

March 12, 2018

VIA ELECTRONIC MAIL

FOIA Public Liaison
U.S. Department of Education
Office of Management
Office of the Chief Privacy Officer
400 Maryland Ave, SW LBJ 2E320
Washington, DC 20202
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 U.S. Department of Education (“ED” or “Department”), 34 C.F.R. Part 5, the National Student Legal Defense Network (“NSLDN”) makes the following requests for records relating to communications between ED and Navient Corporation, Great Lakes Educational Loan Services, Inc., Missouri Higher Education Loan Authority (MOHELA), FedLoan Servicing (PHEAA), Nelnet, and HESC/Edifinancial (collectively referred hereinafter as “Servicers”),

Background

On March 9, 2018, ED made public a Notice of Interpretation (“Notice”) titled “Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers” (available at: <https://www.federalregister.gov/documents/2018/03/12/2018-04924/federal-preemption-and-state-regulation-of-the-department-of-educations-federal-student-loan>)

ED labeled the Notice an “unpublished rule.” The Notice stated that “several States have enacted regulatory regimes that impose new regulatory requirements on servicers of loans under the William D. Ford Federal Direct Loan Program (Direct Loan Program). States also impose disclosure requirements on loan servicers with respect to loans made under title IV of the Higher Education Act of 1965, as amended (HEA).” ED went on to say the intent of the notice was to “clarify further the Federal interests in this area.”

Request

NSLDN hereby requests that ED produce the following within twenty business days:

1. All communications or correspondence between the ED and representatives, including in-house or external legal counsel, of one or more Servicicers since January 19, 2016 that mention “preemption,” “preempt,” and/or discuss state laws and issues that may be preempted by federal law.
2. All communications or correspondence between the ED and representatives of the Servicicers that discusses the Notice.
3. All communications or correspondence between the ED and representatives of the National Council of Higher Education Resources (including but not limited to James Bergeron) since January 19, 2016 that either discuss the Notice, mention “preemption,” and/or discuss state laws and issues that may be preempted by federal law.
4. All documents and communications sent by the Servicicers to ED since January 19, 2016 that discuss preemption and/or legal claims made against the Servicicers under state laws.

We ask that you search records of all personnel in the Office of the Secretary, Office of the Undersecretary, Office of Federal Student Aid, Office of Postsecondary Education (OPE), and the Office of General Counsel, who are reasonably likely to have documents responsive to the request. This includes but is not limited to the Acting Undersecretary, Acting Assistant Secretary for OPE, any Deputy Assistant Secretary for OPE, Senior Counselor to the Secretary, General Counsel or Acting General Counsel, any Deputy General Counsel, any Special Counsel, and any attorney in the Division of Postsecondary Education. In addition, your search for records should include, but should not be limited to, documents containing the following terms, without regard to capitalization:

- Preemption
- Preempt
- Preempts
- Conflicts
- Chae
- “Notice of Interpretation”
- “NOI”
- “Statement of Interest”
- “SOI”
- “uniquely federal interests”
- “uniformity”
- 1098g

As the Department knows, FOIA is “a tool of inquiry and information gathering for various sectors – including the media, businesses, scholars, attorneys, consumers, and activities.” Ginsberg, W. (2014) *The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues* (CRS Report No. R41933) available at <https://fas.org/sgp/crs/secretcy/R41933.pdf>.

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For that reason, FOIA “allows any person—individual or corporate, citizen or not—to request and obtain, without explanation or justification, existing, identifiable, and unpublished agency records on any topic.” *Id.* FOIA presumes disclosure and the Department “bear[s] the burden of justifying withholding of any records.” *AP v. FBI*, 256 F. Supp. 3d 82, 2017 U.S. Dist. LEXIS 161516 at *10 (D.D.C. Sept. 30, 2017) (quoting *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991)). Under the FOIA Improvement Act of 2016, an agency is permitted to withhold materials only in one of two limited circumstances, *i.e.*, if disclosure would “harm an interest protected by an exemption” or is otherwise “prohibited by law.” 5 U.S.C. § 552(a)(8)(A)(i). The Department has a duty to construe a FOIA request liberally.

