

April 21, 2022

VIA ELECTRONIC MAIL

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: Records Regarding Collaboration with the Consumer Financial Protection Bureau
(DFI FOIA No. 100-15-22)

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.

Pursuant to the Higher Education Act of 1965, as amended (“HEA”)¹, Congress tasked the U.S. Department of Education (“ED”) with “direct[ing], coordinat[ing], and recommend[ing] policies for programs that are designed to provide financial assistance to eligible students enrolled in postsecondary educational institutions.”² ED’s Chief Operating Officer (“COO”) for the Office of Federal Student Aid (“FSA”) “manages the administrative and oversight functions supporting programs authorized under Title I [funding for extension and continuing education programs] and Title IV [funding for scholarships, low-interest loans, and work-study programs]” and currently oversees grants, loans, and work-study assistance to nearly 12.9 million students through approximately 6,100 postsecondary institutions.³

¹ The Higher Education Act of 1965 (HEA; P.L. 89-329, as amended); 20 U.S.C. Chapter 28 (§ 1001 *et seq.*).

² *See*

<https://www2.ed.gov/about/offices/or/fs/fsa/intro.html#:~:text=The%20Office%20directs%2C%20coordinates%2C%20and,enrolled%20in%20postsecondary%20educational%20institutions.>

³ *See Id.*



According to the Board of Governors of the Federal Reserve System, student loan debt in the United States reached nearly \$1.75 trillion by the end of the 2021.⁴ With over 40 million borrowers and federal student loans accounting for more than 90% of that debt, on April 19, 2022, the Biden Administration announced an expansion of the student-loan debt forgiveness program⁵ (occurring less than two weeks after its announcement of another six-month “pause” on repayment of federal student loans⁶). According to President Biden, failing to extend the collection moratorium (to a date just two months shy of the mid-term elections) could “threaten Americans’ financial stability”.⁷ President Biden failed to mention the report of the Federal Reserve Bank of New York that the cost of ED’s repeated pandemic-justified moratoria on student debt collections had already cost American taxpayers nearly \$200 billion before the most recent “pause.”⁸

FSA is the “largest provider of student financial aid,” has more than 1,400 employees, and two of its primary responsibilities are “managing the outstanding federal student loan portfolio and securing repayment from federal student loan borrowers” and the “oversight and monitoring of all program participants – schools, financial entities, and students – to ensure compliance with the laws, regulations, and policies governing the federal student aid programs.”⁹

Despite its statutory mandates under the HEA and its recent well-publicized laxity in collection actions (suspending large portions of its core student loan debt collection efforts, discussed *supra*), ED is sharing administrative duties with the Consumer Financial Protection Bureau (“CFPB”) that may contradict the Memorandum of Understanding (“MOU”) executed between ED and CFPB in February 2020.¹⁰ The MOU delineated the proper roles of ED and CFPB for complaints regarding

⁴ See <https://fred.stlouisfed.org/series/SLOAS>.

⁵ Gabriel T. Rubin, “Biden Aims to Expand Access to Student-Loan Debt Forgiveness for Millions of People,” THE WALL STREET JOURNAL (April 19, 2022), <https://www.wsj.com/articles/biden-aims-to-expand-access-to-student-loan-debt-forgiveness-for-millions-of-people-11650391396>.

⁶ Morgan Smith, “Biden administration extends the student loan pause through Aug. 31 – here’s what you need to know,” CNBC (April 6, 2022), <https://www.cnbc.com/2022/04/06/biden-administration-extends-the-student-loan-pause-through-august-31.html>.

⁷ See *Id.*

⁸ Jacob Goss, Daniel Mangrum, and Joelle Scally, “Student Loan Repayment during the Pandemic Forbearance,” LIBERTY STREET ECONOMICS (March 22, 2022), <https://libertystreeteconomics.newyorkfed.org/2022/03/student-loan-repayment-during-the-pandemic-forbearance/>.

