

August 24, 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 Compliance by the National Education Association with Reporting Requirements Contained in Its Federal Charter
(DFI FOIA Request 100-8-23)

Dear FOIA Public Liaison:

The Defense of Freedom Institute for Policy Studies (“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.

The NEA’s Statutory Reporting Requirement

The National Education Association (“NEA”) is both the largest labor union in the United States and the only such union to which Congress has granted a federal charter.¹ That charter, which Congress granted to the NEA in 1906, established the “National Education Association of the United States” as a corporation in the District of Columbia.² The charter identifies the dual purposes of the NEA as follows: “to elevate the character and advance the interests of the profession of teaching” and “to promote the cause of education in the United States.”³

¹ See MAXFORD NELSON, RETHINKING THE NATIONAL EDUCATION ASSOCIATION’S FEDERAL CHARTER, 1 (2023), available at <https://www.freedomfoundation.com/wp-content/uploads/2023/07/Rethinking-the-NEA-Federal-Charter.pdf>.

² 36 U.S.C. § 151101(a), (b).

³ 36 U.S.C. § 151102.



Prior to fiscal year 1999, the NEA’s federal charter exempted from taxation the organization’s real property (*i.e.*, land and buildings) located in the District of Columbia provided that it was used for the charter-based purposes defined above and not used to produce income.⁴ Beginning in that year, Congress ended this real property tax exemption, declaring that such real property held by the NEA “shall be subject to taxation by the District of Columbia in the same manner as any similar organization.”⁵ However, this law left in place the charter’s parallel exemption of the NEA from the taxation of its personal property, so long as such property is used for the purposes of the corporation described above “or to produce income to be used for those purposes.”⁶

As a tool for overseeing compliance with the terms of these tax exemptions, Congress included in the NEA’s charter the following requirement:

The corporation shall submit annually to the Secretary of Education a written report stating in detail for the prior year—

- (1) the real and personal property held by the corporation;
- (2) the income from the property; and
- (3) the expenditure or other use or disposition of the property and income from the property.⁷

The NEA’s Policies and Activities

The NEA’s constitution includes organizational objectives including to “promote, support and defend public employees’ right to collective bargaining,” “unite educational employees for effective citizenship,” and “promote and protect human and civil rights.”⁸ Its 2022–2024 Strategic Plan includes among its “core values” calls for a “Just Society” and “Collective Action,” the latter of which the document justifies on the basis that, “[a]s

⁴ 36 U.S.C. § 151106(a).

⁵ Act of Oct. 21, 1998, Pub. L. No. 105-277 112 Stat. 2681-145 (Div. A, Sec. 101(c)).

⁶ 36 U.S.C. § 151106(b).

⁷ 36 U.S.C. § 151106(c). The provision of this information to the Commissioner of Education of the United States, as enacted in the charter in 1906, has been revised to require its provision to the Secretary of Education in accordance with the creation of the Department in 1979 and the designation of its head as a cabinet-level secretary. *See* An Act to Incorporate the National Education of the United States, ch. 3929, 59 Pub. L. No. 398, 34 Stat. 804 (1906).

⁸ CONSTITUTION OF THE NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES, 2022–2023, at 1 (Preamble), available at <https://www.nea.org/sites/default/files/2022-07/NEA%20Constitution%20--%202022-2023.pdf>.



education professionals, we improve both our professional status and the quality of public education when we united and advocate collectively.”⁹

The Strategic Plan commits to spending just under \$100 million over the course of two years on a political agenda lobbying for union policies; seeking the installation of pro-union legislators, executive officials, and judges to the exclusion of those who oppose “the rights of workers”; and “foster[ing] social, racial, and economic justice.”¹⁰ The plan sets aside more than \$33 million over two years for its goal “to enhance the advancement of racial and social justice in education,” including by “raising awareness of the effects of institutional and systemic racism.”¹¹

In light of the NEA’s status as a congressionally chartered organization, its ongoing policies and activities as a labor union, and its extensive involvement in local, state, and federal politics, DFI believes the American people have a deep interest in whether the Department is capable of effectively overseeing the NEA’s compliance with its charter by ensuring that the NEA reports its property, income generated from that property, and disposition of that property and income as required by 36 U.S.C. § 151106(c).

In the same vein, the American people also have a significant interest in understanding whether the materials, if any, the NEA has submitted in compliance with this statutory requirement contain the details the Department needs to review and confirm whether the NEA is using its tax-exempt personal property appropriately in furtherance of the two objectives set out in its charter—“to elevate the character and advance the interests of the profession of teaching” and “to promote the cause of education in the United States.”

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:

Requested Records

DFI requests that ED produce within **twenty (20) business days** as required by statute all reports and any other communications submitted by the NEA, or any of its officers or employees, to the Department between May 1980 to the date of the search in compliance with the requirement of 36 U.S.C. § 151106(c) (for the NEA to submit annually to the Secretary of Education a written report

⁹ NATIONAL EDUCATION ASSOCIATION, 2022–2024 STRATEGIC PLAN AND BUDGET, 1 (2022), available at <https://www.nea.org/sites/default/files/2022-10/2022-24-strategic-plan-and-budget-10-26-22.pdf>.

¹⁰ *Id.* at 21–26.

¹¹ *Id.* at 16, 20.



detailing for each prior year the real and personal property held by the NEA, the income from that property, and the expenditure or other use or disposition of the property and income from the property).

