

June 3, 2022

**VIA ELECTRONIC MAIL**

U.S. Department of Labor  
Office of the Solicitor of Labor  
200 Constitution Avenue, NW  
Washington, D.C. 20210  
foiarequests@dol.gov  
ATTN: Chief FOIA Officer Seema Nanda

**Re: FOIA Request: Records Related to Teachers' Union(s) Communications with the U.S. Department of Labor Concerning Overtime Pay Regulations**  
(DFI FOIA No. 100-26-22)

Dear Chief FOIA Officer:

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.

As part of its Fall 2021 regulatory agenda, the U.S. Department of Labor (“DOL”) announced its review of regulations governing the Fair Labor Standards Act’s (“FLSA”) minimum wage and overtime requirements, particularly regarding current exemptions for executive, administrative, professional, outside sales, and computer employees.<sup>1</sup> In anticipation of releasing a Notice of Proposed Rulemaking (“NPRM”) regarding revising exemptions to FLSA overtime pay requirements, DOL announced that its Wage and Hour Division would hold a series of virtual listening sessions in from April through June 2022 to consider “questions . . . about the salary level above which the overtime exemption may apply, the duties test, and workplace and flexibility issues”<sup>2</sup> and described the sessions as seeking the input of “workers, advocates [and] union representatives on possible revisions to overtime regulations.”<sup>3</sup>

Currently, employees who meet certain earnings thresholds are exempt from FLSA’s overtime pay requirements if they are employed in a bona fide executive, administrative, or professional (“EAP”) capacity.<sup>4</sup> The governing regulations, at 29 C.F.R. § 541(c), specifically bar from FLSA

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<sup>1</sup> See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1235-AA39>.

<sup>2</sup> See <https://www.dol.gov/agencies/whd/overtime-listening>.

<sup>3</sup> See <https://www.dol.gov/newsroom/releases/whd/whd20220429>.

<sup>4</sup> See <https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-A/part-541>.



overtime pay requirements “any employee employed in the capacity of academic administrative personnel or teacher<sup>5</sup> in elementary or secondary schools”<sup>6</sup> and recognizes that “faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities . . . are a recognized part of the schools’ responsibility in contributing to the educational development of the student.”<sup>7</sup>

The FLSA’s overtime exemption for “Learned Professional[s]” applies when employees are paid on a salary basis above a certain threshold (currently \$684 per week) and perform certain primary duties.<sup>8</sup> Absent the exemption, the FLSA would require that teachers working over forty hours in a work week be paid “at a rate not less than time and one-half their regular rates of pay.”<sup>9</sup>

On May 25, 2022, the National Education Association (“NEA”), which claims to be the largest U.S. labor union and represents public school teachers, demanded that DOL “rescind[] the [FLSA’s] teacher exclusion regulation,” citing a 2021 study that “more than 1.5 million teachers” would stand to financially benefit if the DOL eliminates the exclusion.<sup>10</sup> The NEA stated that “[t]he U.S. Department of Labor must use its regulatory authority to raise compensation standards in the teaching profession . . .”<sup>11</sup> In its letter to Secretary Martin Walsh, the NEA and thirty-four partner organizations declared that there was a “long-smoldering crisis of teacher shortages” that, because of the COVID-19 pandemic, had “accelerated to a five-alarm fire” necessitating DOL’s rescinding of the teacher exclusion.<sup>12</sup>

DFI is concerned that DOL is under extraordinary lobbying pressure by the NEA and other labor unions claiming to represent the interests of American workers, particularly as regards the FLSA’s learned professional exemption and its inclusion of elementary and secondary teachers. DFI believes the American people are entitled to know about these tremendous outside pressures, particularly as DOL has indicated rulemaking on the matter is imminent. DFI thus seeks records and information related to DOL’s policies regarding the FLSA’s teacher overtime exemption since January 20, 2021.

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations of DOL, 29 C.F.R. § 70.1 (General Provisions: Production or Disclosure of Information or Materials), DFI makes the following request for records within your possession and/or control:

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<sup>5</sup> 29 C.F.R. § 541.303 (“Teachers”).

<sup>6</sup> See <https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-A/part-541>.

<sup>7</sup> 29 C.F.R. § 541.303 (b).

<sup>8</sup> See <https://www.dol.gov/agencies/whd/fact-sheets/17d-overtime-professional>.

<sup>9</sup> See <https://www.dol.gov/agencies/whd/overtime>.

<sup>10</sup> See <https://www.nea.org/about-nea/media-center/press-releases/nea-urges-labor-secretary-walsh-rescind-unjust-teacher-pay-regulation>.

<sup>11</sup> See *Id.*

<sup>12</sup> See <https://www.nea.org/sites/default/files/2022-05/2022.25.5%20End%20FLSA%20Teacher%20Exclusion%20Coalition%20Letter.pdf>.



