

May 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 the U.S. Department of Education's Communications with Legal Advocacy Groups and Associated Individuals Regarding Title IV Student Loan Program Litigation and Related Policies
(DFI FOIA No. 100-23-22)

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

ED has been the subject of multiple federal and state lawsuits regarding its Title IV student loan program policies during recent years. Plaintiffs and related parties (including several legal advocacy groups) in many of those lawsuits have publicly attempted to prevent or dramatically alter various student loan program policies through lawsuits against ED.

One such legal advocacy group, Harvard Law School’s Project on Predatory Student Lending (“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.¹⁰ Of note, on July 6, 2021, ED announced that it had hired as its Deputy General Counsel, Toby Merrill, who founded and directed PPSL.¹¹

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.¹² In one such matter (*Vara, et al. v. DeVos, et*

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://predatorystudentlending.org/about-the-project/impact/>.

¹¹ See <https://www.ed.gov/news/press-releases/us-department-education-announces-more-biden-harris-appointees-2>.

¹² See <https://predatorystudentlending.org/cases/>.



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 motion¹³ 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 . . .”¹⁴

Other legal advocacy groups and associated individuals have similarly supported lawsuits and other public efforts in opposition to ED’s previous Title IV student loan program policies. The transformation of ED’s policies and related litigation positions since January 20, 2021, is of potentially profound interest to millions of students, borrowers, lenders, families, and taxpayers, and may involve more than \$1.75 trillion¹⁵ at a time when the American economy is already facing perilous headwinds.¹⁶ The American people have a right to know about the communications of these legal advocacy groups with ED officials concerning ED’s Title IV student loan program litigation positions and related policies.

DFI thus seeks records of ED’s communications with certain legal advocacy groups and associated individuals regarding ED’s Title IV student loan program litigation positions and related 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 at 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 *to ED Officials* (see Custodians, *infra*) from the following entities and associated individuals from January 20, 2021, through the date the search is conducted, which reference “student loan cancellation” or “forgiveness” or “BD” or “BDR” or “borrower defense rule” or “borrower defense” or “borrower defense process” or “borrower defense applications” or “unresolved borrower defense

¹³ See <https://studentaid.gov/announcements-events/vara>.

¹⁴ 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/>.

¹⁵ 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/>.

¹⁶ Bernhard Warner, “Goldman Sachs calculates a worst-case recession forecast as investors dump stocks and crypto,” FORTUNE (May 16, 2022), <https://fortune.com/2022/05/16/goldman-sachs-recession-forecast-spx-stocks-crypto/>.



claims” or “sham borrower defense process” or “predatory student debt” or “predatory lending” or “seizure of borrower tax refunds” or “unlawful partial relief methodologies” or “gainful employment” or “GE” or “negotiated rulemaking” or “neg reg” “or “collecting” or “collections” or “default” or “extensions” or “student loan payment pause” or “cancellation” or “student borrowers” or “defrauded borrowers” or “partial relief” or “discharge” or “Pell Grants” or “for-profit” or “Consumer Financial Protection Bureau” or “CFPB” or “Rohit” or “Chopra” or “DeVos” or “Betsy” or “Villalba v. ITT” or “Villalba” or “Navient” or “Bauer v. DeVos” or “Bauer” or “Williams v. King” or “Williams” or “Vara v. DeVos” or “Vara” or “Calvillo Manriquez v. Cardona” or “Manriquez” or “Pratt v. DeVos” or “Pratt” or “Sweet v. Cardona” or “Sweet” or “Britt v. Florida Career College” or “Britt” or “NYLAG v. Cardona” or “NYLAG” or “Colon v. DeVos” or “Colon” or “Dieffenbacher v. DeVos” or “Dieffenbacher” or “Marinello” or “DeVry” or “ITT” or “Corinthian” or “Ninth Circuit Court of Appeals” or “Ninth Circuit” or “9th Circuit” or “deposition” or “sanctions” or “contempt”:

- a. Public Citizen Litigation Group
- b. Housing & Economic Rights Advocates
- c. Student Borrower Protection Center
- d. Center for Responsible Lending
- e. National Consumer Law Center
- f. Student Debt Crisis Center
- g. Institute for Policy Integrity
- h. New York University School of Law
- i. National Student Legal Defense Network
- j. Consumers Union
- k. Americans for Financial Reform
- l. Columbia Legal Services
- m. Justice Catalyst
- n. American Oversight
- o. New Jersey Citizen Action
- p. Secure Democracy
- q. Center for American Progress
- r. Berkeley Center for Consumer Law & Economic Justice
- s. Young Invincibles
- t. Adam R. Pulver
- u. Adina H. Rosenbaum
- v. Joseph Jaramillo
- w. Natalie Lyons
- x. Claire Torchiana
- y. Jeremy S. Golden
- z. Richard L. Revesz
- aa. Max Sarinsky
- bb. Jack Lienke
- cc. Martha U. Fulford



