



**LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL**

**CENTRO DE SERVICIOS LEGALES**

122 Boylston Street

Jamaica Plain, Massachusetts 02130-2246

TEL: (617) 522-3003 • FAX: (617) 522-0715

**FREEDOM OF INFORMATION ACT APPEAL**

December 2, 2016

Melanie Ann Pustay  
Director  
Office of Information Policy (OIP)  
United States Department of Justice  
Suite 11050, 1425 New York Avenue, NW  
Washington, DC 20530-0001

**VIA CERTIFIED MAIL**

**RE: Appeal of Denial, FOIA Request No. FOIA-2016-03030**

Dear Ms. Pustay:

This letter constitutes an appeal of the Department of Justice (“DOJ”)’s denial of the above-referenced Freedom of Information Act (“FOIA”) request submitted by the Project on Predatory Student Lending (“PPSL”) of the Legal Services Center of Harvard Law School. This administrative appeal is submitted pursuant to FOIA, 5 U.S.C. § 552(a)(6)(A), and DOJ’s implementing regulations, 28 C.F.R. § 16.8.

**Background**

On June 20, 2016, PPSL submitted a request to DOJ’s Executive Office for United States Attorneys (“EOUSA”). The request sought the release of records produced to DOJ by Education Management Corporation and its subsidiaries and affiliates (collectively, “EDMC”) in *United States ex rel. Washington v. Education Management Corp.*, No. 2:07-cv-461 (W.D. Pa.) (“EDMC litigation”). See PPSL FOIA Request (attached as Exhibit A). The EDMC litigation involved that company’s recruiting practices and the Department of Education’s enforcement of Title IV of the Higher Education Act’s prohibition on the use of incentive compensation by institutions participating in federal student aid programs (“Incentive Compensation Ban”), 20 U.S.C. § 1094(a)(20); 34 C.F.R. § 668.14(b)(22).

On September 6, 2016, DOJ, through EOUSA, issued a full denial of PPSL’s FOIA request. See Denial (attached as Exhibit B) (“Ex. B”). DOJ cited four exemptions—5 U.S.C. §§ 552(b)(3), (4), (6), and (7)(c)—and provided a single-sentence explanation: “In making our determination we have taken the following into account: the protective orders in place, protection of personal privacy, protection of confidential business information, and the Family Educational Rights and Privacy Act.” Ex. B.

## **Grounds for appeal**

### **I. DOJ has failed to meet its burden of demonstrating that the withheld records are exempt from disclosure.**

DOJ bears the burden of demonstrating that its cited exemptions apply to PPSL's requested records. *See* 5 U.S.C. § 552(a)(4)(B). A "sweeping and conclusory citation of an exemption" is insufficient to meet this burden. *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). Yet DOJ has offered nothing more.

When an agency denies the public access to records, due process and FOIA require the agency to explain itself in sufficient detail so as to afford the requester "an opportunity to effectively challenge the applicability of the exemption." *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. U.S. Dep't of Justice*, 503 F. Supp. 2d 373, 379 (D.D.C. 2007). There can be no effective challenge where, as here, the requester "is not informed of at least a list of the documents to which he was denied access, . . . and why those decisions were made." *Shermco Indus., Inc. v. Sec'y of U.S. Air Force*, 452 F. Supp. 306, 317 n.7 (N.D. Tex. 1978), *rev'd on other grounds*, 613 F.2d 1314 (5th Cir. 1980).

DOJ's scant explanation further fails to demonstrate that PPSL's requested records are properly withheld under any of the cited exemptions.

For example, Exemption 4 exempts from disclosure "trade secrets and commercial or financial information obtained from a person . . . [that are] privileged or confidential." 5 U.S.C. § 552(b)(4). First, it is not clear that any of the requested records constitute "trade secrets." This term is narrowly defined to include only "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). Second, DOJ's passing reference to the "protection of confidential business information" is precisely the type of "[c]onclusory and generalized allegation[] of substantial competitive harm" that "cannot support an agency's decision to withhold requested documents." *Id.* at 1291; *see also Delta Ltd. v. U.S. Customs & Border Prot. Bureau*, 393 F. Supp. 2d 15, 19 (D.D.C. 2005) (agency "must show exactly who will be injured by the release of this information and explain the concrete injury").

