

January 16, 2024

VIA ELECTRONIC MAIL

FOIA Public Liaison  
U.S. Department of Education  
Office of Management  
Office of the Chief Privacy Officer  
400 Maryland Ave, S.W.  
LBJ 2E320  
Washington, D.C. 20202  
[EDFOIAManager@ed.gov](mailto: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 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 relating to the Department’s entry into settlement or other agreements with student borrowers who have filed an “adversary” complaint against the Department in a bankruptcy proceeding.

**Background**

The Department of Justice (“DOJ”) issued updated Guidance on November 17, 2022 to DOJ attorneys regarding requests to discharge student loans in bankruptcy cases. The Guidance advises DOJ attorneys to stipulate to facts demonstrating a debt would impose an undue hardship and recommend a discharge if the following conditions are met: “(1) the debtor presently lacks an ability to repay the loan; (2) the debtor’s inability to pay the loan is likely to persist in the future; and (3) the debtor has acted in good faith in the past in attempting to repay the loan.”<sup>1</sup>

On July 28, 2023, in response to a request submitted by Student Defense under the Freedom of Information Act, the Department released new data showing that fewer than 45 student loan borrowers in bankruptcy proceedings had received either a partial or full discharge of their federal student loans from November 2022 to June 5, 2023.<sup>2</sup> Despite the small number of borrowers who have seen relief, the number of borrowers partaking in the process has grown; as of June 29, 2023, 338 new cases were filed since the November guidance, and in July, that number grew to over 460.<sup>3</sup>

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<sup>1</sup> See U.S. Department of Justice, “Guidance for Department Attorneys Regarding Student Loan Bankruptcy Litigation,” (November 17, 2022), available at: <https://www.justice.gov/civil/page/file/1552681/download>.

<sup>2</sup> See *Bankruptcy*, NATIONAL STUDENT LEGAL DEFENSE NETWORK, available at: <https://defendstudents.org/foia/bankruptcy#bankruptcy-settlements-june-5-2023>.

<sup>3</sup> See The New York Times, “Discharging student debt in bankruptcy is supposed to be easier than before,” (August 10, 2023), available at: <https://www.nytimes.com/2023/08/09/your-money/student-loan-bankruptcy->

Student Defense now requests documents showing the number of settlements or other final agreements the Department has reached with any student loan borrower who has filed an “adversary” complaint against the Department in bankruptcy between June 5, 2023 and the date of this request.

### **Requested Records**

Student Defense hereby requests that the Department produce the following in the time and manner required under FOIA and the Department’s regulations:

1. All settlements, stipulations, decisions, and final agreements reached with any student loan borrower who has filed an “adversary” complaint against the Department in bankruptcy. While Student Defense understands that certain information may not be disclosable under FOIA due to privacy concerns, in light of the fact that much information about individual borrowers is already part of the public record (due to the filing of the adversary complaint and associated pleadings), we specifically request that the Department narrowly tailor any redactions that it believes are necessary. This request can be limited to any agreements executed with a borrower between June 5, 2023 and the date of this request. We specifically request that the Department search the Office of the General Counsel (and the Division of Postsecondary Education within OGC) and the Litigation Support Team within Federal Student Aid.

***Note: In lieu of documents, Student Defense would accept a chart or description providing the requested information.***

### **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.”<sup>4</sup> The Guidance states that “[t]he new process will help ensure transparent and consistent expectations for the discharge of student loan debt in bankruptcy; reduce the burden on debtors of pursuing such proceedings; and make it easier for Justice Department

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[discharge.html](#); see also Business Insider, “Only a couple dozen student-loan borrowers have gotten their debt wiped out in court since Biden announced changes nearly a year ago to make the process easier,” (August 10, 2023), available at: <https://www.businessinsider.com/how-to-discharge-student-loan-debt-bankruptcy-biden-reforms-2023-8>.

<sup>4</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

attorneys to identify cases where discharge is appropriate.” *See* At a Glance: Department of Justice’s New Process for Student Loan Bankruptcy Discharge Cases <https://www.justice.gov/civil/page/file/1552676/download>. Thus, the public has a significant interest in data related to bankruptcy proceedings.

Records with the potential to shed light on the new Guidance would contribute significantly to the public understanding of student loan discharge in bankruptcy cases. 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.<sup>5</sup> Student Defense is a non-profit, non-partisan 501(c)(3) organization.<sup>6</sup> 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.
- 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

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<sup>5</sup> *See* 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>6</sup> *See About Us*, NATIONAL STUDENT LEGAL DEFENSE NETWORK, <https://www.defendstudents.org/about>.

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.<sup>7</sup> 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.<sup>8</sup>
- 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,<sup>9</sup> 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.

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<sup>7</sup> 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).

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

<sup>9</sup> 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. 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, Student Defense and your agency 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 any responsive material being sent by email to [sarai@defendstudents.org](mailto:sarai@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 you on this request. If you have any questions or concerns, or anticipate any problems in complying with this request, please contact me at [sarai@defendstudents.org](mailto: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