

February 7, 2022

**VIA ELECTRONIC MAIL AND FACSIMILE**

U.S. Department of Education  
Office of the Executive Secretariat  
FOIA Service Center  
400 Maryland Ave. SW, LBJ 7W106A  
Washington, D.C. 20202-4536  
[EDFOIAManager@ed.gov](mailto:EDFOIAManager@ed.gov)  
ATTN: FOIA Public Liaison

**Re: FOIA Request: Records Related to Section 117 Enforcement and the University of Pennsylvania’s Biden Center for Diplomacy and Global Engagement**  
(DFI FOIA No. 100-3-22)

Dear FOIA Public Liaison:

The Defense of Freedom Institute for Policy Studies, Inc. (“DFI”) is a 501(c)(3) nonprofit, nonpartisan organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting civil and constitutional rights at schools and in the workplace. For the benefit of the public, DFI’s mission includes obtaining records related to the consideration and implementation of policies imposed by the federal government and its officials on the American people.

Section 117 of the Higher Education Act of 1965, codified at 20 U.S.C. § 1011f, clearly requires that institutions of higher education that receive federal funding provide semi-annual disclosures to ED of gifts and contracts from government and non-government foreign sources (*e.g.*, if the annual value of the gifts and contracts is \$250,000 or more from an institution owned or controlled by a foreign source, it must be disclosed to ED).<sup>1</sup>

According to the U.S. Department of Education (“ED”), various U.S. universities received at least \$6.5 billion in *undisclosed* foreign gifts and contracts between 2010 and 2020, frequently and illegally failing to reveal the true sources of those foreign gifts and contracts,<sup>2</sup> a practice known as “anonymizing.” Following ED’s increased enforcement of Section 117’s reporting requirements prior to 2021, many universities filed corrective reports with ED, reflecting previously undisclosed foreign gifts and contracts valued at approximately \$6.5 billion from government and non-

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<sup>1</sup> 20 U.S.C. § 1011f. See <https://www.govinfo.gov/content/pkg/USCODE-2018-title20/pdf/USCODE-2018-title20-chap28-subchapI-partB-sec1011f.pdf> and <https://sites.ed.gov/foreigngifts/>.

<sup>2</sup> Aruna Viswanatha and Melissa Korn, “Top Universities Took Billions in Unreported Foreign Funds, U.S. Finds,” Wall Street Journal (October 20, 2020), <https://www.wsj.com/articles/top-universities-took-billions-in-unreported-foreign-funds-u-s-finds-11603226953>.



government foreign sources in places such as the People’s Republic of China (“PRC”), Qatar, Saudi Arabia, and the United Arab Emirates.<sup>3</sup>

On February 1, 2017, the University of Pennsylvania (“UPenn”) announced<sup>4</sup> the formation of the “Penn Biden Center for Diplomacy & Global Engagement” (“Biden Center”), describing its mission as engaging “with its faculty and global centers to convene world leaders, develop and advance smart policy, and strengthen the national debate for continued American global leadership in the 21<sup>st</sup> century.”<sup>5</sup> The Biden Center opened a Washington, D.C. office in 2018. The next year, UPenn received an astonishing 389% higher reportable foreign contributions 2019 compared to 2018).<sup>6</sup> *The Philadelphia Inquirer* reported that foreign source contributions to UPenn increased by at least \$258 million.<sup>7</sup> Another analysis revealed that between 2013 and 2019, UPenn was the third highest university recipient of foreign funding from groups in the PRC and that approximately 40% of those gifts (approximately \$27.1 million) came from anonymous PRC donors.<sup>8</sup>

President Joseph R. Biden, Jr. officially launched his 2020 presidential campaign on April 25, 2019. As referenced above, a massive increase in foreign contributions to UPenn occurred during the period leading up to and after the campaign announcement, including millions of dollars in gifts from anonymous PRC donors. In May 2020, responding to a request from the public for

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<sup>3</sup> Lauren Camera, “Colleges and Universities Fail to Report Billions in Foreign Donations,” *U.S. News & World Report* (February 13, 2020), <https://www.usnews.com/news/education-news/articles/2020-02-13/colleges-and-universities-fail-to-report-billions-from-china-qatar-saudi-arabia-and-others>.