Exemption 6, also summarily cited by DOJ, prevents disclosure of information contained in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 6 provides for "a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976). The phrase "clearly unwarranted" in Exemption 6 "tilt[s] the balance in favor of disclosure." *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971), *stay denied*, 404 U.S. 1204 (1971); *accord Washington Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 261 (D.C. Cir. 1982) ("[U]nder Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act."). In light of this

presumption favoring disclosure, a privacy interest is cognizable only if disclosure would work a significant or substantial invasion of privacy. *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989). This privacy invasion must be “more palpable than [a] mere possibilit[y].” *Rose*, 425 U.S. at 380 n.19. It is unclear *whose* privacy interest is at stake, although it is clear that Exemption 6 may not be cited to protect privacy interests of EDMC. *See FCC v. AT & T Inc.*, 562 U.S. 397, 403 (2011); *see also Sims v. CIA*, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980) (“Exemption 6 is applicable only to individuals.”).

Similarly, DOJ has cited Exemption 7(c) without performing any balancing of the public interest against the threat to privacy. That exemption exempts “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(c).<sup>1</sup> Rather than permitting an agency to withhold all information that may affect any person’s privacy interest, Exemption 7(c) requires DOJ to “prove that it is reasonably expected that disclosure would result in an *unwarranted* invasion of privacy.” *Akin*, 503 F. Supp. 2d at 383 (emphasis added). “[C]onclusory statements” will not suffice. *Id.* at 379. DOJ’s brief citation to “protection of personal privacy” thus cannot establish the existence of a significant “privacy interest of an identifiable, living person” that is required for the agency to meet its burden under Exemption 7(c). U.S. Dep’t of Justice, *FOIA Update*, Vol. X, No. 2 (1989).

Even if DOJ were to demonstrate the existence of a significant privacy interest under Exemption 6 or Exemption 7(c)—which it has not—that interest would be outweighed by the powerful public interest in disclosure. The requested records will substantially enhance public understanding of the government’s enforcement of the Incentive Compensation Ban. As funders of the trillion dollar federal student loan program, members of the public have a direct interest in understanding how the Department of Education determines that for-profit education companies such as EDMC have met Title IV’s requirements for receiving federal student aid monies. The public’s need for the requested records is all the more acute given the Department of Education’s struggle to effectively enforce the Incentive Compensation Ban and the fact that many for-profit education companies have devised methods to circumvent it. Senate Comm. on Health, Educ., Labor & Pensions, *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success* (“HELP Report”) 18, 50 (2012).

Indeed, DOJ recognized this strong public interest in announcing the settlement of the EDMC litigation, characterizing the resolution as an example of the government’s “deep commitment to protecting precious public resources” and explaining that EDMC’s “recruitment mill” violated federal law and students’ trust “at taxpayer expense.” 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”).<sup>2</sup> In 2010, for example, the year before DOJ intervened in the EDMC litigation, EDMC received 77.4

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<sup>1</sup> Like Exemption 6, Exemption 7(c) cannot justify blanket withholding of requested records to protect EDMC’s corporate interests. *See FCC*, 562 U.S. at 409-10 (“personal privacy” phrase in Exemption 7(c) “does not extend to corporations”).

<sup>2</sup> <https://www.justice.gov/opa/pr/profit-college-company-pay-955-million-settle-claims-illegal-recruiting-consumer-fraud-and> (quoting U.S. Attorney General Loretta E. Lynch).

percent of its revenues—almost \$1.79 billion—from Title IV financial aid funds alone. HELP Report at 453, A9-5 (2012). Disclosure of evidence marshaled by DOJ to demonstrate that EDMC “profit[ed] illegally off of students and taxpayers” will significantly enhance the public’s understanding of how the government attempts to ensure that for-profit education companies receiving taxpayer dollars comply with their Title IV obligations. DOJ Settlement Press Release (quoting then-Secretary of Education Arne Duncan). A balancing of the public interest in accessing such records against any privacy interest that may be implicated under Exemption 6 or 7(c) would thus plainly favor disclosure.

