

Exhibit D



U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

February 9, 2017

Ms. Amanda Savage
Legal Services Center of Harvard Law School
122 Boylston Street
Jamaica Plain, MA 02130
asavage@law.harvard.edu

Re: Appeal No. DOJ-AP-2017-001214
Request No. FOIA-2016-03030
TAZ:PJA

VIA: FOIAonline

Dear Ms. Savage:

You appealed from the action of the Executive Office for United States Attorneys (EOUSA) on your Freedom of Information Act request for access to records located in the United States Attorney's Office for the Western District of Pennsylvania produced by Education Management Corporation and its subsidiaries and affiliates in response to discovery requests in *United States ex rel. Washington v. Education Management Corp.*, No. 2:07-cv-461 (W.D. Pa.) ("EDMC Litigation").

After carefully considering your appeal, I am affirming, on modified grounds, EOUSA's action on your request. The records you seek are not "agency records." Agency records are either created or obtained by an agency and under agency control at the time of the FOIA request. See *DOJ v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). The materials you seek were produced to the government in discovery by EDMC and many of those were designated as subject to protective orders that limit the government's ability to disseminate the designated documents and require the government to return those documents at the conclusion of litigation. Furthermore, the government did not fully integrate the documents received in discovery into its own records systems, nor did the government review or rely on those documents to any substantial extent.

I further note that even if the documents produced in discovery were agency records under the FOIA, to process those materials for release pursuant to the FOIA would constitute an unreasonable burden for the agency. There are terabytes of data potentially responsive to your request, which if printed, would comprise approximately 145 million pages, and to process that volume would likely take at least hundreds of thousands of hours. See *Ayuda v. FTC*, 70 F. Supp. 3d 247 (D.D.C. 2014) (finding that processing effort that would require several thousand hours of processing effort would be unreasonably burdensome).

Please be advised that this Office's decision was made only after a full review of this matter. Your appeal was assigned to an attorney with this Office who thoroughly reviewed and

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analyzed your appeal, your underlying request, and the action of EOUSA in response to your request. If you have any questions regarding the action this Office has taken on your appeal, you may contact this Office's FOIA Public Liaison for your appeal. Specifically, you may speak with the undersigned agency official by calling (202) 514-3642.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

X 

Sean R. O'Neill
Chief, Administrative Appeals Staff