



August 22, 2017

**BY E-MAIL & U.S. MAIL**

U.S. Department of Education  
Office of Management  
Office of the Chief Privacy Officer  
400 Maryland Avenue, SW, LBJ 2E320  
Washington, DC 20202-4536  
ATTN: FOIA Public Liaison  
EDFOIAManager@ed.gov

**Re: FREEDOM OF INFORMATION ACT REQUEST**

To whom it may concern:

My name is Amit Paley. I am the CEO of The Trevor Project, the world's largest suicide prevention and crisis intervention organization for lesbian, gay, bisexual, transgender, queer and questioning (LGBTQ) young people. The Trevor Project works closely with the National Center for Transgender Equality ("NCTE"), the nation's leading social justice advocacy organization winning life-saving change for transgender people.

This letter constitutes a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, on behalf of The Trevor Project and NCTE for records related to the Department of Education's treatment of civil rights complaints involving a student's gender identity, real or perceived, including complaints involving transgender students.

**Background**

The Trevor Project is the leading and only accredited national organization providing crisis intervention and suicide prevention services to LGBTQ young people under the age of 25. Its mission is to end suicide among LGBTQ youth. The Trevor Project offers a suite of crisis intervention and suicide prevention services, including the 24/7 TrevorLifeline, TrevorText, and TrevorChat, as well as TrevorSpace, a peer-to-peer social network for LGBTQ young people. Trevor also runs innovative research, advocacy and education programs.

The National Center for Transgender Equality is a national social justice organization devoted to ending discrimination and violence against transgender people through education and advocacy on national issues of importance to transgender people. By empowering transgender people and our allies to educate and influence policymakers and others, NCTE facilitates a strong and clear voice for transgender equality in our nation's capital and around the country.

The Department of Education's OCR is tasked with enforcing the nation's civil rights laws in schools that receive funding from the Department.<sup>1</sup> Through twelve enforcement offices located around the country, OCR conducts periodic compliance reviews, investigates complaints of unlawful discrimination, and takes enforcement action where necessary.<sup>2</sup> As OCR's website explains, "[t]he mission of the Office for Civil Rights is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights."<sup>3</sup>

Yet since President Trump's inauguration, the Trump Administration, the Department of Education and its leadership, and OCR itself have taken steps to significantly rollback OCR's enforcement of this country's civil rights laws in our schools, including the following:

- in June 2017, the Acting Assistant Secretary for Civil Rights issued a memo (1) instructing OCR investigators to limit unprompted "systematic" or "class-action" reviews to those instances where a complainant specifically raises the issue, and (2) ending OCR Headquarters' oversight of particular categories of "sensitive cases";
- the Trump Administration proposed to reduce OCR's funding in its Fiscal Year 2018 budget request; and

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<sup>1</sup> 34 C.F.R. §§ 100, 104, 106, 110.

<sup>2</sup> *About OCR*, Dep't of Ed. (last visited July 31, 2017), <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html>; see 34 C.F.R. §§ 100.6 – 100.11.

<sup>3</sup> *About OCR*, Dep't of Ed. (last visited July 31, 2017), <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html>.

- upon taking office, the Secretary of Education appointed staff who fought against expanding protections for victims of sexual assault on campus.<sup>4</sup>

In addition, OCR has indicated that it will rollback enforcement of Title IX with respect to complaints filed by transgender students. Title IX prohibits discrimination based on sex. Accordingly, schools receiving Federal funds agree that they will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations.<sup>5</sup>

In May 2016, OCR and the U.S. Department of Justice’s Civil Rights Division (“CRD”) issued joint guidance on schools’ obligations to transgender students under Title IX.<sup>6</sup> OCR and CRD explained that their offices “treat[ed] a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations,” such that schools could not discriminate against students on the basis of their gender identity.<sup>7</sup> In the guidance, schools receiving federal funds were instructed to provide transgender students with a safe and nondiscriminatory environment; treat students consistent with their gender identity, notwithstanding documentation indicating a different sex; provide transgender students access to activities and facilities in accord with their gender identity, including bathrooms; and protect the privacy of transgender students, including their birth name or sex assigned at birth.<sup>8</sup>

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<sup>4</sup> Letter from Senator Patty Murray, et al., to Hon. Betsy DeVos, Secretary of Education, Hon. Betsy DeVos (June 27, 2017), available at <https://www.documentcloud.org/documents/3878600-Senators-Letter-Betsy-DeVos-ED-OCR.html>.

