NATIONAL STUDENT LEGAL DEFENSE NETWORK

April 4, 2018

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 U.S. Department of Education ("ED"), 34 C.F.R. Part 5, the National Student Legal Defense Network ("NSLDN") the following requests for records relating to the Accrediting Council for Independent Colleges and Schools ("ACICS").

Background

The background surrounding ACICS's status as a recognized accreditor is familiar to the Department as it has been the subject of numerous Secretarial orders, FOIA requests, and federal lawsuits. Briefly stated, however, on December 12, 2016, ED terminated the Department's recognition of ACICS as a nationally recognized accreditor after finding that ACICS was pervasively noncompliant with numerous criteria required of such entities.

On March 23, 2018, the U.S. District Court for the District of Columbia issued an Order remanding the December 2016 decision back to the Secretary for consideration of additional evidence. *See* March 23, 2018 Order in *Accrediting Council for Independent Colleges and Schools v. DeVos*, No. 16-cv-2448 (D.D.C.). On April 3, 2018, Secretary DeVos issued an Order restoring ACICS's status as a recognized accreditor and removing ACICS from the agenda at the May 2018 meeting of the National Advisory Council on Institutional Quality and Integrity ("NACIQI"). That same day, the Department issued a press release announcing the Secretary's decision regarding ACICS's status.

Request

NSLDN hereby requests that ED produce the following in the time and manner required under the Freedom of Information Act and the Department's regulations.

1. All documents constituting or reflecting communications, **regardless of the subject matter,** between the Department and its employees or representatives, on the one hand, and *either* or *both* of ACICS (including its representatives, counsel, and employees) and/or Career Education Colleges and Universities ("CECU"), formerly known as the Association of Private Sector Colleges and Universities ("APSCU"), including its representatives, counsel, and employees.

For purposes of this request, we ask that the Department include at least following individuals in custodians required to conduct a search:

- Betsy DeVos
- Josh Venable
- Bob Eitel
- James Manning
- Kathleen Smith
- Diane Auer Jones
- Steven Menashi
- Donna Mangold
- Jed Brinton
- Jeffrey (Justin) Riemer
- Sally Morgan
- Steven Finley
- Herman Bounds (and all staff in the OPE Accreditation Group)
- Beth Daggett
- Lynn Mahaffie
- Jennifer Hong
- Gail McLarnon
- Frank Brogan
- Phil Rosenfelt

In addition, we specifically ask that the Department include **without limitation** the following terms as search terms to enable the Department to identify relevant documents:

- ACICS
- Venable
- Michelle
- Edwards
- Allyson

- Baker
- Kenneth
- Ingram
- NACIQI
- Walton
- SDO

Finally, through this request, NSLDN is only seeking documents constituting or reflecting communications that took place between March 23, 2018 and April 3, 2018.

NSLDN does not object to the redaction from such records of any names or personally identifiable information of any individual.

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 the Department takes the position that any portion of any requested record is exempt from disclosure, NSLDN requests that you "demonstrate the validity of [each] exemption that [the Department] asserts." *People for the American Way v. U.S. Department of Education*, 516 F. Supp. 2d 28, 34 (D.D.C. 2007). To satisfy this burden, you may provide NSLDN 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, NSLDN also requests records describing the processing of this request, including records sufficient to identify search terms used (if any), and locations and custodians searched and any tracking sheets used to track the processing of this Request. This includes any questionnaires, tracking sheets, emails, or certifications completed by, or sent to, ED 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.

NSLDN seeks all responsive records, regardless of format, medium, or physical characteristics. In conducting your 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, the Department has a duty to construe a FOIA request liberally.

In conducting a "reasonable search" as required by law **you must use the most up-to-date technologies and tools available,** in addition to searches by individual custodians likely to have responsive information. 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 the Department, NSLDN welcomes the opportunity to discuss this request at your earliest convenience, consistent with and without waiving the legal requirements for the timeframe for your response, including the request for expedited processing.

Please provide responsive material in electronic format, if possible. Please send any responsive material either via email to info@nsldn.org. We welcome any materials that can be provided on a rolling basis. Nevertheless, NSLDN fully intends to hold the Department 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), NSLDN requests a waiver of fees associated with the processing of this request because: (1) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; *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 specifically relates to the operations or activities of the government.** As noted above, ACICS's status as a recognized accreditor has been the subject of numerous decisions of the Secretary, numerous decisions of federal courts, and a host of Freedom of Information Act requests. This particular requests seeks information that is reasonably necessary to understand the process by which the Department implemented Judge Walton's decision in the *ACICS v. DeVos* litigation, including the Department's understanding of that order and the Department's recognition process more generally.

2. The requested documents will be likely to contribute to an understanding of those specific operations or activities. Because of the importance of accrediting agencies as gatekeepers to billions of taxpayer dollars, the public must be able to understand the process by which ED reviews and communicates with accreditors under review by the Department.

3. The disclosure will contribute to a greater understanding on the part of the public at large. NSLDN seeks this information to aid the public discourse surrounding the process by which the Department considers accreditation agencies under review. NSLDN has the capacity to analyze documents provided and to 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 great public interest. Accrediting agencies such as ACICS serve as the gatekeepers to billions of taxpayer dollars, and recent failures have had devastating consequences to taxpayers and students alike. Whether these accreditors should be recognized is a matter of critical importance to taxpayers as well as thousands of students across the country. *See, e.g., The Century Foundation v. Betsy DeVos & U.S. Department of Education*, Case No. 1:18-cv-00128-PAC, TRO Order at 9-10 (S.D.N.Y Feb. 15, 2018) (explaining that it would "impose a hardship on the public at large" if "ACICS has not improved its practices in the past year, and it receives federal recognition again despite its many deficiencies"). Indeed, it is of such significance that ACICS sued ED after it lost its recognition in December 2016. It is also of such significance that The Century Foundation sued the Department for access to other information regarding ACICS and that ACICS sought to intervene in NSLDN's litigation. It is of such further significance that the Department chose to issue a press release specifically announcing the Secretary's April 3, 2018 decision. NSLDN's analysis of the sought records, and use of the records to inform further discourse and comment on these issues, including the process by which ED accredits institutions, will therefore significantly enhance the public's understanding of the Department's actions.

Disclosure of Information is Not in Commercial Interest of NSLDN

This request is fundamentally non-commercial. NSLDN is a non-profit, non-partisan organization with recognition pending with the IRS as a 501(c)(3) organization. NSLDN's mission is to work, through a variety of means, to advance students' rights to educational opportunity and to 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 student protections and promoting opportunity. As noted above, NSLDN has the capacity to make the information it receives available to the public through reports, social media, press releases, in litigation filings, and regulatory comments to government agencies. For these reasons, NSLDN qualifies for a fee waiver.

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NSLDN 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 aaron@nsldn.org. If NSLDN's request for a fee waiver is not granted, and any fees will be in excess of $25, please contact me immediately.

Sincerely,

/s/ Martha Fulford

Martha Fulford
Senior Counsel
National Student Legal Defense Network