

May 4, 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 “Governing for Impact” Communications with the U.S. Department of Education
(DFI FOIA No. 100-18-22)

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 January 20, 2021, the U.S. Department of Education (“ED”) has enacted radical shifts in various ED policies¹ and has announced its intent to enact significant additional policy changes. Among other significant developments, ED’s dramatic policy shifts regard student debt repayment², delaying collection of student loans³, repealing Title IX due process protections for

¹ Laura Meckler and Danielle Douglas-Gabriel, “Biden’s mammoth education agenda would expand the federal role from cradle to college,” THE WASHINGTON POST (April 21, 2021), <https://www.washingtonpost.com/education/2021/04/21/biden-education-spending-race-proposals/>.

² Nancy Cook, Jarrell Dillard, and Emma Kinery, “Biden Eyes Student-Loan Forgiveness Starting at \$10,000,” BLOOMBERG (April 29, 2022), <https://www.bloomberg.com/news/articles/2022-04-29/biden-eyes-targeted-student-loan-forgiveness-starting-at-10-000>.

³ Zach Friedman, “Education Department Halts Collection Action on Student Loans Through November,” FORBES (February 17, 2022), <https://www.forbes.com/sites/zackfriedman/2022/02/17/education-department-halts-collection-of-student-loans-through-november/?sh=43e02a6c38f7>.



survivors and the accused⁴, redefining gender⁵, collecting sexual identity information from young students⁶, permitting biological males to compete against girls and women in competitive scholastic athletics⁷, undermining the Charter School Program⁸, altering the Public Service Loan Forgiveness program to further dramatically dismiss student loan debt⁹, and initiating an “Agency Equity Plan” to re-order the award of grants and other federal aid based on racial, sexual, and other demographic criteria¹⁰.

The Office of Information and Regulatory Affairs (“OIRA”) is the executive branch’s “central authority” for the review and approval of proposed and final regulations issued by federal agencies, consistent with the President’s policies.¹¹ Prior to her appointment as President Joe Biden’s acting administrator of OIRA, Sharon Block¹² publicly enunciated a very untraditional vision of OIRA’s role - not as a dispassionate agency regulatory lead, but as a regulatory coordinator where OIRA’s staff act as “experts in how to seek out stakeholders and assess appropriate weight to their input” and to “put[] its expertise in service of a progressive agenda.”¹³ During a “listening tour” with twenty-one other like-minded public policy advocates for the “Roadmap 2021 Transition Project,” OIRA’s Block expressed her passionate enthusiasm for the involvement of a progressive policy infrastructure to more efficiently impose the Biden Administration’s policy agenda: “I’m jumping out of my seat with excitement about this idea.”¹⁴

⁴ William E. Trachman, “Joe Biden Abandons Due Process,” NATIONAL REVIEW (October 4, 2021), <https://www.nationalreview.com/2021/10/joe-biden-abandons-due-process/>.

⁵ Oriana Gonzalez, “Education Department extends Title IX protections to transgender students,” AXIOS (June 16, 2021), <https://www.axios.com/education-title-ix-transgender-biden-a3ca1a9f-e836-48b4-b925-833c23dc75b9.html>.

⁶ See <https://blog.ed.gov/2021/11/announcing-the-proposed-data-elements-for-the-2021-22-crdc/#more-31002>.

⁷ Madeline Osburn, “Biden Administration To Demand Colleges Erase Women’s Sports, Due Process, Free Speech, and Men and Women,” THE FEDERALIST (April 4, 2022), <https://thefederalist.com/2022/04/04/biden-administration-to-demand-colleges-erase-womens-sports-due-process-free-speech-and-men-and-women/>.

⁸ Editorial Board, “Backlash Against Biden’s Limits on Charter Schools,” THE WALL STREET JOURNAL (April 19, 2022), https://www.wsj.com/articles/backlash-against-joe-biden-on-charters-education-department-rules-charter-schools-program-miguel-cardona-11650057608?mod=hp_opin_pos_5.

⁹ Katie Lobosco, “Public Service Loan Forgiveness: 100,000 borrowers are eligible so far under new rules,” CNN (March 9, 2022), <https://www.cnn.com/2022/03/09/politics/student-loan-public-service-forgiveness-waiver/index.html>.

¹⁰ See <https://www2.ed.gov/documents/equity/2022-equity-plan.pdf>.

