

May 11, 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: EXPEDITED PROCESSING FOIA REQUEST: Records Related to Deputy General Counsel Toby Merrill's Ethics Pledge, Ethics Pledge Waivers, and Conflict of Interest Communications
(DFI FOIA No. 100-19-22)

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 engaged in significant policy and enforcement efforts regarding federal student aid for students who attend for-profit schools,¹ including anticipated rulemaking related to ED’s Borrower Defense to Repayment regulations.² Pursuant to its new policies, ED has liberally applied its “Closed School Discharge³” and “Borrower Defense Loan Discharge⁴” programs to eliminate significant amounts of student loan debt incurred by students attending for-profit colleges. For example, in February 2022, ED approved \$415 Million in borrower defense claims, thereby discharging the repayment obligations

¹ Lauren Camera, “Biden Administration Moves to Undo DeVos Education Agenda,” U.S. NEWS & WORLD REPORT (January 18, 2022), <https://www.usnews.com/news/education-news/articles/2022-01-18/biden-administration-moves-to-undo-devos-education-agenda>.

² See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1840-AD53>.

³ See <https://studentaid.gov/manage-loans/forgiveness-cancellation/closed-school>.

⁴ See <https://studentaid.gov/borrower-defense/>.



of more than 16,000 borrowers.⁵ That discharge followed ED’s August 2021 elimination of more than \$1.1 Billion in student loan debt under the Closed School Discharge program.⁶

ED’s unprecedented unilateral “elimination” of student loan debt under these programs appears to be part of a much wider effort by the Biden Administration to “forgive” student loan debt⁷ and its repeated suspension of its obligation to collect student loan debt.⁸ As President Biden’s press secretary recently noted, “[n]ot a single person in this country has paid a dime on federal student loans since the president took office.”⁹ Sen. Elizabeth Warren (D-MA) has called for ED to cancel as much as \$50,000 in student loan debt for each borrower¹⁰ even if “the bottom 60% of households receive only 34% of the benefit,”¹¹ as noted in a study published by the Brookings Institution.

On July 6, 2021, ED announced that it had hired as Deputy General Counsel (“DGC”) Toby Merrill, who founded and directed the “Project on Predatory Student Lending at the Legal Services Center of Harvard Law School” (“PPSL”).¹² Merrill’s PPSL has “been involved in long-running litigation involving the Borrower Defense to Repayment program” and “helped draft a key legal analysis arguing that the President has authority to cancel student loan debt through executive action.”¹³ This loan forgiveness policy is currently under consideration by President Biden, Secretary Cardona, and their advisers.

⁵ See <https://www.ed.gov/news/press-releases/education-department-approves-415-million-borrower-defense-claims-including-former-devry-university-students>.

⁶ See <https://www.ed.gov/news/press-releases/extended-closed-school-discharge-will-provide-115k-borrowers-itt-technical-institute-more-11b-loan-forgiveness>.

⁷ 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>.

⁸ 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>.

⁹ Annie Nova, “Biden administration signals a decision on student loan forgiveness could come soon,” CNBC (April 27, 2022), <https://www.cnbc.com/2022/04/27/administration-signals-student-loan-forgiveness-decision-may-come-soon.html>.

¹⁰ See <https://www.warren.senate.gov/newsroom/press-releases/warren-schumer-pressley-colleagues-president-biden-can-and-should-use-executive-action-to-cancel-up-to-50000-in-federal-student-loan-debt-immediately>.

¹¹ Adam Looney, “How progressive is Senator Elizabeth Warren’s loan forgiveness proposal?”, UP FRONT (Brookings Institution) (April 24, 2019), <https://www.brookings.edu/blog/up-front/2019/04/24/how-progressive-is-senator-elizabeth-warrens-loan-forgiveness-proposal/>.

¹² See <https://www.ed.gov/news/press-releases/us-department-education-announces-more-biden-harris-appointees-2>.

