

February 4, 2022

**VIA ELECTRONIC MAIL AND FACSIMILE**

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: Calendars, Virtual Meetings, and Visitor Logs**  
(DFI FOIA No. 100-2-22)

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.

Since assuming office, Secretary Cardona and other senior officials at the U.S. Department of Education (“ED”) have initiated significant policy changes which may impact the constitutional rights of students in a wide array of matters, including, *inter alia*, Title IX enforcement (prohibition of sex-based discrimination), Title IV (federal student loan programs), Title VI (prohibition of race-based discrimination), and other related Higher Education Act re-authorization proposals.

Under consideration are distinctly radical interpretations of applicable statutes and regulations that would, among other effects, deny biologically female students the right to fairly compete in sports against other biologically female students,<sup>1,2</sup> deny the rights of accused students and faculty to

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<sup>1</sup> Quin Hillyer, “Betsy DeVos is right that boys can’t be girls,” *Washington Examiner* (September 18, 2020), <https://www.washingtonexaminer.com/opinion/columnists/betsy-devos-is-right-that-boys-cant-be-girls>.

<sup>2</sup> Doreen Denny, “The Biden Administration is Sending Title IX to the Ash Heap of History | Opinion,” *Newsweek* (December 16, 2021), <https://www.newsweek.com/biden-administration-sending-title-ix-ash-heap-history-opinion-1659730>.



have access to fair and impartial tribunals,<sup>3,4</sup> summarily “forgive” student loan debts,<sup>5</sup> permit discrimination in college admission policies against students of certain racial backgrounds,<sup>6</sup> and deny religious freedom exceptions to certain colleges.<sup>7</sup>

Given the enormity of these proposed changes in policies, DFI is concerned about the scope of access that Secretary Miguel Cardona and other senior ED officials may have provided to advocacy groups and activists pursuing these extraordinary shifts in vitally important ED policies.

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. All calendars, calendar invitations, calendar entries, and associated attachments pertaining to each ED appointee identified in Appendix “A” (attached) during the period January 20, 2021, through the time the search for these records is conducted.
2. Records produced pursuant to Item 1 should include all records related to calendar invitations for “virtual” and hybrid virtual meetings (in-person and virtual), including but not limited to the following commonly-used virtual platforms and any others utilized by ED personnel: Microsoft Teams, Skype, Skype for Business (formerly Lync 2013 for IOS), Google Meet, Google Meetings, Google Calendar, and Zoom Meeting.

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<sup>3</sup> Collin Binkley, “Campus sexual assault rules bolster rights of accused,” *Associated Press* (May 6, 2020), <https://apnews.com/article/virus-outbreak-us-news-ap-top-news-sexual-assault-sexual-misconduct-f489490cb06c0ac02e6c586be9abc5f1>.

<sup>4</sup> Tyler Kingkade, “Activists increase pressure on Biden to scrap Betsy DeVos’ Title XI rules,” *NBC News* (March 15, 2021), <https://www.nbcnews.com/news/us-news/activists-increase-pressure-biden-scrap-betsy-devos-title-ix-rules-n1261017>.

<sup>5</sup> Abigail Johnson Hess, “Education Secretary Cardona: the Biden Administration is still ‘examining loan forgiveness,’” *CNBC* (October 26, 2021), <https://www.cnbc.com/2021/10/26/ed-secretary-cardona-biden-administration-is-examining-loan-forgiveness.html>.

<sup>6</sup> Lloyd Green, “Biden’s DOJ Grabs Hold of Another Political Third Rail,” *The Daily Beast* (December 10, 2021), <https://www.thedailybeast.com/bidens-department-of-justice-grabs-hold-of-another-political-third-rail-with-harvard-and-college-admissions>.

<sup>7</sup> Ryan Bangert, “Biden’s DOJ Threatens To Abandon Legal Protections For Religious Colleges,” *The Federalist* (June 14, 2021), <https://thefederalist.com/2021/06/14/bidens-doj-threatens-to-abandon-legal-protections-for-religious-colleges/>.



3. Records produced should indicate if recordings and/or electronic transcripts of any meetings identified in Item 2 were made (certain commonly-used virtual platforms automatically produce video and audio records and transcripts of virtual meetings). Please indicate which meetings were so recorded, if recorded by audio, video, and/or were electronically transcribed, and which ED senior officials participated in the recorded meetings (please include assistants or confidential assistants who participated in whole or in part on behalf of the invited senior ED official).
4. Records produced should also include records of incoming and outgoing telephone calls (including “desk” phones and mobile phones) made or received by all of the officials listed in Item 1 during the period from January 21, 2021, through the time the search for these records is conducted. Please include a description of how these records were obtained and who obtained them. If a designated custodian of official records at ED obtained these records, please identify that person by name and official position.
5. All visitor logs used, maintained, and/or created during the period January 20, 2021, through the time the search for these records is conducted for the following ED locations:
  - a. Lyndon Baines Johnson (LBJ) Department of Education Building  
400 Maryland Avenue, SW  
Washington, D.C. 20202
  - b. Potomac Center Plaza (PCP)  
550 12<sup>th</sup> Street, SW  
Washington, D.C. 20202
  - c. Union Center Plaza (UCP)  
830 1<sup>st</sup> Street, NE  
Washington, D.C. 20202