dd. Persis Yu
ee. Mike Pierce
ff. Winston Berkman-Breen
gg. Amy Czulada
hh. Chris Hicks
ii. Ben Kaufman
jj. Amber Saddler
kk. Chuck Bell
ll. Eileen Connor
mm. Lisa Donner
nn. Richard Dubois
oo. Merf Ehman
pp. Ben Elga
qq. Austin Evers
rr. Kristin McGuire
ss. Ted Mermin
tt. Holly Petraeus
uu. John Podesta
vv. Ed Mierzwinski
ww. Charley Olena
xx. Angela Peoples
yy. Nick Rathod
zz. Beverly Brown Ruggia
aaa. Jay Urwitz
bbb. Dan Zibel
ccc. Aaron Ament
ddd. James Cole, Jr.
eee. Alex Elson
fff. Emily Goldman
ggg. Kirin Jessel
hhh. Abigail Moats
iii. Eric Rothschild
jjj. Isabel Tessier
kkk. Libby DeBlasio Webster
lll. Mohamed Abdel-Kader
mmm. Saba Bireda
nnn. Jacek Pruski
ooo. John Robinson
ppp. Joy Silvern

2. All records, including but not limited to electronic mail (“email”), texts, letters, memoranda, and other documentation *from ED officials* (see Custodians, *infra*) to any and all of the entities and associated individuals listed in Item 1 from January 20, 2021, through the date the search is conducted, which reference "student loan cancellation”



or “forgiveness” or “BD” or “BDR” or “borrower defense rule” or “borrower defense” or “borrower defense process” or “borrower defense applications” or “unresolved borrower defense claims” or “sham borrower defense process” or “predatory student debt” or “predatory lending” or “seizure of borrower tax refunds” or “unlawful partial relief methodologies” or “gainful employment” or “GE” or “negotiated rulemaking” or “neg reg” or “collecting” or “collections” or “default” or “extensions” or “student loan payment pause” or “cancellation” or “student borrowers” or “defrauded borrowers” or “partial relief” or “discharge” or “Pell Grants” or “for-profit” or “Consumer Financial Protection Bureau” or “CFPB” or “Rohit” or “Chopra” or “DeVos” or “Betsy” or “Villalba v. ITT” or “Villalba” or “Navient” or “Bauer v. DeVos” or “Bauer” or “Williams v. King” or “Williams” or “Vara v. DeVos” or “Vara” or “Calvillo Manriquez v. Cardona” or “Manriquez” or “Pratt v. DeVos” or “Pratt” or “Sweet v. Cardona” or “Sweet” or “Britt v. Florida Career College” or “Britt” or “NYLAG v. Cardona” or “NYLAG” or “Colon v. DeVos” or “Colon” or “Dieffenbacher v. DeVos” or “Dieffenbacher” or “Marinello” or “DeVry” or “ITT” or “Corinthian” or “Ninth Circuit Court of Appeals” or “Ninth Circuit” or “9th Circuit” or “deposition” or “sanctions” or “contempt”.

Custodians

The search for records described in Items 1 and 2 should be limited to “ED officials” within the Office of the General Counsel who are classified as any of the following, referenced with the following job titles, or assigned to its Postsecondary Education Division:

- a. “PAS” (Presidential Appointments Requiring Senate Confirmation)
- b. “PA” (Presidential Appointments Not Requiring Senate Confirmation)
- c. “NC-SES” (Non-Career Senior Executive Service)
- d. “SC” (Schedule C Confidential or Policymaking Positions)
- e. Any attorney of any classification assigned to the Postsecondary Education Division in the Office of the General Counsel

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 requestor¹⁷ 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.”¹⁸ Upon request, ED must “promptly” make the requested records available to the requester.¹⁹ Notably, covered agency records include materials provided to ED by both private and governmental organizations.²⁰ 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,²¹ ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.²² 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.”²³

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.²⁴

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

¹⁷ 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).

¹⁸ *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

¹⁹ 5 U.S.C. § 552(a)(3)(A).

²⁰ *Id.* at 144.

²¹ 5 U.S.C. § 552(a)(3)(A)(i).

²² *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

²³ 5 U.S.C. § 552(a)(3)(B).

²⁴ 5 U.S.C. § 552(a)(6)(A)(i).



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



FOIA²⁵ and provide a sufficiently detailed justification and rationale for each non-disclosure and the statutory exemption upon which the non-disclosure relies.

- Please provide responsive records in electronic format by email, native format by mail, or PDF or TIF format on a USB drive. If it helps speed production and eases ED's administrative burden, DFI welcomes provision of the records on a rolling basis. Responsive records sent by mail should be addressed to the Defense of Freedom Institute for Policy Studies, 1455 Pennsylvania Avenue NW, Suite 400, Washington, D.C. 20004.

Fee Waiver Request

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.33 and 34 C.F.R. § 5.32(b)(1)(ii), DFI requests a waiver of all fees associated with this FOIA request for agency records.

Disclosure of the requested records is in the public interest.

Disclosure of the requested records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and because disclosure of the information contained within the requested records is not primarily in the commercial interests of DFI.

The disclosed materials are likely to contribute significant information to the public's understanding of the involvement and impact of interested outside legal advocacy groups and associated individuals 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.

²⁵ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



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.”²⁶ 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 involvement and impact of outside legal advocacy groups and associated individuals in the formulation of important ED litigation and related policy matters regarding its student loan debt policies. Provision of the requested records will meaningfully inform the general

²⁶ See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



public about significant developments in wide-ranging ED policies and rulemaking, which affect millions of American students, 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.