⁹ See

<https://financialaidtoolkit.ed.gov/tk/about.jsp#:~:text=The%20office%20of%20Federal%20Student,for%20college%20or%20career%20school>.

¹⁰ See <https://www2.ed.gov/documents/press-releases/20200203-cfpb-ed-mou.pdf>.



federally-backed (Title IV¹¹) loans and private education loans, following CFPB's previous expansion of its role to include review of Title IV federal student loan complaints.¹²

Since its formation in 1980, ED has promulgated and implemented regulations¹³ for the oversight and administration of federal student loan programs, pursuant to the statutory framework for oversight and administration of the HEA provided by Congress.¹⁴ ED's primary role in the oversight and administration of the federal student loan program(s) is clear from the HEA (as amended) and ED's own rulemaking. Neither CFPB nor any other federal agency has comparable responsibilities regarding the oversight and administration of the federal student loan program(s).

On May 28, 2021, FSA COO Richard Cordray¹⁵ issued revised guidance to FSA vendors regarding the provision of records and data to State attorneys general and regulators.¹⁶ In that guidance, Cordray noted that “the Department regularly partners with agencies like the Consumer Financial Protection Bureau . . . to conduct joint oversight and supervisory examinations” and noted that “[t]o conduct these joint oversight and supervisory examinations effectively, our interagency partners need to have streamlined access to Department records and data”¹⁷ In an official blogpost, Cordray described how ED would now more seamlessly share “the companies’ [loan servicers and debt collectors] policies and procedures, their handbooks, complaints made by customers, and anything else that shows how the company operates”, promising “[t]his is only a start.”¹⁸

¹¹ 20 U.S.C. § 1070 *et seq.* Title IV authorizes ED's loan and grant programs providing financial aid to students at postsecondary institutions of higher education.

¹² Part E of Title I of the HEA (as amended) provides direction to ED regarding “disclosure and reporting requirements applicable to lenders and IHEs with respect to Title IV federal student loans and private education loans.” 20 U.S.C. § 1019 *et seq.*

¹³ *See generally*, e.g., 34 C.F.R. § 685 (Direct Loan Program regulations); 34 C.F.R. § 682 (FFELP regulations); 34 C.F.R. § 686 (TEACH Grant Program regulations)

¹⁴ The programs include the William D. Ford Federal Student Loan Program (direct loans), 20 U.S.C. § 1087a *et seq.*, the Federal Family Education Program (“FFELP”) through which ED reinsures, backs guarantors, subsidizes loans, and collects on defaulted loans, 20 U.S.C. § 1071 *et seq.*, income-driven repayment plans (“IDR”), the Public Service Loan Forgiveness Program (“PSLF”), and Teacher Education Assistance for College and Higher Education (“TEACH”) grants.

¹⁵ FSA COO Richard Cordray was the Director of the CFPB from 2012 through 2017. *See* Michael Stratford, “Biden admin taps Rich Cordray, former CFPB chief, to oversee federal student loans,” POLITICO (May 3, 2021), <https://www.politico.com/news/2021/05/03/biden-picks-richard-cordray-student-loans-485231>.

¹⁶ *See* <https://www2.ed.gov/policy/fund/guid/revised-vendor-guidance-fsa.pdf>.

¹⁷ *Id.*

¹⁸ *See* <https://blog.ed.gov/2021/05/stronger-partnerships-with-state-allies-to-protect-student-borrowers/>.



Indeed, on August 9, 2021, ED issued a new legal interpretation, indicating revised enforcement policies to increase “collaboration” with various State entities and other regulators.¹⁹ The new interpretation jettisoned important aspects of federal preemption of State laws, ceding important ED administrative responsibilities (governed by regulations and contractual agreements with federal loan servicers and debt collectors) to a myriad of State laws and other federal regulators (including the CFPB).

DFI thus seeks records and information related to ED’s significant policy changes regarding its oversight of federal loan servicers and debt collectors since January 20, 2021.

