



June 11, 2020

**VIA EMAIL**

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 Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of your agency, National Student Legal Defense Network (Student Defense) and American Oversight make the following request for records.

The Higher Education Act (HEA) requires the Department of Education (Education) to annually enter into a performance agreement with the Chief Operating Officer (COO) of Federal Student Aid (FSA).<sup>1</sup> The law also requires that the FSA COO's performance agreement be made publicly available and that it be transmitted to congressional committees with relevant jurisdiction.<sup>2</sup> Despite the requirement that these agreements be made publicly available, in recent years Education has not posted the FSA COO performance agreements on its website.<sup>3</sup> Any bonus paid to the FSA COO may only be awarded on the basis of an evaluation based on the performance agreement.<sup>4</sup>

Student Defense and American Oversight request records that can shed light on the substance of performance agreements for the FSA COO and how Education has evaluated the individuals who have held that important position.

**Requested Records**

Student Defense and American Oversight requests that Education produce the following records within twenty business days:

All performance agreements the Education Secretary has entered into with the Chief Operating Officer of Federal Student Aid from Fiscal Year 2018, Fiscal Year 2019, and Fiscal Year 2020, as required by section 141(d)(4)(A) of the HEA, 20 U.S.C. § 1018

<sup>1</sup> HEA § 141(d)(4)(A); 20 U.S.C. § 1018 (d)(4)(A).

<sup>2</sup> HEA § 141(d)(4)(B); 20 U.S.C. § 1018 (d)(4)(B).

<sup>3</sup> See U.S. Dep't of Education, *View Federal Student Aid's Strategic Plans, Reports, and Key Initiatives*, <https://studentaid.gov/data-center/business-info/strategic-planning-and-reporting#coo-performance-agreement> (last accessed June 8, 2020).

<sup>4</sup> HEA § 141(d)(5)(B); 20 U.S.C. § 1018 (d)(5)(B).



(d)(4)(A). Please note that the HEA requires that these agreements be made public. HEA § 141(d)(4)(b), 20 U.S.C. § 1018 (d)(4)(B).

Given this request seeks a small volume of readily-identifiable documents, and that disclosure of those documents is *required* by federal law, Student Defense and American Oversight expect that this request will be assigned to the Simple processing track and that a response will be made promptly.

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

### **Fee Waiver Request**

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency's regulations, Student Defense and American Oversight request 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. Moreover, the request is primarily and fundamentally for non-commercial purposes.

Student Defense and American Oversight request a waiver of fees because 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>5</sup> The public has a significant interest in how Education is evaluating the performance of a high-ranking official with responsibility for administering federal student aid for millions of students and student borrowers, as well as whether Education is following appropriate legal requirements related to those evaluations. Records with the potential to shed light on these matters would contribute significantly to public understanding of operations of the federal government, including whether the COO of FSA is being appropriately evaluated. Student Defense and American Oversight are committed to transparency and makes the responses agencies provide to FOIA requests publicly available, and the public's understanding of the government's activities would be enhanced through their analysis and publication of these records.

This request is primarily and fundamentally for non-commercial purposes.<sup>6</sup> Student Defense: National Student Legal Defense Network is a non-profit, non-partisan organization. Student Defense's mission is to work, through a variety of means, to advance students' rights to educational opportunity and to ensure that higher education provides a launching point for economic mobility. Student Defense also believes that transparency is critical to fully understanding the government's role in student protections and promoting opportunity. Student Defense has the capacity to make the information it receives available to the public through reports, social media, press releases, in litigation filings, and regulatory comments to government agencies. Student Defense has no commercial purpose in seeking the requested records.

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

<sup>5</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>6</sup> See 5 U.S.C. § 552(a)(4)(A)(iii).

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>7</sup>

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through numerous substantive analyses posted to its website.<sup>8</sup> Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to an ethics waiver received by a senior Department of Justice attorney and an analysis of what those records demonstrated regarding the Department's process for issuing such waivers;<sup>9</sup> posting records received as part of American Oversight's "Audit the Wall" project to gather and analyze information related to the administration's proposed construction of a barrier along the U.S.-Mexico border, and analyses of what those records reveal;<sup>10</sup> posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;<sup>11</sup> posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;<sup>12</sup> and posting records and analysis regarding the Department of Justice's decision in response to demands from Congress to direct a U.S. Attorney to undertake a wide-ranging review and make recommendations regarding criminal investigations relating to the President's political opponents and allegations of misconduct by the Department of Justice itself and the Federal Bureau of Investigation.<sup>13</sup>

Accordingly, Student Defense and American Oversight qualify for a fee waiver.

<sup>7</sup> American Oversight currently has approximately 15,500 page likes on Facebook and 102,100 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited June 8, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited June 8, 2020).

<sup>8</sup> News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

<sup>9</sup> DOJ Records Relating to Solicitor General Noel Francisco's Recusal, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; 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>10</sup> See generally Audit the Wall, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; see, e.g., Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>.

<sup>11</sup> Documents Reveal Ben Carson Jr.'s Attempts to Use His Influence at HUD to Help His Business, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>.

<sup>12</sup> Investigating the Trump Administration's Efforts to Sell Nuclear Technology to Saudi Arabia, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>.

<sup>13</sup> Sessions' Letter Shows DOJ Acted on Trump's Authoritarian Demand to Investigate Clinton, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

## **Guidance Regarding the Search & Processing of Requested Records**

In connection with its request for records, Student Defense and American Oversight provide the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. For instance, if the request seeks “communications,” please search all locations likely to contain communications, including relevant hard-copy files, correspondence files, appropriate locations on hard drives and shared drives, emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voicemail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.
- 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 for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.<sup>14</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, by intent or through negligence, failed to meet their obligations.<sup>15</sup>
- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to government-wide requirements to manage agency information electronically,<sup>16</sup> and many agencies have

<sup>14</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>15</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).

<sup>16</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,

adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

- 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 a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

### **Conclusion**

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to Student Defense and American Oversight, please do not hesitate to contact us to discuss this request

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF 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.

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, please contact Dan McGrath at [foia@americanoversight.org](mailto:foia@americanoversight.org) or 202.897.4213.

<sup>1</sup>“Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

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,

/s/ Aaron Ament  
Aaron Ament  
President, Student Defense:  
National Legal Student Defense Network



Austin R. Evers  
Executive Director  
American Oversight