## **II. DOJ has failed to disclose all “reasonably segregable” portions of the requested records.**

FOIA requires DOJ to provide “[a]ny reasonably segregable portion of a record . . . to any person requesting such record after deletion of” any exempt portions. 5 U.S.C. § 552(b). Although DOJ seeks to withhold records pursuant to its cited exemptions, “it must nonetheless disclose all reasonably segregable, nonexempt portions of the requested record(s).” *Roth v. U.S. Dep’t of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011) (quoting *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 58 (D.C. Cir. 2003)). The burden of demonstrating that withheld documents contain no reasonably segregable information rests on DOJ. *Mokhiber v. U.S. Dep’t of Treasury*, 335 F. Supp. 2d 65, 69 (D.D.C. 2004).

For example, DOJ cites Exemption 3 without performing any segregability analysis. Exemption 3 protects from disclosure records “specifically exempted from disclosure by statute.” 5 U.S.C. § 552(b)(3). DOJ’s denial cites only one statute other than FOIA: the Family Educational Rights and Privacy Act (“FERPA”). *See* Ex. B; 20 U.S.C. § 1232g. FERPA requires representatives of the Attorney General to protect students’ personally identifiable information (“PII”) contained in records collected for law enforcement purposes. But even if requested records contain students’ PII, FERPA does not authorize the agency’s wholesale withholding of the requested records. Rather, DOJ is obligated to conduct a segregability review and disclose reasonably segregable portions of the requested records—i.e., the requested records with any PII redacted. *See Arieff v. U.S. Dep’t of Navy*, 712 F.2d 1462, 1466 (D.C. Cir. 1983).

No FOIA Exemption can be applied “wholesale” to “insulate from disclosure the entire file in which it is contained, or even the entire page on which it appears.” *Id.*; *see also Mead*, 566 F.2d at 260 (“The focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.”). DOJ’s perfunctory denial neglects even to mention a segregability review, much less attempt to provide detailed justification for a claim that no segregable records exist. *See id.* (rejecting agency’s claim that there “were no factual portions . . . which could be reasonably segregated” where agency offered “[n]o supporting justification . . . for this conclusion”). As DOJ has withheld the requested records in their entirety—without even referencing segregability—it has clearly failed to comply with its obligation to release segregable portions of the requested records.

### **III. The protective orders do not prevent DOJ from providing the requested records to PPSL.**

Although DOJ cited “the protective orders in place” as justification for its denial, the two protective orders entered in the EDMC litigation do not sanction DOJ’s wholesale withholding of the requested records.

First, the FERPA Protective Order<sup>3</sup> applies only to those requested records—if any—that contain students’ PII. The Order explicitly provides that “[n]othing in this Order shall be construed to abrogate any provision of FERPA or its implementing regulations.” FERPA Protective Order, ¶ 5. Even if DOJ continues to retain PII, the FERPA Protective Order contemplates that PII may be protected through redaction. *See id.* ¶ 11.

Second, the Confidential Material Protective Order<sup>4</sup>—in both its pre- and post-amendment forms—expressly *permits* DOJ to produce Confidential Material in response to third-party requests absent a motion for a *further* protective order by EDMC. *See* Protective Order Governing Confidential Material, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. Apr. 12, 2013), ECF No. 257, ¶ 7 (providing that a party in receipt of a third-party request “*may produce the requested Confidential Material*” absent a motion for a further protective order by the designating party (emphasis added)); First Amended Protective Order Governing Confidential Material, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. Sept. 16, 2016), ECF No. 453, ¶ 7 (same). In requiring EDMC to move for a further protective order and specifically demonstrate why the requested records should be shielded, the Special Master adopted an approach advocated by DOJ itself. Report & Recommendation #1 of the Special Master, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. Mar. 14, 2013), ECF No. 251 (“Plaintiffs argue that this approach is appropriate because it enables Defendants to make an effort to protect their confidential material, but *does not inhibit a third party’s ‘judicially enforceable right [created by FOIA] to access certain information held by the government.’*” (emphasis added)). Thus, neither protective order provides a basis for DOJ’s withholding of the requested records in their entirety.

