

December 2, 2022

**VIA ELECTRONIC MAIL**

OIG FOIA Coordinator  
U.S. Department of Education  
Office of Inspector General  
400 Maryland Ave. SW  
Washington, D.C. 20202-1500  
oig.foia@ed.gov  
ATTN: OIG FOIA Coordinator

**Re: FOIA REQUEST: Records of OIG’s Comments Regarding the Department’s Draft Notice of Student Loan Program Waivers and Modifications Pursuant to the HEROES Act and Complaints Related to the Student Loan Debt Cancellation Program**  
(DFI FOIA No. 100-36-22)

Dear OIG FOIA Coordinator:

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.

On August 24, 2022, President Biden and the Department announced a massive, three-part plan to cancel outstanding student loan debt, including a “one-time” “cancellation” of up to \$20,000 in debt for Pell Grant recipients with loans held by the Department and up to “\$10,000 for non-Pell Grant borrowers, if their individual annual adjusted gross income is less than \$125,000 or, for married couples, less than \$250,000.”<sup>1</sup> The financial consequences of the debt cancellation program to the American people are enormous. A reliable non-partisan estimate puts the cost (excluding the costs of loan forbearance and the new income-driven repayment program) at up to

---

<sup>1</sup> See <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/>.



\$519 billion.<sup>2</sup> The Department “estimates the total cost in today’s dollars [at] \$379 billion,”<sup>3</sup> while the Congressional Budget Office estimates a \$400 billion cost to the American people.<sup>4</sup>

Citing the COVID-19 pandemic as an ongoing “national emergency,” the Department asserted that the HEROES Act<sup>5</sup> permitted it to “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs” as its statutory justification permitting the massive student loan debt cancellation program.<sup>6</sup>

In its most recent Semiannual Report to Congress (“Report”), OIG noted the following with regard to its review of the Department’s waivers and modifications notice under the HEROES Act:

**Department’s notice of updated waivers and modifications of statutory and regulatory provisions governing the Federal student aid programs under the authority of the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act).** The OIG provided comments on the draft notice in our unique area of responsibility on a proposed waiver to prevent abuse. The Department addressed our comments by clarifying the terms of the waiver.<sup>7</sup>

The Department’s notice to which OIG referred was published in the Federal Register on October 12, 2022 (“Action: Waivers and modifications of statutory and regulatory provisions”),<sup>8</sup> which waiver and modification authority was cited by the Department’s General Counsel as the statutory basis for the student loan debt cancellation program.<sup>9</sup>

As OIG is aware, on October 19, 2022, DFI expressed its concerns<sup>10</sup> to OIG regarding known risks of fraud associated with the program’s self-certification of income (risks highlighted recently by

---

<sup>2</sup> “The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact,” Wharton School of the University of Pennsylvania (August 26, 2022), <https://budgetmodel.wharton.upenn.edu/issues/2022/8/26/biden-student-loan-forgiveness>.

<sup>3</sup> See <https://www.ed.gov/news/press-releases/us-department-education-estimate-biden-harris-student-debt-relief-cost-average-30-billion-annually-over-next-decade#:~:text=The%20Department%20estimates%20that%20one,loan%20payments%20in%20January%202023>.

<sup>4</sup> See

<https://www.cbo.gov/publication/58494#:~:text=CBO%20estimates%20that%20the%20cost,executive%20action%20canceling%20some%20debt>.

<sup>5</sup> 20 U.S.C. § 1098bb(a)(1), (2)(A).

<sup>6</sup> See <https://www2.ed.gov/policy/gen/leg/foia/secretarys-legal-authority-for-debt-cancellation.pdf>.

<sup>7</sup> See <https://www2.ed.gov/about/offices/list/oig/edoigsar85.pdf> at p. 31 (“OIG Report”).

<sup>8</sup> 87 Fed. Reg. 61,512 (Oct. 12, 2022).

<sup>9</sup> See <https://www2.ed.gov/policy/gen/leg/foia/secretarys-legal-authority-for-debt-cancellation.pdf>.

<sup>10</sup> See [https://dfipolicy.org/wp-content/uploads/2022/10/IG-Letter-Self-Certification-of-Income-10.19.2022-signed-2\\_encrypted\\_.pdf](https://dfipolicy.org/wp-content/uploads/2022/10/IG-Letter-Self-Certification-of-Income-10.19.2022-signed-2_encrypted_.pdf).



the Inspectors General of multiple federal agencies, including at the Department of Labor and the Small Business Administration, which raised alarms about the risks of self-certification within weeks of the first wave of COVID disbursements<sup>11</sup>).

DFI also noted OIG’s recent determinations regarding serious deficiencies in the Department’s compliance with the Payment Integrity Information Act of 2019 (“PIIA”) for fiscal year 2021, including insufficient risk assessment methodologies leading to “the Department . . . reporting an improper payment estimate for its two high-priority programs,” the Pell and Direct Loan programs.<sup>12</sup> In that matter, OIG’s investigation revealed that certain of the Department’s risk assessments were unreliable and failed to reflect the “true level of [fraud] risk in the population because the improper payment estimates for the Pell and Direct Loan programs were unreliable.”<sup>13</sup> OIG also found that the Department “did not comply with the requirement to report improper payment rates of less than 10 percent for all applicable programs” and “reported an improper payment estimate of 14.77 percent for the Title I, Part A programs, which is above the 10 percent threshold . . . .”<sup>14</sup>

DFI believes the American people have an important interest in OIG’s comments on the draft notice in its “unique area of responsibility on a proposed waiver to prevent abuse.” The purpose of this FOIA request is to obtain those comments from OIG for the benefit of the American people, who are profoundly impacted by the Department’s massive and unprecedented student loan debt cancellation program.

DFI believes the provision of OIG’s comments to DFI will benefit the public by illuminating the Department’s concern for and awareness of potential fraud risks associated with the student loan debt cancellation program, particularly the concerns raised by OIG, the Department’s “independent entity within [the Department] responsible for identifying fraud, waste, abuse, and criminal activity involving ED funds, programs, and operations.”<sup>15</sup>

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:

---

<sup>11</sup> See <https://www.pandemicoversight.gov/news/articles/self-certification-procedures-may-increase-fraud-risk-pandemic-response-programs>.

<sup>12</sup> *Id.*

<sup>13</sup> See <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2022/a22ga0050.pdf>.

<sup>14</sup> *Id.* at 17.

<sup>15</sup> See <https://www2.ed.gov/about/offices/list/oig/index.html>.



1. All comments, including any and all recorded remarks, observations, opinions, reactions, or other expressions provided to Department officials with regard to the draft notice referenced in OIG’s Semiannual Report which final notice was published in the Federal Register on October 12, 2022 (identified and described *supra*).
2. All complaints, including any allegations of fraud, waste, abuse, misconduct, or mismanagement, whether substantiated or unsubstantiated, submitted to OIG by any employee or contractor concerning any part of the Department’s “Student Loan Debt Relief Plan” announced by the President on August 24, 2022,<sup>16</sup> and as administered by the Department’s office of Federal Student Aid,<sup>17</sup> between August 24, 2022, and the time the search for records occurs.

Please note that DFI is not seeking the names or identities of any submitters or related personal information (which information should be redacted before any provision of records in response to this request).

## 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 requestor<sup>18</sup> if ED (1) created or obtained the requested materials,

---

<sup>16</sup> See <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/>.

<sup>17</sup> See <https://studentaid.gov/manage-loans/forgiveness-cancellation>.

<sup>18</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).



and, (2) is “in control of the requested materials at the time the FOIA request [was] made.”<sup>19</sup> Upon request, ED must “promptly” make the requested records available to the requester.<sup>20</sup> Notably, covered agency records include materials provided to ED by both private and governmental organizations.<sup>21</sup> 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,<sup>22</sup> ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.<sup>23</sup> 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.”<sup>24</sup>

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.<sup>25</sup>

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

---

<sup>19</sup> *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

<sup>20</sup> 5 U.S.C. § 552(a)(3)(A).

<sup>21</sup> *Id.* at 144.

<sup>22</sup> 5 U.S.C. § 552(a)(3)(A)(i).

<sup>23</sup> *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

<sup>24</sup> 5 U.S.C. § 552(a)(3)(B).

<sup>25</sup> 5 U.S.C. § 552(a)(6)(A)(i).



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"<sup>26</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 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.

---

<sup>26</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



## **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 Department's student loan debt cancellation policies and, more particularly, OIG's concerns regarding a proposed waiver to prevent abuse, 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, notice, 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.”<sup>27</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 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 cancellation policies, and, more particularly, OIG’s concerns regarding a proposed waiver to prevent abuse, which 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 student loan debt cancellation program and associated risks of fraud, waste, and abuse, 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

---

<sup>27</sup> See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



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 Department's student loan debt cancellation policies and associated risks of fraud, waste, and abuse, 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.