

February 18, 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 Related to Borrower Defense to Repayment Policies**  
(DFI FOIA No. 100-5-22)

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.

On February 16, 2022, the U.S. Department of Education (“ED”) announced its approval of an additional \$415 million in discharges of student loans under the Borrower Defense to Repayment Program (“BD”).<sup>1</sup> Since January 20, 2021, ED has used BD regulations to forgive approximately \$2 billion in student loans.<sup>2</sup> Notably, this constitutes only one part of the Biden Administration’s aggressive unilateral cancellation of student loan debt, which cancellation now totals nearly \$16 billion.<sup>3</sup> Concurrent with its approval of the \$415 million in additional discharges of student loans, on February 16, 2022, ED also announced an additional six month delay in its student loan collection responsibilities (*i.e.*, through November 2022).<sup>4</sup> ED’s discharge of student loans and

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<sup>1</sup> See 34 C.F.R. § 685.206.

<sup>2</sup> Adam S. Minsky, “Biden Administration Approves \$415 Million In New Student Loan Forgiveness Under Troubled Program: Key Details,” FORBES (February 16, 2022), <https://www.forbes.com/sites/zackfriedman/2022/02/17/education-department-halts-collection-of-student-loans-through-november/?sh=36c8d57938f7>.

<sup>3</sup> Zach Friedman, “Biden Has Cancelled \$15 Billion Of Student Loans,” FORBES (January 26, 2022), <https://www.forbes.com/sites/zackfriedman/2022/01/26/biden-has-cancelled-15-billion-of-student-loans/?sh=6178883f7fa5>.

<sup>4</sup> Zach Friedman, “Education Department Halts Collection Action on Student Loans Through November,” FORBES (February 17, 2022),



the new additional delay in collection enforcement comes despite record job growth for American workers<sup>5</sup> and massive financial aid made available to students experiencing COVID-19 related financial hardships through the CARES Act.<sup>6</sup>

On March 18, 2021, ED announced revocation of its previous formula for considering BD claims by student borrowers, instituted by Secretary of Education Betsy DeVos,<sup>7</sup> and replacing it with a “streamlined approach” to fully (rather than partially) discharge student debt and effectively diminishing the requirement that student claimants prove that they were knowingly misled by colleges.<sup>8</sup> The streamlined approach enables ED officials to more swiftly and less judiciously award all claims seeking discharge of borrower debt against proprietary colleges found by ED to have engaged in prohibited activities (*e.g.*, deceptive advertising regarding post-graduate employment opportunities).

ED’s return to loosened requirements for asserting and awarding BD claims against proprietary colleges appears to come at the behest of particularly allied interest groups radically opposed to federal student lending benefitting students’ rights to attend proprietary colleges. One such organization, “The Project on Predatory Student Lending” (“PPSL”) (part of Harvard Law School’s “Legal Services Center”), claims to be the “leading legal organization representing students against the predatory for-profit college industry.”<sup>9</sup> PPSL openly advocates for ED to stop all federal funding available to students to attend proprietary colleges – even without any accusation of BD-related misconduct by proprietary colleges.

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<https://www.forbes.com/sites/zackfriedman/2022/02/17/education-department-halts-collection-of-student-loans-through-november/?sh=5e7086b738f7>.

<sup>5</sup> Reade Pickert, “U.S. Sees Record Job Growth in 2021 After Millions Lost in 2020,” BLOOMBERG (January 7, 2022), <https://www.bloomberg.com/news/articles/2022-01-07/u-s-sees-record-job-growth-in-2021-after-millions-lost-in-2020>.

<sup>6</sup> See

<https://www2.ed.gov/about/offices/list/ope/caresact.html#:~:text=This%20bill%20allotted%20%242.2%20trillion,Emergency%20Relief%20Fund%2C%20or%20HEERF>. The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), passed by Congress on March 27, 2020 and providing approximately \$14 billion for relief to ED’s Office of Postsecondary Education (“OPE”). Additional supplemental \$22.7 billion was provided on January 5, 2021. A significant portion of these funds were intended for students experiencing financial hardships because of COVID-19.

<sup>7</sup> Michael Stratford, “DeVos orders partial loan relief for many duped student borrowers,” POLITICO (December 6, 2019), <https://www.politico.com/news/2019/12/06/devos-student-loan-relief-077539>.

<sup>8</sup> Danielle Douglas-Gabriel, “Cardona scraps DeVos policy, will fully cancel debt of many students defrauded by colleges,” WASHINGTON POST (March 18, 2021), <https://www.washingtonpost.com/education/2021/03/18/student-loans-borrower-defense-cardona/>.

<sup>9</sup> See <https://predatorystudentlending.org/about-the-project/>.