<sup>4</sup> “Vice President Joe Biden to lead the Penn Biden Center for Diplomacy and Global Engagement,” *Penn Today* (February 1, 2017), <https://penntoday.upenn.edu/spotlights/vice-president-joe-biden-lead-penn-biden-center-diplomacy-and-global-engagement>.

<sup>5</sup> See Penn Biden Center for Diplomacy & Global Engagement, <https://global.upenn.edu/penn-biden-center>. In addition to President Biden, the Biden Center maintains close ties with others in the Biden Administration. Antony Blinken, is former managing director, currently serves as the Secretary of State. Amy Gutmann, UPenn’s president, is President Biden’s nominee for Ambassador to Germany.

<sup>6</sup> Analytics Staff, “Penn received 389% more foreign donations in 2019 than in 2018, DP analysis finds,” *The Daily Pennsylvanian* (April 20, 2021), <https://www.thedp.com/article/2021/04/foreign-donations-penn-analysis-china>.

<sup>7</sup> Catherine Dunn, “Penn got \$258 million in foreign money, and there may be more it hasn’t disclosed,” *The Philadelphia Inquirer* (February 24, 2020), <https://www.inquirer.com/business/university-pennsylvania-foreign-donations-china-saudi-arabia-20200224.html>.

<sup>8</sup> Janet Lorin and Brandon Kochkodin, “Harvard Leads U.S. Colleges That Received \$1B from China,” *Bloomberg / Quint* (February 6, 2020), <https://www.bloombergquint.com/global-economics/harvard-leads-u-s-colleges-that-received-1-billion-from-china>.



information about anonymous donors benefitting the Biden Center, a UPenn spokesman stated that the Biden Center had “never solicited any gifts for the Penn Biden Center” and that none of its unsolicited gifts came from China.<sup>9</sup> Reporting by *Politico* confirmed that the Biden Center does not fundraise and that the Biden Center is instead funded by UPenn’s general funds for its operations.<sup>10</sup> ED’s online portal for Section 117 foreign disclosure reporting shows that from the time of the announcement by UPenn of the establishment of the Biden Center on February 1, 2017, through September 2020, UPenn received approximately \$21,187,333 in reportable foreign gifts and contracts from China.<sup>11</sup>

In a letter to President-elect Biden dated November 18, 2020, the American Council on Education (“ACE”) asked that the incoming administration act “quickly” to “[h]alt the expanded reporting requirements, including the new Information Collection Request (ICR) and Notice of Interpretation (NOI) on Section 117 imposed by the Department of Education in its effort to expand those reporting requirements...”<sup>12</sup> ACE claimed to represent the demands of approximately forty-six (46) higher education associations, which it named in its letter (and which are named in the request below). In the wake of that demand, ED’s enforcement of Section 117’s disclosure requirements has weakened since President Biden took office.<sup>13</sup>

ED’s Section 117 enforcement efforts are a matter of public interest given the PRC’s ongoing political, diplomatic, economic, and military competition<sup>14</sup> with the United States and its allies<sup>15</sup> and its ongoing efforts to leverage American higher education to its competitive advantage. DFI

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<sup>9</sup> Tori Sousa, “U. denies complaint that Penn Biden Center accepted undisclosed donations from China,” *The Daily Pennsylvanian* (May 30, 2020), <https://www.thedp.com/article/2020/05/penn-biden-center-china-undisclosed-donations-complaint-millions>.

<sup>10</sup> Theodoric Meyer, “Groups with Biden ties pose ethics quandary for his Administration,” *Politico* (January 18, 2021), <https://www.politico.com/news/2021/01/18/biden-ties-ethics-quandary-for-his-administration-460126>.

<sup>11</sup> See Section 117 of the Higher Education Act – Public Records, Foreign Funding Disclosure Reports, searchable at <https://sites.ed.gov/foreigngifts/>

<sup>12</sup> Letter to Joe Biden, President-Elect and Kamala Harris, Vice President-Elect, from the American Council on Education (ACE), <https://www.acenet.edu/Documents/Letter-Biden-Administration-Regulatory-Actions-111820.pdf>.

