

**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.

Case No. 1:22-cv-1473

COMPLAINT

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

Defendant.

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. 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."

8. 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.

9. While the Department publishes public reports regarding borrower defense claims, these reports do not provide information at the institutional level, and no reports have been published in 2022. *See* U.S. Dep't. of Educ., "Borrower Defense to Repayment Loan Forgiveness Data", <https://studentaid.gov/data-center/student/loan-forgiveness/borrower-defense-data>.

10. This case concerns three FOIA requests seeking documents regarding the number of borrower defense claims filed, granted, and denied, broken down by institution. The requests are relevant and important to advance the public's understanding of the Department's treatment of borrower defense applications and the ways in which the Department holds institutions accountable. *See e.g.* 34 C.F.R. § 685.206(e)(16).

11. The Department's delay stands in stark contrast to the recently stated policy of the United States that the "[t]imely disclosure of records is ... essential to the core purpose of FOIA," and that agencies should approach FOIA requests with a "presumption of openness." *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

12. On January 21, 2022, Student Defense submitted FOIA Request No. 22-01683-F for documents showing the total number of borrower defense claims: (1) filed from January 1, 2015 to January 1, 2022, broken down by institution; (2) granted from January 1, 2015 to January 1, 2022, broken down by institution; and (3) denied from January 1, 2015 to January 1, 2022, broken down by institution. Of the granted claims, Student Defense sought the total number that received monetary relief, broken down by institution, and the total dollar amount discharged, broken down by institution.

13. Student Defense also stated that, for each of these requests, it would accept a chart or description providing the requested information in lieu of documents.

14. On January 24, 2022, the Department acknowledged receipt of the request, stated that it forwarded the request "to the primary responsible office(s) for action," and assigned tracking number 22-01683-F to the request.

15. On January 24, 2022, the Department updated the request's status to "In Process."

16. On February 4, 2022, the Department granted Student Defense's request for a fee waiver.

17. On February 16, 2022, Student Defense received an interim response letter from the Department stating that "[a]t this time, we are unable to provide an estimated completion date, but intend to provide records on a rolling basis as they become available."

18. On March 14, 2022, Student Defense requested a status update, and the Department responded on March 16, 2022, stating that the request's status was "pending."

19. Student Defense has not received any further communication from the Department regarding this request.

FOIA Request 2

20. On March 7, 2022, Student Defense submitted FOIA Request No. 22-02164-F for documents showing all borrower defense claims filed, granted, and denied from January 1, 2022 to March 1, 2022, broken down by institution. Other than the date range, this request contained the same language as FOIA Request 1.

21. On March 8, 2022, the Department acknowledged receipt of the request, stated that it forwarded the request "to the primary responsible office(s) for action," and assigned tracking number 22-02164-F to the request.

22. On March 21, 2022, the Department updated the request's status to "In Process" and granted Student Defense's request for a fee waiver.

23. On April 6, 2022, Student Defense received an interim response letter from the Department stating that “[d]ue 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.”

24. Student Defense has not received any further communication from the Department regarding this request.

FOIA Request 3

25. On April 19, 2022 Student Defense submitted FOIA Request No. 22-02546-F for documents showing all borrower defense claims filed, granted, and denied from March 1, 2022 to March 31, 2022, broken down by institution. Other than the date range, this request contained the same language as FOIA Requests 1 and 2.

26. On April 20, 2022, the Department acknowledged receipt of the request, stated that it forwarded the request “to the primary responsible office(s) for action,” and assigned tracking number 22-02546-F to the request.

27. On May 3, 2022, the Department updated the request’s status to “In Process” and granted Student Defense’s request for a fee waiver.

28. On May 17, 2022, Student Defense received an interim response letter from the Department stating that “[d]ue 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.”

29. Student Defense has not received any further communication from the Department regarding this request.

Exhaustion of Administrative Remedies

30. As of the date of this complaint, the Department has failed to:
(a) notify Student Defense of any determination regarding FOIA Requests Nos. 22-01683-F, 22-02164-F, and 22-02546-F (collectively the “Borrower Defense 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.

31. Through the Department’s failure to respond to the Borrower Defense 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

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

33. Student Defense properly requested records within the Department’s possession, custody, and control.

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

35. The Department has failed to promptly review agency records for the purpose of locating those records that are responsive to the Borrower Defense FOIA Requests.

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

37. Student Defense is therefore entitled to injunctive and declaratory relief requiring the Department to promptly make reasonable efforts to search for records responsive to the Borrower Defense FOIA Requests.

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

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

39. Through the Borrower Defense FOIA Requests, Student Defense properly requested records within the Department's possession, custody, and control.

40. The Department is an agency subject to FOIA and must therefore release any non-exempt records in response to the Borrower Defense FOIA Requests, and provide a lawful reason for withholding any materials.

41. By failing to produce documents responsive to the Borrower Defense FOIA Requests, the Department is wrongfully withholding non-exempt agency records.

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

43. Student Defense is therefore entitled to declaratory and injunctive relief requiring the Department to promptly produce all non-exempt records responsive to the Borrower Defense 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 Borrower Defense 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 Borrower Defense 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 Borrower Defense 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: May 25, 2022

Respectfully submitted,

/s/Alexander S. Elson

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