

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA**

PROJECT ON PREDATORY STUDENT  
LENDING OF THE LEGAL SERVICES  
CENTER OF HARVARD LAW SCHOOL,

*Plaintiff,*

V.

UNITED STATES DEPARTMENT OF  
JUSTICE,

*Defendant.*

Civil Action No. 2:17-cv-00210-NBF

Hon. Nora Barry Fischer

Electronically Filed Document

# FIRST AMENDED COMPLAINT

## INTRODUCTION

1. This action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeks to compel the United States Department of Justice (“DOJ”) to release agency records in its possession.

2. The records were produced to DOJ as part of discovery in *United States ex rel. Washington v. Education Management LLC*, No. 2:07-cv-461 (W.D. Pa.) (“EDMC litigation”). In that lawsuit, the United States government, along with several states, alleged that Education Management Corporation (“EDMC”), a large, for-profit education company, violated the False Claims Act. The government claimed that EDMC illegally compensated its recruiters, and then lied to the government about it to receive \$11 billion in federal funding.

3. The Project on Predatory Student Lending of the Legal Services Center of Harvard Law School (the “Project”), which advocates on behalf of low-income student loan borrowers harmed by the predatory practices of for-profit schools, submitted a FOIA request to DOJ seeking these records, which are likely to shed light on EDMC’s recruitment and regulatory

compliance practices and, in turn, the government's actions in enforcing federal law.

4. DOJ summarily denied the Project's FOIA request, asserting that the records were covered by four FOIA exemptions and the protective order in the EDMC litigation.

5. The Project timely appealed DOJ's denial.

6. Months after the Project submitted its appeal, DOJ affirmed its denial on different—and conflicting—grounds, claiming that the documents are not agency records at all, and that searching for them would be unreasonably burdensome.

7. DOJ has failed to demonstrate that the records, which are in its possession and control, are not "agency records" subject to FOIA. Nor has the agency shown that searching for the records would be overly burdensome.

8. To date, DOJ has not searched for, let alone produced, any records responsive to the Project's FOIA request.

9. The Project brings this action to compel DOJ's compliance with its obligations under FOIA.

### **JURISDICTION AND VENUE**

10. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

11. Venue is proper in the Western District of Pennsylvania pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1)(B), because the withheld records are located in this district and because a substantial part of the events giving rise to this claim occurred in this district.

### **PARTIES**

12. Plaintiff requester the Project on Predatory Student Lending is part of the Legal

Services Center of Harvard Law School, a nonprofit civil legal services organization located in Jamaica Plain, Massachusetts. The Project provides free, high-quality legal representation to low-income student loan borrowers who have been harmed by the predatory practices of—and carry unmanageably high debt loads from attendance at—schools owned by EDMC and other for-profit higher education companies. The Project advocates for strong federal enforcement of rules that govern for-profit schools’ recruitment activities, such as the incentive compensation ban, a federal law which prohibits colleges from compensating their recruiters based on the number of students they enroll. In the Project’s experience, the use of enrollment targets, quotas, and other incentive compensation is prevalent amongst for-profit higher education companies, and is highly correlated with illegal, abusive, and coercive recruiting tactics used to induce students to enroll in expensive higher education programs.

13. Defendant DOJ is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1). The Executive Office for United States Attorneys is a component of DOJ located in Washington, D.C.

## STATEMENT OF FACTS

### **The EDMC Litigation**

14. The EDMC litigation is a False Claims Act suit, in which the United States government, along with several states, alleged that EDMC violated federal law and then lied to the government about it in order to receive billions of dollars in federal funding. Joint Complaint in Intervention by the United States of America, and the States of California, Florida, Illinois, and Indiana (“Joint Complaint”) ¶¶ 1, 6-11, 36-168, 271, *United States ex rel. Washington v. Educ. Mgmt. LLC*, No. 2:07-cv-461 (W.D. Pa. Aug. 8, 2011), ECF No. 128.

15. EDMC’s primary source of revenue is government student loans. *See, e.g.*, Senate

Comm. on Health, Educ., Labor & Pensions, *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success* 453, A9-5 (2012). The company recruits students to attend one of its for-profit colleges, the students apply for state and federal loans, that loan money goes to EDMC for tuition, and the students are on the hook to repay the government. This business model depends on a constant “churn” of new enrollments, particularly given EDMC-owned schools’ high withdrawal rates—the more students enroll at EDMC, the more loan money they bring in, and the more revenue EDMC earns. *See id.* at 462, 464.