Numerous other similarly-aligned entities and individuals (identified below in Item 1), strongly opposed to the rights of students to attend the college of their choice with the support of federal student loans, appear to be making considerable impact on the Biden Administrations ED’s policies, which appear targeted against proprietary colleges and in favor of traditional colleges and universities.<sup>10</sup>

Notably, ED’s apparent regulatory hostility to proprietary colleges, evidenced by its new BD policies, comes at a time when student interest in proprietary colleges has increased while interest in traditional colleges and universities has decreased.<sup>11</sup> Another close ally of the Biden Administration’s antagonism toward proprietary colleges is The Brookings Institution, which notes the recent “alarming rise” of undergraduate enrollment at proprietary colleges (compared to enrollment at public colleges) during the pandemic.<sup>12</sup>

It appears that ED’s new BD policies are designed to unfairly prevent the increasing role of proprietary colleges, the ability of American students to attend the colleges of their choosing, and to simultaneously enhance the position of traditional public colleges and universities, insulating the latter from competition and providing unfair advantages.

DFI thus seeks records and information related to the formation and revision of ED’s BD policies, implemented 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, including but not limited to electronic mail (“email”), texts, letters, memoranda, and other documentation from the following entities and individuals to any and all ED officials from January 20, 2021, through the date the search is conducted, which reference “Rulemaking on Borrower Defense” or “Borrower Defense

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<sup>10</sup> Krisztina Pusok and Edward Longe, “New Study: Discriminatory Regulation in Higher Education and the Role of Proprietary Colleges,” THE AMERICAN CONSUMER INSTITUTE, CENTER FOR CAREER RESEARCH (October 29, 2021), <https://www.theamericanconsumer.org/2021/10/new-study-discriminatory-regulations-in-higher-education-and-the-role-of-proprietary-colleges/>.

<sup>11</sup> Sarah Butrymowicz and Meredith Kolodner, “For-Profit Colleges, Long Troubled, See Surge Amid Pandemic,” NEW YORK TIMES (June 17, 2020), <https://www.nytimes.com/2020/06/17/business/coronavirus-for-profit-colleges.html>.

<sup>12</sup> Stephanie Riegg Cellini, “The alarming rise in for-profit college enrollment,” THE BROOKINGS INSTITUTION (November 2, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/11/02/the-alarming-rise-in-for-profit-college-enrollment/>.



to Repayment” or “Defense to Repayment” or “Borrower Defense” or “Borrower Defense Claim” or “34 C.F.R. § 685.206” or “Section 206” or “Borrower Defense Application” or “DeVos formula” or “partial relief” or “full relief” or “predatory” or “recruiting practices” or “deposition” or “subpoena” or “Westwood College” or “Marinello Schools of Beauty” or “Court Reporting Institute” or “ITT Technical Institute” or “Minnesota School of Business/Globe University” or “DeVry University” or “DeVry” or “Villalba v. Navient” or “Pratt v. Cardona” or “Britt v. Florida Career College” or “NYLAG v. Cardona” or “Vara v. Cardona” or “Sweet v. DeVos” or “Sweet v. Cardona” or “Sweet” or “Judge William Alsup” or “Project & NSLDN v. Department of Education” or “Calvillo Manriquez v. Cardona” or “Colon v. DeVos:”

- a. Project on Predatory Student Lending
- b. Legal Services Center of Harvard Law School
- c. The Debt Collective
- d. Center for American Progress
- e. American Federation of Teachers
- f. National Association of Student Financial Aid Administrators
- g. Center for Responsible Lending
- h. American Association of University Women (AAUW)
- i. National Association for College Admission Counseling
- j. National Consumer Law Center
- k. Consumer Federation of California
- l. National Education Association
- m. Student Defense
- n. Education Trust
- o. Institute for College Access & Success
- p. Housing and Economic Rights Advocates
- q. Century Foundation
- r. Generation Progress
- s. Public Counsel
- t. Public Good Law Center
- u. The Institute for College Access and Success (TICAS)
- v. Young Invincibles
- w. National Student Legal Defense Network
- x. Student Borrower Protection Center
- y. Eileen Connor
- z. Somaliyah Al-Mahdi
- aa. Rebecca Eisenbrey
- bb. Rebecca Ellis
- cc. Kate Manning Kennedy
- dd. Deanne Loonin
- ee. Margaret O’Grady
- ff. Victoria Roytenberg
- gg. Eric Schmidt
- hh. John Sigel



ii. Michael Turi  
jj. Claire L. Torchiana  
kk. Joseph E. Jaramillo,  
ll. Natalie Ann Lyons,  
mm. Kyra A. Taylor  
nn. Toby Rachel Merrill  
oo. Yan Cao  
pp. David Halperin  
qq. Thomas Gokey  
rr. Beth Stein  
ss. Justin Draeger  
tt. Julia Barnard  
uu. Daniel Zibel  
vv. Aaron Ament  
ww. James Cole, Jr.  
xx. Alex Elson  
yy. Emily Goldman  
zz. Kirin Jessel  
aaa. Eric Rothschild  
bbb. Libby DeBlasio Webster  
ccc. Ben Kaufman  
ddd. Amber Saddler  
eee. Mike Pierce  
fff. Kate Bulger  
ggg. Doug Lewis  
hhh. Daniel Hanley  
iii. Chris Hicks

