

January 10, 2019

**SENT VIA ELECTRONIC MAIL**

Appeals Office  
Office of the Chief Privacy Officer  
U.S. Department of Education  
400 Maryland Avenue, S.W.  
LBJ 2W218-52  
Washington, D.C. 20202-4536  
[EDFOIAappeals@ed.gov](mailto:EDFOIAappeals@ed.gov)

RE: Freedom of Information Act Appeal FOIA No. 19-00550-F

Dear FOIA Appeals Officer:

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a)(6)(A), and United States Department of Education regulations, 34 C.F.R. Part 5, the National Student Legal Defense Network (“NSLDN”) submits the following administrative appeal.

On December 18, 2018, NSLDN submitted a FOIA request (hereinafter the “Request”) to the Department seeking:

1. All Notices of Proposed Debarments issued or provided to any individual or entity relating to, or arising out of, that individual’s or entity’s participation or involvement in Title IV, HEA programs; *and*
2. All Notices of Proposed Suspensions issued or provided to any individual or entity relating to, or arising out of, that individual’s or entity’s participation or involvement in Title IV, HEA programs.

The Request sought documents from 2012-present. A true and correct copy of the Request is attached hereto as Exhibit A.

The Department subsequently assigned the Request tracking number 19-00550-F. On December 19, 2018, the Department sent a letter to NSLDN stating that “[y]our request was forwarded to the primary office(s) for action.” A true and correct copy of the December 19 letter is attached hereto as Exhibit B.

On January 9, 2019, the Department issued a final response to the Request (hereinafter the “Final Response”), which stated the following: “Your request was forwarded to the appropriate office to search for documents that may be responsive to your request: Office of the Deputy Secretary . . . The staff in ODS informed the FOIA Service Center that, after a thorough search of their files, they were unable to locate any documents that were responsive to your request.” A true and correct copy of the Final Response is attached hereto as Exhibit C.

Consistent with the requirements of 34 C.F.R. § 5.40, NSLDN hereby submits this administrative appeal.

### APPEAL OF FINAL RESPONSE

Under FOIA, the Department has a clear obligation to undertake a search that is reasonably calculated to uncover all relevant documents. The reasonableness of the search must be guided by the documents requested. Agencies may not design a search that excludes files where records reasonably may be located, nor may an agency ignore “a lead it cannot in good faith ignore, *i.e.*, a lead that is both clear and certain.” See *Kowalczyk v. U.S. Dep’t of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996). As noted above, after initially forwarding the Request “to the primary office(s) for action,” the Department’s Final Response stated that “staff in ODS informed the FOIA Services Center that, after a thorough search of their files, they were unable to locate any documents that were responsive to your request.” This response is plainly inadequate for at least two reasons.

*First*, the Request is not limited to records that may exist with “staff in ODS.” Rather, the Request sought copies of all documents that demonstrated the Department’s use of debarments and suspensions pursuant to its authority under the Higher Education Act (“HEA”). The Administrative Actions and Appeals Service Group (“AAASG”)—a division of the Enforcement Unit<sup>1</sup> at Federal Student Aid (“FSA”)—is the entity that “administers the Secretary’s authority to initiate debarment and suspension proceedings against parties.”<sup>2</sup>

The Department has not explained why it conducted such a narrow search and has not come close to providing an adequate justification for its search methodology. An agency “cannot limit its search to only one or more places if there are additional sources that are likely to turn up the information requested.” *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (internal quotation marks omitted). In this case, the Department’s only explanation is that “staff in ODS informed the FOIA Services Center that, after a thorough search of their files, they were unable to locate any documents that were responsive to your request.” Ex. C at 1 (emphasis added). The Department has provided no details regarding why other offices—especially the Enforcement Unit and its AAASG subcomponent—were not searched. Both the search and the justification for that search are therefore deficient.

*Second*, it would appear from the face of the Final Response that the Department conducted its search by asking “staff” from ODS whether they had responsive documents. Ex. C at 1. The Department did not provide any further information to explain what steps these custodians took to conduct a good faith, reasonable search for the requested records. Nor did the Department provide any insight as to which staff, or which categories of ODS staff, were asked to search for

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<sup>1</sup> The Enforcement Unit “takes” or “recommends the taking of” “final agency actions of the Department that . . . [d]ebar or suspend the ability of a party to contract with or receive or management grants from Federal agencies.” See Exhibit D, U.S. Dep’t of Educ., Office of Fed. Student Aid, Enforcement Unit, “Functional Statement,” [https://www2.ed.gov/about/offices/list/om/fs\\_po/fsa/enforcement.html](https://www2.ed.gov/about/offices/list/om/fs_po/fsa/enforcement.html) (last updated Nov. 25, 2016).

<sup>2</sup> *Id.* (also noting that “AAASG’s activities include . . . initiat[ing] department and suspension proceedings against parties in connection with FSA programs”).

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responsive records. This is particularly troubling because NSLDN specifically requested records describing how the Request was processed. Ex. A at 2. Because the Department has failed to produce records sufficient to show how the search was conducted, NSLDN is left with only the sparse and conclusory statements from “staff” who were unable to locate responsive records.

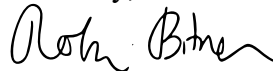
For the reasons stated above, NSLDN cannot take seriously the Department’s contention that it was “unable to locate any documents that were responsive to your request.” NSLDN therefore appeals this determination insofar as it represents nothing more than the Department’s failure to conduct a reasonable search.

### CONCLUSION

In light of the facts described above, NSLDN requests that the Department promptly conduct an adequate, reasonable search for the materials requested in FOIA Request No. 19-00550-F and promptly disclose all non-exempt materials.

Thank you for your consideration of this appeal. As provided in 5 U.S.C. §552(a)(6)(A)(ii), we look forward to a determination on our appeal within twenty working days. For questions regarding any part of this appeal, or the underlying request for records, please do not hesitate to contact me at [robyn@nslldn.org](mailto:robyn@nslldn.org) or (202) 734-7495.

Sincerely,



Robyn K. Bitner\*  
Counsel

\*Member of New York Bar only; practicing in the District of Columbia under supervision of members of the D.C. Bar while D.C. Bar application is pending.