

February 10, 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 Related to the Department’s Borrower Defense to Repayment Recoupment Action Against DeVry University
(DFI FOIA No. 100-2-23)

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.

Since January 20, 2021, the Department has engaged in significant shifts in its policies regarding federal student aid for students who attend for-profit schools,¹ including anticipated rulemaking related to the Department’s Borrower Defense to Repayment (“BDR”) regulations (also known as Borrower Defense Loan Discharge).² The Department has radically applied its “Closed School Discharge”³ and “Borrower Defense Loan Discharge”⁴ programs to eliminate significant amounts of student loan debt incurred by students attending for-profit colleges and, it appears, to levy punishment on disfavored for-profit educational institutions.

¹ Lauren Camera, “Biden Administration Moves to Undo DeVos Education Agenda,” U.S. NEWS & WORLD REPORT (January 18, 2022), <https://www.usnews.com/news/education-news/articles/2022-01-18/biden-administration-moves-to-undo-devos-education-agenda>.

² See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1840-AD53>.

³ See <https://studentaid.gov/manage-loans/forgiveness-cancellation/closed-school>.

⁴ See <https://studentaid.gov/borrower-defense/>.



For example, in February 2022, the Department approved \$415 Million in borrower defense claims, thereby discharging the repayment obligations of more than 16,000 borrowers.⁵ That discharge followed the Department’s August 2021 elimination of more than \$1.1 Billion in student loan debt under the Closed School Discharge program.⁶

On August 15, 2022, the Department issued a notice of its intent to recover nearly \$24 million in discharged debt on behalf of 649 borrowers from DeVry University (“DeVry”), threatening to “impose [] liabilities and require DeVry to pay” if it failed to meet the Department’s demands (“recoupment notice” or “recoupment action”).⁷ DeVry then pursued an appeal before a Department administrative law judge in hearings that began on January 23, 2023.⁸ The judge expressed concern that the Department’s recoupment effort could constitute “double liability” for DeVry, since DeVry already paid approximately \$100 million in restitution to borrowers in addition to other debt relief for certain borrowers pursuant to its 2016 settlement based on the same factual allegations.⁹

The Department’s recoupment notice to DeVry came just days after it proposed a far more massive \$6 billion class settlement involving nearly 200,000 BDR applications regarding alleged fraud by more than 150 colleges.¹⁰ In both the DeVry recoupment matter and the class settlement,¹¹ the Department insisted on broad findings of fact against scores of private educational institutions without making fact-specific determinations involving allegations of fraud (in support of individual BDR applications) against the individual educational institutions. As a result, on January 13, 2023, three educational institutions filed a motion asking the district court that approved the settlement to pause its implementation, pending appeal of the settlement.¹²

The Department’s apparently punitive use of the BDR program to sanction a for-profit educational institution – here, DeVry University - appears to be unprecedented, particularly given DeVry’s ongoing educational operations and previous settlement providing extensive relief to allegedly

⁵ See <https://www.ed.gov/news/press-releases/education-department-approves-415-million-borrower-defense-claims-including-former-devry-university-students>.

⁶ See <https://www.ed.gov/news/press-releases/extended-closed-school-discharge-will-provide-115k-borrowers-itt-technical-institute-more-11b-loan-forgiveness>.

⁷ See <https://static.politico.com/53/ec/f10a0eea4ab9a4e7b0a55f994e75/devry-letter-1.pdf>.

⁸ Michael Stratford, “Education Department, DeVry University face off over \$23M bill for student loan discharges,” POLITICO (Jan. 23, 2023), <https://subscriber.politicopro.com/article/2023/01/education-department-devry-university-face-off-over-23m-bill-for-student-loan-discharges-00079087?source=email>.

⁹ See <https://www.ftc.gov/news-events/news/press-releases/2016/12/devry-university-agrees-100-million-settlement-ftc>.

¹⁰ See <https://studentaid.gov/sites/default/files/sweet-v-cardona-settlement-agreement.pdf>.

¹¹ See Order Granting Final Settlement Approval, *Sweet v. Cardona*, No. 3:19-cv-03674 (N.D. Cal. Nov. 16, 2022), ECF No. 345.

¹² See Intervenor’s Notice of Motion and Joint Motion for Stay Pending Appeal, *Sweet v. Cardona*, No. 3:19-cv-03674 (N.D. Cal. Jan. 13, 2023), ECF No. 350.



defrauded students concerning precisely the same factual basis. The Department’s administrative judge’s apparent uneasiness regarding reliance on the same factual basis (involving the previous settlement) lends further credibility to this important procedural concern.

The Department’s expansive BDR-based actions against DeVry, among other educational institutions, are cause for tremendous concern and interest to the American people. These actions have occurred in the policy-making context of the Department’s extraordinary “elimination” of student loan debt and the repeated suspension of its obligation to collect that debt¹³ (on August 24, 2022 the Department announced cancellation of up to \$20,000 for Pell Grant recipients and up to \$10,000 for non-Pell Grant borrowers,¹⁴ imposing costs on the American people of at least \$400 billion according to the Congressional Budget Office¹⁵).

