November 7, 2017

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By E-mail

Matthew J. Donnelly
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave. NW
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Dear Mr. Donnelly:

Thank you for your letter of October 19, as well as your letter of the same date to my colleague Felicia Ellsworth. We appreciate your responses to some of Harvard's questions regarding the nature of and basis for your investigation. I write to respond to a few of your points, to follow up on the remaining questions in my October 6 letter, and to propose a plan for complying with your information request.

As an initial matter, I am surprised that you characterize Harvard's position as "an about-face" from our meeting on September 11. At that meeting, as in your letter, you explained the need for discovery to "facilitate the United States' informed participation as an *amicus curiae* in the *SFFA* suit." Notably, in every previous case concerning the use of race in university admissions, the Department has participated as an *amicus curiae* without ever expressing a need for discovery. We offered nonetheless to make available to the Department, under appropriate assurances of confidentiality, everything that either party relies upon in the upcoming motions for summary judgment (including each party's expert reports). We have not taken any position inconsistent with that; to the contrary, we continue to believe that would be the most sensible approach.

Furthermore, while you refer to Harvard's inquiries as "irregular," the inquiries are necessary here because of the Department's irregular decision to investigate a years-old complaint, despite the pendency of litigation addressing identical allegations. It is entirely reasonable for Harvard to seek assurances that this investigation is (as your letter states) "like any other." Indeed, Harvard would be neglecting its obligations to its students and applicants, whose sensitive information the Department is seeking to access, if it did anything less.

All that said, I appreciate your forthcoming responses to certain questions Harvard has raised. I hope that you will be able to answer a few additional questions prompted by those responses.

First, your letter notes that it is not uncommon for the Civil Rights Division to lead Title VI investigations. But as you also know, the Department's regulations implementing Title VI vest authority to request access to records and conduct investigations in "the responsible Department official or his designee," 28 C.F.R. §§ 42.106(c), 42.107(c), defined as the official "that has been assigned the principal responsibility within the Department for the administration of the law extending" financial assistance to the recipient in question, *id.* § 42.102(a). Based on the grants

and contractual assurance agreements you have identified, the responsible Department official here is the Assistant Attorney General for the Office of Justice Programs.

Your letter states that the Department has delegated the authority to pursue this matter to the Division. We recognize that the Division can (and sometimes does) receive delegated authority from OJP; we are simply making the reasonable request, given the unusual circumstances of this investigation, that the Division identify the date and source of that delegation. *See, e.g.*, *United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 103 (5th Cir. 1992) (compliance with internal procedures is a factor in assessing the reasonableness of an agency's Title VI review).

Second, Mr. Gore's letter of September 20 stated that the Department has received "*complaints* … that Harvard University is discriminating against Asian Americans in admissions" (emphasis added). Yet your October 19 letter mentions only one such complaint. Can you confirm that the Department is not investigating other complaints? If the investigation does pertain to other complaints, please provide copies as requested in my October 6 letter.

Third, my October 6 letter asked that you provide a current version of the Civil Rights Division's Title VI Investigation Procedures Manual or confirm that the September 1998 version, published online in the past, remains current. Your response does neither. Is the September 1998 version in fact current?

Fourth, your letter declines to respond to the fifth and seventh inquiries in my October 6 letter, which requested copies of investigative case files and the Department's correspondence with various individuals and groups, on the ground that "a response could interfere with the investigation." Given the pending litigation, we believe it is particularly appropriate for Harvard to be made aware of communications with outside parties related to the investigation. We therefore reiterate our request for the communications with outside parties set forth in my October 6 letter. In addition, we ask that you clarify whether your response means that, if Harvard were to request the same materials under the Freedom of Information Act (FOIA), the Department would take the position that the materials fall within Exemption 7(A). We note that the Division's Title VI Investigation Procedures Manual advises federal funding agencies that FOIA exemptions cannot "generally be used to deny access to an entire [Title VI complaint] file." Tab 2 of the Investigation Procedures Manual, https://www.justice.gov/crt/tab-2-investigation-procedures-manual (visited Nov. 6, 2017).

As noted in my October 6 letter, Harvard is committed to meeting its responsibilities under Title VI, the relevant federal grants, and associated law, and to cooperating with all reasonable efforts to evaluate its compliance with its non-discrimination obligations. To that end, despite its concerns about the highly unusual nature of this investigation, Harvard will provide you and your colleagues with access to documents requested by your First Request for Information dated October 19, 2017. Although the regulation contemplates that the Department will review a

funding recipient's "books, records, accounts, and other sources of information" on site, 28 C.F.R. § 42.106(c), we assume you would prefer to review the documents without having to travel to Cambridge, and we are therefore willing to make the documents available during normal business hours on mutually convenient dates at WilmerHale's Washington, D.C. office. Given the focus of your request on the discovery in the SFFA litigation, we will make the documents available as produced in the SFFA litigation—that is, with redactions for relevance, privacy, and privilege/work product protection.

For several reasons, we do not think it makes sense to make available the database information that Harvard produced to SFFA. First, review of that information at WilmerHale's office would be impractical. Second, although we do not understand them to be "books [and] records" as defined in 28 C.F.R. § 42.106(c), and without waiving any rights, Harvard remains prepared to give you access to the expert reports in the SFFA litigation. These reports analyze the database information in detail. If after reviewing the reports you believe you have a need to review discrete additional elements of the database, we would be pleased to discuss whether Harvard is able to provide access to that additional information.

To the extent you and your colleagues have a demonstrated need for copies of certain documents—although Harvard does not believe the Title VI regulations and associated contractual undertakings require it to provide such copies—Harvard is willing to explore with the Department whether a confidentiality agreement could provide sufficient assurances that the materials would remain confidential. As you know, the protective order agreed upon by the parties and approved by the Court in the *SFFA* litigation imposes extensive obligations on the recipients of confidential information, including obligations not to (1) share the information with others, (2) use the information for any purpose other than the litigation, or (3) ascertain the identity of any individual student or applicant. These are the sort of assurances that would be important to Harvard as it seeks to discharge its responsibilities to protect the privacy of students and applicants.

We believe the approach outlined above should be more than sufficient to fulfill the objectives you have identified—namely, enabling the Department to assure itself that discovery in the *SFFA* matter has been fulsome and to determine whether and how to participate in the *SFFA* matter—while minimizing unnecessary burden either to you or to Harvard. We are happy to discuss our proposal, and your responses to the questions set forth above, at your convenience.

Sincerely,

/s/ Seth P. Waxman
Seth P. Waxman