



July 16, 2019

**VIA ELECTRONIC MAIL**

U.S. Department of Education  
Office of Management  
Office of the Chief Privacy Officer  
400 Maryland Avenue, SW, LBJ 7W104  
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 the Department of Education (Education), 34 C.F.R. Part 5, American Oversight makes the following request for records.

Education's Inspector General (IG) recently reported that Secretary Betsy DeVos used four personal, non-official email accounts for agency business.<sup>1</sup> The IG further found that Secretary DeVos had failed to properly forward at least a portion of those records to her government account, as is required by the Federal Records Act.<sup>2</sup> The U.S. House of Representatives Committee on Oversight and Reform has expanded its investigation of Secretary DeVos's use of personal email to communicate about government business.<sup>3</sup>

American Oversight seeks records with the potential to shed light on the extent to which Secretary DeVos utilized her private email accounts to conduct official agency business, and to shed light on individuals and entities that have influenced Secretary DeVos's decision-making at Education through communications with her through these accounts.

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<sup>1</sup> Associated Press, *DeVos Used Personal Emails for Work in 'Limited' Cases, Report Finds*, NBC NEWS (May 20, 2019, 1:24 PM), <https://www.nbcnews.com/politics/white-house/devos-used-personal-emails-work-limited-cases-report-finds-n1007786>.

<sup>2</sup> *Id.*

<sup>3</sup> Kimberly Hefling, *DeVos' Use of Personal Email as Secretary Probed by House Democrats*, POLITICO (July 15, 2019, 4:34 PM), <https://www.politico.com/story/2019/07/15/devos-use-of-personal-email-as-secretary-probed-by-house-democrats-3582116>.



## Requested Records

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

All emails sent or received by Secretary Betsy Devos on any personal, non-governmental, or non-official email account regarding official agency business.

Please understand emails regarding “official agency business” to broadly include, at a minimum, all communications that would ordinarily comprise federal records per 44 U.S.C. § 3301(a)(1)(A), which defines federal government records as,

all recorded information . . . appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them[.] *Id.*

Please provide all responsive records from February 7, 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, 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. Moreover, the request is primarily and fundamentally for non-commercial purposes.

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 operations or activities of the government.”<sup>4</sup> The public has a significant interest in many matters discussed in agency emails.<sup>5</sup> When email communications are removed from public access because they are sent and received on

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

<sup>5</sup> See, e.g., Associated Press, *supra* note 1; Hefling, *supra* note 3; Ben Kesling, *House Democrats to Probe How Trump’s Associates Influenced the VA: Panel Seeks Info About a Private Email Channel*, WALL ST. J. (Feb. 8, 2019), <https://www.wsj.com/articles/house-democrats-to-probe-how-trumps-associates-influenced-the-va-11549634520>; Carol D. Leonnig & Josh Dawsey, *Ivanka Trump Used a Personal Email Account to Send Hundreds of Emails About Government Business Last Year*, WASH. POST (Nov. 19, 2018), [https://www.washingtonpost.com/politics/ivanka-trump-used-a-personal-email-account-to-send-hundreds-of-emails-about-government-business-last-year/2018/11/19/6515d1e0-e7a1-11e8-a939-9469f1166f9d\\_story.html](https://www.washingtonpost.com/politics/ivanka-trump-used-a-personal-email-account-to-send-hundreds-of-emails-about-government-business-last-year/2018/11/19/6515d1e0-e7a1-11e8-a939-9469f1166f9d_story.html); Alan Levin, *Former EPA Chief Scott Pruitt Used a Private Email Account for Work*, TIME, Dec. 8, 2018, <https://time.com/5474795/former-epa-chief-private-email-work/>.

private accounts, courts have recognized a public interest in their recovery.<sup>6</sup> Furthermore, the requested records will shed light on private parties and government actors who have communicated with the highest-ranking official at Education and have the potential to shed light on the effects these parties' communications with Secretary DeVos have had on Education policies and actions. Consequently, the requested records would contribute significantly to public understanding of operations of the federal government. American Oversight is 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 American Oversight's analysis and publication of these records.

This request is primarily and fundamentally for non-commercial purposes.<sup>7</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>8</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>9</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>10</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

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<sup>6</sup> See, e.g., *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952 (D.C. Cir. 2016).

<sup>7</sup> See 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>8</sup> American Oversight currently has approximately 12,300 page likes on Facebook and 54,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited July 16, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited July 16, 2019).

<sup>9</sup> News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

<sup>10</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>.

reveal;<sup>11</sup> posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;<sup>12</sup> posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;<sup>13</sup> 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>14</sup>

Accordingly, American Oversight qualifies for a fee waiver.

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

In connection with its request for records, American Oversight provides 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.
- 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

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<sup>11</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>12</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>13</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>14</sup> *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

Records Act and FOIA.<sup>15</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>16</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>17</sup> and many agencies have 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

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<sup>15</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>16</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>17</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>.

production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. 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 your agency can decrease the likelihood of costly and time-consuming litigation in the future.

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 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.

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 Daniel McGrath at [foia@americanoversight.org](mailto:foia@americanoversight.org) or (202) 897-4213. 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