

January 2, 2019

VIA ELECTRONIC MAIL

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), 34 C.F.R. Part 5, the National Student Legal Defense Network (“NSLDN”) makes the following requests for records relating to the historical use of the Department executing an emergency action against institutions of higher education and/or third-party servicers that contract with institutions of higher education.

Background

Under the Title IV of the Higher Education Act of 1965 (as amended), 20 U.S.C. §§1070 *et seq.*, (HEA) and its implementing regulations, institutions participating in Title IV programs, and third-party servicers contracting with such institutions, must operate in accordance with all statutory provisions applicable to Title IV of the HEA.¹ Additionally, both the institutions and servicers must act as fiduciaries in the administration of the Title IV programs, thereby administering those programs subject to the highest standard of care and diligence.² If institutions or servicers violate these standards, the Department may execute an **emergency action** against an institution participating in Title IV, HEA program, or the third-party servicer contracting with a participating institution.³

An emergency action against an **institution of higher education or third-party servicer** may result in Title IV funding withheld from participating institutions, its students, or third-party servicers administering any aspect of an institution’s participation in Title IV program.⁴ Also, an emergency action could result in the Secretary withdrawing the authority of an institution or applicable servicers to commit, disburse, deliver, or cause the commitment, disbursement, or delivery of Title IV funding.⁵ Lastly, the Secretary could use the emergency action to withdraw

¹See 34 C.F.R. § 668.16.

²See 34 C.F.R §§ 668.82.

³See 34 C.F.R §§ 668.82(c).

⁴See 34 C.F.R §§ 668.83(a)(1).

⁵See 34 C.F.R §§ 668.83(a)(2).

the servicer's authority to administer any aspect of the institution's participation in Title IV Programs.⁶

The Department begins an emergency action by notifying an institution or servicers of the violation by registered mail with return receipt requested or by other more practical, expedited means.⁷ In regard to third-party servicers, the Department must also send notice to each institution of higher education that contracts with the servicer.⁸ The notice must inform the institution or servicer of the following: (1) grounds triggering an emergency action, (2) consequences of the emergency action, and (3) opportunity for institution and servicer to show cause why the emergency action is unwarranted.⁹ Emergency actions take effect on the mailing date.¹⁰

Request

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

1. All documents constituting a notice provided to an institution of higher education pursuant to 34 C.F.R. § 668.83 of the Department beginning an **emergency action** against the institution participating in Title IV Programs.
2. All documents constituting a notice provided to an institution of higher education or third-party servicer pursuant to 34 C.F.R. § 668.83 of the Department beginning an **emergency action** against the servicer contracting with institutions participating in Title IV Programs.

NSLDN is only seeking documents sent by the Department relating to emergency actions against institutions and servicers participating in Title IV Programs between 2012 and present.

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 the Department takes the position that any portion of any requested record is exempt from disclosure, NSLDN requests that you “demonstrate the validity of [each]

⁶See 34 C.F.R §§ 668.83(a)(3).

⁷See 34 C.F.R §§ 668.83 (b)(1).

⁸See 34 C.F.R §§ 668.83(b)(1).

⁹See 34 C.F.R §§ 668.83(b)(3).

¹⁰See 34 C.F.R §§ 668.83(b)(2).

exemption that [the Department] 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), 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. In addition, the Department 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**, 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.

To ensure that this request is properly construed and does not create any unnecessary burden on the Department, 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 at info@nsldn.org. We welcome any materials that can be provided on a rolling basis. Nevertheless, NSLDN fully intends to hold the Department 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 specifically relates to the operations or activities of the government. As stated above, the Department has authority over institutions of higher education and third-party servicers that administer educational programs in accordance with all statutory provisions applicable to Title IV of the HEA. This particular request seeks information that is reasonably necessary to understand the Department's historical use of enforcement by way of emergency actions against institutional or third-party servicer participation in Title IV programs.

2. The requested documents will likely contribute to an understanding of those specific operations or activities. This request seeks documents that will contribute to the understanding of the circumstances in which the Department has executed an emergency action against an institution or servicer that participates in Title IV Programs.

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 historical use of enforcement actions. NSLDN has the capacity to analyze 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. The subject of this request is a matter of great public interest. Recent events, including the abrupt closures of some institutions, warrant a closer examination into the Department's historical use of enforcement tools, including emergency actions against institutions and servicers. NSLDN's analysis of the sought records and use of the records to inform further discourse and comment on these issues, including the process by which the Department executes emergency actions against higher education institutions and third-party servicers, will significantly enhance the public's understanding of the Department's enforcement actions.

Disclosure of Information is Not in Commercial Interest of NSLDN

This request is fundamentally non-commercial. NSLDN is a non-profit, non-partisan organization that the IRS recognizes 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

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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.

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 kate@nsldn.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/ Kate Azevedo
Counsel

National Student Legal Defense Network