

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

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DEFENSE OF FREEDOM  
INSTITUTE  
FOR POLICY STUDIES, INC.

*Plaintiff,*

v.

U.S. DEPARTMENT OF  
EDUCATION

*Defendant.*

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Case No. 6:24-cv-00390

COMPLAINT  
FOR DECLARATORY,  
INJUNCTIVE, AND  
OTHER RELIEF

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**COMPLAINT**

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Plaintiff Defense of Freedom Institute for Policy Studies, Inc. (“DFI”), by its undersigned attorneys, brings this action against defendant the U.S. Department of Education (the “Department”), and alleges as follows:

1. On May 11 and May 12, 2022, DFI served two expedited requests under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, on the Department. Notwithstanding the passage of over twenty-two months, the Department has not produced documents responsive to one request and, to the

other, produced only 40 pages, two of which were entirely redacted and 27 others were redacted in part.

2. DFI's FOIA requests seek records relating to professional responsibility matters of a particular Department attorney. The attorney had previously been affiliated with a public interest organization that frequently litigated against the Department regarding student loan issues.

3. DFI's FOIA requests are calculated to explore whether the Department failed to guard against conflicts of interest in the administration of a related financial program and the Department's legal advice concerning that program and related litigation. The Department's utter failure to provide a complete production of records responsive to DFI's FOIA requests underscores DFI's concerns that Department personnel may have violated professional responsibility requirements, and that the Department has failed to ensure compliance with such requirements.

4. DFI now seeks relief from this Court under FOIA and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, declaring the Department in violation of its legal obligations under FOIA, enjoining it from

continuing to withhold responsive records, and ordering the immediate production of all responsive agency records.

### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 and may grant declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

6. Venue is proper in this District pursuant to 5 U.S.C. § 552(a)(4)(B) because DFI resides in the District, including maintaining an office in Titusville, Florida.

7. Because the Department has failed to comply with the applicable time-limit provisions of FOIA, DFI is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to the requested relief from this Court.

### **PARTIES**

8. DFI is an independent, nonprofit organization that is tax exempt pursuant to I.R.S. § 501(c)(3) is organized and exists under the laws of the Commonwealth of Virginia. DFI's registered agent is located at 250 Browns Hill Court, Midlothian, VA 23114. DFI is comprised of former senior Department officials who founded DFI to defend and advance freedom and

opportunity for every American family, student, entrepreneur, and worker, and to protect civil and constitutional rights at school and in the workplace. To achieve this mission, DFI's efforts include submitting FOIA requests to federal agencies to obtain records relating to the consideration and implementation of policies imposed by the federal government and its officials on the American people and then posting records produced by the agencies online for public review.

9. The Department is a department of the executive branch of the federal government within the meaning of 5 U.S.C. § 552(f)(1), with its headquarters at 400 Maryland Avenue, S.W., Washington, DC 20202. The Department has possession, custody, and control of the records responsive to DFI's two FOIA requests.

#### **STATEMENT OF FACTS**

##### **The Attorney General's FOIA Disclosure Directive**

10. In a March 15, 2022 directive to executive departments and agencies (including the Department), Attorney General Merrick Garland emphasized that FOIA's "basic purpose . . . is to ensure an informed citizenry,' which is 'vital to the functioning of a democratic society [and] needed to check against corruption and to hold the governors accountable to the governed.'"

Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines, Memo Att'y Gen (2022), <https://rb.gy/znu3f> (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)) (“Garland Directive”).

11. The Garland Directive emphasized the “Presumption of Openness” required of federal departments and agencies, including the Department, 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).” *Id.* at 1. Attorney General Garland warned agencies that requested “[i]nformation that might technically fall within an exemption 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.” *Id.* Attorney General Garland instructed further that pursuant to 5 U.S.C. § 552(a)(8)(A)(ii), 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.’” *Id.*

### **DFI’s First FOIA Request**

12. On May 11, 2022, DFI submitted to the Department a FOIA request regarding the professional responsibility matters described *supra* (the “First Request,” attached hereto as **Exhibit A-1**<sup>1</sup>).

