

July 6, 2021

VIA ELECTRONIC MAIL

FOIA Public Liaison
U.S. Department of Education
Office of Management
Office of the Chief Privacy Officer
400 Maryland Ave, S.W.
LBJ 2E320
Washington, D.C. 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 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, including suits brought under FOIA against the Department.

On June 2, 2021, Senior Department Official (“SDO”) Jordan Matsudaira issued a decision terminating ACICS’s federal recognition, stripping it of its powers to accredit colleges and universities (“SDO Decision”). Pursuant to 34 C.F.R. § 602.37(a), ACICS may appeal the SDO Decision to the Secretary. As set forth in the SDO Decision:

Under 34 C.F.R. § 602.37(a), ACICS may appeal this determination of noncompliance and decision to terminate the agency’s recognition to the Secretary of the U.S. Department of Education. ACICS must notify both the Secretary and the SDO no later than 10 business days after receipt of this decision, or by June 16, 2021. The agency appeal must be filed with the Secretary and concurrently provided to the SDO no later than 30 days after receipt of this decision, or by July 2, 2021.

SDO Decision at 78.

Request

Student Defense 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 that constitute or have been submitted by ACICS (including by any representative of ACICS) in connection with any appeal of the June 2, 2021 SDO Decision, including but not limited to ACICS's notice of appeal, appeal, and all documents and attachments filed in connection with the appeal.

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

- Jordan Matsudaira
- The Department's Office of Hearings and Appeals
- The Department's Office of the General Counsel

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 you "demonstrate the validity of [each] exemption that [ED] asserts." *People for the American Way v. U.S. Dep't of Educ.*, 516 F. Supp. 2d 28, 34 (D.D.C. 2007). To satisfy this burden, you 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, questionnaires, 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.

Student Defense 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, ED 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. 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 your response.

Please provide responsive material in electronic format, if possible. Please send any responsive material via email to abigail@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 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 request specifically relates to the operations or activities of the government. 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 request seeks information that is reasonably necessary to understand the Department’s recognition process, the extent to which it coordinates with accreditors during the recognition process, and the release of documents related to that process.

2. The requested documents will likely 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. Student Defense seeks this information to aid the public discourse surrounding the process by which the Department considers accreditation agencies under review. Student Defense 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. Dep’t of Educ.*, 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”). ACICS’s accreditation has also been the subject of numerous stories in national media outlets. Student Defense’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 recognizes accreditors, will significantly enhance the public’s understanding of the Department’s actions.

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 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, 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.

* * *

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 abigail@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,

U.S. Department of Education
FOIA Public Liaison
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/s/ Abigail Moats

Abigail Moats
Intake & Digital Advocacy Manager
National Student Legal Defense Network