<sup>13</sup> Audrey Conklin, “US Colleges report fewer foreign gifts after Biden takes office, sparking concern from Rep. Gallagher,” *Fox News* (November 5, 2021), <https://sites.ed.gov/foreigngifts/>.

<sup>14</sup> Eric Tucker, “FBI director says the threat from China is ‘more brazen’ than ever before,” *Associated Press* (January 31, 2022), <https://www.npr.org/2022/01/31/1077174231/fbi-director-says-the-threat-from-china-is-more-brazen-than-ever-before>.

<sup>15</sup> Editorial Board Opinion, “China’s Xi promises the world ‘heads bashed bloody.’ He should be taken seriously,” *Washington Post* (July 5, 2021), <https://www.washingtonpost.com/opinions/2021/07/05/chinas-xi-promises-world-heads-bashed-bloody-he-should-be-taken-seriously/>.



thus seeks records and information related to ED’s enforcement of Section 117. In this context, anonymized foreign contributions to American universities, including UPenn, which received \$21,187,333 in reportable foreign gifts and contracts from China after announcing the formation of the Biden Center, are of particular concern.

Therefore, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations of ED, 34 C.F.R. Part 5 (“Availability of Information to the Public”), DFI makes the following request for records within your possession and/or control:

### **Requested Records**

DFI requests that ED produce the following records within twenty (20) business days:

1. All records, including but not limited to electronic mail (“email”), texts, letters, memoranda, and other documentation from the following “higher education associations” to any and all ED officials from November 3, 2020, through the date the search is conducted, which reference “Section 117” or “foreign reporting” or “reporting requirements” or “foreign donors” or “anonymized” or “Information Collection Request” or the “Notice of Interpretation (NOI) on Section 117”:
  - a. American Council on Education (“ACE”)
  - b. ACPA-College Student Educators International
  - c. American Association of Colleges of Nursing
  - d. American Association of Collegiate Registrars and Admissions Officers
  - e. American Association of Community Colleges
  - f. American Association of State Colleges and Universities
  - g. American Dental Education Association
  - h. American Indian Higher Education Consortium
  - i. APPA, “Leadership in Educational Facilities”
  - j. Association of Governing Boards of Universities and Colleges
  - k. Association of American Colleges and Universities
  - l. Association of American Universities
  - m. Association of Catholic Colleges and Universities
  - n. Association of Community College Trustees
  - o. Association of Independent California Colleges and Universities
  - p. Association of Independent Colleges and Universities in Massachusetts
  - q. Association of Independent Colleges and Universities in Pennsylvania
  - r. Association of Independent Colleges and Universities in Rhode Island
  - s. Association of Jesuit Colleges and Universities
  - t. Association of Public and Land-grant Universities
  - u. Association of Research Libraries
  - v. Association of Vermont Independent Colleges
  - w. Coalition of Urban and Metropolitan Universities
  - x. College and University Professional Association for Human Resources



- y. Connecticut Conference of Independent Colleges
    - z. Council for Advancement and Support of Education
    - aa. Council for Christian Colleges & Universities
    - bb. Council for Higher Education Accreditation
    - cc. Council for Opportunity in Education
    - dd. Council of Graduate Schools
    - ee. Council on Government Relations
    - ff. Council on Social Work Education
    - gg. EDUCAUSE
    - hh. ETS
  - ii. Higher Education Consultants Association
  - jj. Hispanic Association of Colleges and Universities
  - kk. NAFSA: Association of International Educators
  - ll. NASPA – Student Affairs Administrators in Higher Education
  - mm. National Association for College Admission Counseling
  - nn. National Association for Equal Opportunity in Higher Education
  - oo. National Association of College and University Business Officers
  - pp. National Association of Independent Colleges and Universities
  - qq. National Association of Student Financial Aid Administrators
  - rr. National Collegiate Athletic Association
  - ss. Phi Beta Kappa Society
2. All records, including but not limited to email, texts, letters, memoranda, and other documentation from any and all ED officials to any and all of the entities listed in Item 1, from November 3, 2020, through the date the search is conducted, which reference “Section 117” or “foreign reporting” or “reporting requirements” or “foreign donors” or “anonymized” or “Information Collection Request” or the “Notice of Interpretation (NOI) on Section 117.”
  3. All records, including but not limited to email, texts, letters, memoranda, and other documentation from any and all ED officials and government contractors assigned to ED (*i.e.*, independent personnel contracted by the federal government to provide professional expertise and support directly or indirectly to ED officials) from November 3, 2020, through the date the search is conducted, which reference “UPenn” or “University of Pennsylvania” or “University of Pennsylvania’s Biden Center for Diplomacy and Global Engagement” or “Penn Biden Center” or “Biden Center” or “Center” or “Amy Gutmann” or “President of UPenn” or “Section 117” or “foreign reporting” or “reporting requirements” or “foreign donors” or “anonymized” or “Information Collection Request” or “Notice of Interpretation (NOI) on Section 117” or “China” or “PRC.”
  4. All records, including but not limited to email, texts, letters, memoranda, and other documentation from any and all ED officials and government contractors assigned to ED (*i.e.*, independent personnel contracted by the federal government to provide



