



July 24, 2017

VIA ELECTRONIC MAIL

U.S. Department of Education
ATTN: FOIA Public Liaison
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 Freedom of Information Act Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations of the Department of Education (ED), 34 C.F.R. Part 5, American Oversight makes the following request for records. The records requested herein may reside in multiple components or offices within your agency. We ask that you coordinate this request across your agency in your role as the agency's FOIA contact.

President Donald Trump has not eliminated his financial ties to the Trump Organization—a subject significant media interest¹—and several agency heads have also retained certain seeming financial conflicts of interest.² American Oversight makes this request to help the public understand how such conflicts are navigated at ED.

Requested Records

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

¹ Dan Alexander et al., *Trump Refuses to Divest Assets, Passes Control to His Sons*, FORBES (Jan. 11, 2017, 11:41 AM), <https://www.forbes.com/sites/chasewithorn/2017/01/11/donald-trump-will-hand-over-business/#3c8651a760d7>; Susanne Craig & Eric Lipton, *Trust Records Show Trump Is Still Closely Tied to His Empire*, N.Y. TIMES, Feb. 3, 2017, <https://www.nytimes.com/2017/02/03/us/politics/donald-trump-business.html>.

² Elisabeth P. DeVos, *Executive Branch Personnel, Public Financial Disclosure Report (OGE Form 278e)*, U.S. OFF. OF GOVT. ETHICS, Jan. 19, 2017, [https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/E554507378A61BDF852580AE002C70E1/\\$FILE/DeVos,%20Elisabeth%20P.%20%20final278.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/E554507378A61BDF852580AE002C70E1/$FILE/DeVos,%20Elisabeth%20P.%20%20final278.pdf) (see endnotes to Part 6, Nos. 31.1, 34.3, 35.1, and 36.1).



1. Records sufficient to demonstrate total costs reimbursed or paid directly by ED for overnight stays at, travel to, or meetings at the Amway Grand Plaza Hotel in Grand Rapids, Michigan.
2. Records sufficient to demonstrate total costs reimbursed or paid directly by ED for overnight stays at, travel to, or meetings at the Grand Hotel Mackinac Island in Mackinac Island, Michigan.
3. All emails containing the words/phrases “Mackinac,” “Amway,” “Grand Plaza,” or “Grand Hotel.”

The search for responsive records should include all individuals and locations where records are likely to exist, including the Office of the Secretary, the Office of the Deputy Secretary, the Office of the Chief Financial Officer, the Office of Management, and all ED offices involved in making travel arrangements or receiving, approving, paying, reimbursing, or auditing travel expenses.

Please provide all responsive records from January 20, 2017, to the date the search is conducted.

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 is subject to the Federal Records Act and FOIA.³ **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.**⁴

³ 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).

⁴ 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

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.**⁵ 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 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.”⁶ 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.”⁷ 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.”⁸ 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.’”⁹

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)).

⁵ 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>.

⁶ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁷ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁸ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

⁹ *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)).

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.¹⁰ 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, American Oversight and ED 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 rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.33, 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 procedures by the general public in a significant way.¹¹ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹²

American Oversight requests 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 government operations and activities.¹³ The Standards of Ethical Conduct for Employees of the Executive Branch prohibit employees from “[d]irectly or indirectly, giv[ing] a gift to or mak[ing] a donation toward a gift for an official superior.”¹⁴ The subject of this FOIA request would shed light on whether and to what extent federal employees at ED are enriching their agency head by choosing accommodations that inure to Ms. DeVos’s financial benefit. The cost and how the site

¹⁰ *Mead Data Central*, 566 F.2d at 261.

¹¹ 34 C.F.R. § 5.33(a)(1).

¹² 34 C.F.R. § 5.33(a)(2).

¹³ 34 C.F.R. § 5.33(a)(1); 34 C.F.R. § 5.33(b)(1)-(4).

¹⁴ 5 C.F.R. § 2635.302(a)(1).

selection of accommodations is determined when federal employees are on official travel concerns the operations and activities of the government. Financial conflicts of interest have been the subject of significant public interest,¹⁵ and the requested information would contribute significantly to the public's understanding of how the government is creating or navigating potential conflicts.

This request is primarily and fundamentally for non-commercial purposes.¹⁶ 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.¹⁷ 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,¹⁸ 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.¹⁹ 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.²⁰

¹⁵ See Dan Alexander et al., *supra* note 1; Susanne Craig & Eric Lipton, *supra* note 1; Ben Miller & Laura Jimenez, *Inside the Financial Holdings of Billionaire Betsy DeVos*, CTR. FOR AM. PROGRESS (Jan. 27, 2017, 2:24 PM), <https://www.americanprogress.org/issues/education/news/2017/01/27/297572/inside-the-financial-holdings-of-billionaire-betsy-devos/>; Michael Stratford, *DeVos Review Identifies 102 Financial Interests with Potential Conflicts*, POLITICO (Jan. 20, 2017, 12:43 PM) <http://www.politico.com/story/2017/01/betsy-devos-potential-conflicts-financial-review-233906>; Valerie Strauss, *Here's Betsy DeVos's Financial Disclosure Form. Read What Trump's Billionaire Education Nominee Included—And Left Out*, WASH. POST, Jan. 7, 2017, https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/07/heres-betsy-devoss-financial-disclosure-form-read-what-trumps-billionaire-education-nominee-included-and-left-out/?utm_term=.08022fd2700a.

¹⁶ 6 C.F.R. § 5.11(k)(1)(ii); 6 C.F.R. § 5.11(k)(3)(i)-(ii).

¹⁷ American Oversight currently has approximately 11,100 page likes on Facebook, and 33,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited July 18, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited July 18, 2017).

¹⁸ *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco>.

¹⁹ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents>.

²⁰ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

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 ED 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 Cerissa Cafasso at foia@americanoversight.org or 202.869.5246. 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,

A handwritten signature in blue ink that reads "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