13. Despite the passage of 657 days and the Department’s representations to DFI that production of records was underway, the Department has failed to produce records in response to DFI’s First Request.

14. In its First Request, DFI sought the following records:

Any and all ethics agreements (*e.g.*, ethics pledge(s) and recusal protocol) for [a Department attorney]

Any and all ethics pledge waivers issued by ED for [a Department attorney] (including but not limited to authorizations pursuant to “Personal and business relationships,” at 5 C.F.R. § 2635.502)

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<sup>1</sup> Information that could personally identify the Department attorney has been redacted by DFI in Exhibit A-1 and other exhibits to this Complaint as appropriate.

Identification of the specific factors cited by ED for any and all ethics pledge waivers issued by ED regarding [a Department attorney]

Any and all records indicating recusal determinations issued by ED regarding [a Department attorney]

*See* Exhibit A-1 at 5.

15. The release of these records is in the public interest because disclosure of the requested records will inform the American people about whether the Department and its attorneys are complying with relevant professional responsibility requirements, including in regard to reporting and ethics pledge waiver matters.

16. DFI requested “expedited processing” of its FOIA request by the Department citing then-existing or then-pending student loan policies. *See* Exhibit A-1 at 5.

17. On May 12, 2022, the Department provided an electronic FOIA “Request Acknowledgement” notification to DFI, confirming receipt of the First Request and assigning it tracking number 22-02728-F. The Acknowledgement Letter indicated that the First Request had been “forwarded to the primary responsible office(s) for action.” (The Department’s FOIA Acknowledgment Letter is attached hereto as **Exhibit A-2**.)

18. On July 1, 2022, the Department electronically notified DFI that responsive records were provided and available at the Department's "DoEd FOIA Portal." DFI accessed the responsive records that day. The Provision of Redacted Records included almost entirely redacted records appearing to concern the Department attorney.

19. On September 29, 2022, DFI filed an appeal "of the Department's extremely limited provision of records related to" the Department attorney's professional responsibility matters with the Department's Appeals Office in the Office of the Executive Secretariat (DFI's Appeal of Department's Provision of Redacted Records is attached hereto as **Exhibit A-3**.) As noted in DFI's appeal, the Department's "provision of records is virtually meaningless as nearly all of the relevant information requested by DFI was redacted by the Department." *Id.* at 5.

20. On September 30, 2022, the Department electronically provided an "Appeal Acknowledgement Letter" to DFI which advised that an "administrative review of our response is underway." (The Department's Acknowledgment of DFI's Appeal is attached hereto as **Exhibit A-4**.)



21. On October 13, 2022, the Department issued a “Determination of Appeal,” denying DFI’s appeal (the Department’s Determination of Appeal is attached hereto as **Exhibit A-5**.) The Department’s denial acknowledges that of the 40 pages of responsive records it located, two pages were entirely redacted, and an additional 27 other pages were redacted in part. *Id.* at 1.

22. In its “Determination on Appeal,” the Department finally responded to DFI’s May 11, 2022, request for expedited processing. *Id.* at 5.

23. The Department has since failed to provide any additional responsive records, either in whole or in part (*i.e.*, rolling production), thereby constructively failing to provide the records requested by DFI.

24. The Department has failed to explain or otherwise justify its failure to provide responsive records to DFI.

25. Other than the forty pages of highly redacted documents, the Department has failed to provide records responsive to any of the other three categories in the First Request, either in whole or in part.

26. Since its July 1, 2022 interim production of the forty pages of highly redacted documents, the Department has failed to explain or otherwise justify its failure to complete its production.

27. As a result of the Department's failure to timely or otherwise provide more than forty highly redacted pages responsive to DFI in accord with its statutory obligations, DFI has now constructively exhausted its administrative remedies. DFI thus seeks immediate judicial review of the matter.

### **DFI's Second FOIA Request**

28. On May 12, 2022, DFI submitted a second FOIA request (the "Second Request," attached hereto as **Exhibit B-1**) to the Department.

29. Like the First Request, the Second Request was for particular records relating to the Department's relationship with the public interest organization described *supra*, including the Department's communications with the organization.