16. According to the governments’ complaint in the EDMC litigation, EDMC established an illegal compensation system for its recruiters—the more students they enrolled, the more they were paid. Joint Complaint ¶¶ 36-168, 271. The complaint alleges that the corporation “created a ‘boiler room’ style sales culture,” the “relentless and exclusive focus” of which was “the number of new students” each recruiter could enroll. *Id.* ¶¶ 88-89. EDMC taught its recruiters a “tactic called ‘finding the pain,’” which meant “locating a prospective student’s vulnerabilities and exploiting those vulnerabilities to persuade the student to enroll in an EDMC program, even after the student has expressed a desire not to enroll.” *Id.* ¶ 108. The corporation “regularly instruct[ed]” recruiters “to enroll applicants regardless of their qualifications, including applicants who are unable to write coherently, applicants who appear to . . . be under the influence of drugs, and applicants for” online education “who do not own computers.” *Id.* ¶ 106.

17. Recruiters’ compensation was based on the number of students they could enroll. *Id.* ¶ 88. And those who recruited the most students were rewarded with bonuses, extra time off, vacations, and gifts. *Id.* ¶¶ 140-47. Those who didn’t meet their quotas were “routinely terminate[d].” *Id.* ¶ 148.

18. Federal law has prohibited this kind of compensation system since 1992, forbidding schools from providing “any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance.” 20 U.S.C. § 1094(a)(20). To receive federal funding, EDMC was required to—and did—certify compliance with this incentive compensation ban. Joint Complaint ¶¶ 271-72. In the EDMC litigation, the government claimed that EDMC’s certifications that it had complied with the incentive compensation ban were false, such that each loan an EDMC student received, which went to funding the school, was a “false or fraudulent claim” in violation of the False Claims Act. *See id.*

19. Following extensive discovery, the parties settled the case for \$95.5 million. *See* U.S. Dep’t of Justice, Office of Pub. Affairs, *For-Profit College Company to Pay \$95.5 Million to Settle Claims of Illegal Recruiting, Consumer Fraud and Other Violations* (Nov. 16, 2015) (“DOJ Settlement Press Release”), <https://www.justice.gov/opa/pr/profit-college-company-pay-955-million-settle-claims-illegal-recruiting-consumer-fraud-and>.

20. Despite being hailed by the government as a victory for students and taxpayers, *see id.*, the settlement did not provide for the cancellation of any federal student loans. This notable omission prompted the Massachusetts Attorney General to call for the federal government to use its \$52.62 million share of the recovery to pay down the loan debt of harmed students—which the federal government did not do. *See* Office of Mass. Attorney Gen., *AG Healey Urges Feds to Use Money from National For-Profit College Settlement to Pay Down Student Debt* (Nov. 16, 2015), <http://www.mass.gov/ago/news-and-updates/press-releases/2015/2015-11-16-edmc-settlement.html>.

21. Nor did the federal settlement require EDMC to admit any liability; instead, the Department of Education released EDMC from a wide range of potential claims, and agreed, subject to limited exceptions, not to “institut[e], direct[], or maintain[] any other administrative action” against EDMC on the basis of the settlement.

22. The federal settlement was announced together with a multistate consumer fraud settlement, *see* DOJ Settlement Press Release, which also did not provide for the reduction or payment of any federal student loans.<sup>1</sup> Instead, pursuant to the multistate settlement, EDMC, “without any admission of wrongdoing, . . . agree[d] to forgo efforts to collect all amounts that Defendants *claim is owed to EDMC* by” a subset of former students—that is, approximately \$102.8 million in “institutional debt.”<sup>2</sup> *State ex rel. Miller v. Educ. Mgmt. Corp.*, No. EQCE079220 (Ia. Dist. Ct. Nov. 17, 2015), at 56 (emphasis added). Although \$102.8 million is less than one percent of the \$11 billion the government alleged EDMC received in federal funds between July 2003 and August 2011, the multistate settlement underscored that its debt relief provision did *not* extend to federal student loan debt. *Id.* at 56-57 (“For the avoidance of doubt, Institutional Debt shall not include debts that are owed to non-EDMC entities, such as, for example, federal student loans owed to the United States government.”).

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<sup>1</sup> The multistate consumer fraud settlement appears to have been effectuated through separate consent judgments between EDMC and individual states, which contain largely identical provisions. *See, e.g., State ex rel. Miller v. Educ. Mgmt. Corp.*, No. EQCE079220 (Ia. Dist. Ct. Nov. 17, 2015), at 2 (“acknowledg[ing] that this Consent Judgment is being filed simultaneously with similar judgments in the States”). Thus, while the quotations in this paragraph are from one publicly available consent judgment, they are mirrored in other states’ consent judgments.