<sup>5</sup> 34 C.F.R. §§ 106.4, 106.31.

<sup>6</sup> U.S. Dep’t of Educ. & U.S. Dep’t of Justice, Dear Colleague Letter on Transgender Students (May 13, 2016), *available at* <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 2–8.

On February 22, 2017, however, OCR abruptly withdrew the 2016 joint guidance on Title IX, ostensibly “in order to further and more completely consider the legal issues involved.”<sup>9</sup> Since withdrawing the guidance, OCR has given no indication that it is actually considering the issue or contemplating whether to re-issue some or all of the 2016 guidance. Moreover, on June 6, 2017, OCR’s Acting Director issued a memorandum allowing investigators to simply dismiss cases relating to discrimination against transgender students.<sup>10</sup>

In short, the Trump Administration’s OCR is laying down the mantle and significantly curtailing its enforcement of the nation’s civil rights laws. In doing so, it is endangering the educations of this nation’s LGBTQ youth.

On June 27, 2017, thirty Democratic Senators sent Secretary DeVos a letter expressing their outrage at OCR’s recent actions.<sup>11</sup> In order to fully understand the impact of OCR’s actions, the Senators requested that the Department of Education produce nine categories of records by July 11, 2017.<sup>12</sup>

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<sup>9</sup> U.S. Dep’t of Educ. & U.S. Dep’t of Justice, Dear Colleague Letter 1 (Feb. 22, 2017), *available at* <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

<sup>10</sup> Memorandum from Candice Jackson on OCR Instructions to the Field re Complaints Involving Transgender Students, June 6, 2017, <http://apps.washingtonpost.com/g/documents/local/trump-administrations-guidance-to-office-for-civil-rights-on-transgender-student-complaints/2474/>.

<sup>11</sup> Letter from Senator Patty Murray, et al., to Hon. Betsy DeVos, Secretary of Education (June 27, 2017), *available at* <https://www.documentcloud.org/documents/3878600-Senators-Letter-Betsy-DeVos-ED-OCR.html>.

<sup>12</sup> Letter from Senator Patty Murray, et al., to Hon. Betsy DeVos, Secretary of Education, at 4 (June 27, 2017), *available at* <https://www.documentcloud.org/documents/3878600-Senators-Letter-Betsy-DeVos-ED-OCR.html>.

On July 11, 2017, Secretary DeVos responded by letter, arguing that the Department's actions under her leadership in fact evince a curtailment of the previous Administration's "pattern of overreaching."<sup>13</sup> Secretary DeVos's letter, however, did not address the Senators' request for documents. To my knowledge, the Department of Education has produced no documents to the Senators and appears to have no intention of doing so. Indeed, the Trump Administration has instructed agencies not to cooperate with document requests from Democratic legislators.<sup>14</sup>

The Department of Education, however, has an obligation to produce its records under the Freedom of Information Act, 5 U.S.C. § 552, when requested. Accordingly, through this FOIA request, I seek to compel the agency to produce the records that it has thus far failed to produce to the Democratic Senators who authored the June 27, 2017 letter.

### **Requested Records**

Pursuant to 5 U.S.C. § 552(a)(2) and 34 C.F.R. § 5.20, I seek release of the following records:

1. Records revealing all open OCR cases involving a student's gender identity, real or perceived, (including cases involving transgender students) as of January 30, 2017, including the nature of the complaint, and the current status of each of these cases.
2. Records revealing all open OCR cases involving a student's sexual orientation, real or perceived, as of January 30, 2017, including the nature of the complaint, and the current status of each of these cases.

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<sup>13</sup> Letter from Hon. Betsy DeVos, Secretary of Education, to Senator Patty Murray (July 11, 2017), *available at* <http://blogs.edweek.org/edweek/campaign-k-12/17-013549%20Murray%20Outgoing.pdf>.

<sup>14</sup> Burgess Everett & Josh Dawsey, *White House Orders Agencies To Ignore Democrats' Oversight Requests*, Politico (June 2, 2017, 5:11 A.M. EDT), <http://www.politico.com/story/2017/06/02/federal-agencies-oversight-requests-democrats-white-house-239034>.

