



July 20, 2021

VIA ELECTRONIC MAIL

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

Re: Freedom of Information Act Request

Dear FOIA Public Liaison:

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the implementing regulations promulgated thereunder for the United States Department of Education (“ED” or “the Department”), 34 C.F.R. Part 5, the National Student Legal Defense Network (“Student Defense”) makes the following request for records relating to the Department’s entry into settlement or other agreements with student borrowers who have filed an “adversary” complaint against the Department in a bankruptcy proceeding.

Background

On July 17, 2021, the *Washington Post* ran a story regarding the extent to which the Department has been contesting requests for student loan bankruptcy discharges filed as “adversary complaints” within an individual bankruptcy proceeding. See D. Douglas-Gabriel, *Washington Post, Education Dept. shows limits of pandemic relief by fighting borrowers in bankruptcy* (July 17, 2021). According to the report, the Department has agreed “to a stay of proceedings requested by the plaintiff in bankruptcy actions at least through the end of the pause on student loan payments.”

Request

Student Defense hereby requests that the Department produce, the following in the time and manner required under FOIA and the Department’s regulations:

1. All settlements or other final agreements reached with any student loan borrower who has filed an “adversary” complaint against the Department in bankruptcy. While Student Defense understands that certain information may not be disclosable under FOIA due to privacy concerns, in light of the fact that much information about individual borrowers is already part of the public record (due to the filing of the adversary complaint and associated pleadings), we specifically request that the Department narrowly tailor any redactions that it believes are necessary. This request can be limited to any agreements executed with a borrower between March 15, 2020 and present. We specifically request that the Department

search the Office of the General Counsel (and the Division of Postsecondary Education within OGC) and the Litigation Support Team within Federal Student Aid.

2. All communications during the month of July 2021 between or among the Office of the General Counsel, the Office of Federal Student Aid, the Office of the Undersecretary, the Office of the Secretary, the Office of Postsecondary Education, and the Office of Communications that use the word “bankruptcy” and refer to either the Washington Post (“Washington Post” or “WaPo” or “Post”) or reporter Danielle Douglas-Gabriel.

As noted above, Student Defense does not object to the redaction from such records of any personally identifiable information of any individual, **so long as that information does not already appear publicly in locations including, for example, a federal bankruptcy docket.**

FOIA presumes disclosure. Indeed, “[a]gencies bear the burden of justifying withholding of any records, as FOIA favors a ‘strong presumption in favor of disclosure.’” *AP v. FBI*, 256 F. Supp. 3d 82, 2017 U.S. Dist. LEXIS 161516 at *10 (D.D.C. Sept. 30, 2017) (quoting *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991)). Under the FOIA Improvement Act of 2016, an agency is permitted to withhold materials only in one of two limited circumstances, *i.e.*, if disclosure would “harm an interest protected by an exemption” or is otherwise “prohibited by law.” 5 U.S.C. § 552(a)(8)(A)(i). If ED takes the position that any portion of any requested record is exempt from disclosure, Student Defense requests that ED “demonstrate the validity of [each] exemption that [ED] asserts.” *People for the Am. Way v. U.S. Dep’t of Educ.*, 516 F. Supp. 2d 28, 34 (D.D.C. 2007). To satisfy this burden, ED may provide Student Defense with a Vaughn Index “which must adequately describe each withheld document, state which exemption the agency claims for each withheld document, and explain the exemption’s relevance.” *Id.* (citing *Johnson v. Exec. Office for U.S. Att’ys*, 310 F.3d 771, 774 (D.C. Cir. 2002)); *see also Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). That index must provide, for each document withheld and each justification asserted, a relatively detailed justification specifically identifying the reasons why the exemption is relevant. *See generally King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

In addition to the records requested above, Student Defense also requests records describing the processing of this request, including records sufficient to identify search terms used (if any), the locations and custodians searched, and any tracking sheets used. This includes any questionnaires, tracking sheets, emails, or certifications completed by, or sent to, ED or OIG personnel with respect to the processing of this request. This specifically includes communications or tracking mechanisms sent to, or kept by, individuals who are contacted in order to process this request.