professional expertise and support directly or indirectly to ED officials) from November 3, 2020, through the date the search is conducted, which reference ED’s Section 117 foreign source contracts and gifts reporting portal, including but not limited to “Information Collection Request” or “ICR” or “<https://partners.ed.gov/ForeignGifts>” or “reporting portal” or “Section 117 portal” or “change in enforcement” or “Section 117 statutory reporting obligation” or “reportable contracts” or “IHE opposition” or “rescission of prior guidance” or “Dear Colleague Letter (DCL), GEN-04-11” or “20 U.S.C. § 1011f” or “Section 117 Report” or “Report on Institutional Compliance with Section 117 of the Higher Education Act of 1965” or “Section 117 investigation” or “Section 117 investigations.”

## Definitions

Absent contrary statutory directives, words and phrases contained herein should be accorded their usual, plain, and ordinary meaning. Please note the following statutory definition:

**“Records”** are defined at 44 U.S.C. § 3301(a)(1-2) as including “all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them” and further “includes all traditional forms of records, regardless of physical form or characteristics, including information created, manipulated, communicated, or stored in digital or electronic form, such as emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voice mail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.

## Identification and Production of the Requested Records

FOIA imposes a burden on ED, as a covered agency under 5 U.S.C. § 551(1), to timely disclose requested agency records to the requestor<sup>16</sup> if ED (1) created or obtained the requested materials, and, (2) is “in control of the requested materials at the time the FOIA request [was] made.”<sup>17</sup> Upon request, ED must “promptly” make the requested records available to the requester.<sup>18</sup> Notably, covered agency records include materials provided to ED by both private and governmental organizations.<sup>19</sup> Upon receipt of a FOIA request that “reasonably” describes the records sought and is in compliance with ED’s published rules regarding the time, place, any fees, and procedures

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<sup>16</sup> FOIA requires the disclosure of nonexempt agency records to any person, which includes an individual, partnership, corporation, association, or public or private organization other than an agency. 5 U.S.C. § 551(2).

<sup>17</sup> *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

<sup>18</sup> 5 U.S.C. § 552(a)(3)(A).

<sup>19</sup> *Id.* at 144.



to be followed,<sup>20</sup> ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.<sup>21</sup> In addition, the records produced by ED are required to be provided in “any form or format requested . . . if the record is readily reproducible by the agency in that form or format.”<sup>22</sup>

Upon receipt of this request, ED has twenty business days to “determine . . . whether to comply with [the] request” and “shall immediately notify” the requester of its determination and the reasons therefor,” the right to seek assistance from the agency’s FOIA public liaison, and the requester’s right to appeal any “adverse determination” by ED.<sup>23</sup>

Consistent with FOIA guidelines, DFI requests the following regarding the provision of the requested records:

- ED should immediately act to protect and preserve all records potentially responsive to this request, notifying any and all responsible officials of this preservation request and verifying full compliance with the preservation request. This matter may be subject to litigation, making the immediate initiation of a litigation hold on the requested materials necessary.
- ED should search all record systems that may contain responsive records, promptly consulting with its information technology (IT) officials to ensure the completeness of the records search by using the full range of ED’s IT capabilities to conduct the search. To constitute an adequate search for responsive records, ED should not rely solely on a search of a likely custodian’s files by the custodian or representations by that likely custodian, but should conduct the search with applicable IT search tools enabling a full search of relevant agency records, including archived records, without reliance on a likely custodian’s possible deletion or modification of responsive records.
- ED should search all relevant records and information retention systems (including archived recorded information systems) which may contain records regarding ED’s business operations. Responsive records include official business conducted on unofficial systems which may be stored outside of official recording systems and are subject to FOIA. ED should directly inquire, as part of its search, if likely custodians have conducted any such official business on unofficial systems and should promptly and fully acquire and preserve those records as ED’s official records. Such unofficial systems include, but are not limited to, governmental business conducted by employees using personal emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voice mail messages, instant messaging systems such as Lync or

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<sup>20</sup> 5 U.S.C. § 552(a)(3)(A)(i)

<sup>21</sup> *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

<sup>22</sup> 5 U.S.C. § 552(a)(3)(B).

<sup>23</sup> 5 U.S.C. § 552(a)(6)(A)(i).



ICQ, and shared messages systems such as Slack. Failure to identify and produce records responsive to this request from such unofficial systems would constitute a knowing concealment by ED calculated to deflect its compliance with FOIA's requirements.

- ED should timely provide entire records responsive to this request, broadly construing what information may constitute a “record” and avoiding unnecessarily omitting portions of potentially responsive records as they may provide important context for the requested records (*e.g.*, if a particular email is clearly responsive to this request, the response to the request should include all other emails forming the email chain, to include any attachments accompanying the emails).
- ED should narrowly construe and precisely identify the statutory basis for any constraint which it believes may prevent disclosure.
- If ED determines that any portions of otherwise responsive records are statutorily exempt from disclosure, DFI requests that ED disclose reasonably segregable portions of the records.
- For any responsive records withheld in whole or part by ED, ED should provide a clear and precise enumeration of those records in index form presented with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA”<sup>24</sup> and provide a sufficiently detailed justification and rationale for each non-disclosure and the statutory exemption upon which the non-disclosure relies.
- Please provide responsive records in electronic format by email, native format by mail, or PDF or TIH format on a USB drive. If it helps speed production and eases ED’s administrative burden, DFI welcomes provision of the records on a rolling basis. Responsive records sent by mail should be addressed to the Defense of Freedom Institute for Policy Studies, 1455 Pennsylvania Avenue NW, Suite 400, Washington, D.C. 20004.

### **Fee Waiver Request**

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.33, DFI requests a waiver of all fees associated with this FOIA request for agency records. Disclosure of the requested records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and because disclosure of the information contained within the requested records is not primarily in the commercial interests of DFI. The subject of this request regards identifiable operations and activities of ED and, more specifically, the identities, positions held, and related professional experience of officials directly involved in ED’s

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<sup>24</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



policy-making and implementing operations and activities. Provision of the requested records will provide the public with a clearer understanding of ED's decisions regarding enforcement of Section 117 of the Higher Education Act of 1965.

DFI is an independent 501(c)(3) nonprofit organization without a commercial purpose primarily engaged in the dissemination of information about government policies to the public. DFI is engaged in the collection, analysis, and dissemination of information to educate the public about government policies that impact the civil and constitutional rights of American families, students, entrepreneurs, and workers. DFI actively publishes information and related analyses on its public website and promotes access to that information and analyses on social media platforms, including but not limited to distribution via Facebook and Twitter.

## Conclusion

DFI appreciates ED's prompt attention to this request for records pursuant to FOIA, which will provide important information to the American people regarding Section 117 foreign disclosure reporting enforcement by the U.S. Department of Education. Please contact me immediately if DFI's request for a fee waiver is not granted in full.

If you have any questions or I can further clarify DFI's request, please contact me at your earliest convenience at [jim.blew@dfipolicy.org](mailto:jim.blew@dfipolicy.org).

Sincerely yours,

/s/ \_\_\_\_\_  
Jim Blew  
Defense of Freedom Institute for Policy Studies, Inc.