### **IV. DOJ has failed to comply with its obligation to estimate the volume of the withheld records.**

FOIA provides that “[i]n denying a request for records, in whole or in part, an agency *shall* make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and *shall* provide any such estimate to the person making the request, . . . .” 5 U.S.C. § 552(a)(6)(F) (emphases added). DOJ’s denial contains no such estimate.

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<sup>3</sup> Protective Order Governing Personally Identifiable Information from Education Records that May be Subject to the Family Educational Rights and Privacy Act, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. Apr. 8, 2013), ECF No. 255 (“FERPA Protective Order”).

<sup>4</sup> Protective Order Governing Confidential Material, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. Apr. 12, 2013), ECF No. 257 (“Confidential Material Protective Order”), as amended in the First Amended Protective Order Governing Confidential Material, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. Sept. 16, 2016), ECF No. 453.

### **Renewal of request for fee waiver**

PPSL renews its application for a fee waiver in connection with its FOIA request, which clearly meets the statutory and regulatory requirements for fee waivers. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.10(k) (providing for fee waiver where disclosure “is likely to contribute significantly to public understanding of the operations or activities of the government” and “is not primarily in the commercial interest of the requester”). First, disclosure of the requested records would substantially enhance public understanding of the Department of Education’s management of the taxpayer-funded federal student loan program, and specifically, its enforcement of the Incentive Compensation Ban.<sup>5</sup> PPSL is well-situated to disseminate and deploy this information. Taking positions informed by documents obtained through public records requests, PPSL attorneys have provided extensive testimony on federal and state higher education regulations, and have served as negotiators for several recent Department of Education Negotiated Rulemakings on the integrity and improvement of the federal student loan program. PPSL has published this testimony on its website, making it available to members of the general public interested in government oversight of for-profit schools. PPSL also regularly shares the information it receives through public records requests with other legal aid providers and consumer advocates. Second, PPSL’s FOIA request is not made in furtherance of any commercial interest, as PPSL is part of the Legal Services Center of Harvard Law School, a non-profit organization that provides legal services at no cost to low-income individuals.

### **Request for Vaughn index**

PPSL requests that DOJ provide 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. *See Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973). A *Vaughn* index is necessary here, where PPSL is “effectively helpless” to respond to DOJ’s single-sentence explanation of its decision to fully withhold a voluminous amount of requested documents.<sup>6</sup> *Id.* at 826.

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<sup>5</sup> The requested records would also further the public interest by furnishing information on the basis of which individuals harmed by EDMC schools could assert borrower defenses to repayment. Borrowers may seek cancellation of their federal student loans on the grounds that their schools violated state law. *See* 34 C.F.R. 685.206(c) (“In any proceeding to collect on a Direct Loan, the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law.”). Although the Department of Education has adopted a new federal standard for borrower defenses, this will apply only to loans first disbursed on or after July 1, 2017; the current defense to repayment standard will continue to govern defenses to repayment of loans disbursed prior to that date. *See* Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75,926 (Nov. 1, 2016) (to be codified at 34 C.F.R. pts. 30, 668, 674, 682, 685, 686). Additionally, the new standard provides for relief when there is a contested judgment under state law, and the use of incentive compensation schemes can violate state consumer protection laws as an unfair and deceptive practice. *See, e.g.*, 940 Mass. Code Regs. § 31.06(10). The evaluation of borrower defense claims under the new standard also takes into account a school’s use of high pressure sales tactics—the inevitable consequence of incentive compensation systems. *See* 81 Fed. Reg. 75,926, 76,083.

<sup>6</sup> *See, e.g.*, Plaintiffs’ Motion Pursuant to Fed. R. Civ. P. 56(d) to Deny Defendants’ Motion for Summary Judgment, Exhibit K (Defendants’ January 28, 2014 Letter to Plaintiffs), *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. May 2, 2014), ECF No. 386-11 (“[t]o date, EDMC has produced more than 7.9 million pages of ESI from Admissions Employees”); *id.*, Exhibit T (Defendants’ March 3, 2014 Opposition to

PPSL requests that DOJ respond to this appeal within 20 days. *See* 5 U.S.C. § 552(a)(6)(A)(ii). I may be reached at the contact information listed below, should you have questions or require any additional information.

