

June 14, 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: Communications with U.S. Senator Elizabeth Warren
(DFI FOIA No. 100-28-22)

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.

U.S. Senator Elizabeth Warren (D-MA) has publicly and repeatedly called for the U.S. Department of Education (“ED”) to cancel as much as \$50,000 in student loan debt for each borrower.¹ Sen. Warren also recently explained how that debt cancellation policy may accrue partisan political benefit for the Democratic Party in the upcoming midterm elections², even if “the bottom 60% of households receive only 34% of the benefit,”³ as noted in a study published by the Brookings Institution. During her 2020 presidential campaign, Sen. Warren announced a massive \$1.25 trillion plan for student loan debt cancellation, “universal free public college,”⁴ and promised to

¹ 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>.

² Elizabeth Warren, “Democrats Can Avoid Disaster in November,” THE NEW YORK TIMES (April 18, 2022), <https://www.nytimes.com/2022/04/18/opinion/elizabeth-warren-democrats-biden-midterms.html>.

³ 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/>.

⁴ See <https://elizabethwarren.com/plans/public-education>.



freeze federal funding of the Charter Schools Program.⁵ Sen. Warren also opposed ED’s Title IX regulations, implemented by Secretary Elisabeth DeVos in August 2020, that strengthened the due process and privacy rights of students and faculty in campus sexual assault matters.⁶

Although Sen. Warren’s presidential effort did not succeed, many of her policy proposals have been implemented in full or in part by ED. Since January 20, 2021, ED has initiated sweeping changes to existing programs “that would constitute the largest federal investment in at least half a century” and would form a “cradle-to-college plan . . . infusing hundreds of billions of dollars into virtually every level of the system.”⁷ Proposed program expansions relate to early universal preschool,⁸ tuition-free community college,⁹ changing enforcement of Title IX anti-discrimination policies,¹⁰ and cancellation of billions of dollars in student loan debt.¹¹

In fact, President Biden’s press secretary recently boasted that “[n]ot a single person in this country has paid a dime on federal student loans since the president took office.”¹² ED has

⁵ Valerie Strauss, “Elizabeth Warren made charter school supporters mighty angry. Now they are targeting her,” *The Washington Post* (October 30, 2019), <https://www.washingtonpost.com/education/2019/10/30/elizabeth-warren-made-charter-school-supporters-mighty-angry-now-they-are-targeting-her/>.

⁶ Erik Ortiz and Tyler Kingkade, “Betsy DeVos releases final changes to campus sexual assault policies,” *NBC NEWS* (May 6, 2020), <https://www.nbcnews.com/news/us-news/betsy-devos-releases-final-changes-campus-sexual-assault-policies-n1094491>.

⁷ Laura Meckler and Danielle Douglas-Gabriel, “Biden’s mammoth education agenda would expand the federal role from cradle to college,” *WASHINGTON POST* (April 21, 2021), <https://www.washingtonpost.com/education/2021/04/21/biden-education-spending-race-proposals/>.

⁸ Jeff Mordock, “Biden’s \$390B universal preschool plan based on troubled Head Start program,” *THE WASHINGTON TIMES* (November 15, 2021), <https://www.washingtontimes.com/news/2021/nov/15/bidens-390-billion-universal-preschool-plan-based-/>.

⁹ Abigail Johnson Hess, “Here’s what Biden’s free community college plan would cost – and what it would save students,” *CNBC* (July 22, 2021), <https://www.cnbc.com/2021/07/22/what-bidens-free-community-college-plan-would-cost-and-save-americans.html>.

¹⁰ Michael Stratford, “Biden administration expects to unveil Title IX proposals in April,” *POLITICO* (December 15, 2021), <https://www.politico.com/news/2021/12/15/title-ix-proposals-april-524871>.

¹¹ Zach Friedman, “Biden Has Cancelled \$15 Billion of Student Loans,” *FORBES* (January 26, 2022), <https://www.forbes.com/sites/zackfriedman/2022/01/26/biden-has-cancelled-15-billion-of-student-loans/?sh=25ba86b77fa5>.

