

May 4, 2020

VIA E-REQUEST FORM

U.S. Department of Education
Office of Management
Office of the Chief Privacy Officer
400 Maryland Avenue, SW, LBJ 7W104
Washington, DC 20202-4536
ATTN: FOIA Public Liaison

**Re: Request Under Freedom of Information Act
Fee Waiver/Limitation Requested**

Dear FOIA Public Liaison,

This is a request for production of records under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the implementing regulations of the Department of Education (“ED”), 34 C.F.R. Part 5, on behalf of the American Civil Liberties Union (“ACLU”) and Know Your IX, a project of Advocates for Youth.

The ACLU and Know Your IX seek documents related to the Proposed Rule titled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” (RIN 1870-AA14, Docket No. ED-2018-OCR-0064) and the forthcoming final version of that rule.

I. Definitions

For purposes of this request, the term “materials” includes, but is not limited to, any and all objects, writings, drawings, graphs, charts, tables, electronic or computerized data compilations, budgets, accountings, balance sheets or other financial statements, invoices, receipts, minutes, emails, appointment books or calendars, electronic or computerized documents, photographs, audiotapes, videotapes, transcripts, drafts, correspondence, notes, notes of oral communications, and non-identical copies, including but not limited to copies with notations.

For purposes of this request, the term “ED” means any individual or group of individuals working for ED and any sub-department, office, board, program, group, agency, bureau, administration, and/or other subdivision within ED.

For purposes of this request, the term “stakeholder” includes, but is not limited to, individuals, non-profit advocacy organizations,



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universities, and lobbyists acting on behalf of such groups. This term refers to, among others, advocates and attorneys for those reporting sexual harassment and violence; advocates and attorneys for those alleged to have committed sexual harassment and violence; organizations representing schools and colleges; Title IX coordinators and other school and college administrators; child and sex abuse prosecutors; scholars and experts; and individuals who have experienced school-level Title IX proceedings as a complainant or respondent.

For purposes of this request, the term “COVID-19” refers to the disease that is caused by the novel coronavirus SARS-CoV-2 and that has now reached global pandemic status. References to the possible impact that COVID-19 has had or may have refer to impacts of the resulting social distancing guidelines, school closures, remote learning programming, and related measures.

II. Requests

Please provide all of the following materials related to the U.S. Department of Education’s Proposed Rule “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” and the forthcoming final version of that rule:

- (1) All written or electronic communications from January 1, 2020, to the present between ED and stakeholders discussing the impact that COVID-19, and related school closures, remote learning programming, and other measures, may have on the application of Title IX of the Education Amendments of 1972 (“Title IX”) to sexual harassment, including, but not limited to, communications from educational institutions and administrators seeking guidance;
- (2) All written or electronic communications from January 1, 2020, to the present regarding the scheduling and content of meetings in which the impact that COVID-19, and related school closures, remote learning programming, and other measures, may have on the application of Title IX to sexual harassment was discussed;
- (3) All recordings or transcripts of telephone or video communications from January 1, 2020, to the present between ED and stakeholders discussing the impact that COVID-19, and related school closures, remote learning programming, and other measures, may have on the application of Title IX to sexual harassment or regarding meetings in which that topic would be discussed;
- (4) All records, documents, reports, memoranda, or notes discussing the impact that COVID-19 may have on the application of Title IX to sexual harassment;

