

April 4, 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 Use of the “Unusual Circumstances” Exception to Delay Provision of Responsive Records
(DFI FOIA No. 100-7-23)

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 announced unprecedented policies involving, *inter alia*, massive student loan debt cancellation, redefining the meaning of sex to include gender identity (“Title IX”), the independence of charter schools, disclosure of foreign gifts and contracts by colleges and universities (“Section 117”), and placing race and other factors at the center of the Department’s grantmaking and related program decisions (“Agency Equity Plan”). Each of these policy developments is highly consequential to the American people and has garnered significant political and legal attention from Congress, Governors, Attorneys General, and various public policy interest groups.

In response to these extraordinary policy developments, DFI has submitted thirty-eight Freedom of Information Act (“FOIA”) requests to the Department since Feb. 2, 2022.¹ Each of DFI’s FOIA requests was for records related to policy areas of immense public interest and worthy of transparency to better inform the American people regarding Departmental decisions, rulemaking,

¹ See DFI’s FOIA requests submitted to the Department, available at <https://dfipolicy.org/oversight/>.



guidance, and other important policies. The FOIA laws governing the Department’s obligation to timely provide non-exempt responsive records freely and promptly were created precisely to serve this informative function for the American people.

On March 15, 2022, U.S. Attorney General Merrick Garland informed executive departments and agencies that FOIA’s “‘basic purpose . . . is to ensure an informed citizenry,’ which is ‘vital to the functioning of a democratic society [and is] needed to check against corruption and to hold the governors accountable to the governed.’”² The Garland Memo emphasized the “presumption of openness” required of federal departments and agencies, noting that responsive records may only be withheld “if: (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the nine exemptions that FOIA enumerates; or (2) disclosure is prohibited by law. 5 U.S.C. § 552(a)(8)(A)(i).” Absent such exemptions, FOIA requires that the presumption of openness be applied by the Department in the provision of the requested records in a timely manner.

In guiding agency responses, Attorney General Garland warned that even when requested “[i]nformation that might technically fall within an exemption [the requested information] should not be withheld from a FOIA requester unless the agency can identify a foreseeable harm or legal bar to disclosure” and that “[i]n case of doubt, openness should prevail.”³ He also instructed that when “an agency determines that it cannot make full disclosure of a requested record, FOIA requires that it ‘consider whether partial disclosure of information is possible’ and ‘take reasonable steps necessary to segregate and release nonexempt information.’”⁴

Notwithstanding the Garland Memo’s directives, DFI has received partial production of the requested records to only four of its FOIA requests and has received only 45 pages of responsive records since May 31, 2022, including 40 pages of almost entirely redacted records.⁵ In response to multiple FOIA requests by DFI, the Department has invoked the “unusual circumstances” exception to justify delayed production of responsive records.⁶

² Merrick Garland, *Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines* (Mar. 15, 2022), <https://www.justice.gov/ag/page/file/1483516/download> (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)) (“Garland Memo”).

³ *Id.* at 1.

⁴ *Id.*

⁵ Regarding its six most recent FOIA requests, filed between Feb. 8 and March 20, 2023, DFI does not currently assert that the Department has failed to meet its statutory production deadlines.

⁶ 5 U.S.C. § 552(a)(6)(B)(iii) (*i.e.*, the “unusual circumstances” exception to the timely production of responsive records) refers to the need to search and collect records from offices that are physically outside of the FOIA office itself, such as field offices. Regarding the latter provision, the Department’s failure to provide any rolling production since May 31, 2022, is highly indicative that the Department has exceeded the reasonable use of the “unusual



To justify its production delays, the Department has repeatedly invoked “unusual circumstances” without further description or identification of those circumstances or any indication as to when the unidentified “unusual circumstances” would be overcome by the Department.

The Department’s now-routine invocation of “unusual circumstances” contrasts sharply with the Department’s centralized electronic search capabilities and FOIA’s provision that the “unusual circumstances” exception may only be used to justify a production delay “to the extent reasonably necessary to the proper processing of the particular requests.”⁷

Instead, it appears that the Department may be following a written or unwritten policy of unnecessarily invoking the “unusual circumstances” exception to create unwarranted delays in the production of responsive records. The Department’s routine invocation of “unusual circumstances” has become the norm, creating an unreasonable barrier to the public’s timely access to responsive records concerning Departmental decision-making and policy formation information to which it is entitled.

The Department’s excessive use of the “unusual circumstances” exception to justify delayed production of responsive records may violate both the letter and spirit of FOIA and the Garland Memo’s directives. It has coincided with the proposal and implementation of several extraordinary and highly consequential policies by the Department (*e.g.*, student loan debt cancellation and redefining sex-based statutory protections to include gender identity).

DFI is concerned that the Department’s excessive and unnecessary reliance on the “unusual circumstances” exception to prevent the timely provision of responsive records to FOIA requests reveals an improper pattern and practice by the Department.

DFI is also concerned that political appointees may have improperly intruded upon the Department’s processing of FOIA requests and caused the Department’s excessive and unnecessary reliance on the “unusual circumstances” exception in response to FOIA requests made by DFI. This unwarranted, inappropriate intrusion into agency processes may have unnecessarily delayed or prevented the timely and fulsome disclosure of non-exempt responsive records in defiance of FOIA’s time-limit provisions and Attorney General Garland’s instructions to departments and agencies.

Therefore, 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:

circumstances” exception beyond those necessary to the proper processing of the particular requests, as described in the statute.

⁷ 5 U.S.C. § 552(a)(6)(B)(iii).



