

December 13, 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 7W104
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 of 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.

Background

Under the Higher Education Act of 1965 (“HEA”) (as amended), 20 U.S.C. §§ 1070 *et seq.*, the Secretary of Education “is authorized to require by subpoena the production of information, documents, reports, answers, records, accounts, papers, and other documentary evidence pertaining to participation in any [Title IV] program.” 20 U.S.C. § 1097a(a). Moreover, the HEA explicitly provides an enforcement mechanism for the Department’s subpoena power, which includes asking the Attorney General to petition the appropriate court to ensure an individual’s compliance. *Id.* § 1097a(b).

Requested Records

Student Defense hereby requests that the Department produce the following records within twenty business days:

1. All subpoenas issued by the Secretary of Education, or any individual serving as the Secretary’s delegee, between December 1, 2018 to present, pursuant to his or her authority under 20 U.S.C. § 1097a.

Request for Waiver of Fees

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency's regulations, Student Defense requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes.

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 Department's use of its administrative subpoena power to assist with investigations of possible Title IV violations. The Department's use of this power is related to its decisions about institutions' ongoing eligibility to participate in Title IV, HEA programs and, therefore, relate 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 issues an administrative subpoena in order to assist its investigations of institutions' compliance with Title IV of the HEA.

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 administrative subpoena power to assist with its investigations of possible Title IV violations, 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 institutions participating in Title IV programs under the HEA.

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 providing 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.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, Student Defense provides the following guidance regarding the scope of the records sought and the search and processing of records:

- This request does not include any document requests issued by the Department under any other statutory or regulatory authority or any subpoenas issued by the Office of the Inspector General.
- Student Defense does not object to the redaction from such records of any names or personally identifiable information of any individual.
- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- In conducting your search, please understand the terms “record” in its 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 and transcripts, notes, or minutes of any meetings, telephone conversations or discussions.
- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.¹ It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; Student Defense has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence,

¹ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

failed to meet their obligations.²

- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to government-wide requirements to manage agency information electronically,³ and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to Student Defense, please do not hesitate to contact Student Defense to discuss this request. We welcome any opportunities to discuss this request with you before you undertake your search or incur search or duplication costs. By working together at the outset, Student Defense and the Department can decrease the likelihood of costly and time-consuming litigation.

Where possible, please provide responsive material in an electronic format by email. Please send any responsive material being sent by email to info@defendstudents.org. If it will accelerate release of responsive records to Student Defense, please also provide responsive material on a rolling basis.

² See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

³ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://www.federalregister.gov/documents/2011/12/01/2011-31096/managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

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Student Defense looks forward to working with the Department on this request. If you do not understand any part of this request, or anticipate any problems in complying with this request please contact me at isabel@defendstudents.org. Also, if Student Defense's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

/s/ Isabel Tessier

Isabel Tessier
National Student Legal Defense Network