



September 25, 2018

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.

Following the acquisition of the Art Institutes from the for-profit Education Management Corp. by Dream Center Education Holdings (DCEH), the schools' accreditor, the Higher Learning Commission (HLC), temporarily removed certain of the Art Institutes' accreditation status.¹ HLC noted that students should be informed of the change in status, which could affect their financial aid eligibility and course credits.² Subsequent reports suggest that in a meeting earlier this year, Education staff led by Diane Auer Jones told DCEH to publicly represent that two of its schools remained accredited despite receiving a letter from HLC to the contrary.³ On August 30, 2018, Senators Durbin, Warren, Blumenthal, and Brown wrote to Secretary DeVos, expressing concern regarding these allegations, and requesting records and information to clarify the issue.⁴

American Oversight seeks records that would shed light on whether and to what extent Education officials have been involved in, or responded to, public statements that may have misled students.

¹ See Daniel Moore, *Deal Under Scrutiny as Art Institutes Face Accreditation Setbacks*, PITTSBURGH POST-GAZETTE (June 19, 2018, 8:15 AM), <http://www.post-gazette.com/business/career-workplace/2018/06/19/Deal-under-scrutiny-Art-Institutes-accreditation-setbacks-dream-center/stories/201806140022>.

² See *id.*

³ David Halperin, *DeVos Aide Tailors Decisions to the Predatory Colleges That Employed Her*, REPUBLIC REPORT, (Aug. 2, 2018, 1:46 PM), <https://www.republicreport.org/2018/devos-aide-tailors-decisions-to-the-predatory-colleges-who-employed-her/>.

⁴ See Ltr. from Sens. Durbin, Warren, Blumenthal, & Brown to Hon. Betsy DeVos, Secretary, Dep't of Educ., Aug. 30, 2018, *available at* <https://www.durbin.senate.gov/imo/media/doc/8.30.18%20DCEH%20Senate%20letter.pdf>.



Requested Records

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

All communications (including email communications, email attachments, calendar entries, and calendar invitations) sent or received by anyone listed in Column A below, and containing any of the search terms listed in Column B below:

Column A	Column B
<ul style="list-style-type: none">• Diane Auer Jones• Any Education employees in the Immediate Office of the Secretary• Any Education employees in the Office of Postsecondary Education• Any Education employees in the Accreditation Group• The following individuals in the office of Federal Student Aid:<ul style="list-style-type: none">○ James Manning○ Marianna O'Brien○ Colleen McGinnis○ Kathleen Smith○ Ingrid Valentine○ Michael Frola○ Joseph Smith	<ul style="list-style-type: none">• “dream center”• “dream foundation”• DCEH• DCF• EDMC• “art institute”• “art institutes”• “institute of art”

Please provide all responsive records from January 1, 2018, 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 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 Administration (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.**

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

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>.

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

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.

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

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) (emphases 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.

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 The allegations concerning Education’s role in the public statements by DCEH about the accreditation status of the Art Institutes directly relates to the job duties of the individual Education employees and offices in question. Education’s role in protecting students from abuses by for-profit colleges has recently been a topic of significant public concern,¹⁶ so actions of the federal government in relation to such institutions (even after they no longer hold for-profit status), will contribute to the “understanding of the public at large, as opposed to an individual or a narrow segment of interested persons.”¹⁷ Moreover, given the central role in these allegations of Diane Auer Jones, who previously worked as a lobbyist for for-profit educational institutions with records of deceiving and abusing students, allegations concerning Education’s communications with DCEH raise serious questions concerning whether Education is fulfilling its responsibilities.¹⁸ The requested records will inform the public regarding these important questions. 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.¹⁹

This request is primarily and fundamentally for non-commercial purposes.²⁰ 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.²¹ American

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 See, e.g., Kevin McCoy, *Trump Administration Plans to Drop Obama-Era Rule Aimed at Abuses by For-Profit Colleges*, USA TODAY (Aug. 10, 2018, 5:11 PM), <https://www.usatoday.com/story/money/2018/08/10/trump-administration-scrap-rules-protect-students-predatory-profit-colleges/956334002/>; Aaron Ament, *Opinion: Protect Students, Not Predatory Colleges*, NY TIMES, May 18, 2018, <https://www.nytimes.com/2018/05/18/opinion/protect-students-not-predatory-colleges.html>; James Denmin, *The DOE Is Scaling Back its Oversight of For-Profit Colleges – Here’s How to Protect Yourself*, MIC, May 15, 2018, <https://mic.com/articles/189386/the-department-of-education-is-scaling-back-its-oversight-of-for-profit-colleges-heres-how-to-protect-yourself#.cD6JRFCRR>.

¹⁷ 34 C.F.R. § 5.33(b)(3).

¹⁸ See Halperin, *supra* note 3.

¹⁹ 34 C.F.R. § 5.33(b)(3).

²⁰ 34 C.F.R. § 5.33(c)(1)-(2).

²¹ American Oversight currently has over 11,900 page likes on Facebook, and over 45,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited Sept. 24, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight?lang=en> (last visited Sept. 24, 2018).

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,²² 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.²³ 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.²⁴

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 Katherine Anthony at foia@americanoversight.org or (202) 897-3918. 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,



Austin R. Evers
Executive Director
American Oversight

²² *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²³ *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>.

²⁴ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.