- (5) All written or electronic communications from January 1, 2020, to the present between ED and stakeholders discussing the application of Title IX to sexual harassment in the remote learning context, including, but not limited to, discussions of online harassment, retaliatory harassment, enforcement of no-contact orders, and communications from educational institutions and administrators seeking guidance;
- (6) All recordings or transcripts of telephone or video communications from January 1, 2020, to the present between ED and stakeholders discussing the application of Title IX to sexual harassment in the remote learning context, including, but not limited to, discussions of online harassment, retaliatory harassment, enforcement of no-contact orders, and communications from educational institutions and administrators seeking guidance;
- (7) All records, documents, reports, memoranda, or notes discussing the application of Title IX to sexual harassment in the remote learning context, including, but not limited to, discussions of online harassment, retaliatory harassment, enforcement of no-contact orders, and communications from educational institutions and administrators seeking guidance;
- (8) All records, documents, reports, memoranda, or notes documenting how many OCR complaints were filed and/or resolved from January 20, 2009, through January 19, 2017;
- (9) All records, documents, reports, memoranda, or notes documenting, or concerning, the average length of time OCR complaints took to be resolved from January 20, 2009, through January 19, 2017;
- (10) All records, documents, reports, memoranda, or notes documenting, or concerning, the outcomes of OCR complaints filed and/or resolved from January 20, 2009, through January 19, 2017, including, if applicable, any reasons for dismissal;
- (11) All records, documents, reports, memoranda, or notes documenting or concerning, how many OCR complaints have been filed or resolved from January 20, 2017, through the present;
- (12) All records, documents, reports, memoranda, or notes documenting, or concerning, the average length of time OCR complaints have taken to be resolved from January 20, 2017, through the present;
- (13) All records, documents, reports, memoranda, or notes documenting, or concerning, the outcomes of OCR complaints filed or resolved from January 20, 2017, through the present, including, if applicable, any reasons for dismissal;

- (14) All records, documents, reports, memoranda, or notes documenting how often OCR has threatened a recipient with loss of funding due to violations of Title IX or has actually rescinded such funding;
- (15) All records, documents, reports, memoranda, or notes related to the creation or planning of the New Civil Rights Initiative to Combat Sexual Assault in K–12 Public Schools announced by ED Secretary Betsy DeVos on February 26, 2020¹;
- (16) All written or electronic communications regarding the creation or planning of the New Civil Rights Initiative to Combat Sexual Assault in K–12 Public Schools announced by Secretary DeVos on February 26, 2020.
- (17) All recordings or transcripts of telephone or video communications regarding the creation or planning of the New Civil Rights Initiative to Combat Sexual Assault in K–12 Public Schools announced by Secretary DeVos on February 26, 2020.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, the ACLU requests that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, Bates-stamped files.

We request that you produce responsive materials in their entirety, including all attachments, appendices, enclosures, and/or exhibits. However, to the extent that a response to this request would require ED to provide multiple copies of identical material, the request is limited so that only one copy of the identical material is requested.

In the event you determine that materials contain information that falls within the statutory exemptions to mandatory disclosure, we request that such information be reviewed for possible discretionary disclosure. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 293–94 (1979). We also request that, in accordance with 5 U.S.C. § 552(b), any and all reasonably segregable portions of otherwise exempt materials be produced. To the extent the request is denied in whole or in part, we expect to receive notice in writing, including a description of the information withheld, the reasons for denial, and any specific exemptions to FOIA that were relied upon.

III. Fee Waiver/Limitation Request

We agree to pay search, duplication, and review fees up to \$100.00. If the fees will amount to more than \$100.00, we request a fee waiver on the grounds that disclosure of the requested records is in the public interest. The disclosure of the records is likely to

¹ *See* Press Release, U.S. Dep't of Educ., Secretary DeVos Announces New Civil Rights Initiative to Combat Sexual Assault in K–12 Public Schools (Feb. 26, 2020), https://www.ed.gov/news/press-releases/secretary-devos-announces-new-civil-rights-initiative-combat-sexual-assault-k-12-public-schools?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term.

contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requesters. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 34 C.F.R. § 5.33(a).

Disclosure pursuant to this request is in the public interest. The records pertain directly to the operations and activities of the federal government; the information to be learned from the requested documents is not already public knowledge; and disclosure will contribute to the public good in a significant way because the requested records, which are all materials related to ED's positions regarding schools' response to sex discrimination in education, concern the operations of a federal agency. Of the utmost "importan[ce] to the public's understanding of [agency] operations" more broadly is understanding who and what informed the government's rulemaking process and how ED and OCR handle complaints and decide to embark on new initiatives. *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003).