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 other guidance related to the FOIA Service Center's utilization of the "unusual circumstances" exception (identified *supra*) or 5 U.S.C. § 552(a)(6)(B)(iii) as a justification for the delayed production of responsive records to FOIA requesters (*i.e.*, not limited to DFI's FOIA requests submitted to the Department), by any Departmental official (see Custodians, *infra*) which were signed, approved, adopted, or implemented by any of those Departmental officials beginning on or after January 20, 2021, through the date the search for the records is conducted.
2. All decision memoranda, directives, policy interpretations, or other guidance related to the FOIA Service Center's utilization of the "unusual circumstances" exception (identified *supra*) or 5 U.S.C. § 552(a)(6)(B)(iii) as a justification for the delayed production of responsive records related to any of DFI's thirty-eight FOIA requests (see FOIA request numbers, *infra*) by any Departmental official (see Custodians, *infra*) which were signed, approved, adopted, or implemented by any of those Departmental officials beginning on or after January 20, 2021, through the date the search for the records is conducted.
3. All communications and correspondence, including but not limited to electronic mail ("email"), email attachments, texts, letters, memoranda, and other documentation regarding the Department's (to include the FOIA Service Center's) reliance on "unusual circumstances" exception (identified *supra*) or 5 U.S.C. § 552(a)(6)(B)(iii) as a justification for the delayed production of responsive records related to FOIA requests made to the Department (to include but not limited to DFI's thirty-eight FOIA requests submitted to the Department) between Departmental officials (see Custodians, *infra*) and any individual(s) in the Executive Office of the President, to include **anyone using an eop.gov email address**, from January 20, 2021, through the date the search is conducted, to include the use of any of the following terms:
 - a. "FOIA" and "Unusual Circumstances"
 - b. "FOIA" and "Unusual Circumstances exception"
 - c. 5 U.S.C. § 552(a)(6)(B)(iii)
4. All communications and correspondence, including but not limited to electronic mail ("email"), email attachments, texts, letters, memoranda, and other documentation regarding the Department's (to include the FOIA Service Center's) reliance on "unusual circumstances" exception (identified *supra*) or 5 U.S.C. § 552(a)(6)(B)(iii) as a justification for the delayed production of responsive records related to FOIA requests made to the Department (to include but not limited to DFI's thirty-eight FOIA requests



submitted to the Department) between Departmental officials (see Custodians, *infra*) and any Member of Congress or congressional staff, to include **anyone using an email address ending in “mail.house.gov” or “senate.gov”** from January 20, 2021, through the date the search is conducted, to include the use of any of the following terms:

- a. “FOIA” and “Unusual Circumstances”
- b. “FOIA” and “Unusual Circumstances exception”
- c. 5 U.S.C. § 552(a)(6)(B)(iii)

DFI FOIA Requests

The search for records in Items 2-4 should include record searches under the numbers assigned by the Department to DFI’s FOIA requests:

- a. 22-01809-F
- b. 22-01847-F
- c. 22-01850-F
- d. 22-02001-F
- e. 22-02221-F
- f. 22-02294-F
- g. 22-02358-F
- h. 22-02360-F
- i. 22-02361-F
- j. 22-02365-F
- k. 22-02366-F
- l. 22-02518-F
- m. 22-02563-F
- n. 22-02610-F
- o. 22-02673-F
- p. 22-02728-F
- q. 22-02740-F
- r. 22-02756-F
- s. 22-02757-F
- t. 22-02796-F
- u. 22-02807-F
- v. 22-02888-F
- w. 22-02970-F
- x. 22-03008-F
- y. 22-03646-F
- z. 23-00251-F
- aa. 23-00368-F
- bb. 23-00439-F
- cc. 23-00456-F
- dd. 23-00619-F



- ee. 23-00581-F
- ff. 23-00642-F
- gg. 23-00981-F
- hh. 23-01007-F
- ii. 23-01128-F
- jj. 23-01291-F
- kk. 23-01292-F
- ll. 23-01293-F

Custodians

The search for records described in Items 1-4 should be limited to “ED officials” within the Office of the Secretary (to include the FOIA Service Center), Office of the Deputy Secretary, Office of the Under Secretary, Office of the Chief Information Officer, Office of Communications and Outreach, Office of Legislation and Congressional Affairs, 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. “SC” (Schedule C Confidential or Policymaking Positions)

Statutory Disclosure Requirements

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 requestor⁸ 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.”⁹ Upon request, ED must “promptly” make the requested records available to the requester.¹⁰ Notably, covered agency records include materials provided to ED by both private and governmental organizations.¹¹ 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,¹² ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.¹³ In addition, the records produced by ED are required to be provided in

⁸ 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).

⁹ *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

¹⁰ 5 U.S.C. § 552(a)(3)(A).

¹¹ *Id.* at 144.

¹² 5 U.S.C. § 552(a)(3)(A)(i).

¹³ *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).



“any form or format requested . . . if the record is readily reproducible by the agency in that form or format.”¹⁴

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.¹⁵

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

¹⁴ 5 U.S.C. § 552(a)(3)(B).

¹⁵ 5 U.S.C. § 552(a)(6)(A)(i).



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”¹⁶ 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

¹⁶ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



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 FOIA policies, including the timely provision of responsive records, 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."¹⁷ DFI provides exactly this service to the general public and other audiences with an interest in those materials and

¹⁷ See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



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 FOIA policies, including the timely provision of responsive records and the Department's frequent use of the "unusual circumstances" exception to FOIA requests. The resulting delayed production of responsive records to FOIA requesters, including DFI, deprives the American public of the timely provision of information about policies that are highly relevant to American students, families, teachers, and taxpayers. Provision of the requested records will meaningfully inform the public about the Department's FOIA policies which affect millions of American students, families, and taxpayers. The requested records concern significant Departmental policies with considerable financial implications for all Americans and are worthy of transparency in service of the public's right to know.

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 FOIA 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.