¹³ Adam S. Minsky, “Did The Biden Administration Just Send A Big Signal On Student Loan Cancellation?”, FORBES (July 6, 2021),



PPSL claims to be at the forefront of litigation against the “predatory for-profit college industry” and reports that it represents “more than one million borrowers” and that its litigation has “directly resulted in the cancellation of over \$2.5 billion” in student loan debts.¹⁴ PPSL has repeatedly filed suit against ED over its administration of the Title IV student loan program, has been involved in at least fourteen state and federal civil lawsuits, and has filed multiple amicus briefs in matters implicating ED policies regarding student loan debt and regulation of for-profit colleges and universities.¹⁵ In one such matter (*Vara, et al. v. DeVos, et al.*, 19-12175-LTS (D. Mass)), ED withdrew its appeal to the First Circuit Court of Appeals in July 2021, aligning with PPSL’s position on the matter. Through ED’s changed litigation position, PPSL achieved a “long-awaited victory [when] the U.S. Department of Education filed a motion¹⁶ dropping its appeal,” thereby agreeing to “comply with a federal court order to grant the Massachusetts Attorney General’s borrower defense application on behalf of 7,200 borrowers”¹⁷

Merrill’s PPSL-backed battle against for-profit colleges and universities has not changed since her arrival at ED. On January 20, 2022, for instance, Merrill used her personal Twitter account (which includes a link to PPSL’s Twitter account although not also to her current employer, ED) to retweet a policy statement from the official account of the Director of the Consumer Financial Protection Bureau that “[t]oday, the @CFBP announced it will begin examining the operations of post-secondary schools, such as for-profit colleges, that extend private loans directly to students.”¹⁸

On January 20, 2021, President Biden issued Executive Order 13989, entitled “Ethics Commitments by Executive Branch Personnel”¹⁹ (“EO”), which provided a two-year prohibition by political appointees on participation in matters in which a former employer or client represents a party, “if the appointee served that employer or client during the two years prior to the appointment.”²⁰ Under the EO, Merrill is required to sign ED’s ethics pledge and, if applicable, any ethics pledge waivers, and disclosure of potential conflicts of interest in ED’s pending matters (including litigation).

DFI is concerned that as ED determines important litigation positions, formulates Borrower Defense rulemaking, and pursues other wide-ranging student loan debt discharge policies (involving matters of direct litigatory interest to PPSL and to ED), the involvement (and any

<https://www.forbes.com/sites/adamminsky/2021/07/06/did-the-biden-administration-just-send-a-big-signal-on-student-loan-cancellation/?sh=6e471e6e4e6d>.

¹⁴ See <https://predatorystudentlending.org/about-the-project/impact/>.

¹⁵ See <https://predatorystudentlending.org/cases/>.

¹⁶ See <https://studentaid.gov/announcements-events/vara>.

¹⁷ See <https://predatorystudentlending.org/news/press-releases/7200-borrowers-cheated-by-corinthian-colleges-to-finally-secure-debt-relief-as-education-department-drops-legal-appeal-press-release/>.

¹⁸ See <https://twitter.com/chopracfcb/status/1484182160198098954>.

¹⁹ See <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01762.pdf>.

²⁰ See <https://www.doi.gov/sites/doi.gov/files/summary-of-biden-ethics-pledge-eo-13989.pdf>.



appropriate limitations on that involvement) of ED’s political appointees, including Merrill, should be fully disclosed to the Department and the public.

The public has an urgent interest in knowing that covered political appointees, particularly those assigned responsibilities involving ED’s litigation positions and policy formulations in which a former employer or client is or represents a party²¹ (as appears to be the case with Merrill and her former organization, PPSL, which she founded and led and which has brought multiple federal and State civil lawsuits involving ED’s direct interests), have properly recorded all relevant potential ethical conflicts.

DFI thus seeks ED’s expedited processing of records related to DGC Merrill’s ethics obligations and ED’s handling of those ethical obligations. This request has been narrowly drawn by DFI to more readily facilitate ED’s ability to respond in a timely and meaningful manner to the request.

Expedited Processing Request

I, the undersigned, hereby certify to the truth of the circumstances described herein, pursuant to the requirements of 35 C.F.R. § 5.21(i)(2)(iii):

As discussed *supra*, issuance of ED’s impactful Borrower Defense rulemaking is pending²² and ED has already engaged in and apparently plans to be further engaged in unprecedented applications of its Closed School Discharge and Borrower Defense Loan Discharge programs, repeated suspension of its student loan debt collection responsibilities, and consideration of student loan debt forgiveness. These policies, potentially involving more than \$1.75 trillion,²³ affect millions of students, borrowers, lenders, families, and taxpayers. Implementation of ED’s student loan debt policies is of enormous consequence to all Americans.