2. All records, including but not limited to email, texts, letters, memoranda, and other documentation from any and all ED officials to any and all of the entities and persons listed in Item 1, from January 20, 2021, through the date the search is conducted, which reference “Rulemaking on Borrower Defense” or “Borrower Defense to Repayment” or “Defense to Repayment” or “Borrower Defense” or “Borrower Defense Claim” or “34 C.F.R. § 685.206” or “Section 206” or “Borrower Defense Application” or “DeVos formula” or “partial relief” or “full relief” or “predatory” or “recruiting practices” or “deposition” or “subpoena” or “Westwood College” or “Marinello Schools of Beauty” or “Court Reporting Institute” or “ITT Technical Institute” or “Minnesota School of Business/Globe University” or “DeVry University” or “DeVry” or “Villalba v. Navient” or “Pratt v. Cardona” or “Britt v. Florida Career College” or “NYLAG v. Cardona” or “Vara v. Cardona” or “Sweet v. DeVos” or “Sweet v. Cardona” or “Sweet” or “Judge William Alsup” or “Project & NSLDN v. Department of Education” or “Calvillo Manriquez v. Cardona” or “Colon v. DeVos.”



3. All records, including but not limited to email, texts, letters, memoranda, and other documentation from any and all ED officials and government contractors assigned to ED (*i.e.*, independent personnel contracted by the federal government to provide professional expertise and support directly or indirectly to ED officials) from January 20, 2021, through the date the search is conducted, which reference “Rulemaking on Borrower Defense” or “Borrower Defense to Repayment” or “Defense to Repayment” or “Borrower Defense” or “Borrower Defense Claim” or “34 C.F.R. § 685.206” or “Section 206” or “Borrower Defense Application” or “DeVos formula” or “partial relief” or “full relief” or “predatory” or “recruiting practices” or “deposition” or “subpoena” or “Westwood College” or “Marinello Schools of Beauty” or “Court Reporting Institute” or “ITT Technical Institute” or “Minnesota School of Business/Globe University” or “DeVry University” or “DeVry” or “Villalba v. Navient” or “Pratt v. Cardona” or “Britt v. Florida Career College” or “NYLAG v. Cardona” or “Vara v. Cardona” or “Sweet v. DeVos” or “Sweet v. Cardona” or “Sweet” or “Judge William Alsup” or “Project & NSLDN v. Department of Education” or “Calvillo Manriquez v. Cardona” or “Colon v. DeVos.”

## 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>13</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>14</sup> Upon

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<sup>13</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>14</sup> *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).



request, ED must “promptly” make the requested records available to the requester.<sup>15</sup> Notably, covered agency records include materials provided to ED by both private and governmental organizations.<sup>16</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>17</sup> ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.<sup>18</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>19</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>20</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.
- 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

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<sup>15</sup> 5 U.S.C. § 552(a)(3)(A).

<sup>16</sup> *Id.* at 144.

<sup>17</sup> 5 U.S.C. § 552(a)(3)(A)(i)

<sup>18</sup> *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

<sup>19</sup> 5 U.S.C. § 552(a)(3)(B).

<sup>20</sup> 5 U.S.C. § 552(a)(6)(A)(i).



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>21</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 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.

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<sup>21</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



### **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 BD policies, which policies are highly relevant to student borrowers and taxpayers. Disclosure of the requested materials will illuminate ED's BD operations (e.g., rulemaking and enforcement decisions). 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).

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."<sup>22</sup> 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

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<sup>22</sup> See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



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).

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, the formation and enforcement of its new Borrower Defense to Repayment policies. Provision of the requested records will meaningfully inform the general public about significant developments in ED policies affecting both student borrowers and the public. As noted above, ED's BD policies implicate billions of dollars in taxpayer money, the financial livelihood and college choices of students, and whether those policies are unfairly targeted against proprietary colleges and in favor of public colleges and universities. 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 newly implemented BD policies. 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](mailto:paul.moore@dfipolicy.org).

Sincerely yours,

*/s/ Paul R. Moore*

Paul R. Moore, Senior Counsel

Defense of Freedom Institute for Policy Studies, Inc.