The Department’s extraordinary applications of its new BDR policies have been strongly urged by particular activist allies to the Department’s current political leadership, certain Members of Congress, and state attorneys general. Those organizations and elected officials have openly advocated the Department’s expansive use of its BDR regulatory authority not merely against bad actors, but also against for-profit educational institutions which often successfully serve the needs of non-traditional students. The Project on Predatory Student Lending (“PPSL”), for example, identifies itself as “the leading legal organization representing students against the predatory for-profit college industry” and (accurately) boasts of its policy impact on the Department.¹⁶ Notably, since PPSL’s founder and director, Toby Merrill, became the Department’s Deputy General Counsel for Postsecondary Education,¹⁷ the Department’s BDR positions, often involving civil lawsuits against the Department, have become largely indistinguishable from PPSL’s.¹⁸

Senator Elizabeth Warren, Congresswoman Pramila Jayapal, and other Members of Congress have also fiercely advocated the Department’s newfound BDR positions, even singling out DeVry University for punitive treatment in their efforts.¹⁹ As with PPSL, it appears that the Department has largely adopted the expansive BDR policies staunchly promoted by those elected officials.²⁰ Several state attorneys general have similarly publicly pressured the Department to abandon its

¹³ See <https://www.ed.gov/news/press-releases/biden-harris-administration-continues-fight-student-debt-relief-millions-borrowers-extends-student-loan-repayment-pause>.

¹⁴ 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/>.

¹⁵ See <https://www.cbo.gov/publication/58494#:~:text=CBO%20estimates%20that%20the%20cost,executive%20action%20canceling%20some%20debt>.

¹⁶ See <https://www.ppsl.org/about-the-project>.

¹⁷ See <https://www2.ed.gov/about/offices/list/ogc/merrill.html>.

¹⁸ See <https://www.ppsl.org/cases>.

¹⁹ See, e.g., <https://jayapal.house.gov/wp-content/uploads/2022/03/2022.03.22-Letter-to-ED-re-Continued-Delay-of-Corinthian-College-Borrower-Discharge-1.pdf>.

²⁰ See <https://www.ed.gov/news/press-releases/education-department-approves-415-million-borrower-defense-claims-including-former-devry-university-students>.



previous BDR policies in favor of a more activist, expansive use of the Department’s authority, particularly regarding for-profit educational institutions.

DFI is concerned that these apparently punitive uses of BDR by the Department have occurred at the behest of PPSL, particular elected officials, and other activist opponents of the Department’s historically-limited uses of its BDR authority. DFI believes the American people have deep concern for such consequential influences on important Departmental policies and a right to know of the pressures brought to bear on the Department by those activist entities and elected officials.

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 August 15, 2022, recoupment action against DeVry University (identified *supra*) which were signed, approved, adopted, or implemented by any of the Departmental officials (see Custodians, *infra*) beginning on or after January 20, 2021, through the date the search for the records is conducted.
2. All records, including but not limited to electronic mail (“email”), texts, letters, memoranda, and other documentation between ED officials (see Custodians, *infra*) and the following activist organizations from January 20, 2021, through the date the search is conducted, which reference “DeVry University” or “DeVry”:
 - a. Project on Predatory Student Lending (@ppsl.org)
 - b. Student Borrower Protection Center (@protectborrowers.org)
 - c. Center for Responsible Lending (@responsiblelending.org)
 - d. Student Debt Crisis Center (@studentdebtcrisis.org)
 - e. National Consumer Law Center (@nclc.org)
 - f. National Student Legal Defense Network (@nslndn.org)
 - g. Center for American Progress (@americanprogress.org)
 - h. Young Invincibles (@younginvincibles.org)
 - i. MoveOn (@front.moveon.org and @moveon.org)
 - j. Dream Defenders (@dreamdefenders.org)
 - k. Debt Collective (@debtcollective.org)
 - l. Student Borrower Protection Center (@protectborrowers.org)
 - m. Future Coalition (@futurecoalition.org)
 - n. The Leadership Conference (@civilrights.org)
 - o. American Federation of Teachers (@aft.org)