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 requestor¹² if ED (1) created or obtained the requested materials, and, (2) is “in control of the requested materials at the time the FOIA request [was] made.”¹³ Upon request, ED must “promptly” make the requested records available to the requester.¹⁴ Notably, covered agency records include materials provided to ED by both private and governmental organizations.¹⁵ Upon receipt of a FOIA request that “reasonably” describes the records sought and is in compliance with ED’s published rules regarding the time, place, any fees, and procedures to be followed,¹⁶ ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.¹⁷ In addition, the records produced by ED are required to be provided in “any form or format requested . . . if the record is readily reproducible by the agency in that form or format.”¹⁸

Upon receipt of this request, ED has **twenty business days** to “determine . . . whether to comply with [the] request” and “shall immediately notify” the requester of its determination and the reasons therefor,” the right to seek assistance from the agency’s FOIA public liaison, and the requester’s right to appeal any “adverse determination” by ED.¹⁹

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

- ED should immediately act to protect and preserve all records potentially responsive to this request, notifying any and all responsible officials of this preservation request and verifying full compliance with the preservation request.

¹² FOIA requires the disclosure of nonexempt agency records to any person, which includes an individual, partnership, corporation, association, or public or private organization other than an agency. 5 U.S.C. § 551(2).

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

¹⁴ 5 U.S.C. § 552(a)(3)(A).

¹⁵ *Id.* at 144.

¹⁶ 5 U.S.C. § 552(a)(3)(A)(i).

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

¹⁸ 5 U.S.C. § 552(a)(3)(B).

¹⁹ 5 U.S.C. § 552(a)(6)(A)(i).



This matter may be subject to litigation, making the immediate initiation of a litigation hold on the requested materials necessary.

- 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.
- ED should narrowly construe and precisely identify the statutory basis for any constraint which it believes may prevent disclosure.
- If ED determines that any portions of otherwise responsive records are statutorily exempt from disclosure, DFI requests that ED disclose reasonably segregable portions of the records.
- For any responsive records withheld in whole or part by ED, ED should provide a clear and precise enumeration of those records in index form presented with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA”²⁰ and provide a sufficiently detailed justification and rationale for each non-disclosure and the statutory exemption upon which the non-disclosure relies.
- Please provide responsive records in electronic format by email, native format by mail, or PDF or TIH format on a USB drive. If it helps speed production and eases ED’s administrative burden, DFI welcomes provision of the records on a rolling basis. Responsive records sent by mail should be addressed to the Defense of Freedom Institute for Policy Studies, 1455 Pennsylvania Avenue NW, Suite 400, Washington, D.C. 20004.

Fee Waiver Request

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.33 and 34 C.F.R. § 5.32(b)(1)(ii), DFI requests a waiver of all fees associated with this FOIA request for agency records. Indeed, the Department recognizes that DFI is entitled to a fee waiver under the applicable authorities: on February 22, 2022, the Department granted DFI’s request for a fee waiver. Please refer to the Department’s correspondence dated February 22, 2022, from Tracey St. Pierre, Chief FOIA Officer, to DFI’s counsel.

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



Disclosure of the requested records is in the public interest.

Disclosure of the requested records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and because disclosure of the information contained within the requested records is not primarily in the commercial interests of DFI.

The disclosed materials are likely to contribute significant information to the public's understanding of the Department's ability to oversee the NEA's compliance with the statutory obligations set out in its congressionally granted federal charter, an issue of significant interest to American students, families, teachers, and taxpayers across the country who are affected by collective bargaining and political activities and spending of the NEA and its state and local affiliates. This information does not otherwise appear to be in the public domain (in duplicative or substantially identical form).

Provision of the requested records will not commercially benefit DFI (a nonprofit, nonpartisan organization interested in the transparency of ED operations and governance), but will benefit the general public and other groups and entities with non-commercial interests in ED's operations and governance.

DFI will review and analyze the requested records and make the records and analyses available to the general public and other interested groups through publication on DFI's website and social media platforms such as Facebook and Twitter (distribution functions it has already demonstrated a capacity to provide since its formation in September 2021, including a detailed news story on ED policies widely distributed by one of the nation's largest news providers in February 2022, a March 2022 analysis of DOJ policies distributed by a leading news magazine, and multiple widely published analyses and news stories involving recent ED policy announcements regarding the student loan repayment program and Title IX proposed rulemaking). DFI personnel also frequently offer commentary and analyses on radio and television news programs and in various public forums.

Federal law makes clear that when the disclosure is in the public interest and the information contained within the disclosed records is not primarily in the commercial interests of the requester (here, DFI), statutory fee waiver is appropriate.

DFI is a representative of the news media.

In addition to the fee waiver request based upon the public interest, DFI also requests a fee waiver on the basis that DFI is a **representative of the news media**, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.32(b)(1)(ii).



FOIA (as amended) provides that a representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that to an audience.”²¹ DFI provides exactly this service to the general public and other audiences with an interest in those materials and analyses. Upon receipt of the requested materials from ED, DFI will review and analyze those materials and will extract and otherwise distill particularly useful information from those materials for the benefit of the general public and other interested audiences.

DFI will provide its analyses to the general public and other interested audiences through publication on DFI’s website and social media platforms such as Facebook and Twitter (distribution functions it has already demonstrated a capacity to provide since its formation in September 2021). 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 oversight of NEA compliance with its statutory obligation to provide to the Secretary of Education an annual report of its property, income from that property, and disposition of that property and income. The Department’s ability to review such reports and monitor the NEA’s compliance with federal law—specifically relating to the conditions of the tax exemption applied to the organization’s personal property—are highly relevant to the interests of American students, families, teacher, and taxpayers. The requested records concern a matter that has been statutorily entrusted to the Secretary 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 oversight of the NEA.

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 robert.eitel@dfipolicy.org.

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



Sincerely,

/s/ Robert S. Eitel

Robert S. Eitel

President & Co-Founder

Defense of Freedom Institute for Policy Studies, Inc.