



May 5, 2020

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

The outbreak of the novel coronavirus, SARS-CoV-2, and the disease it causes, COVID-19, has been declared a public health emergency at both the national and international levels.¹ On March 2, 2020, the Senate Committee on Health, Education, Labor, and Pensions sent a letter to Secretary DeVos requesting information regarding how Education is preparing for the effect the spread of the virus will have on education stakeholders.²

American Oversight seeks records to shed light on Education's communications with the online education industry.

Requested Records

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

¹ *Coronavirus Disease 2019 (COVID-19) Situation Summary*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/summary.html>.

² Letter from Ranking Mem. Patty Murray, et al., Sen. Comm. On Health, Educ., Labor & Pensions, to Betsy DeVos, Sec'y, Dep't of Educ., Mar. 2, 2020, <https://www.help.senate.gov/imo/media/doc/03022020%20ED%20Coronavirus%20Letter%20FINAL.pdf>.



All email communications (including emails, email attachments, complete email chains, and calendar invitations) between any of the individuals listed in Column A below and any of the individuals or groups listed in Column B:

Column A: ED Officials	Column B: External Entities
<ul style="list-style-type: none"> i. Secretary Betsy DeVos ii. Chief of Staff Nate Bailey iii. Deputy Chief of Staff Dougie Simmons iv. Deputy Secretary Mitchell Zais v. Senior Advisor to the Deputy Secretary Kent Talbert vi. Office of Elementary and Secondary Education Assistant Secretary Frank Brogan vii. Deputy Assistant Secretary for Higher Education Robert King viii. Deputy Assistant Secretary for Higher Education Programs Christopher McCaghren ix. Principal Deputy Under Secretary Diane Auer Jones x. Office of Planning, Evaluation and Policy Development Assistant Secretary James Blew xi. Office of Finance and Operations Acting Assistant Secretary Denise Carter xii. Federal Student Aid Chief Operating Officer Mark Brown xiii. Office of Career, Technical, and Adult Education Assistant Secretary Scott Stump xiv. Principal General Counsel and Acting General Counsel Reed Rubinstein 	<ul style="list-style-type: none"> i. Any employee or representative of Blackboard, including, but not limited to, anyone communicating with an email address ending in blackboard.com ii. Any employee or representative of Coursera, including, but not limited to, anyone communicating with an email address ending in coursera.org iii. Any employee or representative of Foundry College, including, but not limited to, anyone communicating with an email address ending in foundrycollege.org iv. Any employee or representative of K12, Inc., including, but not limited to, anyone communicating with an email address ending in k12.com v. Any employee or representative of Connections Education, including, but not limited to, anyone communicating with an email address ending in connectionsacademy.com vi. Any employee or representative of Apollo Education Group, including, but not limited to, anyone communicating with an email address ending in apollo.edu

<ul style="list-style-type: none"> xv. Office of Special Education Programs Director Laurie VanderPloeg xvi. Student Privacy Policy Office Acting Director Kala Suprenant xvii. Anyone serving as White House Liaison xviii. Anyone serving as the head of the Office of Communications and Outreach xix. Anyone serving as point of contact for the White House Coronavirus Task Force xx. Anyone other official serving on the Department of Education’s Coronavirus working group 	<ul style="list-style-type: none"> vii. Any employee or representative of University of Phoenix, including, but not limited to, anyone communicating with an email address ending in phoenix.edu viii. Any employee or representative of Adtalem Global Education, including, but not limited to, anyone communicating with an email address ending in adtalem.com ix. Any employee or representative of Career Education Colleges and Universities, including, but not limited to, anyone communicating with an email address ending in career.org x. Any employee or representative of International Connections Academy, including, but not limited to, anyone communicating with an email address ending in internationalconnectionsacademy.com xi. Any employee or representative of Instructure, including, but not limited to, anyone communicating with an email address ending in instructure.com
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Please provide all responsive records from January 30, 2020, 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.”³ The public has a significant interest in the effects of the coronavirus on education and students.⁴ Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including whether and to what extent agency officials are communicating with online education companies who may benefit from the upheaval to the education sector caused by this disease. 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.⁵ 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.⁶

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.⁷ Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to

³ 5 U.S.C. § 552(a)(4)(A)(iii).

⁴ See, e.g., Erin Richards, *Is Online School Illegal? With Schools Closing from Coronavirus, Special Education Concerns Give Districts Pause*, USA TODAY (Mar. 19, 2020, Updated 1:00 PM), <https://www.usatoday.com/story/news/education/2020/03/19/coronavirus-online-school-closing-special-education-teacher-distance-learning/2863503001/>.

⁵ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁶ American Oversight currently has approximately 15,500 page likes on Facebook and 102,300 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited Mar. 26, 2020); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Mar. 26, 2020).

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

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;⁸ 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;⁹ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;¹⁰ posting records and analysis relating to the federal government’s efforts to sell nuclear technology to Saudi Arabia;¹¹ 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.¹²

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:

- 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

⁸ *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>.

⁹ *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>.

¹⁰ *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>.

¹¹ *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>.

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

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.¹³ 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.¹⁴
- 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,¹⁵ 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

¹³ 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).

¹⁴ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

¹⁵ 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>.

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 Emma Lewis at foia@americanoversight.org or 202.919.6303. 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