¹¹ See <https://www.whitehouse.gov/omb/information-regulatory-affairs/>.

¹² See <https://lwp.law.harvard.edu/people/sharon-block>.

¹³ Sharon Block, “Why Bolster the Regulatory Gatekeeper?,” THE AMERICAN PROSPECT (April 24, 2020), <https://prospect.org/day-one-agenda/why-bolster-the-regulatory-gatekeeper/>.

¹⁴ Other listening tour participants included Muneer Ahmad (Yale Law), Aaron Ament (Student Defense), Peter Colavito (ex-SEIU), Aman George (Democracy Forward), Jeff Hauser (Revolving



The “listening tour” was organized by a progressive organization known as “Governing for Impact” (“GFI”), which describes itself as a regulatory policy shop seeking to “build progressive power at the state and federal level.”¹⁵ GFI is financially supported by the “Open Society Foundations”¹⁶ which is funded with more than \$32 billion¹⁷ from billionaire mega-political-donor (to Democratic political causes¹⁸) George Soros.¹⁹

GFI appears to be justified in its boast of influence, with little apparent space (if any) between its list of progressive policy proposals and actual policy results at ED since January 20, 2021, including ED’s policies on the discharge of student loan debt, Title IX, transgender issues, public student loan forgiveness, loan servicer regulations, and school discipline guidance.²⁰ By its account, GFI diligently pressed more than fifty legal policy memoranda, outlining its agenda and rulemaking strategies to achieve the agenda, to at least ten federal agencies, including ED²¹ and other policy makers within the Biden Administration (such as OIRA acting administrator Block²²) to implement GFI’s ED agenda. Indeed, review of GFI’s “listening tour” participants (discussed

Door Project), Robert Jackson (NYU Law, SEC), Chris Jennings (Obama White House), Katie Keith (Georgetown Law), Matt Kend (Public Citizen), MB Maxwell (Open Society Foundations), Robin Lloyd (Giffords), Joel McElvain (Dept. of Justice), Nina Mendelson (Michigan Law), Amit Narang (Public Citizen), Raj Nayak (Assistant Secretary, Dept. of Labor), Sabeel Rahman (OIRA), Ganesh Sitaraman (Vanderbilt University, former Elizabeth Warren staff), Narayan Subramanian (Dept. of Energy), Maggie Thomas (White House Domestic Climate), Haeyoung Yoon (National Domestic Workers Alliance), Dan Zibel (National Student Legal Defense Network). *See* Governing for Impact’s “Concept Proposal,” <file:///C:/Users/16179/Downloads/571516341-Governing-for-Impact-s-internal-slide-deck-on-its-operations.pdf>.

¹⁵ *See* <https://governingforimpact.org/about/>.

¹⁶

See

https://www.opensocietyfoundations.org/grants/past?filter_keyword=Governing+for+Impact.

¹⁷ *See* <https://www.opensocietyfoundations.org/george-soros>.

¹⁸ Elena Schneider, “Soros pours \$125M into super PAC ahead of midterms,” POLITICO (January 28, 2022), <https://www.politico.com/news/2022/01/28/soros-pours-125m-into-super-pac-ahead-of-midterms-00002847>.

¹⁹ *See* <https://www.georgesoros.com/philanthropy/>.

²⁰ *See* Governing for Impact’s “Concept Proposal,” <file:///C:/Users/16179/Downloads/571516341-Governing-for-Impact-s-internal-slide-deck-on-its-operations.pdf>.

²¹ *See* <https://governingforimpact.org/our-work/>.

²² Office of Management and Budget Director Shalanda Young noted of Block’s time at OIRA, that “[u]nder Sharon’s [Block’s] leadership, OIRA has played a crucial role in advancing the president’s agenda – from powering our historic economic recovery and combatting the pandemic, to tackling the climate crisis and advancing equity.” Joe Schoffstall, “Secretive Soros-funded group works behind the scenes with Biden admin on policy, documents show,” FOXNEWS (April 26, 2022), <https://www.foxnews.com/politics/secretive-soros-funded-group-works-behind-scenes-biden-admin-policy-documents>.



supra) reveals that its “collaboration with partners” appears to effectively embed current high-ranking administration officials with highly politicized “grassroots groups and other progressive advocates,” as promised.²³

DFI is concerned that ED’s proposed rulemaking on issues of tremendous significance to American students, families, and taxpayers, has been directly related to policies formulated and proposed by “Governing for Impact” and related organizations and individuals, particularly given the known relationship amongst OIRA officials, GFI, and its known efforts to impact ED policies.

