

March 21, 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” or “Department”), 34 C.F.R. Part 5, the National Student Legal Defense Network (“NSLDN”) makes the following requests for records relating to letters of credit held by the Department pertaining to institutions of higher education participating in the federal student assistance programs authorized by Title IV of the Higher Education Act.

Background

As stated by the Department on its website (<https://studentaid.ed.gov/sa/about/data-center/school/loc>):

Section 498(c) of the Higher Education Act (HEA) of 1965, as amended, requires institutions to submit financial statements to the Department of Education when applying to start participation, to determine compliance annually with the standards of financial responsibility, or to continue participation after a change in ownership, in the various Title IV programs. The regulations establish general standards of financial responsibility, and also provide for the Department to determine the financial responsibility of an institution each year by calculating composite financial scores. The regulations specify that certain amounts reported in the institution's financial statements are used as required elements to calculate the composite score.

The most common reason why an institution is required to remit a letter of credit (LOC) to the Department is because they have a failing financial responsibility composite score (generally a score of 1.4 or less on a scale of -1.0 to +3.0) and are not deemed financially responsible. In accordance with 34 CFR 668.175, an institution with a composite score of 1.4 or less may continue to participate in the

Title IV programs under the Provisional certification alternative. Institutions participating under provisional certification are subject to heightened cash monitoring, and may be required to submit an irrevocable LOC of not less than 10 percent of the Title IV aid the institution received during its most recently completed fiscal year. *Institutions that passed the score in the previous year may score from 1.0 to 1.4 for up to three consecutive years without providing a LOC, provided other reporting conditions are met. Institutions that score below a 1.0 are required to submit a LOC of not less than 10 percent of the Title IV aid the institution received during its most recently completed fiscal year.*

A LOC may also be required by institutions that are cited for failure of other portions of the financial responsibility standards noted under 34 CFR Part 668 Subpart L.

In addition, as part of the Department's recently concluded negotiated rulemaking sessions regarding Borrower Defense, the Department has been apparently considering changes to both the circumstances in which institutions of higher education will be required to post letters of credit and also the form of financial surety required to be posted. *See, e.g., Issue Paper 3 (Session 3: February 12-15, 2018) available at:* <https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/issuepaper3.pdf>.

Request

NSLDN hereby requests that ED produce the following within twenty business days:

1. A copy of every letter of credit currently held by the Department that has been posted by, or on behalf of, any institution participating in one or more Title IV, HEA programs.
2. A copy of every communication from the Department wherein the Department requested or demanded an institution to post a letter of credit that is currently held by the Department.

To the extent this request is unduly burdensome on the Department, and without waiving any rights for full compliance with this request, NSLDN would be willing to receive a detailed log in lieu of the documents themselves, so long as the log provides the following information:

- OPEID;
- Institution Name
- State
- Institution Type
- Institution Fiscal Year End Date
- LOC Request Date
- Reason LOC Requested

- LOC Received Date
- LOC Amount
- LOC Percent Requested
- Notes

NSLDN is aware that the Department has previously been able to provide such information, as is currently available on the Department's website (for Award Year 2015) at <https://studentaid.ed.gov/sa/sites/default/files/Final-AY15-LOCs.xlsx>

As the Department knows, FOIA is “a tool of inquiry and information gathering for various sectors – including the media, businesses, scholars, attorneys, consumers, and activities.” Ginsberg, W. (2014) *The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues* (CRS Report No. R41933) available at <https://fas.org/sgp/crs/secretary/R41933.pdf>. For that reason, FOIA “allows any person—individual or corporate, citizen or not—to request and obtain, without explanation or justification, existing, identifiable, and unpublished agency records on any topic.” *Id.* FOIA presumes disclosure and the Department “bear[s] the burden of justifying withholding of any records.” *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). The Department has a duty to construe a FOIA request liberally.

If ED takes the position that any portion of any requested record is exempt from disclosure, ED must “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, ED 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).

To ensure that this request is properly construed and does not create any unnecessary burden, we welcome the opportunity to discuss this request, consistent with and without waiving the legal requirements for the timeframe for your response. We note again that the Department may provide summary information in lieu of the documents requested.

Please provide responsive material in electronic format, if possible. Please send any responsive material via email to info@nsldn.org.

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

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.

Your search should consider all agency records and should not exclude files kept or maintained in the personal control of employees or officials, such as personal email accounts, text messages, or other electronic forms of communication. Moreover, to the extent searches are conducted of agency emails or other electronic records, such search must consider all appropriate sources – regardless of whether information is archived or otherwise moved after a certain time period. FOIA does not permit an agency to avoid its obligations simply by having moved records to a different electronic source.

In addition, please note that 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.

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

This request seeks information that is reasonably necessary to better understand the standards the Department uses to require institutions to post letters of credit and sureties and the degree to which the Department uses such instruments to protect taxpayers from unnecessary risk in

connection with the Title IV programs. This issue has been put into the public discourse by the Department's prior promulgation of regulations and discussion of this issue as part of the current efforts to engage in a "regulatory reset." NSLDN has the capacity to analyze records and to use the sought records to inform public discourse regarding issues currently pending at the Department. NSLDN has the capacity to broadcast its analysis through the news, its website, and via social media – thus "significantly" contributing to the public understanding of issues present at the Department, including those raised by the Department's processes for handling FOIA requests.

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.

* * *

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 dan@nslan.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/ Daniel Zibel

Daniel A. Zibel
Vice President & Chief Counsel
National Student Legal Defense Network