



September 10, 2019

**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 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.

Recent press reporting indicates that senior White House officials working on immigration policy have explored ways to prevent undocumented immigrant children from attending public schools.<sup>1</sup> Although reportedly abandoned due to the 1982 Supreme Court decision *Plyler v. Doe*, which prohibits states from denying public school access due to immigration status, this effort at one time allegedly involved consideration of an Education Department guidance memorandum giving states the option to prohibit undocumented migrant children from attending public schools.<sup>2</sup>

American Oversight seeks records to shed light on Education's role in federal immigration policy, including whether and to what extent White House officials and outside entities are influencing Education on immigration-related issues.

**Requested Records**

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

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<sup>1</sup> Jennifer Jacobs & Justin Sink, *White House Looked Into Ways to Block Migrant Children From Going to School*, BLOOMBERG (Aug. 17, 2019, 4:00 AM),

<https://www.bloomberg.com/news/articles/2019-08-17/white-house-mulled-ways-to-block-migrant-children-from-schools>.

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



All email communications (including emails, email attachments, calendar invitations, and calendar invitation attachments) sent by (a) Education officials to (b) external individuals and organizations specified below:

Column A: Education Officials	Column B: External Entities
<ul style="list-style-type: none"> <li>i. Secretary Betsy DeVos, and anyone serving as her Chief of Staff (including but not limited to Josh Venable and Nate Bailey)</li> <li>ii. Deputy Secretary Mitchell Zais, and anyone serving as his Chief of Staff</li> <li>iii. Anyone serving as General Counsel</li> <li>iv. Anyone serving as White House Liaison or White House Advisor</li> <li>v. Anyone serving as Assistant Secretary of Elementary and Secondary Education, including in an acting capacity</li> <li>vi. Kenneth Marcus, Assistant Secretary for Civil Rights, and anyone serving as his Chief of Staff</li> <li>vii. Candice Jackson, Deputy General Counsel and former Deputy Assistant Secretary for Civil Rights</li> <li>viii. Kimberly Richey, Principal Deputy Assistant Secretary for Civil Rights</li> <li>ix. José A. Viana, Assistant Deputy Secretary and Director, Office of English Language Acquisition</li> <li>x. Aimee Viana, Former Executive Director, White House Initiative on Educational Excellence for Hispanics and Former Principal Deputy Assistant Secretary, Office of Elementary and Secondary Education</li> <li>xi. Andrea Ramirez, Executive Director, Center for Faith and Opportunity Initiatives, and Interim Executive Director, White House Initiative on Educational Excellence for Hispanics</li> </ul>	<ul style="list-style-type: none"> <li>i. Family Research Council (FRC), Jerry Boykin, Tony Perkins, or anyone with an email address ending in @frc.org</li> <li>ii. Federation for American Immigration Reform (FAIR), Daniel Stein, or anyone with an email address ending in @fairus.org</li> <li>iii. Immigration Reform Law Institute (IRLI), Dale Wilcox, or anyone with an email address ending in @irli.org</li> <li>iv. Center for Immigration Studies (CIS), Mark Krikorian, Jessica Vaughan, Jason Richwine, or anyone with an email address ending in @cis.org</li> <li>v. NumbersUSA, Roy Beck, Rosemary Jenks, or anyone with an email address ending in @numbersusa.com or @numbersusa.org</li> <li>vi. The Remembrance Project, or any person using an email address ending in @theremembranceproject.org</li> <li>vii. Thomas More Law Center, Richard Thompson, or anyone with an email address ending in @thomasmore.org</li> <li>viii. The Heritage Foundation, Kay Cole James, Hans von Spakovsky, Mike Gonzalez, Steven Groves, Charles Stimson, or anyone with an email address ending in @heritage.org</li> <li>ix. ProEnglish, including anyone with an email address ending in @proenglish.org</li> <li>x. Kris Kobach, including but not limited to the email addresses <a href="mailto:kkobach@gmail.com">kkobach@gmail.com</a>, <a href="mailto:kris@kriskobach.com">kris@kriskobach.com</a>, or any emails Kris Kobach sent from an address ending in @ks.gov</li> </ul>

In an effort to accommodate the Department of Education and reduce the number of potentially responsive records, American Oversight agrees that the search for responsive email communications may be limited to emails sent by Education officials. Despite this search accommodation, American Oversight still requests that complete email chains be produced, displaying both sent and received messages.

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

### **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>3</sup> The public has a significant interest in agency actions related to enforcing the Trump administration's hardline immigration policy, including how such enforcement impacts migrant children.<sup>4</sup> Records with the potential to shed light on this issue would contribute significantly to public understanding of operations of the federal government, including the extent of influence White House senior advisor Stephen Miller has exerted on agency policies through relationships with high-ranking officials. 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>5</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

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<sup>3</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>4</sup> *Supra* note 1.

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

materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.<sup>6</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>7</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>8</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 reveal;<sup>9</sup> posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;<sup>10</sup> posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;<sup>11</sup> and 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>12</sup>

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<sup>6</sup> American Oversight currently has approximately 12,400 page likes on Facebook and 54,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Sept. 9, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Sept. 9, 2019).

<sup>7</sup> News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

<sup>8</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>.

<sup>9</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>10</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>11</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>12</sup> *Sessions' Letter Shows DOJ Acted on Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

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. For instance, if the request seeks “communications,” please search all locations likely to contain communications, including relevant hard-copy files, correspondence files, appropriate locations on hard drives and shared drives, emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voicemail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.
- 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 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 Records Act and FOIA.<sup>13</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

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<sup>13</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).

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>14</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>15</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 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

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<sup>14</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>15</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>.

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 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.

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 Khahilia Shaw at [foia@americanoversight.org](mailto:foia@americanoversight.org) or 202.539.6507. 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, appearing to read "Austin R. Evers", with a long horizontal flourish extending to the left.

Austin R. Evers  
Executive Director  
American Oversight