

February 2, 2022

VIA ELECTRONIC MAIL AND FACISIMILE

U.S. Department of Education
Office of the Executive Secretariat
FOIA Service Center
400 Maryland Ave. SW, LBJ 7W106A
Washington, D.C. 20202-4536
EDFOIAManager@ed.gov
ATTN: FOIA Public Liaison

Re: FOIA Request: Identities, Qualifications, and Impartiality of Political Appointees
(DFI FOIA No. 100-1-22)

Dear FOIA Public Liaison:

The Defense of Freedom Institute for Policy Studies, Inc. (DFI) is a 501(c)(3) nonprofit, nonpartisan organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting civil and constitutional rights at schools and in the workplace. For the benefit of the public, DFI's mission includes obtaining records related to the consideration and implementation of policies imposed by the federal government and its officials on the American people.

This records request is made in order to determine the identities, qualifications, and ethics compliance of recently-appointed officials involved in making and implementing policy decisions at the U. S. Department of Education (ED).

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations of ED, 34 C.F.R. Part 5 ("Availability of Information to the Public"), DFI hereby makes the following request for records within your possession and/or control:

Requested Records

DFI requests that ED produce the following records within twenty (20) business days:

1. a. All records sufficient to establish the identity of each ED employee hired on or after January 20, 2021, through the date the search is conducted, and classified "non-career Senior Executive Service" (collectively, "political appointees"). Records should include the full name and official date of hire by ED of each political appointee and, if applicable, date of termination with ED.



- b. All records sufficient to establish the identity of each ED employee hired on or after January 20, 2021, through the date the search is conducted, and classified as “Schedule C” (excepted service) (collectively, “political appointees”). Records should include the full name and official date of hire by ED of each political appointee and, if applicable, date of termination with ED.
2. Records provided should include each title and official position held by the political appointee (identified in item 1) at ED, the dates of service related to the employee’s title(s)/position(s), and the official ED job/position description(s) related to the position(s) held by the political appointee.
 3. Records provided should identify the political appointee’s supervisor(s) for each ED position held by the political appointee since January 20, 2021, including the supervisor’s full name and official title.
 4. Records provided should include any and all resumes and/or curriculum vitae (CV) submitted by (or in support of) the political appointee for the political appointee’s employment application.

If a resume and/or CV was submitted in support of the employment application of the political appointee to any ED employee (whether or not a political appointee) by another individual or entity (including but not limited to another government official or entity), the identifying information of the submitter should include the submitter’s name or the name of the entity and date of submission.

Any email(s) associated with the submission of the resume and/or CV should also be provided, including related email(s) from the political appointee and/or the individual submitting the resume and/or CV in support of the political appointee’s application for employment.

Previous employment, education, training, and professional memberships and associations should be included in the provision of requested records. (DFI does not object to the redaction of particular personal contact information contained within resumes and/or CVs, to include the political appointee’s home address, personal telephone number, personal email address(es), and the contact information for references provided by the political appointee’)

If more than one resume has been received in support of the political appointee’s appointment, each resume should be provided in response to this request.

5. Records provided should also include the identities of political appointees detailed or otherwise temporarily assigned from other federal agencies or Congress to ED since on or



after January 20, 2021, the positions and official job descriptions to which those political employees are or were detailed or temporarily assigned, the dates of those details/assignments (including the date of termination of the detail), and the identity(ies) and official position(s) of the detailee's supervisor(s). Information should also include the agency of origin information and official title/position at the agency of origin for the political appointee detailed to ED. If applicable, information should further include each detailee's official title/position with Congress.

