



September 10, 2019

**VIA EMAIL**

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: Expedited 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.

President Trump recently announced his intent to nominate Steven Menashi, the Department of Education's former acting General Counsel, to the U.S. Court of Appeals for the Second Circuit.<sup>1</sup> Before Mr. Menashi was the department's head lawyer, he was the Deputy Counsel for Postsecondary Education. As Mr. Menashi has been nominated to serve a lifetime term on the federal bench, there is an urgent need to reveal any communications with the potential to inform his confirmation process, for both the representatives with the authority to confirm and the constituents they represent.

American Oversight seeks records with the potential to shed light on Mr. Menashi's activities and communications during his tenure at Education.

**Requested Records**

American Oversight seeks expedited review of this request for the reasons identified below and requests that Education produce the following records as soon as practicable, and at least within twenty business days:

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<sup>1</sup> Tal Axelrod, *Trump Taps White House Lawyer for Federal Appeals Court*, THE HILL (Aug. 18, 2019, 5:58 PM), <https://thehill.com/homenews/administration/457470-trump-taps-white-house-lawyer-for-federal-appeals-court>.



All email communications (including email messages, complete email chains, email attachments, calendar invitations, and attachments thereto) sent by former General Counsel Steven Menashi containing the following terms:

- a. “Plyler”
- b. “Public charge”
- c. “undocumented”
- d. “illegal alien”
- e. “illegal immigrant”

Please provide all responsive records from May 24, 2017 to May 1, 2018.

In an effort to accommodate Education and reduce the number of responsive records to be processed and produced, American Oversight has limited its request to emails sent by former General Counsel Steven Menashi. To be clear, however, American Oversight still requests that complete email chains be produced, displaying both the sent messages and the prior received messages in each email chain. This means, for example, that both Mr. Menashi’s response to an email and the initial received message are responsive to this request and should be produced.

This request includes all prior messages (whether incoming or outgoing) reflected in the responsive correspondence and any attachments thereto.

### **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>2</sup> As Mr. Menashi’s nomination process moves forward, the public has a significant interest in understanding Mr. Menashi’s former activities at Education, including the types of communications he had while serving as acting general counsel and Postsecondary deputy counsel, as well as understanding whether a former Education official has complied with ethical requirements. Recent reporting has shed light on Mr. Menashi’s former written opinions on a variety of social and political issues that raise questions about his activities while at

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<sup>2</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

the Department.<sup>3</sup> Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including with whom Mr. Menashi corresponded and the extent of outside influence on Mr. Menashi's decisions. 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>4</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>5</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>6</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

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<sup>3</sup> Trudy Ring, *Trump Judicial Nominee Has History of Antigay, Misogynistic Writings*, ADVOCATE (Aug. 26, 2019, 11:28 AM), <https://www.advocate.com/politics/2019/8/26/trump-judicial-nominee-has-history-antigay-misogynistic-writings>; Andrew Kaczynski & Em Steck, *Trump Court Pick Denounced Feminists, Gay Rights Groups and Diversity Efforts in 1990s, 2000s Editorials*, CNN (Aug. 22, 2019, 5:13 PM), <https://www.cnn.com/2019/08/22/politics/kfile-steven-menashi-judge-nominee/index.html>; Eleanor Clift, *Trump Judge Pick Spread Anti-Muslim Pig Blood Bullet Myth*, THE DAILY BEAST (Aug. 24, 2019, 5:14 AM), <https://www.thedailybeast.com/trump-judge-pick-steven-menashi-spread-anti-muslim-pig-blood-bullet-myth>; Rachel Maddow, *Trump Nominates Advocate of 'Ethnonationalism' for Judgeship*, MSNBC, Aug. 15, 2019, <https://www.msnbc.com/rachel-maddow/watch/trump-nominates-advocate-of-ethnonationalism-for-judgeship-66238021914>.

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

<sup>5</sup> American Oversight currently has approximately 12,200 page likes on Facebook and 54,500 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>6</sup> News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

waivers;<sup>7</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>8</sup> posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;<sup>9</sup> posting records and analysis relating to the federal government’s efforts to sell nuclear technology to Saudi Arabia;<sup>10</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>11</sup>

Accordingly, American Oversight qualifies for a fee waiver.

