U.S. Department of Justice

Civil Rights Division

DJ 169-36-72

Assistant Attorney General
950 Pennsylvania Ave, NW - RFK
Washington, DC 20530

November 17, 2017

Via email

Seth P. Waxman
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006

Dear Mr. Waxman:

I write in response to your November 7, 2017, letter that came five days after the November 2 deadline for Harvard to comply with the Department of Justice's first written document request. Rather than provide the documents and materials that the Department requested, your letter again erroneously challenges our authority to investigate Harvard under Title VI of the Civil Rights Act of 1964 and proposes an unacceptable plan to provide the United States restricted access to limited documents. *See* Letter from Seth P. Waxman, Harvard Counsel, to Matthew J. Donnelly, Civil Rights Division (Nov. 7, 2017) ("Waxman Nov. 7, 2017, Letter").

Nothing in your letter affects, much less eliminates, Harvard's obligation to provide the requested documents as a condition of its receipt of Title VI funding from the Department. Moreover, Harvard has these documents readily available because it already has produced them to the plaintiffs in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (Harvard Corporation)*, No. 14cv14176 (D. Mass.) ("*SFFA*" suit). Indeed, at our September 11, 2017, meeting, Harvard suggested that the Department participate as *amicus curiae* in that case and offered to work collaboratively to provide the Department with access to those documents. Yet in the intervening two months, Harvard has pursued a strategy of delay and has not yet produced even a single document.

Accordingly, the Department is left with no choice but to conclude that Harvard is out of compliance with its Title VI access obligations. The Department therefore is simultaneously serving Harvard with a separate notice of this determination.

I. The Department Has Authority To Request the Documents, and Harvard Is Obliged To Comply with Those Requests

Your letter does not dispute that Harvard receives Title VI funding from the Department. Your letter also does not dispute that, as a condition of that funding, Harvard agreed to provide the Department with broad-ranging access to documents regarding Harvard's admissions policy

and practices. Your letter therefore makes no serious effort to dispute the dispositive point: that the Department has authority to request the documents it seeks and that Harvard is obliged to comply with those requests. In fact, your letter expresses that "Harvard is committed to meeting its responsibilities under Title VI, the relevant federal grants, and associated law." Waxman Nov. 7, 2017, Letter at 2.

Your letter nonetheless attempts to side-step Harvard's Title VI obligations. In particular, while your letter does not challenge the Department's authority to conduct this investigation, it once again challenges the Civil Rights Division's involvement in the investigation. This challenge again sails wide of the mark. First, your letter requests the date and source of the Department's delegation of authority to the Civil Rights Division to conduct this investigation. *Id.* at 1-2. The authority to conduct this investigation was properly delegated to the Civil Rights Division before the investigation was opened. That delegation followed the Department's longstanding internal delegation protocols that govern assignment of Title VI responsibilities. Your colleague Mr. Driscoll may be aware of the protocols in place when he worked for the Division.

Second, your letter again requests information on any complaints regarding Harvard's admissions policy and practices that underlie the Department's investigation. Waxman Nov. 7, 2017, Letter at 2. The subject matter of the *SFFA* suit captures the subject matter of any complaints the Department is investigating. Moreover, as the Department previously stated, beyond the publicly-available complaint that the Department already shared with you, the Department will not supply any other complaints it may be investigating because the release may interfere with an active investigation. *E.g.*, Letter from Mathew J. Donnelly, Civil Rights Division, to Seth P. Waxman, Harvard Counsel at 2 n.1 (Oct. 19, 2017) ("Donnelly Oct. 19, 2017, Letter").

Third, your letter asks whether the "Title VI Investigation Procedures Manual" is current. Waxman Nov. 7, 2017, Letter at 2. As I previously explained, that Manual was written to aid other agencies conducting Title VI investigations and does not constrain the Civil Rights Division's investigations or create any legal rights in any member of the public. Donnelly Oct. 19, 2017, Letter at 2. Your request thus misses the point: if you are looking for the current procedures governing the Division's Title VI investigations, I direct you to the Department's Title VI regulations.

Finally, your letter reiterates your previous irregular requests for the Department's communications with outside groups and our "investigative case files." Waxman Nov. 7, 2017, Letter at 2. For obvious reasons, the Department of Justice generally does not share its civil investigative case files with the targets of its investigations. The Department therefore will not respond to these irregular requests because a response could interfere with the investigation. My understanding is that the Department would give you the same response if you made your irregular requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 522, but you may make an official FOIA request through the normal Department procedures if you would like an official FOIA response.

