

January 18, 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, Office of Postsecondary Education Related to the Establishment of the Higher Education Program Integrity and Institutional Quality Negotiated Rulemaking Committee
(DFI FOIA Request 100-1-2024)

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 November 28, 2023, the U.S. Department of Education’s (“ED”) Office of Postsecondary Education (“OPE”) announced its intent to establish a negotiated rulemaking committee to “rewrite regulations that address some of the ‘nuts and bolts’ of Title IV program integrity and institutional quality” pursuant to the Higher Education Act of 1965 (“HEA”).¹ ED also announced that it would be seeking members to form a subcommittee “to address participant eligibility requirements for the Federal TRIO programs”²

On November 29, 2023, OPE published a notice in the Federal Register soliciting nominations for representatives to serve on both the Higher Education Program Integrity and Institutional Quality

¹ See Press Release, Dept. of Education, BIDEN-HARRIS ADMINISTRATION SEEKS NOMINATIONS FOR NEW HIGHER EDUCATION PROGRAM INTEGRITY AND INSTITUTIONAL QUALITY RULEMAKING PANEL, (Nov. 29, 2023), <https://www.ed.gov/news/press-releases/biden-harris-administration-seeks-nominations-new-higher-education-program-integrity-and-institutional-quality-rulemaking-panel>.

² *Id.*



Negotiated Rulemaking Committee and the Federal TRIO Programs Subcommittee.³ ED sought applications from “representatives of organizations or groups with interests that are significantly affected”⁴ by proposed regulations pertaining to (1) the Secretary's endorsement of accrediting agencies, under 34 CFR part 602 and related sections; (2) Institutional eligibility under 34 CFR 600.2, including State authorization as “a component of such eligibility under 34 CFR 600.9”⁵; (3) distance education requirements under 34 CFR 600.2 for clock hour programs and online student reporting; (4) “return of title IV funds, to address requirements for participating institutions to return unearned title IV funds in a manner that protects students and taxpayers while easing the administrative burden for institutions of higher education under 34 CFR 668.22”⁶; (5) cash management directives for timely access to title IV funds, credit balances, and related provisions, per 34 CFR part 668, subpart K; and (5) eligibility criteria for participants in the Federal TRIO Programs. The members of both Committees will meet in three sessions to develop proposed regulations.

The objective of negotiated rulemaking is to reach a consensus on the proposed regulatory language. According to an OPE August 2023 notice, “the goal of the committee is to develop proposed regulations that reflect a final consensus of the committee. Consensus means that there is no dissent by any member of a negotiating committee, including the committee member representing the Department.”⁷ DFI and the public have an interest in knowing the names and qualifications of each individual nominated to serve as a negotiator on the Higher Education Program Integrity and Institutional Quality Negotiated Rulemaking Committee and the Federal TRIO Programs Subcommittee.

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 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 deliberative and non-deliberative communications submitted to “negregnominations@ed.gov”, “Aaron.washington@ed.gov”, and “Aaron Washington”, including but not limited to electronic mail (“email”), resumes, curriculum vitae (CV), email attachments, texts, letters, memoranda, calendar invitations, calendar entries, training materials, and other documentation between nominators and the Department of Education (“ED”) regarding nominations, establishment, operation, administration,

³ Negotiated Rulemaking Committee; Public Hearing, 88 Fed. Reg. 83365 (Nov. 29, 2023), <https://www.federalregister.gov/d/2023-26198>.

⁴ *Id.* at ¶ 3.

⁵ *Id.* at ¶ 14.

⁶ *Id.* at ¶ 15.

⁷ See Negotiated Rulemaking Committee; Negotiator Nominations and Schedule of Committee Meetings, 88 Fed. Reg. 60163 (Aug. 31, 2023), <https://www.federalregister.gov/d/2023-18853/p-30>.



purpose, membership, activities, and cost(s) of the “Negotiated Rulemaking Process for Title IV Regulations,” from November 28, 2023, through the date the search is conducted.

2. All nominations, records, materials, and evidence sent to “negregnominations@ed.gov”, “Aaron.washington@ed.gov,” and “Aaron Washington” concerning the nominee’s “specific knowledge” of the Negotiated Rulemaking Committee topics referenced above.
3. Records provided should include any and all resumes and/or curriculum vitae (CV) and their attachments submitted by (or in support of) the nominee. If a resume and/or CV was submitted in support of the nomination by another individual or entity (including but not limited to another government official or entity), the identifying information of the submitter should include the submitter’s name or the name of the entity and date of submission. Any email(s) associated with the submission of the resume and/or CV should also be provided, including related email(s) from the ED employee and/or the individual submitting the resume and/or CV in support of the nominee’s referral to serve on the Committee. Previous employment, education, training, and professional memberships and associations should be included in the provision of requested records. (DFI does not object to the redaction of particular personal contact information contained within resumes and/or CVs, to include the nominee’s home address, personal telephone number, personal email address(es), and the contact information for references provided). If more than one resume has been received in support of the political appointee’s appointment, each resume should be provided in response to this request.
4. All records of communications, including but not limited to electronic mail (“email”), email attachments, texts, letters, memoranda, calendar invitations, calendar entries, and other documentation, between the ED officials (see “Custodians” infra) and the individuals appointed to the Higher Education Program Integrity and Institutional Quality Negotiated Rulemaking Committee and the Federal TRIO Programs Subcommittee, since January 20, 2021, through the date the search was conducted:

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 Postsecondary Education, 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 “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 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.

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).

¹⁴ 5 U.S.C. § 552(a)(3)(B).

¹⁵ 5 U.S.C. § 552(a)(6)(A)(i).



- 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, 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. 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).

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



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 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.”¹⁷ 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

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



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 agency's solicitation of nominations of negotiators to a negotiated rulemaking committee responsible for reviewing and providing comments to proposed regulations concerning the Federal Student Aid programs authorized under title IV of the Higher Education Act of 1965. The Department's ability to review such nominations and select the representatives to serve on the committee, especially those who will be allowed to provide comment during negotiation sessions, is 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 materials received by ED in response to its solicitation for negotiators to and all nominations ED received for the current rulemaking.

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 or (321) 390-2707.

Sincerely,

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