- p. National Education Association (@nea.org)
3. All records, including but not limited to electronic mail (“email”), texts, letters, memoranda, and other documentation between ED officials (see Custodians, *infra*) and the following U.S. Senators and U.S. Representatives (or their official staff) from January 20, 2021, through the date the search is conducted, which reference “DeVry University” or “DeVry”:
- a. U.S. Senator Elizabeth Warren (@warren.senate.gov)
 - b. U.S. Senator Dick Durbin (@durbin.senate.gov)
 - c. U.S. Senator Sherrod Brown (@brown.senate.gov)
 - d. U.S. Senator Mazie Hirono (@hirono.senate.gov)
 - e. U.S. Senator Tammy Duckworth (@duckworth.senate.gov)
 - f. U.S. Senator Tina Smith (@smith.senate.gov)
 - g. U.S. Senator Jeffrey A. Merkley (@merkley.senate.gov)
 - h. U.S. Senator Amy Klobuchar (@klobuchar.senate.gov)
 - i. Cong. Pramila Jayapal (@jayapal.house.gov)
 - j. Cong. Mark Takano (@takano.house.gov)
 - k. Cong. Nikema Williams (@williams.house.gov)
 - l. Cong. Joe Courtney (@courtney.house.gov)
 - m. Cong. Lloyd Doggett (@doggett.house.gov)
 - n. Cong. Raul M. Grijalva (@grijalva.house.gov)
 - o. Cong. Ayanna Pressley (@pressley.house.gov)
 - p. Cong. Katie Porter (@porter.house.gov)
4. All records, including but not limited to electronic mail (“email”), texts, letters, memoranda, and other documentation between ED officials (see Custodians, *infra*) and the following state attorneys general (or their official staff) from January 20, 2021, through the date the search is conducted, which reference “DeVry University” or “DeVry”:
- a. Email addresses ending in “mass.gov”
 - b. Email addresses ending in “ag.ny.gov”
 - c. Email addresses ending in “oag.ca.gov”
 - d. Email addresses ending in “coag.gov”
 - e. Email addresses ending in “portal.ct.gov”
 - f. Email addresses ending in “attorneygeneral.delaware.gov”
 - g. Email addresses ending in “oag.dc.gov”
 - h. Email addresses ending in “ag.hawaii.gov”
 - i. Email addresses ending in “illinoisattorneygeneral.gov”
 - j. Email addresses ending in “iowaattorneygeneral.gov”
 - k. Email addresses ending in “maine.gov”
 - l. Email addresses ending in “msa.maryland.gov”
 - m. Email addresses ending in “michigan.gov”
 - n. Email addresses ending in “ag.state.mn.us”



- o. Email addresses ending in “ag.nv.gov”
- p. Email addresses ending in “njoag.gov”
- q. Email addresses ending in “nmag.gov”
- r. Email addresses ending in “ncdoj.gov”
- s. Email addresses ending in “doj.state.or.us”
- t. Email addresses ending in “attorneygeneral.gov”
- u. Email addresses ending in “riag.ri.gov”
- v. Email addresses ending in “usvidoj.com”
- w. Email addresses ending in “ago.vermont.gov”
- x. Email addresses ending in “atg.wa.gov”
- y. Email addresses ending in “doj.state.wi.us”

Custodians

The search for records in Items 1-4 should be limited to Department officials within the Office of the Secretary, Office of the Deputy Secretary, Office of the Under Secretary, Office of Legislation and Congressional Affairs, Office of Communications and Outreach, Office of Postsecondary Education, Office of Federal Student Aid, and Office of the General Counsel, who are classified as any of the following or referenced with the following job titles:

- a. “PAS” (Presidential Appointments Requiring Senate Confirmation)
- b. “PA” (Presidential Appointments Not Requiring Senate Confirmation)
- c. “NC-SES” (Non-Career Senior Executive Service)
- d. “SES” (Career Senior Executive Service)
- e. “SC” (Schedule C Confidential or Policymaking Positions)
- f. Chief Operating Officer, Federal Student Aid
- g. Deputy Chief Operating Officer, Federal Student Aid
- h. Chief Financial Officer, Federal Student Aid
- i. Executive Assistant to the Chief Operating Officer, Federal Student Aid
- j. Chief of Staff, Federal Student Aid
- k. Senior Advisor for Management, Federal Student Aid
- l. Senior Advisor, Federal Student Aid
- m. Ombudsman, Federal Student Aid
- n. Congressional Team Lead, Federal Student Aid

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 requestor²¹ 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.”²² Upon request, ED must “promptly” make the requested records available to the requester.²³ Notably,

²¹ 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).

²² *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

²³ 5 U.S.C. § 552(a)(3)(A).



covered agency records include materials provided to ED by both private and governmental organizations.²⁴ 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,²⁵ ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.²⁶ 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.”²⁷

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.²⁸

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

²⁴ *Id.* at 144.

²⁵ 5 U.S.C. § 552(a)(3)(A)(i).

²⁶ *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

²⁷ 5 U.S.C. § 552(a)(3)(B).

²⁸ 5 U.S.C. § 552(a)(6)(A)(i).



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"²⁹ and provide a sufficiently detailed justification and rationale for each non-disclosure and the statutory exemption upon which the non-disclosure relies.
- Please provide responsive records in electronic format by email, native format by mail, or PDF or TIF format on a USB drive. If it helps speed production and eases ED's administrative burden, DFI welcomes provision of the records on a rolling basis. Responsive records sent by mail should be addressed to the Defense of Freedom Institute for Policy Studies, 1455 Pennsylvania Avenue NW, Suite 400, Washington, D.C. 20004.

Fee Waiver Request

²⁹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



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 Borrower Defense to Repayment (also known as Borrower Defense Loan 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 considerations. 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.”³⁰ 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 Department’s Borrower Defense to Repayment (also known as Borrower Defense Loan Discharge) policies 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 important student loan discharge policies which affect millions of American students, families, and taxpayers. These policies have a 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.

³⁰ 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 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.