Student Defense seeks all responsive records, regardless of format, medium, or physical characteristics. In conducting ED’s search, please understand the terms “record,” “document,” and “information” in their broadest sense to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages, transcripts, notes or minutes of any meetings, telephone conversations, or discussions.

Our request includes any attachment to these records. In addition, ED has a duty to construe a FOIA request liberally.

In conducting a “reasonable search” as required by law, ED must use the most up-to-date technologies and tools available. Recent technology advances may render ED’s prior FOIA practices unreasonable. Moreover, not only does this request require the agency to conduct a search, but individual custodians must conduct their own searches in order to make sure that documents are appropriately collected.

To ensure that this request is properly construed and does not create any unnecessary burden on ED, Student Defense welcomes the opportunity to discuss this request at your earliest convenience, consistent with and without waiving the legal requirements for the timeframe for ED’s response.

Please provide responsive material in electronic format, if possible. Please send any responsive material via email to dan@defendstudents.org. We welcome any materials that can be provided on a rolling basis. Nevertheless, Student Defense fully intends to hold ED to the timeframe required by statute for a response to this request.

Request for Waiver of Fees

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.33(a), Student Defense requests a waiver of fees associated with the processing of this request because: (1) disclosure of the requested information is in the public interest; and (2) disclosure of the information is not primarily in the commercial interest of the requester.

Disclosure of Information is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government

1. The FOIA request specifically relates to the operations or activities of the government. This request seeks documents relating to the extent to which the Department has settled or provided relief to borrowers who have filed adversary complaints against the Department in bankruptcy. The Department’s use of these procedures directly relates to its effective oversight and management of the Title IV, HEA programs and, therefore, relates specifically to the operations or activities of the government.

2. The requested documents will contribute to an understanding of those specific operations or activities. This request seeks documents that will contribute to the understanding of the circumstances under which the Department may agree to a resolution of an adversary complaint. The request will also provide a greater understanding of the extent to which the Department believes that a stay of a bankruptcy proceeding will benefit borrowers.

3. The disclosure will contribute to a greater understanding on the part of the public at large. Student Defense seeks this information to aid the public discourse surrounding issues related to the Department’s effective oversight of federal student aid disbursed under Title IV of the HEA. Student Defense has the capacity to analyze any documents provided and disseminate its analysis to the public through its website and other sources.

4. Disclosure will “significantly” contribute to the public’s understanding of government activities. As noted above, the subject of this request is a matter of public interest. This request seeks information that will allow Student Defense to more completely understand the instances under which the Department uses its authorities in bankruptcy to benefit borrowers, beyond that information already available to the public. Moreover, Student Defense’s analysis of this information will inform further public discourse and comment on these issues, thereby significantly enhancing the public’s understanding of the Department’s oversight of the Title IV, HEA programs.

Disclosure of Information is Not in the Commercial Interest of Student Defense

This request is fundamentally non-commercial. Student Defense is a non-profit, non-partisan 501(c)(3) organization. Student Defense’s mission is to work, through a variety of means, to advance students’ rights to educational opportunity and ensure that higher education provides a launching point for economic mobility. We also believe that transparency is critical to fully understanding the government’s role in running the Title IV student aid programs. As noted above, Student Defense has the capacity to make the information it receives available to the public through reports, social media, press releases, litigation filings, and regulatory comments to government agencies. For these reasons, Student Defense qualifies for a fee waiver.

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Student Defense looks forward to working with you on this request. If you have any questions or concerns, or anticipate any problems in complying with this request, please contact me at dan@defendstudents.org. If Student Defense’s request for a fee waiver is not granted, and any fees will be in excess of \$25, please contact me immediately.

Sincerely,

/s/ Daniel A. Zibel
Daniel A. Zibel
VP & Chief Counsel