30. Despite the passage of 656 days and the Department's representation to DFI that production of responsive records was in process, the Department has failed to produce records in response to DFI's Second Request.

31. DFI's FOIA requested records and documents about a particular Department attorney and their connection to student loan forgiveness

programs, including negotiated rulemaking at the Department as more fully described in Exhibit B-1 at 4-6.

32. The release of these records is in the public interest because disclosure of the requested records will inform the American people about the influence of the public interest organization on the Department's policies since January 20, 2021, and since the Department attorney first became employed by the Department.

33. DFI requested "expedited processing" of its FOIA request by the Department, citing then-existing or then-pending student loan policies. *See* Exhibit B-1 at 3.

34. On May 13, 2022, the Department provided an electronic FOIA "Request Acknowledgement" notification to DFI, confirming receipt of the Second Request and assigning it tracking number 22-02740-F. The Acknowledgement Letter indicated that the Request had been "forwarded to the primary responsible office(s) for action." (The Department's FOIA Acknowledgment Letter is attached hereto as **Exhibit B-2**.)

35. On June 13, 2022, the Department electronically notified DFI in its "20-Day Status Notification" that "[d]ue to the unusual circumstances that

exist with your FOIA requests as defined by U.S.C. § 552(a)(6)(B)(i)(ii), the Department will not be able to respond by the 20-day statutory requirement. The scope of your FOIA requests requires the Department to conduct a vast search across multiple program offices, which we anticipate will result in a large amount of responsive records.” (The Department’s 20-Day Status Notification is attached hereto as **Exhibit B-3**.) The Department has never identified any of the “unusual circumstances” it cited as justification for its failure to meet the statutory deadline for producing responsive records.

36. On October 13, 2022, the Department electronically provided its denial of DFI’s expedited processing request in a letter dated “*June 13, 2023*” (emphasis added) (The Department’s Denial of Plaintiff’s Request for Expedited Processing of its FOIA Request is attached as “**Exhibit B-4**”).

37. During the period between DFI’s May 2022 request for expedited processing and the Department’s October 2022 denial of the request for expedited processing of the FOIA request (which was dated June 13, 2023), President Biden announced a student loan debt cancellation plan.

38. As a result of the Department’s failure to timely or otherwise provide records responsive to DFI in accord with its statutory obligations, DFI

has now constructively exhausted its administrative remedies. DFI thus seeks immediate judicial review of the matter.

**The Department's Violation of the Garland Directive**

39. The Department's failure to timely or otherwise produce non-exempt records responsive to DFI's First and Second Requests directly violates the Garland Directive regarding the FOIA obligations of departments and agencies within the executive branch of the federal government, including the Department.

40. Lastly, most, if not all, communications from DFI to the Department after June 2022 originated from Florida, as DFI's then-Senior Counsel with primary responsibility for DFI's FOIA efforts resided in Florida at that time (and continues to do so).

**FIRST CAUSE OF ACTION**

**Violation of FOIA, 5 U.S.C. § 552**  
**(Wrongful Withholding by the Department of**  
**Non-Exempt Records Responsive to First Request)**

41. DFI repeats and incorporates by reference each of the foregoing paragraphs as if fully set forth below.

42. Through its First Request, DFI properly requested records within the possession, custody, and control of the Department.

43. The Department is a federal agency subject to FOIA's statutory provisions and is obligated to provide, in a timely manner, all non-exempt records responsive to DFI's First Request. In the event that the Department withholds any responsive records, it must provide a lawful reason for withholding those records in response to a FOIA request.

44. After the passage of 657 days, the Department has provided no such lawful reason for withholding all but forty pages of highly redacted responsive records and has demonstrably ignored DFI's First Request, the Department's statutory obligations under FOIA, and the Garland Directive.

45. By failing to provide non-exempt records responsive to DFI's First Request, the Department is wrongfully withholding agency records lawfully requested by DFI in violation of the Department's statutory FOIA obligations.

46. DFI is thus entitled to declaratory and injunctive relief requiring the Department to produce promptly any and all records responsive to DFI's First Request (besides the forty highly redacted pages already produced).