### **Application for Expedited Processing**

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 34 C.F.R. § 5.21(i)(2)(i)(B), American Oversight requests that your agency expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief that the information requested is urgently needed in order to inform the public concerning actual or alleged government activity. President Trump recently nominated former acting General Counsel Steven Menashi to the Second Circuit of the U.S Court of Appeals.<sup>12</sup> As Mr. Menashi has

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<sup>7</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>8</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>9</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>10</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>11</sup> *Sessions’ Letter Shows DOJ Acted On Trump’s Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

<sup>12</sup> *See President Donald J. Trump Announces Judicial Nominees, Unites States Attorney Nominees, and United States Marshal Nominees*, THE WHITE HOUSE (Aug. 14, 2019),

been nominated to serve a lifetime term on the federal bench, there is an urgent need to reveal communications with external parties and about pertinent matters Mr. Menashi worked on while serving at Education, including if he complied with his ethical requirements. The American public has a substantial and urgent interest in understanding Mr. Menashi's activities and decisions at Education as the confirmation process advances.<sup>13</sup>

Moreover, I certify to be true and correct to the best of my knowledge and belief that there is an urgent need to inform the public about Mr. Menashi's communications and activities while serving as a top lawyer for Education. There has been intense public interest in and concern about Mr. Menashi's previous opinions, and the American people need access to this information with sufficient time to advocate for their elected representatives to move forward with Mr. Menashi's nomination or to withdraw that support or reject his nomination to the Second Circuit.

I further certify that American Oversight is primarily engaged in disseminating information to the public. 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. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,<sup>14</sup> American Oversight "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience."<sup>15</sup> American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, and other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social

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<https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-united-states-attorney-nominees-united-states-marshall-nominees/>.

<sup>13</sup> Trudy Ring, *Trump Judicial Nominee Has History of Antigay, Misogynistic Writings*, ADVOCATE (Aug. 26, 2019, 11:28 AM), <https://www.advocate.com/politics/2019/8/26/trump-judicial-nominee-has-history-antigay-misogynistic-writings>; Andrew Kaczynski & Em Steck, *Trump Court Pick Denounced Feminists, Gay Rights Groups and Diversity Efforts in 1990s, 2000s Editorials*, CNN (Aug. 22, 2019, 5:13 PM), <https://www.cnn.com/2019/08/22/politics/kfile-steven-menashi-judge-nominee/index.html>; Eleanor Clift, *Trump Judge Pick Spread Anti-Muslim Pig Blood Bullet Myth*, THE DAILY BEAST (Aug. 24, 2019, 5:14 AM), <https://www.thedailybeast.com/trump-judge-pick-steven-menashi-spread-anti-muslim-pig-blood-bullet-myth>; Rachel Maddow, *Trump Nominates Advocate of 'Ethnonationalism' for Judgeship*, MSNBC, Aug. 15, 2019, <https://www.msnbc.com/rachel-maddow/watch/trump-nominates-advocate-of-ethnonationalism-for-judgeship-66238021914>.

<sup>14</sup> See *ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 30–31 (D.D.C. 2004); *EPIC v. Dep't of Defense*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

<sup>15</sup> *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

media platforms, such as Facebook and Twitter.<sup>16</sup> As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.<sup>17</sup>

Accordingly, American Oversight's request satisfies the criteria for expedition.

### **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.

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<sup>16</sup> American Oversight currently has approximately 12,200 page likes on Facebook and 54,500 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>17</sup> See generally *News*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>; see, e.g., *DOJ Civil Division Response Noel Francisco Compliance*, 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>; *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; *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>; *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>; *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>; *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

- 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>18</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>19</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>20</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

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<sup>18</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>19</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>20</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>.

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 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 Cerissa Cafasso at [foia@americanoversight.org](mailto:foia@americanoversight.org) or (202) 869-5244. Also, if American Oversight's request for expedition is not granted or its



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