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July 25, 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 United States Department of Education (“ED” or “the Department”), 34 C.F.R. Part 5, the National Student Legal Defense Network (“NSLDN”) makes the following request for records relating to the Department’s rejection of Title IV annual compliance audits.

Background

The Office of Federal Student Aid (“FSA”) is responsible for ensuring that schools with access to federal student aid are eligible and capable of properly administering federal student aid funds, according to standards established by ED and authorized by the Higher Education Act. 20 U.S.C. §1099c.

Schools that participate in federal student aid programs are required to submit annual compliance audits to FSA. *See* 34 C.F.R. § 668.23. These compliance audits, conducted by independent auditors, provide critical information for FSA staff to use in assessing schools’ administration of federal student aid programs and identifying schools that require additional oversight because they do not fully comply with federal student aid requirements. For example, independent auditors are directed to check whether schools are distributing federal student aid to eligible students and accurately calculating student loan amounts. *See* <https://www2.ed.gov/about/offices/list/oig/nonfed/schoolservicerauditguide.pdf>.

The United States Department of Education, Office of Inspector General (“OIG”), in turn, is required to assess the quality of school compliance audits themselves, selecting a sample to review each year. The OIG reviews the audit documentation to ensure that it supports the auditor’s opinions and that the audit results are reliable.

According to FSA procedures and the OIG, an auditor is required to conduct additional audit work to correct any quality deficiencies the OIG identifies during the quality review. If the auditor does not do so or if the response is not acceptable, the OIG may recommend that the audit be rejected. If an audit is rejected, the school is notified that it must submit an acceptable audit within 45 days from the date of the notice. If the school does not submit an acceptable audit, the school will be required to repay all federal student aid received during the audit period. *See, e.g.*, 34 C.F.R. § 668.174(a)(3).

In a July 2018 report titled *Education's Postsecondary School Certification Process*, the United States Government Accountability Office ("GAO") conducted an analysis of the OIG's findings regarding the quality of annual compliance audits. *See* <https://www.gao.gov/assets/700/693151.pdf> ("GAO Report"). The GAO's analysis of the OIG data found that, "of the 739 compliance audits reviewed by the OIG from fiscal years 2006 through 2017, the OIG passed 23 percent (173) and failed 59 percent (436). An additional 18 percent (130) passed with deficiencies. For example, across the 41 compliance audits it reviewed in fiscal year 2016, the OIG identified 264 quality deficiencies with the auditor's work, according to our analysis of quality reviews provided by the OIG." *Id.* at 15 (internal citations omitted).

The GAO Report further found that "FSA generally relies on compliance audits as the *only* annual on-site review to determine how schools applying for recertification administer federal student aid." *Id.* at 14 (emphasis added). Further, "FSA officials and staff from all four of our selected regional offices said that compliance audits are a key source of information they use to assess a school's administrative capability." *Id.*

Request

NSLDN hereby requests that ED produce the following in the time and manner required under the Freedom of Information Act and the Department's regulations:

1. All communications from the Department to schools from January 1, 2016 to the present informing schools or an auditor that a Title IV compliance audit submitted to the Department was rejected or otherwise found not "acceptable," as that word is used in 34 C.F.R. § 668.174(a)(3).
2. All documents constituting the "input and feedback" provided by the OIG to FSA, as described in the GAO Report at page 17, which states: "FSA recently established a working group to update its guidance to FSA staff on how to coordinate with the OIG to address compliance audits with quality problems. Among other topics, the working group has consulted with the OIG about how schools are made aware of the OIG's findings regarding the quality of their audits. *FSA officials said that OIG officials have provided input and feedback on FSA's proposed changes to the guidance.*" *Id.* (emphasis added).

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

FOIA presumes disclosure. Indeed, “[a]gencies bear the burden of justifying withholding of any records, as FOIA favors a ‘strong presumption in favor of disclosure.’” *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). If ED takes the position that any portion of any requested record is exempt from disclosure, NSLDN requests that you “demonstrate the validity of [each] exemption that [ED] asserts.” *People for the American Way v. U.S. Dep’t of Educ.*, 516 F. Supp. 2d 28, 34 (D.D.C. 2007). To satisfy this burden, you 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).

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), the locations and custodians searched, and any tracking sheets used in the processing of this Request. This includes any questionnaires, tracking sheets, emails, or certifications completed by, or sent to, ED or OIG 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. In addition, ED has a duty to construe a FOIA request liberally.

In conducting a “reasonable search” as required by law you must use the most up-to-date technologies and tools available. 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.

To ensure that this request is properly construed and does not create any unnecessary burden on ED, NSLDN welcomes the opportunity to discuss this request at your earliest convenience, 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 alex@nslldn.org. We welcome any materials that can be provided on a rolling basis. Nevertheless, NSLDN fully intends to hold ED to the timeframe required by statute for a response to this request.

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

1. The FOIA request specifically relates to the operations or activities of the government. As noted above, FSA is responsible for ensuring that schools with access to federal student aid are eligible and capable of properly administering federal student aid funds. One of the primary ways in which they do that is through review of the compliance audits that are the subject of this request. This request therefore relates directly to the operations and activities of the government.

2. The requested documents will likely contribute to an understanding of those specific operations or activities. Annual audits are critical to the government's determinations regarding the disbursement of billions of taxpayer dollars to institutions of higher education. This request will contribute to the public's understanding of those audits and shed much needed light onto the process by which the federal government uses them in order to make these critical determinations.

3. The disclosure will contribute to a greater understanding on the part of the public at large. NSLDN seeks this information to aid the public discourse surrounding the Department's process for ensuring that schools with access to federal student aid are eligible and capable of properly administering federal student aid funds. NSLDN has the capacity to analyze the documents provided and to disseminate its analysis to the public through its website and other sources.

4. Disclosure will "significantly" contribute to the public's understanding of government activities. As noted above, the subject of this request is a matter of great public interest. As explained in the GAO Report, the Department provided over \$122 billion in

grants, loans, and work study funds to help students pay for college at about 6,000 schools in fiscal year 2017 alone. The Department is responsible for certifying that these schools are eligible for and capable of properly administering federal student aid funds. The annual compliance audits at issue here provide critical information on schools' administrative capability, which ED considers in its school certification decisions. NSLDN's analysis of the records sought, as well as its use of the records to inform further discourse and comment on these issues, will therefore significantly enhance the public's understanding of the Department's Title IV compliance process.

Disclosure of Information is Not in the Commercial Interest of NSLDN

This request is fundamentally non-commercial. NSLDN is a non-profit, non-partisan 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, litigation filings, and regulatory comments to government agencies. For these reasons, NSLDN qualifies for a fee waiver.

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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 NSLDN counsel Alexander Elson at alex@nslan.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/ Alexander S. Elson

Alexander S. Elson*
Senior Counsel
National Student Legal Defense Network

*Member of New York Bar only; practicing in the District of Columbia under supervision of members of the D.C. Bar while D.C. Bar application is pending.