



September 18, 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](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 *et seq.* and the implementing regulations for the Department of Education (Education), 34 C.F.R. Part 5, American Oversight makes the following request for records.

The Gainful Employment Rule helps students contain education costs and make wise educational investments by cutting off access to federal student aid dollars for educational programs that saddle graduates with high debts relative to their earning potential.<sup>1</sup> According to data released in January 2017, “over 800 programs serving hundreds of thousands students fail[ed] the Department’s accountability standards.”<sup>2</sup> Yet Education has begun to roll back these protections for students. In June 2017, Education announced its intention to form a rulemaking committee to review the Gainful Employment Rule as part of a “regulatory reset.”<sup>3</sup> In July, Education announced delays in existing provisions of the rule, including deadlines for disclosing “graduate employment rates or

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<sup>1</sup> See, e.g., Stephanie Rigg et al., *Gainful Employment Regulations Will Protect Students and Taxpayers. Don’t Change Them*, BROOKINGS, Aug. 4, 2017, <https://www.brookings.edu/blog/brown-center-chalkboard/2017/08/04/gainful-employment-regulations-will-protect-students-and-taxpayers-dont-change-them/>.

<sup>2</sup> Press Release, Department of Education, Education Department Releases Final Debt-to-Earnings Rates for Gainful Employment Programs (Jan. 9, 2017), <https://www.ed.gov/news/press-releases/education-department-releases-final-debt-earnings-rates-gainful-employment-programs>.

<sup>3</sup> Press Release, Department of Education, Secretary DeVos Announces Regulatory Reset to Protect Students, Taxpayers, Higher Ed Institutions (June 14, 2017), [https://www.washingtonpost.com/news/answer-sheet/wp/2017/06/14/betsy-devos-delays-2-obama-era-rules-designed-to-protect-students-from-predatory-for-profit-colleges/?utm\\_term=.b4c4dc867aff](https://www.washingtonpost.com/news/answer-sheet/wp/2017/06/14/betsy-devos-delays-2-obama-era-rules-designed-to-protect-students-from-predatory-for-profit-colleges/?utm_term=.b4c4dc867aff); Negotiated Rulemaking Committee; Public Hearings, 82 Fed. Reg. 27640 (proposed June 16, 2017), <https://www.federalregister.gov/documents/2017/06/16/2017-12555/negotiated-rulemaking-committee-public-hearings>.



debt levels to prospective students” and to “file alternate earnings appeals.”<sup>4</sup> In August, Education announced a second extension of time to appeal earnings data for graduates.<sup>5</sup>

American Oversight seeks information to shed light on Education’s shifting view of its responsibility to protect American students from unmanageable debt loads dramatically out of proportion to the value of their certificates or degrees.

### **Requested Records**

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

All decision memoranda, directives, policy interpretations, or policy guidance related to the gainful employment rule signed, approved, or otherwise adopted by any of the following:

- Secretary DeVos
- The Deputy Secretary
- The Under Secretary
- The Assistant Secretary for Postsecondary Education
- The Deputy Assistant Secretary for Higher Education Programs
- The Deputy Assistant Secretary for Policy, Planning, and Innovation
- The Assistant Secretary for Career, Technical, and Adult Education
- The General Counsel
- The Deputy General Counsel for Postsecondary Service
- Any other political appointee, SES employee, or person holding an administratively determined position in the Office of the Secretary, the Office of the Deputy Secretary, the Office of the Under Secretary, the Office of the Assistant Secretary for Postsecondary Education, the Office of Higher Education Programs, the Office of Policy, Planning, and Innovation, the Office of Career, Technical, and Adult Education, or the Office of the General Counsel.

Please provide all responsive records from January 20, 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 your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe

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<sup>4</sup> Andrew Kreighbaum, *DeVos Allows Career Programs to Delay Disclosures to Students*, INSIDE HIGHER ED, July 3, 2017, <https://www.insidehighered.com/news/2017/07/03/education-department-announces-new-delays-gainful-employment>.

<sup>5</sup> Doug Lederman, *U.S. Continues to Delay, Soften Gainful-Employment Rules*, INSIDE HIGHER ED, Aug. 18, 2017, <https://www.insidehighered.com/quicktakes/2017/08/18/us-continues-delay-soften-gainful-employment-rules>.