Additionally, disclosure of the information requested is in neither the ACLU's nor Know Your IX's commercial interest. Any information disclosed to the ACLU and Know Your IX as a result of this FOIA request will be made available to the public at no cost. The ACLU is "a non-profit, non-partisan, public interest organization." *Id.* at 1310 (citation omitted). Know Your IX is a project of Advocates for Youth, which is also a nonprofit public interest group. Additionally, the purpose of the request is to monitor and vindicate legal rights; it is unrelated to business, trade, or profit. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See id.* at 1312 ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" (citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, § 2, 121 Stat. 2524 (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act" (citation omitted)).

Because the ACLU meets the test for a fee waiver, fees associated with responding to FOIA requests are regularly waived for the ACLU. *See, e.g., Serv. Women's Action Network v. Dep't of Def.*, 888 F. Supp. 2d 282, 290 (D. Conn. 2012) (finding that the ACLU Women's Rights Project was entitled to a public interest fee waiver for records relating to the military's response to sexual violence). In fact, ED waived fees for a similar request submitted by the ACLU in October 2019 (a request for which production is not yet complete).²

We also request a waiver of search and review fees on the grounds that the ACLU qualifies as a "representative of the news media." 34 C.F.R. § 5.31(f). Accordingly, fees associated with the processing of this request should, at most, be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 34 C.F.R. § 5.32(b)(1)(ii).

The ACLU meets the statutory and regulatory definitions of a "representative of

² Letter from Shahanga Lee, Gov't Info. Specialist, U.S. Dep't of Educ., to Rebecca Ojserkis, Legal Fellow, Am. Civil Liberties Union (Oct. 18, 2019) (granting a fee waiver for FOIA Request No. 20-00122-F).

the news media” because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); 34 C.F.R. § 5.31(f); *see also Nat’l Sec. Archive v. U.S. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. Am. Civil Liberties Union v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n. 5 (D.D.C. 2004) (finding non-profit public interest group to be “primarily engaged in the dissemination of information”); *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 10–15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of FOIA).

The ACLU regularly gathers information on issues of public significance (including information gathered through FOIA requests), and uses its editorial skills to turn that information into distinct publications such as reports, newsletters, right-to-know pamphlets, fact sheets, and other educational materials. It distributes these materials to the general public through various channels, such as its heavily subscribed website (www.aclu.org), a newsletter sent to more than 1.2 million members, and an electronic newsletter, which is distributed to subscribers by email. Because of these activities, fees associated with responding to FOIA requests are regularly waived for the ACLU.³ *See, e.g., Serv. Women’s Action Network*, 888 F. Supp. 2d at 287–88 (finding that the ACLU Women’s Rights Project is a representative of the news media).⁴

Finally, pursuant to the applicable regulations and statute, we expect the determination of this request for documents within 20 days. *See* 5 U.S.C. § 552(a)(6)(A)(i); 34 C.F.R. § 5.21(c). We reserve the right to appeal a decision to respond without any information or to deny a waiver of fees.

³ For example, the Department of Housing and Urban Development granted a fee waiver to the ACLU for a FOIA request filed in April 2008. The ACLU subsequently posted the response to this FOIA request on its website at <https://www.aclu.org/other/aclu-foia-request-and-hud-response-regarding-huds-implementation-violence-against-women-act?redirect=cpredirect/38690>. The Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in 2006. The Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003.

⁴ Following the court’s grant of this fee waiver, the ACLU Women’s Rights Project co-published a report based on the FOIA production, entitled *Battle for Benefits: VA Discrimination Against Survivors of Military Sexual Trauma* (2013), and made the production available at <https://www.aclu.org/battle-benefits-va-discrimination-against-survivors-military-sexual-trauma>.

Thank you for your prompt attention to this matter. If you have any questions, please feel free to reach me at rojserkis@aclu.org or (332) 204-2737. The records should be sent to Rebecca Ojserkis at rojserkis@aclu.org.

Dated: May 4, 2020

Sincerely,



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