

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL STUDENT LEGAL
DEFENSE NETWORK,
1015 15th Street Northwest, Suite 600
Washington, DC 20005

Plaintiff,

v.

U.S. DEPARTMENT OF EDUCATION,
400 Maryland Avenue Southwest
Washington, DC 20202

Defendant.

Case No. 1:22-cv-988

COMPLAINT

INTRODUCTION

1. Plaintiff National Student Legal Defense Network (“Student Defense”) brings this action against the United States Department of Education (“Department”) under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because the Department has failed to comply with the applicable time-limit provisions of FOIA, Student Defense is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining the agency from continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff Student Defense is a nonpartisan, non-profit organization incorporated in the District of Columbia. Student Defense’s mission is to work, through a variety of means, to advance students’ rights to educational opportunity and ensure that higher education provides a launching point for economic mobility. To further its mission, Student Defense gathers information—including through responses to FOIA requests submitted to government agencies—to inform the public via, *inter alia*, its website, social media, press releases and other comments to the media, and regulatory comments to government agencies.

6. Defendant U.S. Department of Education is a department of the executive branch of the United States government headquartered in Washington, D.C. and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). The Department has possession, custody, and control of the records that Student Defense seeks.

STATEMENT OF FACTS

7. Under the Higher Education Act (“HEA”) and Department regulations, institutions of higher education (“IHEs”) may owe money to the Department for various reasons, including for reimbursing the government for costs associated with

certain student loan discharges or enforcement actions stemming from Title IV compliance failures. *See, e.g.*, Federal Student Aid, *Liabilities Associated with Closed School Discharges* (Nov. 25, 2019), <https://ifap.ed.gov/electronic-announcements/112519liabilitiesassoclosedschooldischarges>.

8. As highlighted in a recent report by Student Defense, as of February 2021, the Department reported holding approximately \$1.2 billion in outstanding liabilities from over 1,300 institutions of higher education. Daniel A. Zibel, Aaron S. Ament, & Kirin Jessel, *The Missing Billion: The U.S. Department of Education Aggressively Pursues Financially Distressed Student Borrowers While Letting Colleges and Executives Walk Away From More Than a Billion in Unpaid Debt* (June 2021),

https://www.defendstudents.org/news/body/NSLDN_paper_Missing_Billion.pdf

(“Missing Billion Report”). The report concluded that the Department has largely ignored these institutional debts while aggressively pursuing student borrowers to collect on defaulted student loans. *Id.* at 2. *See also, e.g.*, Annika Kim Constantino, *U.S. government fails to collect over \$1 billion in debt from nearly 1,300 colleges, report says*, CNBC (June 24, 2021), <https://www.cnbc.com/2021/06/24/us-government-fails-to-collect-over-1-billion-in-debt-from-nearly-1300-colleges-report-says.html>.

9. The Missing Billion Report was based on documents released to Student Defense via FOIA. On February 9, 2021, Student Defense submitted FOIA Request No. 21-00919-F that sought a list of all unpaid liabilities currently owed to the Department by IHEs. On April 15, 2021, the Department issued a final

production, consisting of a PDF chart titled “Program Portfolio Monthly Overview Report” and including data reported as of February 28, 2021.

10. Second, on June 25, 2021, contemporaneous to the release of the Missing Billion Report, Student Defense submitted FOIA Request No. 21-02015-F, which requested an updated version of the records the Department provided in response to FOIA Request No. 21-00919-F. On July 29, 2021, the Department issued a final production, consisting of the “Program Portfolio Monthly Overview Report” with data reported as of May 31, 2021. Then, on August 4, 2021, the Department issued an additional final production providing another version of the “Program Portfolio Monthly Overview Report,” also with data reported as of May 31, 2021.

11. FOIA Request Nos. 21-00919-F and 21-02015-F are not at issue in this case. Rather, the requests that are at issue, described in detail below, seek updated versions of documents, at various points in time, that have already been produced by the Department, and for which there is no reason for delay. The requests are relevant and important to advance the public’s understanding of the Department’s management of the Title IV, student aid programs.