3. Records revealing all cases OCR has closed or dismissed between January 1, 2017, and today, and the specific reason each case was closed.
4. A complete, unredacted copy of the current manual used by investigators investigating civil rights complaints.
5. Records drafted or revised on or after January 1, 2017, revealing how the Department intends to ensure that OCR investigators are making determinations about LGBTQ students' rights based on binding legal precedent in their region.
6. Records and communications drafted or revised on or after January 1, 2017, revealing whether the Department will continue to post all resolution agreements online.
7. Any and all memoranda, analyses, or other communications, including correspondence with the White House or non-government persons or organizations, drafted or revised on or after January 1, 2017, discussing the rationale for, and impact of, policy changes affecting civil rights enforcement by the Department related to gender identity, sexual orientation, or sex stereotyping discrimination.
8. Any and all memoranda, analyses, or other communications drafted or revised on or after January 1, 2017, discussing the rationale for, and impact of, proposed budget cuts in OCR.
9. Records revealing all metrics that will be used by the Department to assess effectiveness of civil rights enforcement.

I request that all of these documents be produced in their native electronic formats with any attached metadata included, so long as such electronic files can be opened using standard commercially available software. If the files cannot be produced in this manner, I request that records be produced in an alternative electronic format that is text-searchable. With respect to databases, spreadsheets or similar organized sets of data, I request that the records be produced in .xls or .csv format. *See* 5 U.S.C. § 552(a)(3)(B).

### **Application For Waiver Or Reduction Of Fees**

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.33, I request that the Department of Education waive all search and production fees.

In general, Congress sought “to encourage open and accountable government under the FOIA fee waiver provision.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Educ.*, 593 F. Supp. 2d 261, 271 (D.D.C. 2009). Accordingly, Congress intended that FOIA be “liberally construe[d] . . . in favor of [fee] waivers for noncommercial requesters.” *Id.*

The Department of Education’s FOIA implementation regulations specify that the Department must waive or reduce search and production fees when a request meets two requirements: “(1) [d]isclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and (2) [d]isclosure of the information is not primarily in the commercial interest of the requester.” 34 C.F.R. § 5.33.

My request satisfies each of the Department’s fee-waiver/reduction requirements.

1. *Disclosure Would Likely Contribute Significantly To Public Understanding of The Impact of OCR’s Policy Changes On Its Overall Enforcement of Civil Rights Laws*

My request meets the Department’s first fee-waiver requirement. The Department’s regulations specify that to determine whether disclosure of records would likely contribute significantly to public understanding, the Department considers four factors:

(1) whether the subject of the request specifically concerns identifiable operations or activities of the government;

(2) whether the disclosable portions of the requested information will be meaningfully informative in relation to the subject matter of the request;

(3) the disclosure’s contribution to public understanding of government operations, i.e., the understanding of the public at large, as opposed to an individual or a narrow segment of interested persons (including whether the requester has expertise in the subject area of the FOIA

request as well as the intention and demonstrated ability to disseminate the information to the public); and

(4) the significance of the disclosure's contribution to public understanding of government operations or activities, i.e., the public's understanding of the subject matter existing prior to the disclosure must be likely to be enhanced significantly by the disclosure.

34 C.F.R. § 5.33(b). Here, each factor weighs in favor of granting a fee waiver.

*i. Identifiable Operations or Activities of the Government*

The Department's first factor weighs in favor of a fee waiver as the subject of my request plainly concerns identifiable operations or activities of the government. 34 C.F.R. § 5.33(b)(a). Specifically, the records requested concern OCR's policies and enforcement activities related to its enforcement of Federal anti-discrimination laws. *See supra* at p. 4.

*ii. Meaningfully Informative*

The Department's second, meaningfully informative factor also weighs in favor of a waiver. 34 C.F.R. § 5.33(b)(2). Records are meaningfully informative in relation to the subject matter of the request when their disclosure "will allow the public to make a more informed assessment" about an agency's actions. *Citizens for Responsibility & Ethics in Washington*, 593 F. Supp. 2d at 271. In general, "a requester satisfies its burden by describing with reasonable specificity the link between the request and the enhancement of public awareness and understanding of governmental activities." *Id.* at 270.

