

December 2, 2021

VIA ELECTRONIC MAIL

Attention: FOIA Public Liaison
U.S. Department of Education
Office of Management
Office of the Chief Privacy Officer
400 Maryland Avenue, SW, LBJ 7W104
Washington, DC 20202-4536
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 U.S. Department of Education (“ED” or “Department”), 34 C.F.R. Part 5, the National Student Legal Defense Network (“Student Defense”) makes the following request for records.

Background

When a school closes, some student borrowers become eligible to have their student loans discharged. 34 C.F.R § 662.402(d). The Department assesses school liabilities equal to the loan funds discharged.¹ The Department may also assess liabilities against schools as an enforcement mechanism where schools fail to comply with Title IV eligibility requirements. *See generally* 34 C.F.R § 668.13.

When the Department discharges student loans due to school misconduct but fails recoup the costs from the institution, the burden falls on taxpayers and, often, the students themselves.

Student Defense has submitted four previous FOIA requests seeking a list of all unpaid liabilities owed to the Department.

- February 9, 2021 (FOIA Request No. 21-00919-F). The Department issued a final production on April 15, 2021, consisting of a PDF chart titled “Program Portfolio Monthly Overview Report” and including data reported as of February 28, 2021.
- June 25, 2021 (FOIA Request No. 21-02015-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. On August 4, 2021, the Department

¹ Federal Student Aid, *Liabilities Associated with Closed School Discharges* (Nov. 25, 2019), <https://ifap.ed.gov/electronic-announcements/112519liabilitiesassocclosedschooldischarges>.

issued another final production including the “Program Portfolio Monthly Overview Report,” also with data reported as of May 31, 2021.

- September 10, 2021 (FOIA Request No. 21-02774-F). This request sought records as of August 30, 2021. To date, Student Defense has not received a final production.
- November 1, 2021 (FOIA Request No. 22-00625-F). This request sought records as of September 30, 2021 and October 31, 2021.

Requested Records

Student Defense requests that the Department produce the following records within twenty business days of the date of this request:

- 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.

Effectively, this request is for the same report sought in our four previous FOA requests, but with updated data for this month. From the Department’s prior responses, we understand that the Department generally produces these reports as of the month-end. Thus, the Department can construe this request for reports produced as of November 30, 2021.

We also request 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.

Further, the answers we provided in our February 16, 2021 response to the Department’s February 10, 2021 request for clarification remain the same. Our answers were as follows:

- *Date Range of Record:* While we have requested a listing of all institutions with currently outstanding liabilities, please prioritize liabilities assessed over the last ten years.
- *Scope:*
 - Our request includes all unpaid amounts owed to the Department. This includes fines and any other liabilities owed, including civil penalties, liabilities stemming from closures, and liabilities associated with any other compliance and enforcement actions (including program reviews and audit determinations).
 - Our request is to include closeout audit, FAD, and FRPD liabilities outstanding from schools no longer in the program, such as closed school discharge liabilities. Our request also includes unpaid FAD and FRPD liabilities from institutions that are still participating in Title IV programs. Alternatively put, this request includes any instance in which the

Department assessed a financial liability or other payment obligation that remains unpaid, whether or not the school is still in the program.

Fee Waiver Request

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."² The public has a significant interest in these change in ownership applications, particularly as many are consumers of educational programs. Records with the potential to shed light on the status of and potential changes to the operations and structures of educational institutions would contribute significantly to public understanding of the federal government and these processes. Student Defense has the capacity to analyze records and to use the sought records to inform public discourse regarding issues currently pending at the Department. Student Defense 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.³ Student Defense is a non-profit, non-partisan 501(c)(3) organization.⁴ 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:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.

² 5 U.S.C. § 552(a)(4)(A)(iii).

³ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁴ See *About Us*, NATIONAL STUDENT LEGAL DEFENSE NETWORK, <https://www.defendstudents.org/about>.

- 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.⁵ 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.⁶
- 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,⁷ 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.

⁵ 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).

⁶ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

⁷ 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>.

- 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.

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