¹² 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>.



initiated unilateral “elimination” of student loan debt¹³ and has repeatedly suspended its obligation to collect student loan debt.¹⁴ On June 1, 2022, ED announced the “largest-ever loan forgiveness” of approximately \$5.8 billion in student loan debt, affecting about 560,000 borrowers.¹⁵ ED’s student loan debt policies, potentially involving more than \$1.75 trillion,¹⁶ affect millions of students, borrowers, lenders, families, and taxpayers.

ED’s radical policy changes appear in many respects to largely reflect Sen. Warren’s education plan. Notably, Sen. Warren’s access to Secretary Cardona on policy matters has included the Secretary’s participation in a roundtable discussion with her and Sen. Chuck Schumer¹⁷ and successful placement of policy allies in critical Departmental positions.¹⁸

To understand the impact of Sen. Warren and her staff on ED’s policy changes, DFI requests records of communications between Senator Warren, her official staff, and particular ED officials 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 provision of records within your possession and/or control:

¹³ 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>.

¹⁴ 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>.

¹⁵ Zoe Richards, “Education Department to cancel \$5.8B in debt for students of Corinthian Colleges,” NBC NEWS (June 1, 2022), <https://www.nbcnews.com/politics/white-house/education-department-cancel-58-billion-debt-students-corinthian-colleg-rcna31560>.

¹⁶ 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/>.

¹⁷ See <https://www.ed.gov/news/press-releases/secretary-education-joins-senator-elizabeth-warren-and-senator-chuck-schumer-roundtable-discussion-student-loan-borrowers-and-advocates>.

¹⁸ Ayelet Sheffey, “Biden’s Education Dept. just hired Elizabeth Warren’s student-loans expert, who studied predatory lending at Harvard,” BUSINESS INSIDER (July 6, 2021), <https://www.businessinsider.com/biden-education-department-toby-merrill-predatory-student-loans-elizabeth-warren-2021-7>; Azmi Haroun, “Biden administration taps Warren ally to lead Office of Federal Student Aid, a promising sign for efforts to wipe out student debt,” BUSINESS INSIDER (May 4, 2021), <https://www.businessinsider.in/politics/world/news/biden-administration-taps-warren-ally-to-lead-office-of-federal-student-aid-a-promising-sign-for-efforts-to-wipe-out-student-debt/articleshow/82381044.cms>.



Requested Records

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

1. All records of communications, including but not limited to electronic mail (“email”), email attachments, texts, letters, memoranda, calendar invitations, calendar entries, meeting notices, meeting agendas, draft legislation, talking points, and other documentation of communications including written summaries thereof (see Custodians, *infra*), with U.S. Senator Elizabeth Warren and her current and former staff, including any person using an email address ending in warren.senate.gov, from January 20, 2021, through the date the search is conducted.

Custodians

The search for records described in Item 1 should be limited to “ED officials” within the Office of the Secretary, Office of Legislation and Congressional Affairs, and Office of the General Counsel, who are classified as any of the following or referenced with the following job titles:

- 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 employee of whatever classification working in the Office of Legislation and Congressional Affairs
- 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 requestor¹⁹ 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.”²⁰ Upon request, ED must “promptly” make the requested records available to the requester.²¹ Notably, covered agency records include materials provided to ED by both private and governmental organizations.²² 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,²³ ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.²⁴ 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.”²⁵

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.²⁶

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

¹⁹ 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).

²⁰ *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

²¹ 5 U.S.C. § 552(a)(3)(A).

²² *Id.* at 144.

²³ 5 U.S.C. § 552(a)(3)(A)(i).

²⁴ *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

²⁵ 5 U.S.C. § 552(a)(3)(B).

²⁶ 5 U.S.C. § 552(a)(6)(A)(i).



- 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 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”²⁷ 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 a particular United States Senator and her official staff in the formulation of important ED policy matters 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

²⁷ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



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.”²⁸ 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 a particular United States Senator and her official staff

²⁸ See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



in the formulation of important ED policy matters. 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, 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.