6. Records provided should include all ethics and conflict of interest-related forms distributed to political appointees (identified in item 1) to ensure compliance with 5 C.F.R. § 2635, and a description of ED's ethics, conflict of interest ("conflicts"), and written recusal protocols governing ED's review of the involvement of political employees in matters in which they may have a conflict of interest or the appearance of a conflict of interest with the requirements of 5 C.F.R. § 2635.101 ("Basic obligation of public service").
7. Records provided should include the identification of and official position(s) of any and all ED official(s) involved in the review of potential ethics and conflict issues for political appointees identified in item 1 (from January 20, 2021, through the date the search is conducted), including political appointees and career officials involved in each review. Identified officials should include ED's agency designees assigned to make independent determinations regarding the impartiality of political appointees in matters in which the political employee's impartiality may be questioned, as described at 5 C.F.R. § 2635.502(c).
8. Records provided should include any and all ethics and/or conflict(s) waivers granted to any political appointees (identified in item 1), including waivers authorized by the agency designee (see item 7) pursuant to 5 C.F.R. § 2635.502(d) ("Authorization by agency designee").
9. Records provided in responses to items 7 and 8 should include any and all records related to recusal determinations, whether the political employee-initiated recusal, he or she was ordered recused by another ED official, or the agency designee authorized participation in a matter(s) by the political appointee, despite the possibility of a conflict of interest.
10. Records provided in responses to items 7, 8, and 9 should include any and all records related to disqualification by the agency designee of the political employee's participation in any matter, as described at 5 C.F.R. § 2635.502(e).

Definitions

Absent contrary statutory directives, words and phrases contained herein should be accorded their usual, plain, and ordinary meaning. Please note the following statutory definitions:



“**Records**” are defined at 44 U.S.C. § 3301(a)(1-2) as including “all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them” and further “includes all traditional forms of records, regardless of physical form or characteristics, including information created, manipulated, communicated, or stored in digital or electronic form, such as emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voice mail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.

“**Schedule C**” personnel appointments, authorized under 5 U.S.C. § 2103 includes positions excepted from the competitive service by the President or by the Director of the Office of Personnel Management, because of the confidential or policy-determining nature of the position duties (5 C.F.R. § 213.3301(a) authorizes “Schedule C” appointments for positions of a confidential or policy-determining nature whereby “[u]pon specific authorization by OPM, agencies may make appointments under this section to positions which are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials”).

“**Noncareer [SES] appointee**” is defined at 5 U.S.C. § 3132(a)(7) and references individuals appointed to Senior Executive Service positions who are not career appointees, limited term appointees, or limited emergency appointees. “Senior Executive Service position,” defined at 5 U.S.C. § 3132(a)(2)(A)-(E), references “any position in an agency which is classified above GS-15 pursuant to section 5108 or in level IV or V of the Executive Schedule, or an equivalent position, which is not required to be filled by an appointment by the President by and with the advice and consent of the Senate” and which employee directs the work of an organizational unit, is held accountable for the success of one or more specific programs or projects, monitors progress toward organizational goals and periodically makes appropriate adjustments to such goals, supervises the work of employees other than personal assistants, or otherwise exercises important policy-making, policy-determining, or other executive functions.

Identification and Production of the Requested Records

FOIA imposes a burden on ED, as a covered agency under 5 U.S.C. § 551(1), to timely disclose requested agency records to the requestor¹ if ED (1) created or obtained the requested materials, and, (2) is “in control of the requested materials at the time the FOIA request [was] made.”² Upon request, ED must “promptly” make the requested records available to the requester.³ Notably, covered agency records include materials provided to ED by both private and governmental

¹ FOIA requires the disclosure of nonexempt agency records to any person, which includes an individual, partnership, corporation, association, or public or private organization other than an agency. 5 U.S.C. § 551(2).

² *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

³ 5 U.S.C. § 552(a)(3)(A).



organizations.⁴ Upon receipt of a FOIA request that “reasonably” describes the records sought and is in compliance with ED’s published rules regarding the time, place, any fees, and procedures to be followed,⁵ ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.⁶ In addition, the records produced by ED are required to be provided in “any form or format requested . . . if the record is readily reproducible by the agency in that form or format.”⁷

Upon receipt of this request, ED has twenty business days to “determine . . . whether to comply with [the] request” and “shall immediately notify” the requester of its determination and the reasons therefor,” the right to seek assistance from the agency’s FOIA public liaison, and the requester’s right to appeal any “adverse determination” by ED.⁸

Consistent with FOIA guidelines, DFI requests the following regarding the provision of the requested records:

- ED should immediately act to protect and preserve all records potentially responsive to this request, notifying any and all responsible officials of this preservation request and verifying full compliance with the preservation request. This matter may be subject to litigation, making the immediate initiation of a litigation hold on the requested materials necessary.
- ED should search all record systems that may contain responsive records, promptly consulting with its information technology (IT) officials to ensure the completeness of the records search by using the full range of ED’s IT capabilities to conduct the search. To constitute an adequate search for responsive records, ED should not rely solely on a search of a likely custodian’s files by the custodian or representations by that likely custodian, but should conduct the search with applicable IT search tools enabling a full search of relevant agency records, including archived records, without reliance on a likely custodian’s possible deletion or modification of responsive records.
- ED should search all relevant records and information retention systems (including archived recorded information systems) which may contain records regarding ED’s business operations. Responsive records include official business conducted on unofficial systems which may be stored outside of official recording systems and are subject to FOIA. ED should directly inquire, as part of its search, if likely custodians have conducted any such official business on unofficial systems and should promptly and fully acquire and preserve those records as ED’s official records. Such unofficial systems include, but are not limited to, governmental business conducted by employees using personal emails, text

⁴ *Id.* at 144.

⁵ 5 U.S.C. § 552(a)(3)(A)(i)

⁶ *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

⁷ 5 U.S.C. § 552(a)(3)(B).

⁸ 5 U.S.C. § 552(a)(6)(A)(i).



messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voice mail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.

- ED should timely provide entire records responsive to this request, broadly construing what information may constitute a “record” and avoiding unnecessarily omitting portions of potentially responsive records as they may provide important context for the requested records (*e.g.*, if a particular email is clearly responsive to this request, the response to the request should include all other emails forming the email chain, to include any attachments accompanying the emails).
- ED should narrowly construe and precisely identify the statutory basis for any constraint which it believes may prevent disclosure.
- If ED determines that any portions of otherwise responsive records are statutorily exempt from disclosure, DFI requests that ED disclose reasonably segregable portions of the records.
- For any responsive records withheld in whole or part by ED, ED should provide a clear and precise enumeration of those records in index form presented with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA”⁹ and provide a sufficiently detailed justification and rationale for each non-disclosure and the statutory exemption upon which the non-disclosure relies.
- Please provide responsive records in electronic format by email, native format by mail, or PDF or TIF format on a USB drive. If it helps speed production and eases ED’s administrative burden, DFI welcomes provision of the records on a rolling basis. Responsive records sent by mail should be addressed to the Defense of Freedom Institute for Policy Studies, 1455 Pennsylvania Avenue NW, Suite 400, Washington, D.C. 20004.

Fee Waiver Request

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.33, DFI requests a waiver of all fees associated with this FOIA request for agency records. Disclosure of the requested records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and because disclosure of the information contained within the requested records is not primarily in the commercial interests of DFI. The subject of this request regards identifiable operations and activities of ED and, more specifically, the identities, positions held, and related professional experience of officials directly involved in ED’s

⁹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



policy-making and implementing operations and activities. Provision of the requested records will provide the public with a clearer understanding of the individuals responsible for ED's policy-making decisions and the implementation of those policies.

DFI is an independent 501(c)(3) nonprofit organization without a commercial purpose primarily engaged in the dissemination of information about government policies to the public. DFI is engaged in the collection, analysis, and dissemination of information to educate the public about government policies that impact the civil and constitutional rights of American families, students, entrepreneurs, and workers. DFI actively publishes information and related analyses on its public website and promotes access to that information and analyses on social media platforms, including but not limited to distribution via Facebook and Twitter.

Conclusion

DFI appreciates ED's prompt attention to this request for records pursuant to FOIA, which records will provide important information to the American people regarding the identities, qualifications, and ethics compliance of policymakers and implementers appointed or detailed to the U.S. Department of Education on or after January 20, 2021. Please contact me immediately if DFI's request for a fee waiver is not granted in full.

If you have any questions or I can further clarify DFI's request, please contact me at your earliest convenience at paul.moore@dfipolicy.org.

Sincerely yours,

/s/ _____

Paul R. Moore

Senior Counsel

Defense of Freedom Institute for Policy Studies, Inc.