Sincerely,



Amanda Mangaser Savage  
Project on Predatory Student Lending  
Legal Services Center  
122 Boylston Street  
Jamaica Plain, MA 02130  
(617) 390-2710  
asavage@law.harvard.edu

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Plaintiffs' Motion to Enforce Report & Recommendation No. 4), *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. May 2, 2014), ECF No. 386-20 ("On October 15, 2013, . . . Defendants produced over 7,900 pages of compliance audit documents."). Given DOJ's failure to comply with its obligation under Section 552(a)(6)(F) of FOIA, *see supra* § 4, PPSL is unable to provide a more specific estimate of the volume of documents withheld by DOJ.

# Exhibit A





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CENTRO DE SERVICIOS LEGALES

122 Boylston Street  
Jamaica Plain, Massachusetts 02130-2246  
TEL: (617) 522-3003 • FAX: (617) 522-0715

June 20, 2016

Susan B. Gerson  
Assistant Director, FOIA/Privacy Unit  
Executive Office for United States Attorneys  
Department of Justice  
Room 7300, 600 E Street, N.W.  
Washington, DC 20530-0001  
USAEO.FOIA.Requests@usdoj.gov

VIA ELECTRONIC MAIL

Dear Ms. Gerson:

This letter constitutes a request under the Freedom of Information Act, 5 U.S.C. § 552 and the implementing regulations of the Department of Justice (“Department”), 28 C.F.R. § 16.1 *et seq.* This request is submitted on behalf of the Project on Predatory Student Lending (“PPSL”) of the Legal Services Center of Harvard Law School.

This request relates to *United States ex rel. Washington v. Education Management Corp.*, No. 2:07-cv-461 (W.D. Pa.) (“EDMC litigation”), which was litigated in the United States District Court for the Western District of Pennsylvania and settled by a Settlement Agreement effective November 16, 2015.<sup>1</sup> As detailed below, PPSL seeks records produced to the Department (together with the Attorneys General of California, Florida, Illinois, Indiana, and Minnesota, and Relators Lynntoya Washington and Michael T. Mahoney, “Plaintiffs”) in discovery by the defendants in the EDMC litigation (“Defendants”).<sup>2</sup>

**Background**

The EDMC litigation involved allegations that Defendants violated Title IV of the Higher Education Act’s prohibition on the use of incentive compensation by institutions participating in federal student aid programs (“Incentive Compensation Ban”).<sup>3</sup> Specifically, the Department alleged that, in order to receive funding through federal student loan and grant programs, Defendants falsely certified that they were in compliance with the Incentive Compensation Ban, when in fact they “created a ‘boiler room’ style sales culture” in which “the sole factor that

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<sup>1</sup> Order of Dismissal, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. Dec. 8, 2015).

<sup>2</sup> The defendants identified in the Settlement Agreement were Education Management Corporation (“EDMC”) and its subsidiaries and affiliates, including Education Management Holdings II LLC, Education Management II LLC, Education Finance III LLC, the Argosy Education Group, Inc., Argosy University of California LLC, the Art Institutes International II LLC, Brown Mackie Education II LLC, the Institute of Post-Secondary Education, Inc., and South University LLC.

<sup>3</sup> 20 U.S.C. § 1094(a)(20).

determined changes to the compensation of [their] admissions personnel was the number of students recruited by the admissions employee during the previous twelve months.”<sup>4</sup>

On November 8, 2012, the District Judge in the EDMC litigation appointed a Special Master to oversee discovery disputes between the parties.<sup>5</sup> The Special Master subsequently issued a series of Reports and Recommendations regarding the scope of discovery. Filed on May 14, 2013 and adopted by the District Judge,<sup>6</sup> Report & Recommendation No. 2 of the Special Master (“R&R No. 2”) granted in part and denied in part Plaintiffs’ motions to compel production of documents and answers to their first set of requests for production (“RFPs”) and interrogatories (“ROGs”).<sup>7</sup>

Subsequently, Report & Recommendation No. 4 of the Special Master (“R&R No. 4”), issued on November 24, 2013 and adopted by the District Judge,<sup>8</sup> ordered Defendants to produce “all material currently available to them regarding” four categories of documents prioritized by Plaintiffs: “(1) admissions employee emails; (2) investor communications related to the [Incentive Compensation Ban]; (3) materials relied upon with regard to the Program Participation Agreements and Defendants’ compliance therewith; and (4) materials related to Defendants’ Compensation Review Task Force[.]”<sup>9</sup>

### **Requests**

In the following requests, the term “materials” refers to, without limitation, documents, reports, applications, notes, emails, voicemails, database entries, and logs, whether in paper, electronic, or other format.