**SECOND CAUSE OF ACTION**

**Violation of FOIA, 5 U.S.C. § 552**  
**(Wrongful Withholding by the Department of**  
**Non-Exempt Records Responsive to Second Request)**

47. DFI repeats and incorporates by reference each of the foregoing paragraphs as if fully set forth below.

48. Through its Second Request, DFI properly requested records within the possession, custody, and control of the Department.

49. The Department is a federal agency subject to FOIA's statutory provisions and is obligated to provide, in a timely manner, all non-exempt records responsive to DFI's Second Request. In the event that the Department withholds records responsive to a FOIA request, it must provide a lawful reason for withholding records.

50. After the passage of 656 days, the Department has provided no such lawful reason for withholding responsive records and has demonstrably ignored DFI's Second Request, the Department's statutory obligations under FOIA, and the Garland Directive.

51. By failing to provide non-exempt records responsive to DFI's Second Request, the Department is wrongfully withholding agency records

lawfully requested by DFI in violation of the Department's statutory FOIA obligations.

52. DFI is thus entitled to declaratory and injunctive relief requiring the Department to produce promptly any and all records responsive to the Second Request.

**WHEREFORE**, DFI respectfully requests that this Court:


- a. Assume jurisdiction in this matter and maintain jurisdiction until the Government complies with its statutory FOIA production obligations and any and all orders of this Court;
- b. Declare the Government in violation of FOIA and order it to conduct immediately a records search or searches reasonably calculated to identify all records responsive to DFI's First and Second Requests;
- c. Order the Government to produce, within twenty days of the Court's order or by other such date as the Court deems appropriate, any and all records responsive to DFI's First and Second Requests;
- d. Enjoin the Government from continuing to withhold any and all non-exempt records responsive to DFI's First and Second Requests;
- e. Award DFI its fees, costs, disbursements and expenses, including reasonable attorney's fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E)(i); and
- f. Grant DFI equitable and such other relief as this Court may deem just and proper.



Dated this 26th day of February, 2024, at Titusville, Florida.

Respectfully submitted,

**DEFENSE OF FREEDOM  
INSTITUTE FOR POLICY  
STUDIES, INC.**



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*Counsel for the Defense of Freedom  
Institute for Policy Studies, Inc.*

# **Exhibit A-1**

May 11, 2022 FOIA Request



May 11, 2022

**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: EXPEDITED PROCESSING FOIA REQUEST: Records Related to [REDACTED], Ethics Pledge Waivers, and Conflict of Interest Communications**  
(DFI FOIA No. 100-19-22)

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. 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 U.S. Department of Education (“ED”) has engaged in significant policy and enforcement efforts regarding federal student aid for students who attend for-profit schools,<sup>1</sup> including anticipated rulemaking related to ED’s Borrower Defense to Repayment regulations.<sup>2</sup> Pursuant to its new policies, ED has liberally applied its “Closed School Discharge<sup>3</sup>” and “Borrower Defense Loan Discharge<sup>4</sup>” programs to eliminate significant amounts of student loan debt incurred by students attending for-profit colleges. For example, in February 2022, ED approved \$415 Million in borrower defense claims, thereby discharging the repayment obligations

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<sup>1</sup> [REDACTED]





[REDACTED]

[REDACTED]

On January 20, 2021, President Biden issued Executive Order 13989, entitled “Ethics Commitments by Executive Branch Personnel”<sup>19</sup> (“EO”), which provided a two-year prohibition by political appointees on participation in matters in which a former employer or client represents a party, [REDACTED]

[REDACTED]

DFI is concerned that as ED determines important litigation positions, formulates Borrower Defense rulemaking, and pursues other wide-ranging student loan debt discharge policies (involving matters of direct litigatory interest to [REDACTED] and to ED), the involvement (and any

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[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]



appropriate limitations on that involvement) of ED’s political appointees, including [REDACTED] should be fully disclosed to the Department and the public.

The public has an urgent interest in knowing that covered political appointees, [REDACTED]  
[REDACTED]  
[REDACTED] have properly recorded all relevant potential ethical conflicts.