## Requested Records

DFI requests that DOL 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 to DOL officials (see “Custodians” *infra*) from January 20, 2021, through the date the search is conducted, which reference “Teacher Exclusion Regulation” or “overtime pay for teachers” or “overtime protections” or “teacher wage penalty” or “29 CFR § 541.303(d)” or “Fair Labor Standards Act” or “FLSA” or “Economic Policy Institute” or “EPI” or “Learning Policy Institute” or “LPI”:
  - a. National Education Association
  - b. American Federation of Teachers
  - c. Center for American Progress
  - d. Center for Popular Democracy
  - e. Jobs with Justice
  - f. Economic Policy Institute
  - g. National Employment Law Project
  - h. National Partnership for Women & Families
  - i. National Women’s Law Center
  - j. Service Employees International Union
  - k. Interreligious Network for Worker Solidarity
  - l. Arise Chicago
  - m. NEA-Alaska
  - n. Arizona Education Association
  - o. California Teachers Association
  - p. Delaware State Education Association
  - q. Education Minnesota
  - r. Federal Education Association
  - s. Georgia Association of Educators
  - t. Idaho Education Association
  - u. Iowa State Education Association
  - v. Kansas National Education Association
  - w. Maine Education Association
  - x. Michigan Education Association
  - y. Missouri NEA
  - z. Ohio Education Association
  - aa. Oklahoma Education Association
  - bb. Oregon Education Association
  - cc. Pennsylvania State Education Association
  - dd. National Education Association Rhode Island
  - ee. South Dakota Education Association



- ff. Utah Education Association
  - gg. Virginia Education Association
  - hh. Wisconsin Education Association Council
  - ii. Washington Education Association
  - jj. Wyoming Education Association
2. All records, including but not limited to electronic mail (“email”), texts, letters, memoranda, and other documentation from DOL officials (see “Custodians” *infra*) to any and all of the entities listed in Item 1 from January 20, 2021, through the date the search is conducted, which reference “Teacher Exclusion Regulation” or “overtime pay for teachers” or “overtime protections” or “teacher wage penalty” or “29 CFR § 541.303(d)” or “Fair Labor Standards Act” or “FLSA” or “Economic Policy Institute” or “EPI” or “Learning Policy Institute” or “LPI”.

## Custodians

The search for records described in Items 1 and 2 should be limited to “DOL officials” within the Office of the Secretary, Office of the Deputy Secretary, Office of the Solicitor of Labor, Office of the Assistant Secretary for Administration & Management, Office of the Chief Information Officer, Office of Public Engagement, Office of the Assistant Secretary for Policy, Employment & Training Administration, Chief Evaluation Office, Office of Public Affairs, Wage and Hour Division, Office of Congressional & Intergovernmental 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)

## 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 DOL, as a covered agency under 5 U.S.C. § 551(1), to timely disclose requested agency records to the requestor<sup>13</sup> if DOL (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 request, DOL must “promptly” make the requested records available to the requester.<sup>15</sup> Notably, covered agency records include materials provided to DOL 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 DOL’s published rules regarding the time, place, any fees, and procedures to be followed,<sup>17</sup> DOL must conduct a search calculated to find responsive records in DOL’s control at the time of the request.<sup>18</sup> In addition, the records produced by DOL 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, DOL 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 DOL.<sup>20</sup>

Consistent with FOIA guidelines, DFI requests the following regarding the provision of the requested records:

- DOL should immediately act to protect and preserve all records potentially responsive to this request, notifying any and all responsible officials of this preservation request and verifying full compliance with the preservation request. This matter may be subject to litigation, making the immediate initiation of a litigation hold on the requested materials necessary.

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<sup>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).

<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).



- DOL 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 DOL’s IT capabilities to conduct the search. To constitute an adequate search for responsive records, DOL 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.
- DOL should search all relevant records and information retention systems (including archived recorded information systems) which may contain records regarding DOL’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. DOL 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 DOL’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 DOL calculated to deflect its compliance with FOIA’s requirements.
- DOL 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).
- DOL should narrowly construe and precisely identify the statutory basis for any constraint which it believes may prevent disclosure.
- If DOL determines that any portions of otherwise responsive records are statutorily exempt from disclosure, DFI requests that DOL disclose reasonably segregable portions of the records.
- For any responsive records withheld in whole or part by DOL, DOL 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 TIH format on a USB drive. If it helps speed production and eases DOL'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 29 C.F.R. § 70.41, 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 DOL's Fair Labor Standards Act overtime pay policies for teachers, which are highly relevant to the interests of students, workers, families, and taxpayers. Disclosure of the requested materials will illuminate DOL's relevant overtime pay 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 DOL operations and governance), but will benefit the general public and other groups and entities with non-commercial interests in DOL'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 DOL 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).

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<sup>21</sup> *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 regarding the activities of multiple federal agencies).

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 29 C.F.R. § 70.41(2)(iii).

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 DOL, 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 U.S. Department of Education policies widely distributed by one of the nation’s largest news providers in February 2022 and more recently, a March 2022 analysis of U.S. Department of Justice policies distributed by a leading news magazine. DFI personnel have also offered commentary and analyses on radio news programs and in various public forums regarding the activities of multiple federal agencies).

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 DOL and, more specifically, its Fair Labor Standards Act overtime pay policies for teachers, which are highly relevant to the interests of students, workers, families, and taxpayers. Provision of the requested

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



records will meaningfully inform the general public about significant developments in DOL's overtime pay policies and rulemaking, which affect millions of American students, workers, families, and taxpayers. 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 DOL's prompt attention to this request for records pursuant to FOIA, which will provide important information to the American people regarding DOL's FLSA overtime pay policies and rulemaking, which policies and related rulemaking are of tremendous interest to students, workers, 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](mailto:paul.moore@dfipolicy.org).

Sincerely yours,

/s/ Paul R. Moore

Paul R. Moore, Senior Counsel

Defense of Freedom Institute for Policy Studies, Inc.