



October 19, 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 (Education), 34 C.F.R. Part 5, American Oversight makes the following request for records.

Since Betsy DeVos took office as Secretary of Education, the Department has taken several significant steps to undermine protections for students, including delaying the Gainful Employment and Borrower Defense Rules, attacking affirmative action in college admissions practices, and rolling back guidance protecting victims of campus sexual assault.¹ Calendars

¹ See, e.g., Press Release, Department of Education, Secretary DeVos Announces Regulatory Reset to Protect Students, Taxpayers, Higher Ed Institutions (June 14, 2017), <https://www.ed.gov/news/press-releases/secretary-devos-announces-regulatory-reset-protect-students-taxpayers-higher-ed-institutions>; 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>; Valerie Strauss, *Betsy DeVos Delays 2 Obama-era Rules Designed to Protect Students From Predatory For-Profit Colleges*, WASH. POST (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; 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>; 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>; Danielle Douglas-Gabriel, *Attorneys General Sue DeVos Over Delay of Rule to Protect Students from Predatory Colleges*, WASH. POST, July 6, 2017, <https://www.washingtonpost.com/news/grade-point/wp/2017/07/06/attorneys-general-sue-devos->



disclosed by other agencies have shown a troubling tendency for Trump Administration officials to give ample time to industry lobbyists without affording similar attention to public interest advocates,² and there are indications that Secretary DeVos and her team are similarly giving priority to wish lists of for-profit colleges and special interest groups without giving equal regard to the needs of students.³ The involvement of several officials with ties to for-profit educational institutions heightens these concerns.⁴

Given these concerns about who has the ear of policymakers at the Education, American Oversight is seeking information to determine the scope of access the Department has provided to industry groups, special interest groups, and others with a stake in educational regulation.

Requested Records

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

1. All calendars or calendar entries for any of the following individuals from July 19, 2017, to the date a search is conducted, including any calendars maintained on behalf of these individuals (e.g., by an administrative assistant):
 - Secretary DeVos
 - Josh Venable, Chief of Staff
 - Dougie Simmons, Deputy Chief of Staff for Operations
 - Ebony Lee, Deputy Chief of Staff for Policy
 - Robert Eitel, Senior Counselor to the Secretary
 - Eric Ventimiglia, Special Assistant to the Secretary

[over-delay-of-rule-to-protect-students-from-predatory-colleges/?utm_term=.289aabfb51d0](https://www.buzzfeed.com/zoetillman/the-justice-department-has-an-active-investigation-into?utm_term=.jveNnYdEWG#.utZqXna2Zp); Zoe Tillman, *The Justice Department Is Investigating Harvard's Admissions Practices*, BUZZFEED (Oct. 4, 2017, 5:32 PM), https://www.buzzfeed.com/zoetillman/the-justice-department-has-an-active-investigation-into?utm_term=.jveNnYdEWG#.utZqXna2Zp; Sophie Tatum, *Education Department Withdraws Obama-Era Campus Sexual Assault Guidance*, CNN (Sept. 22, 2017, 3:09 PM), <http://www.cnn.com/2017/09/22/politics/betsy-devos-title-ix/index.html>.

² Eric Lipton & Lisa Friedman, *E.P.A. Chief's Calendar: A Stream of Industry Meetings and Trips Home*, N.Y. TIMES, Oct. 3, 2017, <https://www.nytimes.com/2017/10/03/us/politics/epa-scott-pruitt-calendar-industries-coal-oil-environmentalists.html>.

³ Danielle Douglas-Gabriel, *DeVos Rejects Invitation to Meet with Former For-Profit College Students*, WASH. POST, Sept. 28, 2017, https://www.washingtonpost.com/news/grade-point/wp/2017/09/28/devos-rejects-invitation-to-meet-with-former-for-profit-college-students/?utm_term=.dbf902df956f.

⁴ See, e.g., Danielle Douglas-Gabriel, *Elizabeth Warren Questions the Hiring of For-Profit-College Officials at the Education Department*, WASH. POST, Mar. 20, 2017, https://www.washingtonpost.com/news/grade-point/wp/2017/03/20/elizabeth-warren-questions-the-hiring-of-for-profit-college-officials-at-the-education-department/?utm_term=.5b1a1f8e337c; Annie Waldman, *Former Lobbying with For-Profit Colleges Quits the Department of Education*, PACIFIC STANDARD, Mar. 22, 2017, <https://psmag.com/former-lobbyist-with-for-profit-colleges-quits-the-department-of-education-ef3f33ec4135>.

2. All calendars or calendar entries for any of the following individuals from April 6, 2017, to the date the search is conducted, including any calendars maintained on behalf of these individuals (e.g., by an administrative assistant):
 - Jason Botel, Deputy Assistant Secretary for Elementary and Secondary Education and Acting Assistant Secretary for Elementary and Secondary Education
 - James Manning, Acting Under Secretary

3. All calendars or calendar entries for any of the following individuals from February 7, 2017, to the date a search is conducted, including any calendars maintained on behalf of these individuals (e.g., by an administrative assistant):
 - Steven Menashi, Deputy General Counsel for Postsecondary Service and Acting General Counsel
 - Candice Jackson, Deputy Assistant Secretary and Acting Assistant Secretary for Civil Rights
 - A. Wayne Johnson, Chief Operating Officer, Federal Student Aid
 - Acting Deputy Secretary
 - Assistant Secretary for Postsecondary Education
 - Deputy Assistant Secretary for Higher Education Programs
 - Deputy Assistant Secretary for Policy, Planning, and Innovation
 - Assistant Secretary for Career, Technical, and Adult Education

Education should provide all calendar entries *in existence* as of the date of the search, including entries that have been created as of the search date but reflect events planned for later dates. For calendar entries created in Outlook or similar programs, the documents should be produced in “memo” form to include all invitees, any notes, and all attachments. Please do not limit your search to Outlook calendars—we request the production of any calendar—paper or electronic, whether on government-issued or personal devices—used to track or coordinate how these individuals allocate their time on agency business.

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 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.⁵ **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.**⁶

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.**⁷ 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 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.**

⁵ 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).

⁶ 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)).

⁷ 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.”⁸ 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.”⁹ 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.”¹⁰ 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.’”¹¹

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.¹² 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, 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 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.

⁸ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹⁰ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹¹ *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)).

¹² *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.¹³ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁴

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 Information about how outside groups and interests are influencing Education officials and decisions will significantly enhance the public’s understanding of key government operations and activities surrounding Education’s responsibility to serve students.¹⁶ Because Education’s activities affect tens of millions of students at all levels, the requested records will enhance “understanding of the public at large, as opposed to an individual or a narrow segment of interested persons.”¹⁷ 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.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

¹³ 34 C.F.R. § 5.33(a)(1).

¹⁴ 34 C.F.R. § 5.33(a)(2).

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

¹⁶ 34 C.F.R. § 5.33(b)(4).

¹⁷ 34 C.F.R. § 5.33(b)(3).

¹⁸ *Id.*

¹⁹ 34 C.F.R. § 5.33(c)(1)-(2).

²⁰ American Oversight currently has over 11,500 page likes on Facebook, and over 35,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited Oct. 19, 2017); American Oversight (@weareoversight), TWITTER (last visited Oct. 19, 2017).

²¹ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

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 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 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

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, www.auditthewall.org.