

June 17, 2022

**VIA FOIAonline**

U.S. General Services Administration  
FOIA Requester Service Center (LG)  
1800 F Street, NW, Room 7308  
Washington, D.C. 20405-0001  
ATTN: FOIA Officer

**Re: FOIA REQUEST: Records of GSA’s Communications with the U.S. Department of Education Regarding Creation of the National Parents and Families Engagement Council**  
(DFI FOIA No. 100-30-22)

Dear 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.

On June 14, 2022, the U.S. Department of Education (“ED”) announced the creation of a “National Parents and Families Engagement Council (“Council”) to “facilitate strong and effective relationships between schools and parents, families and caregivers” and to “foster a collaborative environment” to “serve the best interest[s] of students and ensure they have the academic and mental health support they need. . . .”<sup>1</sup> ED’s announcement indicated that the Council “will reflect the diversity of the education system, including, but not limited to, families of students in public schools, charters, private schools, and homeschool” and will “create a feedback loop” with schools on how American Rescue Plan funds are allocated.<sup>2</sup>

ED appointed fourteen advocacy groups to the Council, including UnidosUS<sup>3</sup> (formerly “the National Council of La Raza”), the National Association for Family, School, and Community Engagement (“NAFSCE”), the National Action Network (“NAN”), the National Parents Union

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<sup>1</sup> See <https://www.ed.gov/news/press-releases/us-department-education-creates-national-parents-and-families-engagement-council-help-ensure-recovery-efforts-meet-students%E2%80%99-needs>.

<sup>2</sup> *Id.*

<sup>3</sup> Mike Gonzalez, “La Raza Finally Loses ‘the Race’,” THE WALL STREET JOURNAL (July 16, 2017) Opinion | Commentary, <https://www.wsj.com/articles/la-raza-finally-loses-the-race-1500229809?mg=prod/accounts-wsj>.



(“NPU”) and ten other organizations generally known for supporting the Biden Administration’s education agenda. In its “feedback loop” role, the Council appears designed to provide an overwhelmingly positive regurgitation of support for ED’s emerging policies.

One prominent Council member, NAN, offers weekly Saturday “Action Rallies” with its founder, president, MSNBC commentator, and former Democratic presidential candidate, the Reverend Al Sharpton, in support of its “modern civil rights agenda.”<sup>4</sup> NAN has hosted and honored various high-profile Democratic Party officials through the years. In a speech to NAN in 2019, former Vice President Joe Biden highlighted his belief in “systematic racism” that “whites don’t like to acknowledge even exists.”<sup>5</sup> NAN, like many of the organizations named to the Council, is predictable in its public alignment with ED’s emerging “equity” policies, including ED’s Equity Action Plan<sup>6</sup> for the allocation of resources based on racial, sexual, and gender identities and undermining the independent character of the Charter School Program.

The NPU created an equity task force and advocates an “equity infused educational recovery” program to guide the allocation of financial resources to schools.<sup>7</sup> Several Council member organizations are notable for segmented representation of American parents and students based on racial distinctions. For example, “Mocha Moms, Inc.” identifies itself as the “premier voice for mothers of color” as it welcomes participants “to our sisterhood.”<sup>8</sup> UnidosUS, claiming to be the nation’s “largest Latino civil rights and advocacy organization, regularly lambasted Secretary Cardona’s predecessor and has tirelessly advocated an education agenda largely indistinguishable from that being implemented by ED since January 2021, including policies on student loan debt cancellation, rollback of Title IX’s protections for girls, women, and accused students and faculty, gender identity, and hostility to for-profit colleges.<sup>9</sup>

Despite the apparent lack of diversity of viewpoints (*i.e.*, diverging from the viewpoints of current ED policymakers) on important education policy matters in the current organizational makeup of the Council, ED plans to use the Council to hold “listening sessions,” to advise and guide the Department on important policies, and to disseminate information.

The Federal Advisory Committee Act (“FACA”) governs the establishment and governance of advisory committees, including advisory councils, in the Executive Branch, requiring that such advisory committees should be established only when determined to be essential, that uniform procedures should govern their establishment, operation, administration, and duration, that the

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<sup>4</sup> See <https://nationalactionnetwork.net/>.

<sup>5</sup> Jenna Amatulli, “Joe Biden: White America Has To Admit There Is Systemic Racism,” THE HUFFINGTON POST (January 21, 2019), [https://www.huffpost.com/entry/joe-biden-white-america-admit-systemic-racism\\_n\\_5c45e193e4b0a8dbe173ac4a](https://www.huffpost.com/entry/joe-biden-white-america-admit-systemic-racism_n_5c45e193e4b0a8dbe173ac4a).

<sup>6</sup> See <https://www2.ed.gov/documents/equity/2022-equity-plan.pdf>.

<sup>7</sup> See <https://nationalparentsunion.org/npu-bill-of-rights/>.

<sup>8</sup> See <https://www.mochamoms.org/i4a/pages/index.cfm?pageid=1>.

<sup>9</sup> See <https://www.unidosus.org/progress-report/looking-ahead-unidosuss-education-policy-team-considers-what-the-biden-administration-will-do-for-public-education/>.



U.S. Congress and the public be kept informed regarding the council’s purpose, membership, activities, and cost, and that the council’s function must be purely advisory.<sup>10</sup> Pursuant to Executive Order 12024, the administrator of the U.S. General Services Administration (“GSA”) is responsible for compliance with FACA within the Executive Branch (through GSA’s Committee Management Secretariat).<sup>11</sup>

In announcing creation of the Council, ED identified its organizational membership and included in its description of the Council’s purpose a declaration from NAFSCE Executive Director Vito Borrello that it will “bring diverse parent voices together to inform the Department’s policies and programs” and will serve as a “*dissemination vehicle* for engaging families . . . in equitable education policy.”<sup>12</sup>

The Council’s “dissemination” role appears to be well outside FACA’s requirements that the Council’s creation be “essential” and that its function should be entirely “advisory.” It also duplicates the role of ED’s Office of Communications and Outreach (“OCO”), which OCO identifies as “engag[ing] the general public, including a wide variety of education, community, business, parent, student, and other organizations, in the U.S. Department of Education’s mission.”<sup>13</sup>

In addition, many of the organizations on the Council are already known public advocates for many of ED’s emerging policy proposals. To the extent membership of the Council is already largely aligned with ED’s policies, ED is acting contrary to one of FACA’s important purposes – offering balanced representation on the Council. FACA’s legislative history is particularly instructive on this point. In the U.S. House Report (Government Operations Committee) No. 92-1017, the House cited the findings of the Special Studies Subcommittee investigation of 1970 regarding the creation and operation of federal advisory committees, indicating Congressional concern that advisory committees (such as the Council) should have a clearly defined mission, balanced representation, and assurance of autonomy (among other guidelines) and that they not be used by special interest groups to promote their private concerns.<sup>14</sup>

The Council’s advisory role appears to be only vaguely described (*e.g.*, “to facilitate strong and effective relationships between schools and parents, families and caregivers”), duplicates the role of OCO, and may exceed permissible advisory committee purposes by acting as “a dissemination vehicle.” FACA simply does not appear to authorize the creation of an advisory committee which has as one of its primary purposes acting as a vehicle for the dissemination of information.

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<sup>10</sup> Pub. L. 92-463, § 1, Oct. 6, 1972, 86 Stat. 770.

<sup>11</sup> See <https://www.gsa.gov/policy-regulations/policy/federal-advisory-committee-act-faca-management-overview>.

<sup>12</sup> See <https://www.ed.gov/news/press-releases/us-department-education-creates-national-parents-and-families-engagement-council-help-ensure-recovery-efforts-meet-students%E2%80%99-needs> (emphasis added).

<sup>13</sup> See <https://www2.ed.gov/about/offices/list/oco/index.html?src=oc>.

<sup>14</sup> See <https://www.gsa.gov/cdnstatic/FACALegislationHistory1972.pdf>, 3495-6.



DFI is concerned that the Council, as constituted and having as a key part of its mission being a “dissemination vehicle,” may not be in compliance with FACA’s clear statutory requirements. DFI, therefore, requests records related to ED’s creation and governance of the National Parents and Families Engagement Council since January 20, 2021.

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations of GSA, 41 C.F.R. Part 105-60 (“Public Availability of Agency Records and Informational Materials”), DFI makes the following request for provision of records within your possession and/or control:

### **Requested Records**

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

1. All non-deliberative communications, including but not limited to electronic mail (“email”), email attachments, texts, letters, memoranda, calendar invitations, calendar entries, and other documentation between Government Services Administration (“GSA”) officials (see “Custodians” *infra*) and the Department of Education (“ED”) regarding the establishment, operation, administration, purpose, membership, activities, and cost(s) of the National Parents and Families Engagement Council, from January 20, 2021, through the date the search is conducted.

### **Custodians**

The search for records described in Item 1 should be limited to GSA officials within the Office of the Administrator, the Committee Management Secretariat, the Office of Communications and Marketing/Office of Strategic Communications, and 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 GSA, as a covered agency under 5 U.S.C. § 551(1), to timely disclose requested agency records to the requestor<sup>15</sup> if GSA (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>16</sup> Upon request, GSA must “promptly” make the requested records available to the requester.<sup>17</sup> Notably, covered agency records include materials provided to GSA by both private and governmental organizations.<sup>18</sup> Upon receipt of a FOIA request that “reasonably” describes the records sought and is in compliance with GSA’s published rules regarding the time, place, any fees, and procedures to be followed,<sup>19</sup> GSA must conduct a search calculated to find responsive records in GSA’s control at the time of the request.<sup>20</sup> In addition, the records produced by GSA 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>21</sup>

Upon receipt of this request, GSA 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 GSA.<sup>22</sup>

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

- GSA 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>15</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>16</sup> *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

<sup>17</sup> 5 U.S.C. § 552(a)(3)(A).

<sup>18</sup> *Id.* at 144.

<sup>19</sup> 5 U.S.C. § 552(a)(3)(A)(i).

<sup>20</sup> *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

<sup>21</sup> 5 U.S.C. § 552(a)(3)(B).

<sup>22</sup> 5 U.S.C. § 552(a)(6)(A)(i).



- GSA 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 GSA’s IT capabilities to conduct the search. To constitute an adequate search for responsive records, GSA 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.
- GSA should search all relevant records and information retention systems (including archived recorded information systems) which may contain records regarding GSA’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. GSA 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 GSA’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 GSA calculated to deflect its compliance with FOIA’s requirements.
- GSA 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).
- GSA should narrowly construe and precisely identify the statutory basis for any constraint which it believes may prevent disclosure.
- If GSA determines that any portions of otherwise responsive records are statutorily exempt from disclosure, DFI requests that GSA disclose reasonably segregable portions of the records.
- For any responsive records withheld in whole or part by GSA, GSA 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>23</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 GSA'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 41 C.F.R. §105-60.807, 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 meaningfully 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 establishment, operation, administration, purpose, membership, activities, and cost of the National Parents and Families Engagement Council and its compliance with the requirements of the Federal Advisory Committee Act, involving important policy matters that are highly relevant to the interests of students, families, and taxpayers. Disclosure of the requested materials will illuminate agency 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 GSA and ED operations and governance), but will benefit the general public and other groups and entities with non-commercial interests in GSA's and 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.

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<sup>23</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 federal agency operations and activities).

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 41 C.F.R. §105-60.807(b)(2)(ii)(B).

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>24</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 GSA, 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 regarding federal agency operations and activities).

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 GSA in its FACA oversight role (here, regarding an advisory council created by ED), including the establishment,

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<sup>24</sup> See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



operation, administration, purpose, membership, activities, and cost of the National Parents and Families Engagement Council and its compliance with the requirements of the Federal Advisory Committee Act, involving important federal policy matters that are highly relevant to the interests of students, families, and taxpayers. Provision of the requested records will meaningfully inform the general public about significant developments related to an important advisory Council involved in ED policies and rulemaking, which affect millions of American students, families, and taxpayers. These records involve the Council's compliance with FACA requirements and related GSA oversight and the Council's operations (which regard significant ED policy issues with tremendous impact on the general public) and are 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 GSA'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 GSA's FACA oversight efforts, impacting ED 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](mailto:paul.moore@dfipolicy.org).

Sincerely yours,

/s/ Paul R. Moore

Paul R. Moore, Senior Counsel

Defense of Freedom Institute for Policy Studies, Inc.