Here, the requested records are meaningfully informative in relation to OCR's enforcement of the country's civil rights statutes, including Title IX. Their disclosure will allow the public to fully understand the impact of OCR's recent policy and civil rights investigatory and enforcement changes. Disclosure of the case information requested will allow the public to learn how OCR is handling cases involving students' gender identity and sexual assault, including the frequency with which OCR is now simply dismissing those complaints. Disclosure of the manual will allow the public to understand what criteria OCR is using to evaluate complaints and whether there have been significant changes thereto. Disclosure of the memoranda and analyses requested will allow the public to better understand why



OCR saw fit to rollback enforcement of civil rights statutes with respect to transgender students.

Moreover, thirty Democratic Senators have specifically requested these records to better understand the impact of OCR's civil rights rollback. Disclosure of the records will inform those legislators' policy positions and their work in Congress. Disclosure will therefore directly facilitate and enhance the exercise of democratic oversight over OCR, the Department of Education, and other agencies under the Trump Administration.

For all of these reasons, the Department's meaningfully informative factor weighs in favor of a fee waiver.

*iii. Contribution To The Public At Large*

The Department's third factor—that disclosure would contribute to the understanding of the public at large, as opposed to an individual or a narrow segment of interested persons—further weighs in favor of granting a fee waiver. 34 C.F.R. § 5.33(b)(3).

As an initial matter, the fact that thirty Senators requested these very records evidences that disclosure is in the broad public interest. Moreover, the records requested are not highly technical records for which special expertise are needed to interpret and understand. Instead, they are straightforward statistics, memoranda, and analyses detailing OCR's handling of discrimination complaints since the President Trump took office. Given the salience of the issue of the rise of discrimination against transgender individuals and other minorities under the Trump Administration, there will be no shortage of interest in and dissection of the records requested.

Nevertheless, The Trevor Project and NCTE are well equipped to interpret the records, if necessary, and plans to widely disseminate the records. The Trevor Project has a Head of Research & Evaluation who has a PhD and Master of Science in Public Health. *See About the Trevor Project: Founders, Board, Staff & Councils*, The Trevor Project, <http://www.thetrevorproject.org/pages/staff-board> (last visited Aug. 1, 2017). In addition, The Trevor Project maintains an interdisciplinary advisory council—The Trevor Advisory Council—comprised of nationally recognized mental health, public health and education experts who donate their time to work with staff and the board, lending their expertise and guidance in the areas of crisis services, education, peer support, evaluation and research. *Id.* Between the research and policy expertise and The Trevor Project's Head of Research & Evaluation, The

Trevor Project is more than capable of interpreting the requested records for the broader public.

In addition to the expertise necessary to interpret the records, The Trevor Project and NCTE have the capacity to broadly disseminate the records and intends to do so. The Trevor Project maintains a website and blog through which it routinely issues press releases on pressing policy matters related to its work. *See, e.g., Legal and Civil Rights Advocates Call On State Education Officials to Protect Transgender Students*, The Trevor Project: Blog & Events (July 19, 2017), <http://www.thetrevorproject.org/blog/entry/legal-and-civil-rights-advocates-call-on-state-education-officials-to-prote>. In addition, The Trevor Project maintains a significant social media presence, tweeting news and developments out to its roughly 258,000 followers every few hours. *The Trevor Project*, Twitter, <https://twitter.com/trevorproject> (last visited Aug. 1, 2017). Similarly, NCTE broadly disseminates information regarding civil rights enforcement through its website and Medium page. *See, e.g., Secretary DeVos: Keep Protections for Transgender Students and Survivors of Sexual Violence*, National Center for Transgender Equality (July 14, 2017), <https://medium.com/@TransEquality/secretary-devos-keep-protections-for-transgender-students-and-survivors-of-sexual-violence-49816a02e8b3>, and regularly shares news and commentary with its more than 73,000 Twitter followers. *Trans Equality*, <https://twitter.com/transequality> (visited Aug. 18, 2017).

For all of these reasons, the Department’s third factor also weighs in favor of a fee waiver.

*iv. Significant Contribution To Public Understanding*

The Department’s final, “significant contribution” factor also weighs in favor of a fee waiver. 34 C.F.R. § 5.33(b)(4). Disclosure satisfies the significance factor where disclosure “likely will result in the expansion of . . . the public’s understanding” of particular government activity. *Citizens for Responsibility & Ethics in Washington*, 593 F. Supp. 2d at 271.