If ED takes the position that any portion of any requested record is exempt from disclosure, ED must “demonstrate the validity of [each] exemption that [the Department] asserts.” *People for the American Way v. U.S. Department of Education*, 516 F. Supp. 2d 28, 34 (D.D.C. 2007). To satisfy this burden, ED may provide NSLDN with a Vaughn Index “which must adequately describe each withheld document, state which exemption the agency claims for each withheld document, and explain the exemption’s relevance.” *Id.* (citing *Johnson v. Exec. Office for U.S. Att’ys*, 310 F.3d 771, 774 (D.C. Cir. 2002)). *See also Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). That index must provide, for each document withheld and each justification asserted, a relatively detailed justification – specifically identifying the reasons why the exemption is relevant. *See generally King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

To ensure that this request is properly construed and does not create any unnecessary burden, we welcome the opportunity to discuss this request, consistent with and without waiving the legal requirements for the timeframe for your response.

Please provide responsive material in electronic format, if possible. Please send any responsive material via email to info@nsltn.org.

NSLDN does not object to the redaction from such records of any names or personally identifiable information of any individual.

In addition to the records requested above, NSLDN also requests records describing the processing of this request, including records sufficient to identify search terms used (if any), and locations and custodians searched and any tracking sheets used to track the processing of this Request. This includes any questionnaires, tracking sheets, emails, or certifications completed by, or sent to, ED personnel with respect to the processing of this request. This specifically includes communications or tracking mechanisms sent to, or kept by, individuals who are contacted in order to process this request. NSLDN seeks all responsive records, regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their 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, transcripts, notes, or minutes of any

meetings, telephone conversations, or discussions. Our request includes any attachment to these records.

Your search should consider all agency records and should not exclude files kept or maintained in the personal control of employees or officials, such as personal email accounts, text messages, or other electronic forms of communication. Moreover, to the extent searches are conducted of agency emails or other electronic records, such search must consider all appropriate sources – regardless of whether information is archived or otherwise moved after a certain time period. FOIA does not permit an agency to avoid its obligations simply by having moved records to a different electronic source.

In addition, please note that in conducting a “reasonable search” as required by law you must use the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology advances may render ED’s prior FOIA practices unreasonable. Moreover, not only does this request require the agency to conduct a search, but individual custodians must conduct their own searches in order to make sure that documents are appropriately collected.

Request for Waiver of Fees

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. 5.33(a), NSLDN requests a waiver of fees associated with the processing of this request because: (1) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; *and* (2) disclosure of the information is not primarily in the commercial interest of the requester.

Disclosure of Information is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government

This request seeks information that is reasonably necessary to better understand the relationship between the Department and loan servicers, and the degree to which the Department believes states are preempted from enforcing state consumer protection laws.

NSLDN seeks this information to aid the public discourse surrounding the Department’s apparent attempts to assert that federal law, through the Higher Education Act, preempts the application of state consumer protection laws over servicers of federally issued or guaranteed student loans. NSLDN has the capacity to analyze records and to use the sought records to inform public discourse regarding issues currently pending at the Department. NSLDN 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.

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Disclosure of Information is Not in Commercial Interest of NSLDN

This request is fundamentally non-commercial. NSLDN is a non-profit, non-partisan organization with recognition pending with the IRS as a 501(c)(3) organization. NSLDN'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, NSLDN 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, NSLDN qualifies for a fee waiver.

* * *

NSLDN 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 aaron@nslndn.org. If NSLDN's request for a fee waiver is not granted, and any fees will be in excess of \$25, please contact me immediately.

Sincerely,

/s/ Aaron Ament

Aaron Ament
President
National Student Legal Defense Network