

July 6, 2023

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 Title IV of the Higher Education Act of 1965 (as amended), 20 U.S.C. §§1070 et seq, (HEA) and its implementing regulations, institutions of higher education (“IHE”) participating in Title IV programs, and third-party servicers contracting with such institutions, must operate in accordance with Title IV of the HEA. Additionally, IHEs and servicers must act as fiduciaries in the administration of the Title IV programs, thereby administering those programs subject to the highest standard of care and diligence.¹ If institutions or servicers violate these standards, the Department may execute an **emergency action** against an institution participating in Title IV, HEA program, or the third-party servicer contracting with a participating institution.²

An emergency action against an **institution of higher education or third-party servicer** may result in withholding Title IV funds from participating institutions, or from third-party servicers administering any aspect of an institution’s participation in Title IV program.³ Also, an emergency action could result in the Secretary withdrawing the authority of an institution or applicable servicer to “commit, disburse, deliver, or cause the commitment, disbursement, or delivery” of Title IV funding.⁴ The Secretary could also use an emergency action to withdraw a servicer’s authority to administer any aspect of an institution’s participation in Title IV Programs.⁵

¹ 34 C.F.R §§ 668.82.

² 34 C.F.R § 668.82(c)(1).

³ 34 C.F.R § 668.83(a)(1).

⁴ 34 C.F.R §§ 668.83(a)(2).

⁵ 34 C.F.R § 668.83(a)(3).

The Department begins an emergency action by notifying an IHE or servicer of the violation by registered mail with return receipt requested or by other more practical, expedited means.⁶ As to third-party servicers, the Department must also send notice to each IHE that contracts with the servicer.⁷ The notice must inform the institution or servicer of the following: (1) grounds triggering the emergency action, (2) consequences of the emergency action, and (3) an opportunity for institution and/or servicer to show why the emergency action is unwarranted.⁸ Emergency actions take effect on the mailing date.⁹

Requested Records

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

1. All documents constituting a notice issued by the Department to an IHE between December 2021 to present, pursuant to 34 C.F.R. § 668.83, beginning an *emergency action* against the IHE.
2. All documents constituting a notice issued by the Department to an IHE or third-party servicer between December 2021 to present, pursuant to 34 C.F.R. § 668.83, that begins an *emergency action* against a *servicer* contracting with a Title IV-participating IHE.

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.

Student Defense requests a waiver of fees because disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government.”¹⁰ The public has a significant interest in the Department's historical use of enforcement by way of emergency actions against IHE or third-party servicer participation in Title IV programs. Recent events, including the abrupt closures of some institutions, warrant a closer examination into the Department's use of enforcement tools such as emergency actions. Records with the potential to shed light on the circumstances in which the Department has executed an emergency action against an institution or servicer that participates in Title IV Programs would contribute significantly to public understanding of the federal government and the

⁶ 34 C.F.R § 668.83 (b)(1).

⁷ 34 C.F.R § 668.83(b)(1).

⁸ 34 C.F.R § 668.83(b)(3).

⁹ 34 C.F.R § 668.83(b)(2).

¹⁰ 5 U.S.C. § 552(a)(4)(A)(iii).

ways in which the Department holds institutions accountable. Student Defense has the capacity to analyze records and to use the sought records to inform public discourse regarding the Department's enforcement practices. Student Defense also 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.

This request is primarily and fundamentally for non-commercial purposes.¹¹ Student Defense is a non-profit, non-partisan 501(c)(3) organization.¹² 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, in 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:

- 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.

¹¹ See 5 U.S.C. § 552(a)(4)(A)(iii).

¹² See *About Us*, NATIONAL STUDENT LEGAL DEFENSE NETWORK, <https://www.defendstudents.org/about>.

- 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.¹³ 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, failed to meet their obligations.¹⁴
- 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,¹⁵ 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.

¹³ 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).

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

¹⁵ 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>.

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.

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 sarai@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/ Sarai Chaidez

Sarai Chaidez
Policy Associate
National Student Legal Defense Network