



October 27, 2017

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 (ED), 34 C.F.R. Part 5, American Oversight makes the following request for records.

On June 20, 2017, ED announced its intention to appoint A. Wayne Johnson as Chief Operating Officer of Federal Student Aid (FSA).¹ At the time of this announcement and since 2012, Mr. Johnson was the CEO of Reunion Financial Services Corporation/Reunion Student Loan Finance Corporation (Reunion). Reunion offered services to students with private student loans through refinancing and consolidation programs.² In 2014, Reunion merged with Student Loan Finance Corporation (SLFC), another private loan servicer that received complaints from many consumers.³

¹ See Molly Hensley-Clancy, *Betsy DeVos Picked a Student Loan CEO to Run the Student Loan System*, BUZZFEED (June 20, 2017, 4:34 PM), https://www.buzzfeed.com/mollyhensleyclancy/betsy-devos-picked-a-student-loan-ceo-to-manage-your?utm_term=.gjdZGVaDM#.ufqOqAiro; Press Release, Dep't of Educ., Secretary of Education Betsy DeVos Announces Intent to Appoint Dr. A. Wayne Johnson as Chief Operating Officer of Federal Student Aid (June 20, 2017), <https://www.ed.gov/news/press-releases/secretary-education-betsy-devos-announces-intent-appoint-dr-wayne-johnson-chief-operating-officer-federal-student-aid>.

² Resume, A. Wayne Johnson (Apr. 14, 2017), http://images.pcmac.org/Uploads/HamiltonCountyDE/HamiltonCountyDE/Departments/DocumentsCategories/Documents/Dr._Wayne_Johnson.pdf.

³ *Id.*



According to the Consumer Financial Protection Bureau’s (CFPB) database, more than forty consumer complaints were filed against SLFC since 2012.⁴ Thirty-seven of the consumer complaints against SLFC were filed after 2014, the year that it reportedly merged with Mr. Johnson’s company.⁵ The last complaint against SLFC was logged on April 25, 2017, three years after the merger with Reunion and less than two months after Mr. Johnson’s appointment to ED.⁶ Consumer complaints against SLFC include disputes over the fees charged, inability to “get flexible payment options,” receiving “harassing, threatening” calls, and giving misleading information relating to student loans.⁷

Mr. Johnson’s involvement with SLFC and Reunion are highly troubling in light of these complaints. Additionally, any financial interests including stocks that Mr. Johnson continues to hold in Reunion create a direct conflict of interest with his current position as COO of FSA. One of FSA’s areas of expertise is student loans, specifically advising students on repayment plans, loan consolidation, deferment or forbearance options, and loan forgiveness programs.⁸ Mr. Johnson’s past employment raises concerns that he may act with bias towards loan companies over students in his role at FSA.

In addition, since Mr. Johnson’s appointment, ED has terminated its fruitful and important partnership with CFPB investigating and suing loan servicers.⁹ As mentioned previously, the CFPB has a list of detailed complaints against SLFC.

Unbiased policy expertise—not a self-interested political agenda, conflicts of interest, or industry bias—should drive the federal government’s approach to equity in higher education and loan management. American Oversight seeks information to shed light on any self-dealing, outside dealing, and ethical limitations in Mr. Johnson’s ability to execute his responsibilities as the head of FSA.

Requested Records

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

1. All communications between A. Wayne Johnson, and any of the following groups, or individuals currently employed by, or involved in, any of the following groups:

⁴ Consumer Complaints Database, CONSUMER FIN. PROT. BUREAU, <https://data.consumerfinance.gov/dataset/Consumer-Complaints/s6ew-h6mp> (last visited Oct. 25, 2017) [hereinafter *CFPB Database*].

⁵ Press Statement from the Dep’t of Educ., *supra* note 1.

⁶ *CFPB Database*, *supra* note 4.

⁷ *Id.*

⁸ *Id.*

⁹ Letter from Kathleen Smith & A. Wayne Johnson, Secretary, Office of Postsecondary Education, and COO, Federal Student Aid, to Richard Cordray, Director, CFPB (Aug. 31, 2017), https://edworkforce.house.gov/uploadedfiles/2017-09-01_signed_letter_to_cfpb.pdf; Anya Kamenetz, *The Department of Education Cuts Off a Student Loan Watchdog*, NPR (Sept. 20, 2017, 6:18 AM), <http://www.npr.org/sections/ed/2017/09/20/551857172/the-department-of-education-cuts-off-a-student-loan-watchdog>.

