

June 19, 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

RE: Freedom of Information Act Appeal of Appeal No. 19-00021-A; 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 its first final response to the Request (hereinafter the “Initial 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

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search of their files, they were unable to locate any documents that were responsive to your request.” A true and correct copy of the Initial Final Response is attached hereto as Exhibit C.

On January 10, 2019, NSLDN submitted an administrative appeal (hereinafter the “First Appeal”), which argued that the Department failed to conduct a reasonable search. The Department assigned the First Appeal tracking number 19-00021-A. A true and correct copy of the First Appeal is attached hereto as Exhibit D.

On May 29, 2019, the Department granted NSLDN’s First Appeal (hereinafter the “Second Final Response”) and produced 244 pages of responsive documents. Each page included multiple redactions under Exemption 6. A true and correct copy of the Second Final Response is attached hereto as Exhibit E. A true and correct copy of the first nine pages of the production, along with the applied redactions, is also attached hereto as Exhibit F.

On June 12, 2019, NSLDN sent an email to Robert Wehausen, the FOIA Public Liaison identified in the Second Final Response as being responsible for assisting in the resolution of FOIA disputes, about the applied redactions pursuant to Exemption 6. On June 17, 2019, rather than helping resolve the dispute, Mr. Wehausen instead responded to NSLDN’s email by stating that he interpreted it as “an appeal submission.” A true and correct copy of these email communications is attached hereto as Exhibit G.

Consistent with the requirements of 34 C.F.R. § 5.40, and because it was not NSLDN’s intention to submit an appeal directly to Mr. Wehausen, NSLDN hereby submits this administrative appeal.

APPEAL OF SECOND FINAL RESPONSE

FOIA provides that every government agency, “upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules . . . shall make the records promptly available to any person.” 5 U.S.C. § 552(a)(3)(A). Certain information is exempt from disclosure, however. As relevant here, Exemption 6 applies to “personnel and medical files and similar files[,] the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).

As a threshold matter, “[t]he information in the file ‘need not be intimate’ for the file to satisfy the standard, and the threshold for determining whether information applies to a particular individual is minimal.” *Milton v. U.S. Dep’t of Justice*, 783 F. Supp. 2d 55, 58 (D.D.C. 2011) (quoting *N.Y. Times Co. v. Nat’l Aeronautics & Space Admin.*, 920 F.2d 1002, 1006 (D.C. Cir. 1990) (*en banc*)). Once this threshold requirement is met, the court turns to its next inquiry: whether disclosure “would compromise a substantial, as opposed to *de minimis*, privacy interest;” FOIA demands disclosure “[i]f no significant privacy interest is implicated.” See *Multi Ag Media LLC v. U.S. Dep’t of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008) (citing *Nat’l Ass’n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990)). A substantial privacy interest is “anything greater than a *de minimis* [one].” *Id.* at

1229–30. If there is a substantial privacy interest, the Court then uses a balancing test to determine whether release of the requested information constitutes a clearly unwarranted invasion of personal privacy. *Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 260 (D.C. Cir. 1982); *U.S. Dep't of the Air Force v. Rose*, 425 U.S. 352, 372, (1976); see also *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989). The Court will weigh “the privacy interest that would be compromised by disclosure against any public interest in the requested information.” *Multi Ag Media LLC*, 515 F.3d at 1228.

Here, the Department redacted all of the names, addresses, and specific reasons why an individual or entity was suspended or debarred from further participation in Title IV programs under the Higher Education Act of 1965. Those redactions fail to meet the standard for withholding information under Exemption 6.

First, there is no substantial privacy interest in the names and addresses of the individuals and entities who have been suspended or debarred. The D.C. Circuit has previously held that “the disclosure of names and addresses is not inherently and always a significant threat to the privacy of those listed; whether it is a significant or a *de minimis* threat depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue.” *Horner*, 879 F.2d at 877. Here, the names and addresses are already publicly available on a government-run website, the System for Award Management (“SAM”). SAM’s purpose is to prevent companies from doing business with an individual or entity who has been debarred, sanctioned, or excluded by a federal agency for prior bad acts. Thus, the disclosure of these names and addresses through FOIA would involve, at most, an additional *de minimis* threat to personal privacy. The fact that these individuals or entities have been suspended or debarred is already public knowledge, and the consequences that flow from that fact (being unable to access government funds) have already taken place. As a result, the Department has improperly redacted this information pursuant to Exemption 6.

Second, the Department categorically redacted every name and address throughout the 244-page production. The D.C. Circuit has made clear, however, that Exemption 6 “does not categorically exempt individuals [sic] identities . . . because the ‘privacy interest at stake may vary depending on the context in which it is asserted.’” *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 153 (D.C. Cir. 2006) (quoting *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 582 (D.C. Cir. 1996)); see also *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894–95 (D.C. Cir. 1995). Thus, if the Department wants to withhold all of these names and addresses, it must make a particularized showing for either a defined subgroup of the individuals or entities or for specific individuals or entities themselves. It has not done so here.

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Third, even assuming that there is a substantial privacy interest in the specific reasons why an individual or entity was suspended or disbarred by the Department,¹ that interest is outweighed by the public's interest in disclosure. Allowing the public to see why an individual or entity was suspended or disbarred would aid in understanding whether the Department is effectively eliminating bad actors from accessing Title IV funds. The public would be able to identify trends in how the Department currently uses its suspension and debarment procedures, such as what type of behavior it targets and why. This information would further allow the public to understand and comment on any future changes the Department proposes to its regulations.

For the reasons stated above, NSLDN appeals the Department's applied redactions under Exemption 6.

CONCLUSION

In light of the facts described above, NSLDN requests that the Department promptly re-produce the 244-page production with the illegal redactions removed.

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@nsltn.org or (202) 734-7495.

Sincerely,

Robyn K. Bitner, Counsel

¹ Upon information and belief, the vast majority of individuals or entities are suspended or disbarred due to a criminal conviction for fraud. For that reason, disclosure of the reasons why an individual or entity was disbarred has the potential to implicate privacy interests. Previously, the United States Supreme Court has held that individuals have a substantial privacy interest in their criminal rap sheets. *See Reporters Comm. for Freedom of the Press*, 489 U.S. at 771. The D.C. Circuit has been less clear about whether the disclosure of a criminal conviction itself also impacts a substantial privacy interest. Instead, the D.C. Circuit has noted only that such a disclosure "is at the lower end of the privacy spectrum," *Am. Civil Liberties Union v. U.S. Dep't of Justice*, 655 F.3d 1, 7 (D.C. Cir. 2011), which "is not to say that a convicted defendant has *no* privacy interest in the facts of his conviction. . . . [D]isclosure of a criminal conviction may be 'embarrassing [and] stigmatizing,' and may endanger one's prospects 'for successful reintegration into the community,'" *id.* (internal citations omitted).