The public has an interest in knowing which outside interest groups may be affecting important ED policies on student loan debt cancellation, suspension of ED’s student loan collection efforts, anticipated revisions of ED’s Title IX 2020 Rule (which Rule established due process protections for survivors and the accused), re-defining sex, collecting sexual identity information from young students, permitting biological males to compete with girls and women in competitive scholastic athletic events, undermining the Charter School Program, altering the Public Service Loan Forgiveness program, and instituting an Equity Action Plan to re-order the award of grants and other federal aid based on racial, sexual, and other demographic criteria.

DFI thus seeks ED records related to its communications with certain organizations and individuals which may reflect the influence of those organizations and individuals on important ED policies 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 between the following organizations and individuals (listed below) and ED officials (see “Custodians” *infra*), including but not limited to electronic mail (“email”), texts, letters, memoranda, and other documentation, from January 20, 2021, through the date the search is conducted:
 - a. Governing for Impact (GFI)
 - b. Governing for Impact Action Fund (GFI AF)
 - c. Open Societies Foundations (OSF)
 - d. Open Society-U.S.
 - e. National Domestic Workers Alliance (NDWA)
 - f. National Student Legal Defense Network (NSLDN)
 - g. National Women’s Law Center (NWLC)

²³ See <https://governingforimpact.org/about/>.



- h. NARAL Pro-Choice America
- i. Arabella Advisors
- j. Sixteen Thirty Fund
- k. New Venture Fund
- l. Roosevelt Institute
- m. The Franklin & Eleanor Roosevelt Institute
- n. Democracy Alliance
- o. Government By and For Millennial America
- p. Center for American Progress
- q. Sam Fulwood III
- r. Ilyse Hogue
- s. Tom Perriello
- t. Jess Morales Rocketto
- u. Rachael Klarman
- v. Will Dobbs-Allsopp
- w. Wes Gobar
- x. Lila Greenwood
- y. Sharon Block
- z. Sabeel Rahman
- aa. Aaron Ament
- bb. Dan Zibel
- cc. Ganesh Sitaraman

Custodians

The search for records described in Item 1 should be limited to “ED officials” within the Office of the Secretary, Office of the Deputy Secretary, Office of Elementary & Secondary Education, Office of Postsecondary Education, Office of Federal Student Aid, Office of the General Counsel, Office for Civil Rights, Office of Small and Disadvantaged Business Utilization, Industry Liaison, Office of Communications and Outreach, 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 requestor²⁴ 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.”²⁵ Upon request, ED must “promptly” make the requested records available to the requester.²⁶ Notably, covered agency records include materials provided to ED by both private and governmental organizations.²⁷ 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,²⁸ ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.²⁹ 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.”³⁰

²⁴ 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).

²⁵ *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

²⁶ 5 U.S.C. § 552(a)(3)(A).

²⁷ *Id.* at 144.

²⁸ 5 U.S.C. § 552(a)(3)(A)(i).

²⁹ *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

³⁰ 5 U.S.C. § 552(a)(3)(B).



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.³¹

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 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

³¹ 5 U.S.C. § 552(a)(6)(A)(i).



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”³² 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 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 the impact of particular outside organizations and individuals on wide-ranging ED policies (including but not limited to student loan debt, Title IX due process protections, the rights of girls and women to engage in competitive scholastic athletics with other girls and women, Public Service Loan Forgiveness, the Charter School Program, and the Equity Action Plan) that are highly relevant to the interests of students, families, and taxpayers. Disclosure of the requested

³² *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



materials will illuminate ED’s policies and planning (*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 and more recently, a March 2022 analysis of DOJ policies distributed by a leading news magazine. DFI personnel also frequently offer commentary and analyses on radio and television 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.”³³ 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

³³ See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



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, the impact of particular outside organizations and individuals on a wide range of ED policies. Provision of the requested records will meaningfully inform the general public about significant developments in wide-ranging ED policies and rulemaking, which affect millions of American students, their families, and taxpayers. These are significant policy 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 the formation and execution of ED's policies and related rulemaking, which 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.