- Reunion Financial Services Corporation
 - Reunion Student Loan Finance Corporation
 - Student Loan Finance Corporation
 - First Performance Corporation
2. All internal communications between A. Wayne Johnson relating to student loan policies, practices, procedures or criteria, and involving any participant from the following offices:
 - Office of the Secretary
 - Office of Postsecondary Education (including Acting Assistant Secretary, Kathleen Smith)
 - Office of the General Counsel (including its Ethics Section)
 - Office of the Under Secretary
 - The Office of Federal Student Aid
 3. All communications between anyone whose email ends in @cfpb.gov, and any of the following agency employees:
 - Chief Operating Officer A. Wayne Johnson
 - Secretary Betsy DeVos
 - Chief of Staff Josh Venable
 - Acting Under Secretary James Manning
 - Acting Assistant Secretary, Office of Postsecondary Education Kathleen Smith
 - Anyone in the Office of the Under Secretary
 - Anyone acting on behalf of any of the individuals listed above (such as administrative assistants or chiefs of staff)
 4. Records reflecting any recusal determination made or issued for A. Wayne Johnson, Chief Operating Officer of FSA.
 5. Records reflecting any conflicts or ethics waivers or authorizations issued for A. Wayne Johnson, including authorizations pursuant to 5. C.F.R. § 2635.502.
 6. Records reflecting any changes to guidance, staff manuals, and policies or practices related to federal student loan programs or student loan servicing platforms.

Please provide all responsive records from May 1, 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 ED 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.¹⁰ **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.**¹¹

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 ED’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.**¹² Furthermore, agencies that have adopted the National Archives and 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 ED’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that ED 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 are available to work with you to craft appropriate search terms. **However, custodian searches are still required;**

¹⁰ 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).

¹¹ 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)).

¹² 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>.

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.”¹³ 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.”¹⁴ 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.”¹⁵ 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.’”¹⁶

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.¹⁷ 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, ED 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 to American Oversight, please also provide responsive material on a rolling basis.

¹³ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹⁴ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹⁵ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹⁶ *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)).

¹⁷ *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. 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.¹⁸ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁹

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.”²⁰ Shifts in federal student loan policy have come to light shortly after Mr. Johnson was appointed as COO of FSA. For example, on September 20, 2017, ED announced its that it would end its partnership and collaboration with CFPB, a consumer protection watchdog in the loan servicing industry.²¹ With current student debt at a record of \$1.3 trillion and delinquency rates rising, the American people deserve to know whether partisan political agendas are overriding long-standing agency commitments to protecting the interests of students.²² Little information is available to inform the public about Mr. Johnson’s capacity to execute the functions of his Office. Because ED has not been forthcoming on any issues related to equity in access to education including student loan policies, the requested disclosure will significantly enhance the public’s understanding of key government operations and activities surrounding federal student aid.²³ As such, given that Mr. Johnson may continue to have personal interests in his private student loan company, American Oversight seeks any information regarding potential conflict of interests.

This request is primarily and fundamentally for non-commercial purposes.²⁴ 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

¹⁸ 34 C.F.R. § 5.33(a)(1).

¹⁹ 34 C.F.R. § 5.33(a)(2).

²⁰ 34 C.F.R. § 5.33(a)(1), (b)(1)-(4).

²¹ Kamenetz, *supra* note 9.

²² See Jessica Dickler, *Student Loan Balances Jump Nearly 150 Percent in a Decade*, CNBC (Aug. 29, 2017, 9:45 AM), <https://www.cnbc.com/2017/08/29/student-loan-balances-jump-nearly-150-percent-in-a-decade.html>; Zack Friedman, *Student Loan Debt in 2017: A \$1.3 Trillion Crisis*, FORBES (Feb. 21, 2017, 7:45 AM), <https://www.forbes.com/sites/zackfriedman/2017/02/21/student-loan-debt-statistics-2017/#60a1fd8b5dab>; Rosanna Xia, *Americans Owe More on Student Debt Than on Credit Cards*, L.A. TIMES, Feb. 21, 2017, <http://www.latimes.com/local/california/la-essential-education-updates-southern-national-student-debt-now-totals-more-1487700056-htmlstory.html>.

²³ 34 C.F.R. § 5.33(b)(4).

²⁴ 34 C.F.R. § 5.33(c)(1)-(2).

promotes their availability on social media platforms, such as Facebook and Twitter.²⁵ 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,²⁶ 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.²⁷ 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.²⁸

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 Pooja Chaudhuri at foia@americanoversight.org or (202) 869-5246. 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

²⁵ American Oversight currently has approximately 11,600 page likes on Facebook, and 35,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited Oct. 27, 2017); American Oversight (@weareoversight), TWITTER (last visited Aug. 29, 2017).

²⁶ *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco>.

²⁷ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents>.

²⁸ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.