Therefore, pursuant to 35 C.F.R. § 5.21(i)(2)(i)(B), there is an urgent need for DFI to inform the public about actual and alleged Federal Government activity, thereby justifying EXPEDITED PROCESSING of this request. As discussed *infra*, DFI is primarily engaged in disseminating such information to inform the public about actual and alleged Federal Government activities such as those policy and rulemaking activities by ED (described in detail herein). In addition, pursuant to 35 C.F.R. § 5.21(i)(2)(i)(C), ED may find that “other circumstances” demonstrate a compelling need for expedited processing, to include the considerable impact of ED’s student loan debt enforcement policies (as described *supra*) and the involvement in the formulation of those policies and related litigation positions of DGC Merrill.

Merrill’s ethics records (as described *infra*) should be easily accessible by ED and, given her almost certain proximity to the formulation of ED’s various student loan debt discharge policies

²¹ See <https://www.doi.gov/sites/doi.gov/files/summary-of-biden-ethics-pledge-eo-13989.pdf>.

²² See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1840-AD53>.

²³ Emma Kinery and Alex Tanzi, “Biden’s \$1.75 Trillion Student Debt Problem by the Numbers,” TIME (April 30, 2022), <https://time.com/6172402/biden-student-debt-problem/>.



and previous founding of and involvement with PPSL (including PPSL’s litigation against ED), the public has a right to know about ED’s handling of Merrill’s ethical obligations to not participate in particular matters in which her previous employer, PPSL, either was a party or represented a party.

I, the undersigned, hereby certify to ED that the circumstances described herein are true and accurate to the best of my knowledge and belief, so justifying expedited processing of this request for records, as required by 35 C.F.R. § 5.21(i)(2)(iii).

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 expedited provision of records within your possession and/or control:

Requested Records

DFI requests that ED produce the following records as quickly as possible (or within twenty (20) business days as required by statute):

1. Any and all ethics agreements (*e.g.*, ethics pledge(s) and recusal protocol) for Toby Merrill
2. Any and all ethics pledge waivers issued by ED for Toby Merrill (including but not limited to authorizations pursuant to “Personal and business relationships,” at 5 C.F.R. § 2635.502)
3. Identification of the specific factors cited by ED for any and all ethics pledge waivers issued by ED regarding Toby Merrill
4. Any and all records indicating recusal determinations issued by ED regarding Toby Merrill

Custodians

The search for records described in Item 1 should be limited to the following:

- a. All attorneys and non-attorneys assigned to the Ethics Division of the Office of the General Counsel on or after January 20, 2021
- b. “ED officials” within the Office of the Secretary, Office of the Deputy Secretary, Office of Legislation and Congressional Affairs, Office of Communications and Outreach, Office of the Undersecretary, Office of Postsecondary Education, Office of Federal Student Aid, and Office of the General Counsel with the classification or job titles:



1. “PAS” (Presidential Appointments Requiring Senate Confirmation)
2. “PA” (Presidential Appointments Not Requiring Senate Confirmation)
3. “NC-SES” (Non-Career Senior Executive Service)
4. “SES” (Career Senior Executive Service)
5. “SC” (Schedule C Confidential or Policymaking Positions)
6. Chief Operating Officer, Federal Student Aid
7. Deputy Chief Operating Officer, Federal Student Aid
8. Chief Enforcement Officer, Federal Student Aid
9. Chief Financial Officer, Federal Student Aid
10. Executive Assistant to the Chief Operating Officer, Federal Student Aid
11. Chief of Staff, Federal Student Aid
12. Senior Advisor for Management, Federal Student Aid
13. Senior Advisor, 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

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).



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

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

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).

³¹ 5 U.S.C. § 552(a)(6)(A)(i).



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”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.

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



I further certify to ED that 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 ethical involvement of particular ED personnel in the formulation of important ED litigation and policy matters regarding its student loan debt policies that are highly relevant to the interests of students, families, and taxpayers. Disclosure of the requested 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).

As an organization primarily engaged in the dissemination of information to inform the public about actual or alleged Federal Government activities and the urgent (*i.e.*, timely) need to so inform the public, **DFI satisfies the criteria for expedited processing of its request.**

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.

I further certify to ED that, 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 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 ethical involvement of particular ED personnel in the formulation of important ED litigation and policy matters regarding its student loan debt 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

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



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 or if DFI's request for expedited processing is not granted.

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.