[REDACTED] This request has been narrowly drawn by DFI to more readily facilitate ED’s ability to respond in a timely and meaningful manner to the request.

**Expedited Processing Request**

I, the undersigned, hereby certify to the truth of the circumstances described herein, pursuant to the requirements of 35 C.F.R. § 5.21(i)(2)(iii):

As discussed *supra*, issuance of ED’s impactful Borrower Defense rulemaking is pending<sup>22</sup> and ED has already engaged in and apparently plans to be further engaged in unprecedented applications of its Closed School Discharge and Borrower Defense Loan Discharge programs, repeated suspension of its student loan debt collection responsibilities, and consideration of student loan debt forgiveness. These policies, potentially involving more than \$1.75 trillion,<sup>23</sup> affect millions of students, borrowers, lenders, families, and taxpayers. Implementation of ED’s student loan debt policies is of enormous consequence to all Americans.

Therefore, pursuant to 35 C.F.R. § 5.21(i)(2)(i)(B), there is an urgent need for DFI to inform the public about actual and alleged Federal Government activity, thereby justifying EXPEDITED PROCESSING of this request. As discussed *infra*, DFI is primarily engaged in disseminating such information to inform the public about actual and alleged Federal Government activities such as those policy and rulemaking activities by ED (described in detail herein). In addition, pursuant to 35 C.F.R. § 5.21(i)(2)(i)(C), ED may find that “other circumstances” demonstrate a compelling need for expedited processing, to [REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]



[REDACTED]

I, the undersigned, hereby certify to ED that the circumstances described herein are true and accurate to the best of my knowledge and belief, so justifying expedited processing of this request for records, as required by 35 C.F.R. § 5.21(i)(2)(iii).

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 request for expedited provision of records within your possession and/or control:

**Requested Records**

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

1. Any and all ethics agreements (*e.g.*, ethics pledge(s) and recusal protocol) for [REDACTED]
2. Any and all ethics pledge waivers issued by ED [REDACTED] (including but not limited to authorizations pursuant to “Personal and business relationships,” at 5 C.F.R. § 2635.502)
3. Identification of the specific factors cited by ED for any and all ethics pledge waivers issued by ED [REDACTED]
4. Any and all records indicating recusal determinations issued by ED regarding [REDACTED]

**Custodians**

The search for records described in Item 1 should be limited to the following:

- [REDACTED]
- [REDACTED]







organizations.<sup>27</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>28</sup> ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.<sup>29</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>30</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>31</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 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

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<sup>27</sup> *Id.* at 144.

<sup>28</sup> 5 U.S.C. § 552(a)(3)(A)(i).

<sup>29</sup> *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

<sup>30</sup> 5 U.S.C. § 552(a)(3)(B).

<sup>31</sup> 5 U.S.C. § 552(a)(6)(A)(i).



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”<sup>32</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 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.**

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<sup>32</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



I further certify to ED that 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 ethical involvement of particular ED personnel in the formulation of important ED litigation and policy matters regarding its student loan debt policies that are highly relevant to the interests of students, families, and taxpayers. Disclosure of the requested materials will illuminate ED's policies and planning (*e.g.*, rulemaking and enforcement decisions). 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 and more recently, a March 2022 analysis of DOJ policies distributed by a leading news magazine. DFI personnel also frequently offer commentary and analyses on radio and television news programs and in various public forums).

As an organization primarily engaged in the dissemination of information to inform the public about actual or alleged Federal Government activities and the urgent (*i.e.*, timely) need to so inform the public, **DFI satisfies the criteria for expedited processing of its request.**

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.**

I further certify to ED that, 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>33</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 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 distributed by a leading news magazine. DFI personnel have also offered commentary and analyses on radio news programs and in various 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 identifiable operations and activities of ED and, more specifically, the ethical involvement of particular ED personnel in the formulation of important ED [REDACTED] Provision of the requested records will meaningfully inform the general public about significant developments in wide-ranging ED policies and rulemaking, which affect millions of American students, their families, and taxpayers. These are significant policy issues with tremendous impact on the general public and 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.

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 formation and execution of

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<sup>33</sup> See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



ED's policies and related rulemaking, 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 or if DFI's request for expedited processing is not granted.