12. Particularly considering the recently stated policy of the United States that the “[t]imely disclosure of records is ... essential to the core purpose of FOIA,” which directs agencies to approach FOIA requests with a “presumption of openness,” the Department’s delays in responding to the requests are both unfortunate and unlawful. *See* U.S. Attorney General Merrick Garland,

Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines at 1, 3-4 (March 15, 2022), <https://www.justice.gov/ag/page/file/1483516/download>.

Student Defense's FOIA Requests

FOIA Request 1

13. On September 10, 2021, Student Defense submitted FOIA Request No. 21-02774-F for a list of all unpaid liabilities owed to the Department as of August 30, 2021.

14. Specifically, Student Defense requested:

- “A complete listing of all institutions with unpaid liabilities stemming from closures or compliance and enforcement actions,
- The amount of those liabilities, *and*
- The date on which the liabilities were assessed.”

15. Student Defense also requested that the Department produce this chart in a native or spreadsheet format (*e.g.*, Microsoft Excel) in addition to (or in lieu of) producing as a PDF.

16. This request used the same language as Student Defense's two previous FOIA requests on this topic, FOIA Request No. 21-00919-F and & No. 21-02015-F, to which the Department previously issued final productions. *See supra* ¶¶ 9-10.

17. On September 13, 2021, the Department acknowledged its receipt of the request, stated that it had forwarded the request “to the primary responsible office(s) for action” and assigned tracking number 21-02774-F to the request.

18. On September 14, 2021, the Department updated the request’s status to “In Process.”

19. On September 23, 2021, the Department granted Student Defense’s request for a fee waiver.

20. On October 12, 2021, Student Defense requested a status update, and the Department responded stating that the request’s status was “pending.” On October 18, 2021, Student Defense asked for an estimated time to receive a response. Student Defense did not receive a response from the Department.

21. On December 30, 2021, Student Defense requested a status update, and the Department responded stating that the request’s status was “pending.”

22. On February 7, 2022 and March 21, 2022, Student Defense requested status updates. On April 4, 2022, the Department responded stating that the request’s status was “pending.”

23. Student Defense has not received any further communication from the Department regarding this Request.

FOIA Request 2

24. On November 1, 2021, Student Defense submitted FOIA Request No. 22-00625-F for a list of all unpaid liabilities owed to the Department as of

September 30, 2021 and October 31, 2021. This request used the same language as FOIA Request 1.

25. On November 2, 2021, the Department acknowledged its receipt of the request, stated that it had forwarded the request “to the primary responsible office(s) for action” and assigned tracking number 22-00625-F to the request.

26. On November 4, 2021, the Department updated the request’s status to “In Process.”

27. On November 19, 2021, the Department granted Student Defense’s request for a fee waiver.

28. On December 1, 2021, Student Defense received an interim response letter from the Department stating that “At this time, we are unable to provide an estimated completion date, but intend to provide records on a rolling basis as they become available.”

29. On December 30, 2021, Student Defense requested a status update, and the Department responded stating that the request’s status was “pending.”

30. On February 7, 2022 and March 21, 2022, Student Defense requested status updates. On April 4, 2022, the Department responded stating that the request’s status was “pending.”

31. Student Defense has not received any further communication from the Department regarding this Request.

FOIA Request 3

32. On December 2, 2021, Student Defense submitted FOIA Request No. 22-01136-F for a list of all unpaid liabilities owed to the Department as of November 30, 2021. This request used the same language as FOIA Requests 1 and 2.

33. On December 3, 2021, the Department acknowledged its receipt of the request, stated that it had forwarded the request “to the primary responsible office(s) for action” and assigned tracking number 22-01136-F to the request.

34. On December 8, 2021, the Department updated the request’s status to “In Process.”

35. On December 9, 2021, the Department granted Student Defense’s request for a fee waiver.

36. On March 14, 2022, Student Defense requested a status update. On March 17, 2022, the Department responded stating the request was “currently under processing review.”

37. Student Defense has not received any further communication from the Department regarding this Request.

FOIA Request 4

38. On January 13, 2022, Student Defense submitted FOIA Request No. 22-01568-F for a list of all unpaid liabilities owed to the Department as of December 31, 2021. This request used the same language as FOIA Requests 1, 2, and 3.