<sup>2</sup> So-called “institutional debts,” or debts owed directly by students to for-profit higher education companies, facilitate compliance with the federal “90/10” rule, which requires any school receiving federal student aid dollars under Title IV of the Higher Education Act to derive at least 10 percent of its revenue from non-Title IV sources. 20 U.S.C. § 1094(a)(24). Such debts are often written off and not collected upon.

### **The Project's FOIA Request**

23. On June 20, 2016, the Project submitted a FOIA request (Ex. A) via email to the Executive Office for United States Attorneys ("EOUSA"), the "FOIA Contact" provided by DOJ to requesters seeking records held by United States Attorneys' Offices.

24. The Project sought documents, produced by EDMC to DOJ in response to a subset of specific discovery requests in the EDMC litigation, regarding EDMC's recruitment and regulatory compliance practices. *See* Ex. A.

25. DOJ, specifically the United States Attorney's Office for the Western District of Pennsylvania, has possession of and control over the requested records.

26. The Project sought these records to better understand the government's enforcement of the incentive compensation ban, and to aid former students harmed by EDMC's predatory recruitment practices. *See* Ex. A.

27. In the month before the Project submitted its FOIA request, Project attorneys met with a group of students who attended the EDMC-owned New England Institute of Art ("NEIA"), and who described the high pressure recruiting tactics they had experienced and the unmanageable student loan debt they incurred. The Project now represents these former students in a putative state consumer class action against EDMC, the Art Institutes, and NEIA.

28. Student loan borrowers have the right under federal law and regulation to raise the illegal conduct of their schools as a defense to the repayment of their loans, through "borrower defense" claims. 20 U.S.C. § 1087e(h); 34 C.F.R. § 685.206(c); 81 Fed. Reg. 75,926 (Nov. 1, 2016) (to be codified at 34 C.F.R. pts. 30, 668, 674, 682, 685, 686).

29. The Project submitted its FOIA request during a period of significant regulatory change regarding, and increasing public awareness of, defrauded students' ability to obtain debt

relief by asserting such borrower defense claims.

30. In the week before the Project submitted its FOIA request, the Department of Education issued a Notice of Proposed Rulemaking to address substantive and procedural issues around borrower defense claims. 81 Fed. Reg. 39,330 (proposed June 16, 2016) (to be codified at 34 C.F.R. pts. 30, 668, 674, 682, 685, 686). Although the right to borrower defense has existed for decades, until the Department of Education undertook this rulemaking, there existed little information about the process of or grounds for establishing such claims. Critically, the proposed rule made clear that the Department of Education considered evidence of a school's use of high pressure sales tactics—an unsurprising consequence of incentive compensation recruiting systems, and precisely the type of recruiting tactics the government alleged EDMC had employed as a result of its incentive compensation system—as supporting a claim for borrower defense. *See id.* at 39,418. The records DOJ obtained through the EDMC litigation are likely to demonstrate EDMC's use of such high pressure sales tactics, and thus support former students' borrower defense claims.

31. At the time the Project submitted its FOIA request, over 900 former EDMC students had presented borrower defense claims to the Department of Education. *See* U.S. Dep't of Educ., *Second Report of the Special Master for Borrower Defense to the Under Secretary* (Dec. 3, 2015), <https://www2.ed.gov/documents/press-releases/report-special-master-borrower-defense-2.pdf> (as of November 18, 2015, the Department of Education had received 931 borrower defense claims from former students of EDMC-owned Art Institute schools).

32. The Project's FOIA request thus seeks records that will assist not only the former students of EDMC-owned NEIA that the Project represents, but also the hundreds, perhaps thousands, of other former EDMC students seeking loan relief through borrower defense claims.



Moreover, to the extent that former EDMC students are able to successfully assert borrower defense claims based on information in the requested records about EDMC's recruitment and regulatory compliance practices, those successful claims will inform the Project's representation of students who attended other for-profit schools alleged to have violated the incentive compensation ban and engaged in predatory recruitment practices.<sup>3</sup>

33. In addition to supporting the claims of former students seeking debt relief from the federal government, the requested records will enable the Project and the public—who fund the federal government's trillion-dollar student loan program—to understand the extent and duration of a for-profit higher education company's practices, evaluate the government's settlement of its claims based on those practices, and assess what, if any, steps may be taken to prevent and remedy similar harms—which occur at taxpayer expense—in the future.

34. On September 6, 2016, DOJ summarily denied the Project's FOIA request in its entirety. Ex. B.

35. As grounds for its denial, DOJ cited the protective order in the EDMC litigation, in addition to four FOIA exemptions, Ex. B—implicitly representing that, as the law requires, the agency had searched its records for responsive documents, examined them, and identified reasons it believed were legally sufficient for withholding each document in its entirety.