I request:

1. All materials produced by Defendants to the Department in response to the following RFPs for which Plaintiffs’ motions to compel were granted in R&R No. 2:<sup>10</sup>
  - a. RFPs 47-52 (“[m]aterial regarding internal or external audits, investigations, and reviews of Defendants’ regulatory compliance efforts, including regarding regulations other than the [Incentive Compensation Ban]”);<sup>11</sup>

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<sup>4</sup> Joint Complaint in Intervention by the United States of America, and the States of California, Florida, Illinois, and Indiana ¶¶ 15-168, 271, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. Aug. 8, 2011).

<sup>5</sup> Order of Appointment of a General and E-Discovery Special Master with Preliminary Scheduling Dates, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. Nov. 8, 2012).

<sup>6</sup> Memorandum of Opinion and Order of Court, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. July 23, 2013).

<sup>7</sup> Report & Recommendation #2 of the Special Master, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. May 14, 2013).

<sup>8</sup> Order Adopting Special Master Report and Recommendation #4, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. Dec. 10, 2013).

<sup>9</sup> Report & Recommendation #4 of the Special Master at 21, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. Nov. 24, 2013).

<sup>10</sup> Report & Recommendation #2 of the Special Master at 50-51, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. May 14, 2013); Memorandum of Opinion and Order of Court, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. July 23, 2013).

- b. RFP 85 (“any complaints made to Defendants regarding their recruiting process or alleged misrepresentations by Defendants”);<sup>12</sup>
  - c. RFPs 96-101 (“documents regarding Defendants’ student retention, persistence, graduation, loan default, job placement, and readmission rates”);<sup>13</sup>
  - d. RFP 119 (“templates for written communications between Defendants and potential students”);<sup>14</sup>
  - e. RFP 120 (“templates of scripts used by admissions employees when providing campus tours”);<sup>15</sup>
  - f. RFP 121 (“documents regarding what [Assistant Directors of Admission] may or may not tell potential students”);<sup>16</sup>
  - g. RFPs 122-25 (“any complaints by faculty members or prospective or actual students about recruiters, including any instances of alleged misrepresentations or misconduct by recruiters”);<sup>17</sup> and
  - h. RFP 135 (“complaints by faculty members regarding Defendants’ admission and grading policies”).<sup>18</sup>
2. All materials produced by Defendants to the Department in response to ROG 18 (“[m]aterial regarding internal or external audits, investigations, and reviews of Defendants’ regulatory compliance efforts, including regarding regulations other than the [Incentive Compensation Ban]”),<sup>19</sup> for which Plaintiffs’ motion to compel was granted in R&R No. 2.<sup>20</sup>
  3. All materials produced by Defendants to the Department “regarding . . . admissions employee emails” as ordered in R&R No. 4.<sup>21</sup>

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<sup>11</sup> Report & Recommendation #2 of the Special Master at 15, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. May 14, 2013).

<sup>12</sup> *Id.* at 39.

<sup>13</sup> *Id.* at 23.

<sup>14</sup> *Id.* at 22.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 39.

<sup>18</sup> *Id.* at 36.

<sup>19</sup> *Id.* at 15.

<sup>20</sup> *Id.* at 50-51; Memorandum of Opinion and Order of Court, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. July 23, 2013).

<sup>21</sup> Report & Recommendation #4 of the Special Master at 21, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. Nov. 24, 2013); Order Adopting Special Master Report and Recommendation #4, *United States ex rel. Washington v. Educ. Mgmt. Corp.*, No. 2:07-cv-461 (W.D. Pa. Dec. 10, 2013).