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 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. All records from any person or entity using an email address ending in *cfpb.gov*, *mail.house.gov*, *senate.gov*, or *mass.gov*, including but not limited to electronic mail (“email”), texts, letters, memoranda, and other documentation to ED officials (see “Custodians” *infra*), from January 20, 2021, through the date the search is conducted, which reference “Consumer Financial Protection Bureau” or “CFPB” or “Bureau” or “34 CFR Chapter IV” or “12 USC 5531” or “Section 5531” or “Prohibiting unfair, deceptive, or abusive acts or practices” or “Federal Preemption” or “Joint Federal-State Regulation” or “Oversight of the Department of Education’s Federal Student Loan Programs” or “Federal Student Loan Servicers” or “loan servicers” or “debt collectors” or “ED-2021-OS-0107” or “2018-04924” or “83 FR 10619” or “2018 Interpretation” or “Aidvantage” or “Ascendium” or “Aspire Resources” or “CornerStone” or “ESA/EDFinancial” or “FedLoan Servicing” or “PHEAA” or “F.H. Cann” or “Granite State” or “GSMR” or “Great Lakes Educational Loan Services” or “Maximus Federal Services” or “MOHELA” or “Navient” or “Nelnet” or “OSLA Servicing” or “Sallie Mae” or “Trellis Corporation” or “VSACK Federal Loans” or “MOU” or “Memorandum of Understanding.”
2. All records of ED officials (see “Custodians” *infra*) responding to the records found pursuant to the search for Item 1, including but not limited to electronic mail (“email”), texts, letters, memoranda, and other documentation from ED officials, from January 20, 2021, through the date the search is conducted.

¹⁹ See <https://www.ed.gov/news/press-releases/new-interpretation-encourage-state-collaboration-student-loan-servicing>.



3. All records, including but not limited to electronic mail (“email”), texts, letters, memoranda, and other documentation from ED officials (see “Custodians” *infra*), from January 20, 2021, through the date the search is conducted, which reference “April 14, 2022 letter” or “CFPB Letter” or “Congresswoman Virginia Foxx” or “Ranking Member Virginia Foxx” or “Virginia Foxx” or “Foxx” or “Congressman Patrick McHenry” or “Ranking Member Patrick McHenry” or “Patrick McHenry” or “McHenry” or “Senator Richard Burr” or “Ranking Member Richard Burr” or “Richard Burr” or “Burr” or “Senator Rand Paul” or “Rand Paul” or “Paul”.

Custodians

The search for records described in Item 1 should be limited to “ED officials” within the Office of the Secretary, Office of Federal Student Aid, Office of the General Counsel, and Office of Legislation and Congressional Affairs, who are classified as any of the following or referenced with the following job title:

- a. “PAS” (Presidential Appointments Requiring Senate Confirmation)
- b. “PA” (Presidential Appointments Not Requiring Senate Confirmation)
- c. “NC-SES” (Non-Career Senior Executive Service)
- d. “SES” (Career Senior Executive Service)
- e. “SC” (Schedule C Confidential or Policymaking Positions)
- f. Chief Operating Officer, Federal Student Aid
- g. Deputy Chief Operating Officer, Federal Student Aid
- h. Chief Enforcement Officer, Federal Student Aid
- i. Chief Financial Officer, Federal Student Aid
- j. Executive Assistant to the Chief Operating Officer, Federal Student Aid
- k. Chief of Staff, Federal Student Aid
- l. Senior Advisor for Management, Federal Student Aid
- m. Senior Advisor, Federal Student Aid
- n. Ombudsman, Federal Student Aid
- o. Congressional Team Lead, Federal Student Aid

Definitions

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

“**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.

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 requestor²⁰ 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.”²¹ Upon request, ED must “promptly” make the requested records available to the requester.²² Notably, covered agency records include materials provided to ED by both private and governmental organizations.²³ 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,²⁴ ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.²⁵ 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.”²⁶

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.²⁷

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.

²⁰ 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).

²¹ *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

²² 5 U.S.C. § 552(a)(3)(A).

²³ *Id.* at 144.