36. Because DOJ's denial explicitly relied on the protective order, the Project moved to intervene in the EDMC litigation, for the limited and sole purpose of seeking clarification or modification of that order.

37. The Project also timely appealed DOJ's denial by letter dated December 2, 2016.

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<sup>3</sup> For example, the Project currently represents over 200 former students of Corinthian-operated schools in submitting borrower defenses, and over 700,000 former students of ITT Tech who are seeking loan forgiveness in the bankruptcy proceedings of that chain's parent company.

Ex. C.

38. The Project's appeal requested that DOJ provide a *Vaughn* index: a complete list of documents covered by the request, and a specific indication of what material is being withheld and what exemptions are claimed with respect to that material. *Id.* The Project observed that without such an index, it was "effectively helpless" to respond to DOJ's scant explanation of its wholesale withholding of the requested records. *Id.*

39. DOJ acknowledged receipt of the Project's appeal by letter dated December 15, 2016. Ex. D.

40. On February 14, 2017, the Project filed a Complaint against DOJ, initiating this action. Doc. 1 ("Complaint"). As of the date of its Complaint, the Project had not received from DOJ any determination with respect to the Project's appeal.

41. Months after the Project had submitted its appeal, and well beyond the 20-working day statutory time limit for the agency's response, 5 U.S.C. § 552(a)(6)(A)(ii), DOJ, on February 15, 2017—the same day the Project's reply briefs in the EDMC litigation were due—emailed the Project its response to the Project's appeal. *See* Ex. E.

42. The Project's email system's spam filter prevented delivery of the response, so that the Project did not actually view the response until the following day. *See* Ex. E.

43. Although it was emailed on February 15, the response was dated February 9, 2017. Ex. F.

44. Whereas DOJ's initial denial explained that the documents sought by the Project were covered by the protective order in the EDMC litigation and subject to four FOIA exemptions, Ex. B, on appeal, DOJ gave two entirely different reasons: It contended that the documents are not agency records at all, and that searching for them would be unreasonably

burdensome. Ex. F.

45. DOJ's response made clear that despite its initial suggestion to the contrary, the agency has never even attempted to search for documents responsive to the Project's request.

46. The Project has exhausted its administrative remedies because DOJ has denied both its initial request and subsequent appeal.

## **CAUSE OF ACTION**

### **Violation of the Freedom of Information Act**

47. The Project realleges and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.

48. DOJ's withholding of the requested records violates FOIA, 5 U.S.C. § 552(a)(3).

49. DOJ has failed to demonstrate that the requested records, which are in its possession and control, are not "agency records" subject to FOIA. Nor has it provided an explanation sufficient to demonstrate that searching for the requested records would be overly burdensome.

50. As the date of this filing, DOJ has not conducted a search reasonably calculated to lead to the discovery of responsive records; produced any records in response to the Project's FOIA request; or demonstrated that the requested records are exempt from production.

51. Pursuant to FOIA, 5 U.S.C. § 552(a)(3), the Project has a right of access to the requested records, and DOJ has no legal basis for its withholding of those records.

52. DOJ's withholding of responsive records not only violates the Project's rights under FOIA, but also hinders the Project's ability to obtain relief for its clients; inform the public about the government's oversight of for-profit education; and advocate for policies that will protect low-income student loan borrowers.

53. Pursuant to FOIA, the Project is entitled to injunctive relief and other remedies.

**REQUEST FOR RELIEF**

WHEREFORE, the Project respectfully requests that this Court:

- A. Order DOJ to conduct a search of its records for documents responsive to the Project's FOIA request pursuant to 5 U.S.C. § 552(a)(3);
- B. Order DOJ to file, within 14 days of conducting its search or as soon as is practicable, a *Vaughn* index: a complete list of documents covered by the request, and a specific indication of what material is being withheld and what, if any, exemptions are claimed with respect to that material;
- C. Order DOJ to promptly produce all responsive records pursuant to 5 U.S.C. § 552(a)(4)(B) or otherwise justify its withholding in reference to statutory exemptions;
- D. Award the Project its costs and reasonable attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E); and
- E. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

PROJECT ON PREDATORY STUDENT  
LENDING

/s/ Amanda Savage

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Dated: March 16, 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 16, 2017, I electronically filed the foregoing First Amended Complaint using the CM/ECF system, which will send notification of such to all counsel of record.

/s/ Amanda Savage  
Amanda Savage  
*Counsel for Plaintiff*