

January 22, 2024

**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 U.S. Department of Education Related to Loan Payments Withheld from MOHELA**  
(DFI FOIA Request 100-2-2024)

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.

On October 30, 2023, ED announced that it would withhold \$7.2 million of payments owed by the agency to the Missouri Higher Education Loan Authority (“MOHELA”). This decision is worrisome given the critical role played by MOHELA in the United States Supreme Court’s decision in *Biden v. Nebraska* that struck down President Biden’s student loan debt blanket cancellation plan. The Department’s decision regarding the withholding of payments owed to MOHELA appears punitive. This action also carries significant implications for various stakeholders, encompassing borrowers, the broader economy, and the integrity of the student loan system.

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 thus makes the following requests for provision of records within your possession and/or control:

**Requested Records**

DFI requests that ED produce the following records within twenty (20) business days as required by statute:



1. All communications and correspondence (including but not limited to electronic mail [“email”], email attachments, texts, letters, memoranda, and other records) that reference “MOHELA” or “Missouri Higher Education Loan Authority” and dated from August 1, 2022, through the date the search for the records is conducted between the Department Custodians listed below and any of the following third parties and individuals:

- a. Project on Predatory Student Lending ([predatorystudentlending.org](http://predatorystudentlending.org) and [ppsl.org](http://ppsl.org))
- b. Legal Services Center at Harvard Law School ([legalservicescenter.org](http://legalservicescenter.org))
- c. Jenner & Block ([jenner.com](http://jenner.com))
- d. Public Citizen Litigation Group ([citizen.org](http://citizen.org))
- e. WilmerHale Legal Services Center ([legalservicescenter.org](http://legalservicescenter.org))
- f. Student Borrower Protection Center ([protectborrowers.org](http://protectborrowers.org))
- g. Center for Responsible Lending ([responsiblelending.org](http://responsiblelending.org))
- h. National Consumer Law Center ([nclc.org](http://nclc.org))
- i. Student Debt Crisis Center ([studentdebtcrisis.org](http://studentdebtcrisis.org))
- j. Institute for Policy Integrity ([policyintegrity.org](http://policyintegrity.org))
- k. New York University School of Law ([law.nyu.edu](http://law.nyu.edu))
- l. National Student Legal Defense Network ([defendstudents.org](http://defendstudents.org))
- m. Consumers Union ([consumerreports.org](http://consumerreports.org))
- n. Americans for Financial Reform ([ourfinancialsecurity.org](http://ourfinancialsecurity.org))
- o. Columbia Legal Services ([columbialegal.org](http://columbialegal.org))
- p. Justice Catalyst ([justicecatalyst.org](http://justicecatalyst.org))
- q. American Oversight ([americanoversight.org](http://americanoversight.org))
- r. New Jersey Citizen Action ([njcitizenaction.org](http://njcitizenaction.org))
- s. Secure Democracy ([influencewatch.org](http://influencewatch.org))
- t. Center for American Progress ([americanprogress.org](http://americanprogress.org))
- u. Berkeley Center for Consumer Law & Economic Justice ([law.berkeley.edu](http://law.berkeley.edu))
- v. Young Invincibles ([younginvincibles.org](http://younginvincibles.org))
- w. Debt Collective ([debtcollective.org](http://debtcollective.org))
- x. Adam Pulver
- y. Adina Rosenbaum
- z. Joseph Jaramillo
- aa. Natalie Lyons
- bb. Claire Torchiana
- cc. Jeremy Golden
- dd. Richard Revesz
- ee. Max Sarinsk
- ff. Jack Lienke
- gg. Martha Fulford
- hh. Persis Yu
- ii. Mike Pierce
- jj. Winston Berkman-Breen
- kk. Amy Czulada
- ll. Chris Hicks



mm. Ben Kaufman  
nn. Amber Saddler  
oo. Chuck Bell  
pp. Eileen Connor  
qq. Lisa Donner  
rr. Richard Dubois  
ss. Merf Ehman

2. All communications and correspondence (including but not limited to electronic mail [“email”], email attachments, texts, letters, memoranda, and other records) that reference “MOHELA” or “Missouri Higher Education Loan Authority” and dated from August 1, 2022, through the date the search for records is conducted between the Custodians listed below and any Member of Congress or congressional staff (to include anyone using an email address ending in “mail.house.gov” or “senate.gov”).

