

November 30, 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 Regarding the Department's Internal Decisions and External Communications for its \$3.9 Billion ITT Student Loan Debt Discharge (DFI FOIA No. 100-35-22)

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. DFI includes former U.S. Department of Education (“Department” or “ED”) and other federal agency officials who are experts in education law and policy and the operation of the Department. 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 Department has engaged in massive, unilateral forgiveness of student loan debt through various means, including the unprecedented use of its borrower defense loan discharge program to eliminate significant amounts of debt incurred by students who attended various for-profit schools.¹ The Department’s position regarding the utilization of its borrower defense to repayment program changed dramatically after President Biden’s inauguration and the arrival at the Department of former parties against the Department in various civil lawsuits, including Deputy General Counsel Toby Merrill, who founded and directed the Project on Predatory Student Lending (“PPSL”).² PPSL has been counsel for plaintiffs in multiple federal lawsuits against the Department, including matters involving the Department’s borrower defense loan discharge program.

¹ See <https://studentaid.gov/announcements-events/borrower-defense-update>.

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



On August 16, 2022, the Department announced that it was discharging approximately \$3.9 billion in federal student loans incurred by 208,000 borrowers who had attended the now defunct ITT Technical Institute³ from January 2005 through its closure in September 2016.⁴ The Department boasted that debts of borrowers who had not even applied for discharge of their debt would be automatically cancelled without application or further review.⁵ The Department indicated that it had relied on findings that “ITT defrauded hundreds of thousands of students” by engaging in “widespread and pervasive misrepresentations related to the ability of students to get a job or transfer credits . . .”⁶

In making its discharge decision, the Department appears to have relied in part on a report and recommendations submitted in February 2022 to Secretary Cardona by PPSL (“PPSL Report”),⁷ which represented former ITT students in a lawsuit against ITT’s bankruptcy estate.⁸ In its ITT decision, the Department appears to have fully absorbed PPSL’s recommendation in its report that it should cancel “all outstanding debt [for former students] attributable to ITT” and that it do so without regard for “whether or not the former student has filed a borrower defense application . . .”⁹ In response to sharp criticisms of the Department by PPSL in the Report, the Department’s ITT decision appears to have assented in full to the substance of the critique and adopted the recommendations demanded by PPSL in its lengthy ITT missive to Secretary Cardona.

The Department’s reversal of its previous positions in the ITT discharge matter, culminating in the Department’s August 2022 announcement of a massive automatic full group discharge, reflects consequential policymaking that appears to elevate the interests of particular State Attorneys General and interested parties with historically adversarial positions vis-à-vis the Department (such as PPSL). The Department also appears to have adopted the Consumer Financial Protection Bureau’s (“CFPB”) 2014 findings against ITT which served as the basis for its lawsuit against ITT¹⁰ – when CFPB was led by Richard Cordray, who now serves as the Chief Operating Officer of Federal Student Aid (“FSA”).¹¹ In so doing, the Department has embraced massive discharges of debt without compiling fact-specific determinations or whether a former student has alleged that substantial misrepresentations occurred through an application for discharge.

³ “ITT Technical Closes All Campuses,” CBS NEWS (Sept. 6, 2016),

<https://www.cbsnews.com/baltimore/news/itt-technical-institute-closes-all-campuses/>.

⁴ See <https://www.ed.gov/news/press-releases/education-department-approves-39-billion-group-discharge-208000-borrowers-who-attended-itt-technical-institute>.

⁵ *Id.*

⁶ *Id.*

⁷ See

<https://static1.squarespace.com/static/62d6e418e8d8517940207135/t/62e1a2ab87017e0158ab20b2/1658954418410/ITT-Report.pdf> (“PPSL Report”).

⁸ *Villalba v. ITT Educational Services, Inc. et al.*, No. 1:16-07207-JMC-7A (Bankr. S.D. Ind.).

⁹ See PPSL Report at p. 15.

¹⁰ See <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-for-profit-college-chain-itt-for-predatory-lending/>.

¹¹ See <https://www.ed.gov/news/press-releases/us-department-education-announces-richard-cordray-chief-operating-officer-federal-student-aid>.



In matters involving serious allegations of fraud by a for-profit school with potentially billions of dollars of discharged debt at stake, the Department has an obligation to fully and particularly develop the factual basis for such a discharge(s) before unilaterally announcing such a momentous decision.

The Department and FSA have been entrusted by the American people with more than sufficient resources to impartially and carefully administer the borrower defense discharge program. If such enormous decisions are to be made without properly developed factual findings and with excessive discharges for thousands of student borrowers who never alleged that fraud had occurred (or applied for discharge), taxpayers may be excused for questioning the Department's need for and use of taxpayer resources to support its enforcement and investigatory efforts. In the ITT matter, the Department seems to have completely allied itself with PPSL in its long-declared war against for-profit colleges, largely abandoning its critical obligation to independently investigate, enforce, and protect the interests of students and taxpayers.

DFI believes the American people have a deep interest in the Department's relevant decisions and external communications on the ITT group discharge between Departmental officials and the parties engaged in lawsuits implicating the Department's policies (and other representatives and allies of those parties) 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 requests for provision of records within your possession and/or control:

Requested Records

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

1. All decision memoranda, directives, policy interpretations, or policy guidance related to the ITT group discharge (announced by the Department on Aug. 16, 2022), signed, approved, or otherwise adopted by any of the following Departmental officials beginning on January 20, 2021, through the date the search for the records is conducted:
 - a. Secretary Miguel Cardona
 - b. The Deputy Secretary
 - c. The Under Secretary
 - d. The Assistant Secretary for Postsecondary Education
 - e. The Deputy Assistant Secretary for Higher Education Programs
 - f. The Deputy Assistant Secretary for Policy, Planning, and Innovation
 - g. The Assistant Secretary for Career, Technical, and Adult Education
 - h. The General Counsel
 - i. The Deputy General Counsel for Postsecondary Education
 - j. Chief Operating Officer, Federal Student Aid



- k. Deputy Chief Operating Officer, Federal Student Aid
 - l. Chief Enforcement Officer, Federal Student Aid
 - m. Chief Financial Officer, Federal Student Aid
 - n. Executive Assistant to the Chief Operating Officer, Federal Student Aid
 - o. Chief of Staff, Federal Student Aid
 - p. Senior Advisor for Management, Federal Student Aid
 - q. Senior Advisor, Federal Student Aid
 - r. Ombudsman, Federal Student Aid
 - s. Congressional Team Lead, Federal Student Aid
 - t. Any other political appointee, SES employee, or person holding an administratively determined position in the Office of the Secretary, Office of the Deputy Secretary, Office of the Under Secretary, Office of the Assistant Secretary for Postsecondary Education, Office of Higher Education Programs, Office of Policy, Planning, and Innovation, Office of Career, Technical, and Adult Education, or the Office of the General Counsel, and
 - u. Anyone acting on behalf of any of the individuals listed above, to include administrative assistants or chiefs of staff
2. All communications and correspondence, including but not limited to electronic mail (“email”), email attachments, texts, letters, memoranda, and other documentation between the Departmental officials listed in Item 1 and any of the following non-governmental third parties and related individuals between January 20, 2021, through the date the search for the records is conducted (note: DFI has included the email addresses to the extent the email address domains are known. A search for records affiliated with the names included should be conducted to capture any records involving those organizations and individuals, which/who may have used different email addresses in their communications with Departmental officials):
- a. Project on Predatory Student Lending (predatorystudentlending.org and ppsl.org)
 - b. Legal Services Center at Harvard Law School (legalservicescenter.org)
 - c. Jenner & Block (jenner.com)
 - d. Public Citizen Litigation Group (citizen.org)
 - e. WilmerHale Legal Services Center (legalservicescenter.org)
 - f. Student Borrower Protection Center (protectborrowers.org)
 - g. Center for Responsible Lending (responsiblelending.org)
 - h. National Consumer Law Center (nclc.org)
 - i. Student Debt Crisis Center (studentdebtcrisis.org)
 - j. Institute for Policy Integrity (policyintegrity.org)
 - k. New York University School of Law (law.nyu.edu)
 - l. National Student Legal Defense Network (defendstudents.org)
 - m. Consumers Union (consumerreports.org)
 - n. Americans for Financial Reform (ourfinancialsecurity.org)
 - o. Columbia Legal Services (columbialegal.org)
 - p. Justice Catalyst (justicecatalyst.org)



- q. American Oversight (americanoversight.org)
- r. New Jersey Citizen Action (njcitizenaction.org)
- s. Secure Democracy (influencewatch.org)
- t. Center for American Progress (americanprogress.org)
- u. Berkeley Center for Consumer Law & Economic Justice (law.berkeley.edu)
- v. Young Invincibles (younginvincibles.org)
- w. Adam Pulver
- x. Adina Rosenbaum
- y. Joseph Jaramillo
- z. Natalie Lyons
- aa. Claire Torchiana
- bb. Jeremy Golden
- cc. Melissa Root
- dd. Cathy Steege
- ee. Richard Revesz
- ff. Max Sarinsky
- gg. Jack Lienke
- hh. Martha Fulford
- ii. Persis Yu
- jj. Mike Pierce
- kk. Winston Berkman-Breen
- ll. Amy Czulada
- mm. Chris Hicks
- nn. Ben Kaufman
- oo. Amber Saddler
- pp. Chuck Bell
- qq. Eileen Connor
- rr. Lisa Donner
- ss. Richard Dubois
- tt. Merf Ehman
- uu. Ben Elga
- vv. Austin Evers
- ww. Kristin McGuire
- xx. Ted Mermin
- yy. Holly Petraeus
- zz. John Podesta
- aaa. Ed Mierzwinski
- bbb. Charley Olena
- ccc. Angela Peoples
- ddd. Nick Rathod
- eee. Beverly Brown Ruggia
- fff. Jay Urwitz
- ggg. Dan Zibel
- hhh. Aaron Ament
- iii. James Cole, Jr.



jjj. Alex Elson
kkk. Emily Goldman
lll. Kirin Jessel
mmm. Abigail Moats
nnn. Eric Rothschild
ooo. Isabel Tessier
ppp. Libby DeBlasio Webster
qqq. Mohamed Abdel-Kader
rrr. Saba Bireda
sss. Jacek Pruski
ttt. John Robinson
uuu. Joy Silvern

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 requestor¹² 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.”¹³ Upon request, ED must “promptly” make the requested records available to the requester.¹⁴ Notably, covered agency records include materials provided to ED by both private and governmental organizations.¹⁵ Upon receipt of a FOIA request that “reasonably” describes the records sought

¹² 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).

¹³ *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

¹⁴ 5 U.S.C. § 552(a)(3)(A).

¹⁵ *Id.* at 144.



and is in compliance with ED's published rules regarding the time, place, any fees, and procedures to be followed,¹⁶ ED must conduct a search calculated to find responsive records in ED's control at the time of the request.¹⁷ 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."¹⁸

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.¹⁹

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

- ED should immediately act to protect and preserve all records potentially responsive to this request, notifying any and all responsible officials of this preservation request and verifying full compliance with the preservation request. This matter may be subject to litigation, making the immediate initiation of a litigation hold on the requested materials necessary.
- ED should search all record systems that may contain responsive records, promptly consulting with its information technology (IT) officials to ensure the completeness of the records search by using the full range of ED's IT capabilities to conduct the search. To constitute an adequate search for responsive records, ED should not rely solely on a search of a likely custodian's files by the custodian or representations by that likely custodian, but should conduct the search with applicable IT search tools enabling a full search of relevant agency records, including archived records, without reliance on a likely custodian's possible deletion or modification of responsive records.
- ED should search all relevant records and information retention systems (including archived recorded information systems) which may contain records regarding ED's business operations. Responsive records include official business conducted on unofficial systems which may be stored outside of official recording systems and are subject to FOIA. ED should directly inquire, as part of its search, if likely custodians have conducted any such official business on unofficial systems and should promptly and fully acquire and preserve those records as ED's official records. Such unofficial systems include, but are not limited to, governmental

¹⁶ 5 U.S.C. § 552(a)(3)(A)(i).

¹⁷ *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

¹⁸ 5 U.S.C. § 552(a)(3)(B).

¹⁹ 5 U.S.C. § 552(a)(6)(A)(i).



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”²⁰ and provide a sufficiently detailed justification and rationale for each non-disclosure and the statutory exemption upon which the non-disclosure relies.
- Please provide responsive records in electronic format by email, native format by mail, or PDF or TIH format on a USB drive. If it helps speed production and eases ED's administrative burden, DFI welcomes provision of the records on a rolling basis. Responsive records sent by mail should be addressed to the Defense of Freedom Institute for Policy Studies, 1455 Pennsylvania Avenue NW, Suite 400, Washington, D.C. 20004.

Fee Waiver Request

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

²⁰ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



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 Department's student loan debt discharge policies that are highly relevant to the interests of American students, families, teachers, 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, a March 2022 analysis of DOJ policies distributed by a leading news magazine, and multiple widely-published analyses and news stories involving recent ED policy announcements regarding the student loan repayment program and Title IX proposed rulemaking. 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.”²¹ 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, and several more recent published and widely distributed news stories regarding DFI’s analyses of ED’s Title IX rulemaking and student loan debt cancellation program, among other news stories. DFI personnel also frequently appear as guests or panelists to offer commentary and analyses on radio and television news programs and in various other 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 the decision memoranda and external communications regarding the Department’s student loan debt discharge policies (as reflected in its ITT group discharge decision) that are highly relevant to the interests of American students, families, teachers, and taxpayers. Provision of the requested records will meaningfully inform the general public about significant developments in the Department’s borrower discharge policies, 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.

²¹ See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



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 Department's student loan debt discharge policies, 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.