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 is subject to the Federal Records Act and FOIA.<sup>6</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, through negligence or willfulness, failed to meet their obligations.**<sup>7</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>8</sup> Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form

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<sup>6</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>7</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>8</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>.

**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>9</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>10</sup> 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.”<sup>11</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>12</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>13</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

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<sup>9</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

<sup>10</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>11</sup> *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

<sup>12</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>13</sup> *Mead Data Central*, 566 F.2d at 261.

duplication costs. By working together at the outset, American Oversight and Education 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 15<sup>th</sup> 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.

### **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.<sup>14</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<sup>15</sup>

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>16</sup> Thousands of educational programs either fail the existing Gainful Employment standards or fall within a watch zone that puts them on a path to lose access to federal funds, indicating that students enrolled in these programs are not receiving the value promised in exchange for the debt loads they carry.<sup>17</sup> But instead of explaining the purported shortcomings of the existing rule—including any infirmities in the data or process used to promulgate it or any material changes since the rule was written—or a providing an alternative model for protecting students, Education summarily asserted that the rule is “overly burdensome and confusing for institutions of higher education.”<sup>18</sup> Little public information is available to clarify Education’s basis for this view, its basis for determining that these alleged burdens outweigh the benefits of protections for students, or its plans to ensure that a new or modified rule will adequately protect students from over-priced and under-performing educational programs. Because Education has not been forthcoming on these issues, the requested disclosure will significantly enhance the public’s understanding of key government operations and activities surrounding Education’s responsibility to protect students.<sup>19</sup>

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<sup>14</sup> 34 C.F.R. § 5.33(a)(1).

<sup>15</sup> 34 C.F.R. § 5.33(a)(2).

<sup>16</sup> 34 C.F.R. § 5.33(a)(1), (b)(1)-(4).

<sup>17</sup> Press Release, Department of Education, Education Department Releases Final Debt-to-Earnings Rates for Gainful Employment Programs (Jan. 9, 2017), <https://www.ed.gov/news/press-releases/education-department-releases-final-debt-earnings-rates-gainful-employment-programs>.

<sup>18</sup> Press Release, Department of Education, Secretary DeVos Announces Regulatory Reset to Protect Students, Taxpayers, Higher Ed Institutions (June 14, 2017), [https://www.washingtonpost.com/news/answer-sheet/wp/2017/06/14/betsy-devos-delays-2-obama-era-rules-designed-to-protect-students-from-predatory-for-profit-colleges/?utm\\_term=.b4c4dc867aff](https://www.washingtonpost.com/news/answer-sheet/wp/2017/06/14/betsy-devos-delays-2-obama-era-rules-designed-to-protect-students-from-predatory-for-profit-colleges/?utm_term=.b4c4dc867aff).

<sup>19</sup> 34 C.F.R. § 5.33(b)(4).

This rule affects thousands of educational programs and hundreds of thousands of students who consider enrolling in them the public's interest and investment in this subject, so the requested disclosures will contribute to the "understanding of the public at large, as opposed to an individual or a narrow segment of interested persons."<sup>20</sup> And (as described further below) American Oversight will convey information obtained through this request to the general public via its website and social media accounts.<sup>21</sup>

This request is primarily and fundamentally for non-commercial purposes.<sup>22</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>23</sup> 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,<sup>24</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>25</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>26</sup>

Accordingly, American Oversight qualifies for a fee waiver.

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<sup>20</sup> Lydia Wheeler, *Outrage Erupts over Report DOJ Will Target Affirmative Action*, THE HILL (Aug. 2, 17, 12:05 PM), <http://thehill.com/regulation/administration/344948-outrage-erupts-over-report-doj-will-target-affirmative-action>.

<sup>21</sup> 34 C.F.R. § 5.33(b)(3).

<sup>22</sup> 34 C.F.R. § 5.33(c)(1)-(2).

<sup>23</sup> American Oversight currently has over 11,500 page likes on Facebook, and over 34,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited Sept. 18, 2017); American Oversight (@weareoversight), TWITTER (last visited Sept. 18, 2017).

<sup>24</sup> *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

<sup>25</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>26</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org).

## 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 Beth France at [foia@americanoversight.org](mailto:foia@americanoversight.org) or (202) 869-5264. 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