the public’s understanding of government activities or operations related Education’s involvement in the litigation CFPB has initiated in an effort to protect student borrowers from allegedly deficient and illegal student loan servicing practices. As noted above, 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 the analysis, publication, and dissemination of these records that American Oversight does with the records it receives, as described below.<sup>17</sup>

This request is primarily and fundamentally for non-commercial purposes.<sup>18</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 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.<sup>19</sup> American

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<sup>14</sup> *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”).

<sup>15</sup> 34 C.F.R. § 5.33(a)(1), (b)(1)–(4).

<sup>16</sup> *See Berman, supra* note 2.

<sup>17</sup> *See supra* note 1.

<sup>18</sup> 34 C.F.R. § 5.33(c)(1)–(2).

<sup>19</sup> American Oversight currently has over 12,200 page likes on Facebook and approximately 54,100 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Mar. 18, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Mar. 18, 2019).

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,<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

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, please contact Dan McGrath at [foia@americanoversight.org](mailto:foia@americanoversight.org) or (202) 897-4213. 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

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<sup>20</sup> *DOJ Records Related to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

<sup>21</sup> *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>.

<sup>22</sup> *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.