## 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 requestor<sup>8</sup> 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.”<sup>9</sup> Upon request, ED must “promptly” make the requested records available to the requester.<sup>10</sup> Notably, covered agency records include materials provided to ED by both private and governmental organizations.<sup>11</sup> 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,<sup>12</sup> ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.<sup>13</sup> 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.”<sup>14</sup>

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.<sup>15</sup>

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.

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<sup>8</sup> 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).

<sup>9</sup> *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

<sup>10</sup> 5 U.S.C. § 552(a)(3)(A).

<sup>11</sup> *Id.* at 144.

<sup>12</sup> 5 U.S.C. § 552(a)(3)(A)(i)

<sup>13</sup> *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

<sup>14</sup> 5 U.S.C. § 552(a)(3)(B).

<sup>15</sup> 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



FOIA”<sup>16</sup> 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 TIH 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 policy-making and implementing operations and activities. Provision of the requested records will provide the public with a clearer understanding of the access of advocacy groups and activists to 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 interactions of advocacy groups and activists (and the existence of recorded communications of those interactions) with Senior Officials at the U.S. Department of Education since January 20, 2021. Please contact me immediately if DFI’s request for a fee waiver is not granted in full.

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<sup>16</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



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](mailto:paul.moore@dfipolicy.org).

Sincerely yours,

/s/ \_\_\_\_\_

Paul R. Moore  
Senior Counsel

Defense of Freedom Institute for Policy Studies, Inc.

**Attachment: Appendix A**



## APPENDIX A

### **Secretary Miguel Cardona**

Sheila Nix  
Scott Sargrad  
Ben Miller  
Donna Harris-Aikens  
Montserrat Garibay  
Nick Simmons  
Hayley Matz Meadvin  
Chris Soto  
Amy Loyd  
Eloy Ortiz Oakley  
Maggie Murphy  
Cristina Flores  
Amanda DelGiudice  
Jordan Johnson  
Larry Bowden  
Anna Hartge  
Aileen Kim

### **Deputy Secretary Cindy Marten**

Joaquin Tamayo  
Doralicia “Allie” Aguilera  
Staci Monreal

### **Under Secretary James Kvaal**

Julie Morgan  
Jordan Matsudaira  
Melanie Muenzer  
Julie Margetta Morgan  
Clare McCann  
Brian Bowsbey

### **Office for Civil Rights**

Catherine Lhamon  
Suzanne Goldberg  
Monique Dixon





Ramin Taheri  
Jasmine Bolton  
Alice Abrokwa  
Hannah Zack  
Addie Zinsner  
Seth Galanter  
Jady Hsin  
Laurie Monk

### **Office of Communications and Outreach**

LaWanda Toney  
Rachel Thomas  
Ben Halle  
Aaliyah Samuel  
Deven Comen  
Kelly Leon  
Ben Cobley  
Tiffany Taber  
Chauncey Alexander  
Vanessa Harmoush  
Kevin Lima  
Precious McKesson

### **Office of Elementary and Secondary Education**

Ian Rosenblum  
Levi Bohanan  
Abel McDaniels

### **Office of Federal Student Aid**

Richard Cordray

### **Office of the General Counsel**

Elizabeth "Lisa" Brown  
Emma Leheny  
Toby Merrill  
Greg Schmidt  
Joanna Darcus  
William Desmond  
Gypsy Moore  
Jessa Mirtle



## **Office of Legislation and Congressional Affairs**

Gwen Graham  
Rachel Bird Niebling  
Blanchi Roblero  
Alex Payne  
Marco Sanchez  
Kalila Winters  
Stephen Cekuta  
Lakeisha Steele

## **Office of Planning, Evaluation, and Policy Development**

Roberto Rodriguez  
Harris-Akins  
Jessica Cardichon  
Nick Lee  
Juliana Herman  
Sara Garcia  
Tariq Habash  
Loredana Valtierra

## **Office of Postsecondary Education**

Michelle Asha Cooper  
Antoinette Flores  
Rich Williams  
Clarence “CJ” Powell  
Heather Ward  
Tiwanda Burse

## **Office of Special Education and Rehabilitative Services**

Glenna Gallo  
Katy Neas  
Valerie Williams  
Kabrillen Jones  
Meghan Whitaker  
Sue Swenson