### **Fee Waiver Request**

I respectfully request that the Department waive any fees associated with the processing of this request pursuant to 28 C.F.R. § 16.10(k). The Legal Services Center of Harvard Law School, of which PPSL is a part, is a non-profit organization that provides legal services at no cost to low-income individuals. This request is not made in the furtherance of any commercial interest. Rather, disclosure of the requested information is likely to contribute significantly to public understanding of the operations and activities of the government, including the Department of Education's enforcement of the Incentive Compensation Ban. Disclosure of the requested information is also in the public interest because it bears on the ability of individuals who have attended Defendants' institutions to obtain relief from their student loan debt. Through its discovery requests, the Department sought to obtain information about Defendants' recruiting practices, including misrepresentations made to prospective students and other forms of misconduct. To the extent that the requested information sheds light on these practices, it is of critical importance to individuals who took out loans to attend Defendants' institutions, as they may be able to assert borrower defenses to repayment based on the requested information.<sup>22</sup>

I ask that you release all responsive records within 20 days, *see* 5 U.S.C. § 552(a)(6)(A)(i); 28 C.F.R. § 16.5(c). Should you deny my application for a fee waiver, please advise me of any costs associated with producing responsive records. Finally, I request that you produce records to me on a rolling basis as they become available, even if additional records may yet be identified. Thank you very much for your attention to this request. I may be reached at the contact information listed below, should you require any clarification regarding this request.

Sincerely,



Amanda Mangaser Savage  
Project on Predatory Student Lending  
Legal Services Center  
122 Boylston Street  
Jamaica Plain, MA 02130  
(617) 390-2710  
asavage@law.harvard.edu

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<sup>22</sup> *See* 34 C.F.R. 685.206(c) (“In any proceeding to collect on a Direct Loan, the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law.”). Although the Department of Education has proposed to adopt a new federal standard for borrower defenses, this would apply only to loans first disbursed on or after July 1, 2017; the current defense to repayment standard would continue to govern defenses to repayment of loans disbursed prior to that date. *See* Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program; Proposed Rule, 81 Fed. Reg. 116 (proposed June 16, 2016) (to be codified at 34 C.F.R. pts. 30, 668, 674, 682, 685, 686).

# Exhibit B



U.S. Department of Justice

Executive Office for United States Attorneys

Freedom of Information and Privacy Staff

Suite 7300, Bicentennial Building  
600 E Street, NW  
Washington, DC 20530

(202) 252-6020  
FAX (202) 252-6047

September 6, 2016

Amanda Savage  
Legal Services Center of Harvard Law School  
122 Boylston Street  
Jamaica Plain, Massachusetts 02130

Re: Request Number: FOIA-2016-03030  
Date of Receipt: June 20, 2016  
Subject of Request: U.S. v. Education Management Corp./Western District of Pennsylvania

Dear Ms. Savage:

Your request for records under the Freedom of Information Act/Privacy Act has been processed. This letter constitutes a reply from the Executive Office for United States Attorneys, the official record-keeper for all records located in this office and the various United States Attorneys' Office.

This letter is a [  ] full denial.

The Freedom of Information exemption(s) cited for withholding records or portions of records are marked below. An enclosure to this letter explains the exemptions in more detail.

(b)(3)  
(b)(4)  
(b)(6)  
(b)(7)(C)

In making our determination we have taken the following into account: the protective orders in place, protection of personal privacy, protection of confidential business information, and the Family Educational Rights and Privacy Act.

This is the final action on this above-numbered request. If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following website: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within ninety (90) days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

You may contact our FOIA Public Liaison at the telephone number listed above for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001; e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas D. Anderson", with a horizontal line extending to the right.

Thomas D. Anderson  
Acting Assistant Director

Enclosure(s)

## EXPLANATION OF EXEMPTIONS

### FOIA: TITLE 5, UNITED STATES CODE, SECTION 552

- (b)(1) (A) specifically authorized under criteria established by and Executive order to be kept secret in the in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

### PRIVACY ACT: TITLE 5, UNITED STATES CODE, SECTION 552a

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to Executive Order 12356 in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability eligibility, or qualification for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his identity would be held in confidence.