



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

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.

On November 20, 2018, Senator Elizabeth Warren released a previously undisclosed audit report conducted by Education that seemed to demonstrate systemic failures by Navient Corporation in servicing the loans of student borrowers.¹ On the very same day, Education released a statement that seemed to defend Navient's practices from further public scrutiny.² As Education is responsible for overseeing Navient's servicing of student borrowers' loans, it is concerning that Education appeared to act so swiftly to defend Navient's public relations interests.

American Oversight seeks records with the potential to shed light on Education's relationship with Navient and with the potential to show whether and to what extent Education may be acting to put Navient's interests above those of student borrowers.

¹ Letter from Sen. Elizabeth Warren to President and CEO Jack Remondi, Navient Corporation, Nov. 13, 2018, <https://www.warren.senate.gov/imo/media/doc/18-11-13%20Sen.%20Warren%20letter%20to%20Navient%20CEO%20Jack%20Remondi.pdf>; *Navient Use of Forbearance Site Visit Review*, FED. STUDENT AID, U.S. DEP'T OF EDUCATION, May 18, 2017, <https://www.warren.senate.gov/imo/media/doc/Ed.%20Dept.%20May%202017%20FSA%20Audit%20Report.pdf>.

² Statement of the U.S. Department of Education, Nov. 20, 2018, <https://news.navient.com/static-files/5afa1bd9-0a8a-4e4f-83e6-74a736c8b80d>. A copy of this statement is posted on Navient's website and labels the statement in browser metadata as the "Liz Hill Navient" webpage, seemingly referencing Education's press secretary despite the lack of reference to Ms. Hill within the statement itself.



Requested Records

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

All email communications (including emails, email attachments, and calendar invitations) between (1) the Education employees and officials specified below and (2) any employee or representative of Navient Corporation, or its subsidiaries or corporate affiliates (including communications with email addresses ending in navient.com and wilmerhale.com³) or any employee or representative of Student Loan Servicing Alliance (SLSA) (including communications with email addresses ending in slsa.net).

American Oversight requests the communications of the following Education employees and officials:

- a. Betsy DeVos, Secretary of Education;
- b. Mitchell ‘Mick’ Zais, Deputy Secretary;
- c. Nathan Bailey, Chief of Staff to Secretary DeVos & former Communications Director;
- d. Elizabeth Hill, Press Secretary;
- e. Kayla Nations, Confidential Assistant, Office of Communications and Outreach;
- f. Diane Auer Jones, Principal Deputy Under Secretary;
- g. James Manning, Federal Student Aid, Chief Operating Officer;
- h. Mark LaVia, Federal Student Aid, Executive Director Servicing;
- i. Kathleen Smith, Federal Student Aid, Deputy Chief Operating Officer.

Please provide all responsive records from October 1, 2018, 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

³ The law firm WilmerHale has represented Navient Corporation in connection with matters related to its alleged failure to properly carry out its servicing of federal student loans.

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 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.**

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

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 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.

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.

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

Under the public interest requirement, FOIA requesters must satisfy four factors in sequence.¹⁴ 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 communications between high-ranking Education officials and a company that Education contracts with to service the loans of student borrowers. The requested records have the potential to shed light on federal government operations and activities that may have been undertaken to mitigate the scrutiny directed at a company that may be failing in its obligations to student borrowers.

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.”¹⁵ As described above, publicly available information shows that Education seems to have taken rapid action to defend Navient upon the release of a report highlighting the company’s shortcomings and apparent failures in servicing the student loans of many borrowers.¹⁶ And reporting has suggested that Education has taken action to shield Navient from another federal agency’s enforcement action against the company for alleged failures to serve student borrowers.¹⁷

Disclosure will “significantly” contribute to the public’s understanding of government activities or operations related to the actions high-ranking Education officials have taken with respect to an important student loan servicing company, and the requested records have the potential to demonstrate whether Education officials have placed Navient’s interests above those of student borrowers. 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

¹² 34 C.F.R. § 5.33(a)(1).

¹³ 34 C.F.R. § 5.33(a)(2).

¹⁴ *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”).

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

¹⁶ *See supra* note 1; *supra* note 2.

¹⁷ *See* 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/cfpb-says-department-of-education-is-obstructing-suit-against-student-loan-giant-2018-07-13>.

receives, as described below.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 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.²⁰ 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,²¹ 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.²² 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.²³

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 or (202) 897-4213. Also, if the request

¹⁸ *See supra* note 1.

¹⁹ 34 C.F.R. § 5.33(c)(1)-(2).

²⁰ 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. 19, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Mar. 19, 2019).

²¹ *DOJ Records Related to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²² *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>.

²³ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

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 flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight