

February 8, 2023

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 of the Department’s Diversity, Equity, and Inclusion
Professional Training Materials for Department Personnel**
(DFI FOIA No. 100-1-23)

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.

On January 20, 2021, President Joe Biden signed Executive Order (“EO”) 13985 (“Advancing Racial Equity and Support for Underserved Communities Through the Federal Government”),¹ which mandated a “comprehensive” “whole-of-government equity agenda” and that federal agencies employ “a systematic approach to embedding fairness” for particular sexual, racial, and ethnic “communities” and to “redress inequities” in policies and programs that “serve as barriers” for those communities.²

¹ See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

² EO 14035 identified the preferred communities as “lesbian, gay, bisexual, transgender, queer, gender non-conforming, and non-binary (LGBTQ+) persons” and “Black and African American, Hispanic and Latino, Native American, Alaska Native and Indigenous, Asian American, Native Hawaiian and Pacific Islander, Middle Eastern, and North African persons.” See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce/>.



The President tasked the Domestic Policy Council with the coordination, formulation, and implementation of the equity agenda across all federal agencies.³ On June 25, 2021, the President issued the “Executive Order on Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce” (EO 14035), effectively requiring that federal agencies reinterpret federal merit system principles to place the President’s equity agenda front and center for recruiting, hiring, developing, promoting, and retaining “our Nation’s [sexual, racially, and ethnically diverse] talent.”⁴ EO 14035 also instructed federal agencies to “increase the availability and use of diversity, equity, inclusion, and accessibility training.”⁵

To achieve “Government-Wide Diversity, Equity, Inclusion, and Accessibility,” the President required that all agency heads, including Secretary Miguel Cardona, “make advancing diversity, equity, inclusion, and accessibility a priority component of the [Department’s] management agenda and agency strategic planning.”⁶ All federal agencies were instructed to engage in diversity-driven “data collection” regarding the sexual, racial, and ethnic identities of its employees and applicants and to “*implement or increase the availability and use of diversity, equity, inclusion, and accessibility training programs for employees, managers, and leadership*” to facilitate “knowledge of systemic and institutional racism and bias against underserved communities” and to “build skillsets to promote respectful and inclusive workplaces” and to increase awareness of “implicit and unconscious bias.”⁷

In response to the President’s directives, on April 14, 2022, the Department released its “2022 Agency Equity Plan,” making preferred demographic identities a central consideration for the Department’s discretionary grant programs to state, local, or tribal governments and all contracting and procurement decisions, among other policy areas.⁸ The Department’s Equity Plan is only one of at least twenty-two such agency equity plans devised and implemented on the President’s command.⁹

Beyond the creation of equity plans, the Administration has, pursuant to EO 14035, implemented transformative new training programs to indoctrinate federal agency employees with the latest diversity, equity, and inclusion (“DEI”) dogmas, thereby re-directing employee decision-making and behavior. The Department of Homeland Security’s (“DHS”) “Inclusive Diversity” training required employees to “identify the many dimensions of diversity and inclusive behaviors,” review “micro-messages” impact on the work environment, develop “diverse interview panels” to fight “unconscious bias,” and “build infrastructure” to achieve organizational diversity goals.¹⁰ The

³ See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce/>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* (emphasis added).

⁸ See <https://www2.ed.gov/documents/equity/2022-equity-plan.pdf>.

⁹ See <https://www.performance.gov/equity/#action-plans>.

¹⁰ See <https://s.wsj.net/public/resources/documents/2022-HQFO-00231.pdf>.



National Endowment for the Arts diversity training added mandatory discussion of key terms such as “White Fragility,” “Anti-Racist,” “Heterosexism,” and “Misogynoir” and offered a “Diversity Prism” urging awareness of ethnicity, race, appearance, political affiliation, union affiliation, religion, and recreational habits (among other identifiers) in achieving newfound agency DEI goals.¹¹

Secretary Cardona asserted that the Department’s proper role is to “address the significant inequities that *millions of students* - primarily students of color – and teachers confront every day in underserved schools across America.”¹² Secretary Cardona failed to substantiate his incendiary claim that “millions” of students of color faced unidentified “inequities” in our public schools, despite the vast amount of data and related statistics collected by the Department regarding the opportunities of all of America’s students.¹³

Considering EO 14035’s explicit requirement that federal agencies increase the use and availability of DEI professional training for federal employees and the known DEI training materials now in use by other federal agencies, DFI believes it is extremely likely that the Department has created or adopted unique DEI professional training materials for instructional use to affect the decision-making and behavior of the Department’s employees.

Therefore, in an effort to obtain the Department’s DEI professional training materials, 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 the 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 Department’s diversity, equity, and inclusion (“DEI”) training efforts for Department employees which were signed, approved, adopted, or implemented by any of the following Departmental officials beginning on or after January 20, 2021, through the date the search for the records is conducted:
 - a. Denise L. Carter, Acting Assistant Secretary, Office of Finance and Operations (“OFO”)
 - b. Victor Shirley, Acting Principal Deputy Assistant Secretary, OFO
 - c. Timothy Barkley, Chief of Staff, OFO
 - d. Ayesha Edwards-Kemp, Executive Officer, OFO

¹¹ See <https://s.wsj.net/public/resources/documents/NEADiversityslides-Easter-June2021.pdf>.

¹² See <https://www.ed.gov/news/press-releases/statement-miguel-cardona-secretary-education-policies-and-priorities-us-department-education> (emphasis added).

¹³ See, e.g., <https://www2.ed.gov/rschstat/landing.jhtml?src=ft>.



- e. Michael Chew, Director, Office of Equal Opportunity Services, OFO
 - f. Antonia Harris, Deputy Assistant Secretary, Office of Human Recourses, OFO
 - g. Andrew Sanzenbacher, Deputy Assistant Secretary, Office of Business Support Services, OFO
 - h. Victor Shirley, Deputy Assistant Secretary, Management and Planning, OFO
2. All professional training materials used by the Department in its DEI training program for Department employees at any time whether or not still in use, from January 20, 2021, through the date the search for the records is conducted, to include but not limited to:
- a. Audio and video presentations (*e.g.*, films or other multimedia recordings)
 - b. Online lectures and commentaries
 - c. Online courses and examinations
 - d. Slide presentations
 - e. PowerPoint or similar presentations
 - f. Instructional animations, graphics, charts, and any other demonstrative exhibits or images
 - g. All other DEI digital learning resources
 - h. All other DEI training materials adopted by the Department as part of its employee training program instructional efforts

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 requestor¹⁴ 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.”¹⁵ Upon request, ED must “promptly” make the requested records available to the requester.¹⁶ Notably, covered agency records include materials provided to ED by both private and governmental organizations.¹⁷ 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,¹⁸ ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.¹⁹ 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.”²⁰

¹⁴ 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).

¹⁵ *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

¹⁶ 5 U.S.C. § 552(a)(3)(A).

¹⁷ *Id.* at 144.

¹⁸ 5 U.S.C. § 552(a)(3)(A)(i).

¹⁹ *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

²⁰ 5 U.S.C. § 552(a)(3)(B).



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.²¹

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 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

²¹ 5 U.S.C. § 552(a)(6)(A)(i).



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”²² 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.

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 professional training materials for its employees 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 considerations. Further, the

²² *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



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.”²³ 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

²³ See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



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 professional training policies and related materials for Department employees 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 the Department's diversity, equity, and inclusion personnel policies which affect millions of American students, families, and taxpayers. These are significant training policies highlighted by the President's EOs and the Secretary's DEI-related statements and have 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 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 professional training 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.