Here, disclosure of the requested records would significantly expand the pool publically available information, and therefore public understanding, about OCR’s recent handling of discrimination complaints, as well as OCR’s updated policies on addressing discrimination more broadly. Currently, the public does not know:

- the total number of open OCR cases involving a student’s gender identity, real or perceived, and/or sexual assault, and/or sexual orientation, real or perceived;

- the number of cases OCR has closed or dismissed since January 1, 2017, or the reason why each case was closed;
- the specific criteria used by OCR investigators to make termination and enforcement decisions;
- whether OCR has formally considered how it intends to ensure that OCR investigators act in compliance with the law when making determinations about complaints from LGBTQ students and, if it has, how it will do so;
- whether OCR will continue to make resolution agreements public;
- the reasons underlying OCR’s recent policy changes regarding its enforcement practices;
- the reasons underling the Trump Administration’s proposed budget cuts to OCR; or
- how OCR measures the effectiveness of its enforcement efforts.

Disclosure of the requested records will fill in each of these gaps in the public’s understanding of OCR’s current enforcement efforts.

Indeed, as the thirty Democratic Senators noted in the June 27, 2017, letter to the Department, disclosure of the requested records is critically necessary to “fully understand[ing] the impact of recent policy and civil rights investigatory and enforcement changes at the Department and OCR.” Letter from Senator Patty Murray, et al., to Hon. Betsy DeVos, Secretary of Education, at 4 (June 27, 2017), *available at* <https://www.documentcloud.org/documents/3878600-Senators-Letter-Betsy-DeVos-ED-OCR.html>.

For all of these reasons, the four factors the Department considers to determine whether disclosure would likely contribute significantly to public understanding of its work all weigh in favor of granting a fee waiver for this request.

## 2. *Disclosure Is Not In My Commercial Interest*

This request also satisfies the Department’s requirement that “[d]isclosure of the information is not primarily in the commercial interest of the requester.” 34

C.F.R. § 5.33(a). To determine whether a request meets this requirement, the Department considers two factors:

(1) The existence of the requester's commercial interest, i.e., whether the requester has a commercial interest that would be furthered by the requested disclosure.

(2) If a commercial interest is identified, whether the commercial interest of the requester is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

34 C.F.R. § 5.33(c).

Here, neither The Trevor Project nor NCTE have a commercial interest that would be furthered by the requested disclosure. The Trevor Project is a non-profit organization dedicated to providing crisis intervention and suicide prevention services to lesbian, gay, bisexual, transgender, queer and questioning (LGBTQ) young people. *About The Trevor Project*, The Trevor Project, <http://www.thetrevorproject.org/section/about> (last visited Aug. 1, 2017). Similarly, NCTE is a nonprofit advocacy organization. *About Us*, Nat'l Ctr. for Transgender Equality, <https://www.transequality.org/about> (last visited Aug. 7, 2017). It is dedicated to providing public education and a transgender advocacy presence in Washington, D.C. *Id.*

Disclosure of the requested information would further The Trevor Project's and NCTE's respective missions by allowing them to advocate for more rigorous enforcement of LGBTQ students' civil rights and to direct its efforts at the most vulnerable individuals; disclosure would not, however, enure to The Trevor Project's, NCTE's, or my own commercial interest.

For these reasons, I request that the Department waive all fees for this request. And, although unnecessary, I certify that the information above is true and accurate to the best of my knowledge.

### **Conclusion**

Pursuant to FOIA statutes and the Department's implementing regulations, I anticipate a determination within 20 days. *See* 5 U.S.C. § 552(a)(6)(A)(i); 34 C.F.R. § 5.21(c).

If my request is denied in whole or in part, please justify all withholdings and redactions by reference to specific FOIA exemptions. I expect the release of all segregable portions of otherwise exempt material, *see* 5 U.S.C. § 552(b), and reserve the right to appeal a decision to withhold any information or deny a waiver of fees.

Thank you for your prompt attention to this matter. Please direct communications and furnish the applicable records to:  
Amit.Paley@thetrevorproject.org.

Please communicate any questions you may have by phone or email, rather than regular mail. Also, if the requested records cannot be provided by email, please notify me as soon as they are available and I will arrange to collect them by courier to avoid additional delay.

Your prompt attention to this request is greatly appreciated.

Respectfully,

A handwritten signature in black ink, appearing to read 'Amit Paley', with a stylized flourish at the end.

Amit Paley  
CEO & Executive Director