II. Harvard's Proposed Access Plan Is Inconsistent with Harvard's Obligations and Improperly Limits the Department's Rightful Access to Documents

Your letter also proposes providing restricted access to a subset of the documents the Department has requested, but your proposal is inconsistent with Harvard's Title VI obligations and improperly limits the Department's rightful access to documents. First, Harvard improperly attempts to limit the scope of its production, indicating that it will not produce to the Department important database information that it already has produced to the private plaintiffs in the *SFFA* suit. Waxman Nov. 7, 2017, Letter at 3. Harvard, however, identifies no authority for limiting its Title VI obligations in this manner. Nor could it: this database already has been deemed relevant and subject to production in the private litigation. And expert reports describing that database, *see id.*, are no substitute for the database itself.

Second, your proposal also states that, despite the Department's request for unredacted copies, Harvard will produce only documents with the redactions for "relevance" and "privacy" that Harvard used for its production set to the private plaintiff in the *SFFA* suit. *Id.* The Department, however, is not subject to those redaction requirements, and nothing in Title VI, the implementing regulations, or the governing law restricts the Department's access to only portions of documents that the funding recipient deems appropriate. Quite to the contrary: for obvious reasons, Title VI does not allow entities under investigation to dictate what information qualifies as relevant to the investigation.

Third, Harvard suggests that it will not provide copies of documents to the Department unless the Department shows a "demonstrated need for copies of certain documents" and "explore[s]" entering into a confidentiality agreement acceptable to Harvard. *Id.* But Harvard has no right to demand, much less determine, a "demonstrated need" for the documents that Title VI already requires it to produce or a confidentiality agreement. Indeed, the Department is under no obligation to, and ordinarily does not, enter into confidentiality agreements with any entity subject to a Title VI investigation.

There is no need to do so here: as the Department already has explained, the Department routinely protects confidential information in its investigations, shares Harvard's interest in shielding private information from public disclosure, and will take all appropriate measures to do so here. Donnelly Oct. 19, 2017, Letter at 3. Indeed, several federal statutes that we previously provided you already protect from disclosure the information that Harvard seeks to safeguard. *Id.* (citing FOIA; Privacy Act of 1974, 5 U.S.C. § 552; Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g(b)(3)). Your letter, however, omits any mention of those statutes, and offers no explanation as to why they are inadequate to protect confidential information in this investigation.

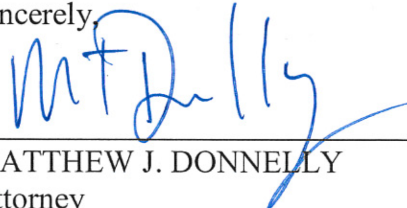
Finally, Harvard indicates that it will not provide copies of the requested documents, but will allow the Division to access the documents at your law firm "during normal business hours on mutually convenient dates." Waxman Nov. 7, 2017, Letter at 3. If your position is that our Title VI regulations do not require Harvard to allow us to make copies, we have consistently interpreted our own regulations differently and routinely require copies of documents in our investigations. Moreover, your proposal is impractical and unnecessary. Having to review

voluminous discovery materials on the defendant's schedule without the unrestricted ability to organize the information would substantially impair our analysis and delay the investigation. Indeed, you even concede, in denying any access to the database information, that review of voluminous information at the law firm "would be impractical." *Id.* And Harvard's proposal breaks with its past practice with the Department of Education; Harvard provided copies of documents for that Department's similar Title VI investigation in 1990.

In all events, the Department is willing to travel to your law firm or to Cambridge to copy and download all of the documents and information that the Department requested in the formats in which the Department requested them. Such an arrangement may reduce the cost in attorney's fees and time to Harvard. The Department, however, will not allow any such arrangement to justify further delays by you or your client.

The United States remains committed to conducting a full, complete, and fair investigation, and to working collaboratively with Harvard to achieve a just and appropriate resolution of this matter. To that end, the Department requested the existing *SFFA* suit discovery materials, which Harvard previously offered to provide, in an effort to alleviate the burden Harvard would encounter in responding to the Department's normal requests for information. Harvard has responded with delays, challenges to our authority to investigate, and a belated, unacceptable proposal to restrict our investigation. The Department hopes that Harvard will quickly return to its collaborative approach and voluntarily comply with the information requests and the investigation, which is in the best interest of all parties.

Sincerely,



MATTHEW J. DONNELLY
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Civil Rights Division

cc *via* email: Felicia H. Ellsworth
Robert N. Driscoll