### **Custodians**

The search for records described in requests 1 and 2 above should be limited to “ED officials” within the Office of the Secretary, Office of the Under Secretary, Federal Student Aid, Office of Postsecondary Education, Office of Legislation and Congressional Affairs, Office of Communications and Outreach, and Office of 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)
- e. Any employee of whatever classification working in the Office of Legislation and Congressional Affairs
- f. Chief Operating Officer, Federal Student Aid
- g. Deputy Chief Operating Officer, Federal Student Aid
- h. Chief Enforcement 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, Federal Student Aid
- l. Congressional Team Lead, Federal Student Aid

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

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<sup>1</sup> FOIA requires the disclosure of nonexempt agency records to any person, which includes an individual, partnership, corporation, association, or public or private organization other than an agency. 5 U.S.C. § 551(2).



and, (2) is “in control of the requested materials at the time the FOIA request [was] made.”<sup>2</sup> Upon request, ED must “promptly” make the requested records available to the requester.<sup>3</sup> Notably, covered agency records include materials provided to ED by both private and governmental organizations.<sup>4</sup> Upon receipt of a FOIA request that “reasonably” describes the records sought and is in compliance with ED’s published rules regarding the time, place, any fees, and procedures to be followed,<sup>5</sup> ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.<sup>6</sup> In addition, the records produced by ED are required to be provided in “any form or format requested . . . if the record is readily reproducible by the agency in that form or format.”<sup>7</sup>

Upon receipt of this request, ED has **twenty business days** to “determine . . . whether to comply with [the] request” and “shall immediately notify” the requester of its determination and the reasons therefor,” the right to seek assistance from the agency’s FOIA public liaison, and the requester’s right to appeal any “adverse determination” by ED.<sup>8</sup>

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

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

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

- ED should timely provide entire records responsive to this request, broadly construing what information may constitute a “record” and avoid 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.

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<sup>2</sup> *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144–45 (1989).

<sup>3</sup> 5 U.S.C. § 552(a)(3)(A).

<sup>4</sup> *Id.* at 144.

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

<sup>6</sup> *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

<sup>7</sup> 5 U.S.C. § 552(a)(3)(B).

<sup>8</sup> 5 U.S.C. § 552(a)(6)(A)(i).



- For any responsive records withheld in whole or part, ED should provide a clear and precise enumeration of those records in index form presented with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA”<sup>9</sup> and provide a sufficiently detailed justification and rationale for each non-disclosure and the statutory exemption upon which the non-disclosure relies.
- Please provide responsive records in electronic format by email, native format by mail, or PDF or 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**

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.

### **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 ED’s authority under the HEA to modify, waive, release, or compromise Federal student loans, conduct negotiated rulemaking, and otherwise amend significant sections of the HEA. These are issues which are of significant interest to American students, families, teachers, and taxpayers across the country who are affected by changes to the Federal Student Loan program.

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

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<sup>9</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



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 X, formerly known as Twitter (distribution functions it has already demonstrated a capacity to provide since its formation in September 2021, including a detailed news story on ED policies widely distributed by one of the nation’s largest news providers in February 2022, a March 2022 analysis of DOJ policies distributed by a leading news magazine, and multiple widely published analyses and news stories involving recent ED policy announcements regarding the student loan repayment program and Title IX proposed rulemaking). DFI personnel also frequently offer commentary and analyses on radio and television news programs and in various public forums.

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

#### **DFI is a representative of the news media.**

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

FOIA (as amended) provides that a representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that to an audience.”<sup>10</sup> DFI provides exactly this service to the general public and other audiences with an interest in those materials and analyses. Upon receipt of the requested materials from ED, DFI will review and analyze those materials and will extract and otherwise distill particularly useful information from those materials for the benefit of the general public and other interested audiences.

DFI will provide its analyses to the general public and other interested audiences through publication on DFI’s website and social media platforms such as Facebook and X (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 analysis 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.

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<sup>10</sup> See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115–16 (D.C. Cir. 2015).



## Conclusion

The subject of this request regards the Department of Education's authority under Title IV of the Higher Education Act of 1965 to amend, modify, or excuse student loans. The Department's ability to single out and withhold funds from a loan servicer, such as MOHELA, is highly relevant to the interests of American students, families, teachers, 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 materials released by ED in response to this request.

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 [martha.astor@dfipolicy.org](mailto:martha.astor@dfipolicy.org) or (321) 390-2707.

Sincerely,

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Martha Astor  
Associate Counsel  
Defense of Freedom Institute  
for Policy Studies, Inc.