

October 5, 2022

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

The Student Loan Reform Act of 1993 (Public Law 103-66) amended the Higher Education Act of 1965 (“HEA”) to establish the William D. Ford Federal Direct Loan Program. Section 455(h) of the HEA, as amended, requires the Secretary to specify through regulation the acts or omissions of a borrower’s school that a borrower may assert as a defense to repayment of a Direct Loan. This is commonly referred to as “borrower defense.”

The Department established borrower defense regulations at 34 C.F.R. § 685.206(c), effective July 1, 1995. These regulations were amended on November 1, 2016 and September 23, 2019. While the Department previously published monthly reports providing some data on borrower defense applications, the Department has not published a report since December 2021. Notably, these reports do not provide any information on the institutional level.

Student Defense has previously submitted nine FOIA requests seeking data that relates to this request: Student Defense submitted FOIA request No. 22-00285-F on October 12, 2021 (which sought borrower defense records from January 1, 2015 to October 12, 2021), and (ii) FOIA request No. 22-00716-F on November 2, 2021 (which sought borrower defense records from October 1, 2021 to October 31, 2021). Student Defense did not receive any documents in response to these requests. On January 21, 2022, Student Defense submitted FOIA request No. 22-01683-F, seeking borrower defense records from January 1, 2015 to January 1, 2022. Because this request overlapped with those previous requests, for the sake of efficiency and simplicity, Student Defense agreed to cancel the two previous requests. On March 7, 2022, Student Defense submitted (iv) FOIA request No. 22-02164-F, seeking borrower defense records from January 1,

2022 to March 1, 2022. On April 19, 2022, Student Defense submitted (v) FOIA request No. 22-02546-F, seeking borrower defense records from March 1, 2022 to March 31, 2022. On May 5, 2022, Student Defense submitted (vi) FOIA request No. 22-02691-F, seeking borrower defense records from April 1, 2022 to April 30, 2022. On July 12, 2022, Student Defense submitted (vii) FOIA request No. 22-03166-F, seeking borrower defense records from May 1, 2022 to June 30, 2022. On August 2, 2022, Student Defense submitted (viii) FOIA request No. 22-03295-F, seeking borrower defense records from July 1, 2022 to July 31, 2022. On September 8, 2022, Student Defense submitted (vix) FOIA request No. 22-03611-F, seeking borrower defense records from August 1, 2022 to August 31, 2022.

On June 24, 2022, Student Defense received responses to the third (22-01683-F), fourth (22-02164-F), and fifth (22-02546-F) requests. Student Defense has not received any documents in response to the sixth, seventh, or eighth requests.

Requested Records

Student Defense requests that, within twenty business days, the Department produce documents sufficient to show:

1. The total number of borrower defense applications filed from September 1, 2022 to September 30, 2022, broken down by institution;
2. The total number of borrower defense applications granted between September 1, 2022 and September 30, 2022, broken down by institution;
 - a. Of the granted applications, the total number that received monetary relief, broken down by institution;
 - b. Of the granted applications, the total dollar amount discharged, broken down by institution;
3. The total number of borrower defense applications denied between September 1, 2022 and September 30, 2022, broken down by institution.
4. The total number of borrower defense applications pending decision as of September 30, 2022, broken down by institution.

Note: For each of these requests, in lieu of documents Student Defense would accept a chart or description providing the requested information.

We also request that the Department produce these documents in native format (i.e., Microsoft Excel or .csv file) in addition to (or in lieu of) producing as PDFs.

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.”¹ The public has a significant interest in the number of borrower defense applications that have been filed by students at institutions of higher education. Records with the potential to shed light on the Department’s treatment of borrower defense applications for students who have been defrauded would contribute significantly to public understanding of the federal government and the ways in which the Department holds institutions accountable. Due to the June 22, 2022 settlement in *Sweet v. Cardona*, the public has a significant interest in the number of pending borrower defense applications. 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.

This request is primarily and fundamentally for non-commercial purposes.² Student Defense is a non-profit, non-partisan 501(c)(3) organization.³ 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, 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:

¹ 5 U.S.C. § 552(a)(4)(A)(iii).

² See 5 U.S.C. § 552(a)(4)(A)(iii).

³ See *About Us*, NATIONAL STUDENT LEGAL DEFENSE NETWORK, available at: <https://www.defendstudents.org/about>.

- 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.⁴ 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.⁵
- 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,⁶ 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

⁴ 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).

⁵ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

⁶ 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>.

.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. Student Defense welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, we can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Please send responsive material to info@defendstudents.org.

Student Defense looks forward to working with you 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 santora@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/ Abigail Moats

Abigail Moats
Intake & Digital Advocacy Manager
National Student Legal Defense Network