²⁴ 5 U.S.C. § 552(a)(3)(A)(i).

²⁵ *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

²⁶ 5 U.S.C. § 552(a)(3)(B).

²⁷ 5 U.S.C. § 552(a)(6)(A)(i).



- 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 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. Failure to identify and produce records responsive to this request from such unofficial systems would constitute a knowing concealment by ED calculated to deflect its compliance with FOIA’s requirements.
- 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



FOIA²⁸ 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 and 34 C.F.R. § 5.32(b)(1)(ii), 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.

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 disclosed materials are likely to contribute significant information to the public's understanding of ED's proposed and ongoing revisions of its policies impacting the oversight and enforcement of student loan debt and collection efforts under ED's purview, which policies are highly relevant to the interests of students, families, and taxpayers. Disclosure of the requested materials will illuminate ED's relevant student loan debt collection policies and planning (*e.g.*, rulemaking and enforcement decisions), particularly its collaborative efforts with the Consumer Financial Protection Bureau. Further, the requested information does not otherwise appear to be in the public domain (in duplicative or substantially identical form).

Provision of the requested records will not commercially benefit DFI (a nonprofit, nonpartisan organization interested in the transparency of ED operations and governance), but will benefit the general public and other groups and entities with non-commercial interests in ED's operations and governance.

DFI will review and analyze the requested records and make the records and analyses available to the general public and other interested groups through publication on DFI's website and social media platforms such as Facebook and Twitter (distribution functions it has already demonstrated a capacity to provide since its formation in September 2021, including a detailed news story on ED policies widely distributed by one of the nation's largest news providers in February 2022 and

²⁸ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



more recently, a March 2022 analysis of DOJ policies distributed by a leading news magazine. DFI personnel have also offered commentary and analyses on radio news programs and in various public forums).

Federal law makes clear that when the disclosure is in the public interest and the information contained within the disclosed records is not primarily in the commercial interests of the requester (here, DFI), statutory fee waiver is appropriate.

DFI is a representative of the news media.

In addition to the fee waiver request based upon the public interest, DFI also requests a fee waiver on the basis that DFI is a **representative of the news media**, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.32(b)(1)(ii).

FOIA (as amended) provides that a representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that to an audience.”²⁹ DFI provides exactly this service to the general public and other audiences with an interest in those materials and analyses. Upon receipt of the requested materials from ED, DFI will review and analyze those materials and will extract and otherwise distill particularly useful information from those materials for the benefit of the general public and other interested audiences.

DFI will provide its analyses to the general public and other interested audiences through publication on DFI’s website and social media platforms such as Facebook and Twitter (distribution functions it has already demonstrated a capacity to provide since its formation in September 2021, including a detailed news story on ED policies widely distributed by one of the nation’s largest news providers in February 2022 and more recently, a March 2022 analysis of DOJ policies distributed by a leading news magazine. DFI personnel have also offered commentary and analyses on radio news programs and in various public forums).

As a qualified non-commercial public education and news media requester with demonstrated ability to review and analyze publicly-available information and to provide insight regarding that information, DFI is thus entitled to a fee waiver under FOIA as a representative of the news media.

Conclusion

The subject of this request regards identifiable operations and activities of ED and, more specifically, its ongoing revisions in student loan debt enforcement policies in collaboration with the Consumer Financial Protection Bureau. Provision of the requested records will meaningfully

²⁹ See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



inform the general public about significant developments in ED's student loan debt collection enforcement policies and rulemaking, which affect millions of American students, their families, and taxpayers. These are significant issues with tremendous impact on the general public and worthy of transparency in service of the public's right to know.

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.

DFI appreciates ED's prompt attention to this request for records pursuant to FOIA, which will provide important information to the American people regarding ED's student loan debt enforcement collaboration policies and rulemaking, which policies and rules are of tremendous interest to students, families, and taxpayers.

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

Paul R. Moore, Senior Counsel

Defense of Freedom Institute for Policy Studies, Inc.