39. On January 14, 2022, the Department acknowledged its receipt of the request, stated that it had forwarded the request “to the primary responsible

office(s) for action” and assigned tracking number 22-01568-F to the request. On January 21, 2022, the Department updated the request’s status to “In Process.”

40. On January 21, 2022, the Department granted Student Defense’s request for a fee waiver.

41. On February 18, 2022, Student Defense received an interim response letter from the Department stating that “Due to the unusual circumstances that exist with your FOIA requests as defined by U.S.C. § 552(a)(6)(B)(i)(ii), the Department will not be able to respond by the 20 day statutory requirement.”

42. On March 14, 2022, Student Defense requested a status update. On March 28, 2022, the Department responded stating that the request’s status was “pending.”

43. Student Defense has not received any further communication from the Department regarding this Request.

FOIA Request 5

44. On February 4, 2022, Student Defense submitted FOIA Request No. 22-01861-F for a list of all unpaid liabilities owed to the Department as of January 31, 2022. This request used the same language as FOIA Requests 1, 2, 3, and 4.

45. On February 9, 2022, the Department acknowledged its receipt of the request, stated that it had forwarded the request “to the primary responsible office(s) for action,” assigned tracking number 22-01861-F to the request, and updated the request’s status to “In Process.”

46. On February 22, 2022, the Department granted Student Defense's request for a fee waiver.

47. On March 14, 2022, Student Defense requested a status update. On March 18, 2022, the Department responded stating that the request's status was "pending."

48. Student Defense has not received any further communication from the Department regarding this Request.

Exhaustion of Administrative Remedies

49. As of the date of this complaint, the Department has failed to:
(a) notify Student Defense of any determination regarding FOIA Requests Nos. 21-02774-F, 22-00625-F, 22-01136-F, 22-01568F, and 22-01861-F (collectively the "Unpaid Liabilities FOIA Requests"), including the scope of any responsive records the Department intends to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

50. Through the Department's failure to respond to the Unpaid Liabilities FOIA Requests within the period required by law, Student Defense has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I Violation of FOIA, 5 U.S.C. § 552 Failure to Conduct Adequate Search for Responsive Records

51. Student Defense repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

52. Student Defense properly requested records within the possession, custody, and control of the Department.

53. The Department is an agency subject to FOIA and must therefore make reasonable efforts to search for requested records.

54. The Department has failed to promptly review agency records for the purpose of locating those records that are responsive to the Unpaid Liabilities FOIA Requests.

55. The Department's failure to conduct adequate searches for responsive records violates FOIA.

56. Student Defense is therefore entitled to injunctive and declaratory relief requiring the Department to promptly make reasonable efforts to search for records responsive to Student Defense's FOIA requests.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

57. Student Defense repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

58. Through the Unpaid Liabilities FOIA Requests, Student Defense properly requested records within the possession, custody, and control of the Department.

59. The Department is an agency subject to FOIA and must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

60. The Department is wrongfully withholding non-exempt agency records requested through the Unpaid Liabilities FOIA Requests by Student Defense by failing to produce non-exempt records responsive to its FOIA requests.

61. The Department's failure to provide all non-exempt responsive records violates FOIA.

62. Student Defense is therefore entitled to declaratory and injunctive relief requiring the Department to promptly produce all non-exempt records responsive to its FOIA requests and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, Student Defense respectfully requests the Court to:

1. Order the Department to conduct searches reasonably calculated to uncover all records responsive to the Unpaid Liabilities FOIA Requests;
2. Order the Department to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to the Unpaid Liabilities FOIA Requests and indexes justifying the withholding of any responsive records withheld under claim of exemption;
3. Enjoin the Department from continuing to withhold any and all non-exempt records responsive to the Unpaid Liabilities FOIA Requests;

4. Award Student Defense the costs of this proceeding, including reasonable attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and

5. Grant Student Defense such other relief as the Court deems just and proper.

Dated: April 11, 2022

Respectfully submitted,

/s/Daniel A. Zibel

Daniel A. Zibel

D.C. Bar No. 491377

National Student Legal Defense
Network

1015 15th Street N.W., Suite 600

Washington, D.C. 20005

dan@defendstudents.org

(202) 734-7495