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](mailto:paul.moore@dfipolicy.org).

Sincerely yours,

*/s/ Paul R. Moore*

Paul R. Moore, Senior Counsel

Defense of Freedom Institute for Policy Studies, Inc.

## **Exhibit A-2**

Department's May 12, 2022  
FOIA Acknowledgment Letter



Paul Moore <paul.moore@dfipolicy.org>

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## Request Acknowledgement by Department of Education

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**EDFOIManager@ed.gov** <EDFOIManager@ed.gov>  
To: paul.moore@dfipolicy.org

Thu, May 12, 2022 at 6:00 AM

Dear Paul Moore,

Your request has been received by the Department of Education and forwarded to the primary responsible office(s) for action. The request has been assigned tracking #22-02728-F, please log into your account and review your submission.

The application address is <https://foiexpress.pal.ed.gov/>.

Please refer to the tracking number to check the status of your FOIA request at the link provided below:

<https://foiexpress.pal.ed.gov/app/CheckStatus.aspx>

For any future correspondence, status updates or questions regarding your request, please contact the FOIA Public Liaison via email to [EDFOIManager@ed.gov](mailto:EDFOIManager@ed.gov)

Thank you,

Department of Education

**Exhibit A-3**  
September 29, 2022  
DFI's Appeal of  
Department's Provision  
of Redacted Records





September 29, 2022

**VIA ELECTONRIC MAIL**  
**EDFOIAappeals@ed.gov**

Appeals Office  
Office of the Executive Secretariat  
U.S. Department of Education  
400 Maryland Ave. SW, LBJ 7W106A  
Washington, D.C. 20202-4536

**Re: Freedom of Information Act Production of Redacted Records Appeal**  
FOIA Request No. 22-02728-F  
(DFI FOIA No. 100-19-22)

Dear FOIA Appeals Officer:

This is an appeal under the Freedom of Information Act (“FOIA”) pursuant to 5 U.S.C. § 552(a)(8)(A), 5 U.S.C. § 552(b)(5), 5 U.S.C. § 552(b)(6), 5 C.F.R. § 2635.501, and 5 C.F.R. § 2635.502.

The Defense of Freedom Institute for Policy Studies (“DFI”) is a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and at work. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces. Our organization is composed of former U.S. Department of Education and other federal agency officials who are experts in education law and policy.

[REDACTED]

**DFI’s expedited FOIA request related to the Department’s student loan debt cancellation and related litigation policies**

On May 11, 2022, DFI submitted a FOIA request for expedited processing of particular records from the U.S. Department of Education (“ED or the “Department”).<sup>1</sup> DFI’s request for expedited processing occurred because the Biden administration had repeatedly indicated that a decision to engage in an unprecedented unilateral elimination of student loan debt was imminent. Without

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<sup>1</sup> See Exhibit 1 (FOIA Request No. 22-02728-F).



explanation, the Department promptly denied DFI’s request for expedited processing of the requested records.

DFI’s request for expedited processing was made in an effort to timely inform the public concerning an urgent, pending, and actual Federal Government activity with vast policy and economic ramifications – here, the Department’s student loan debt cancellation policies and the Department’s changing positions in student loan debt litigation matters.

The reason underlying DFI’s request for expedited processing of the requested records soon became obvious with the Department’s announcement of its controversial, unprecedented student loan debt cancellation policies.<sup>2</sup>

On August 24, 2022, the Department announced what it termed “targeted student loan debt cancellation.”<sup>3</sup> As noted by THE WALL STREET JOURNAL, the administration’s student loan debt cancellation had been “long-sought by advocates” and cancels “\$10,000 in federal student loan debt for borrowers making under \$125,000 per year . . . and “total forgiveness of \$20,000” for Pell Grant recipients.<sup>4</sup>

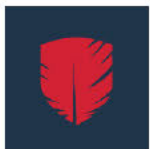
[REDACTED]

[REDACTED]

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<sup>2</sup> DFI, as a representative of the news media and regularly recognized as such a representative by the Department, routinely gathers such information of potential interest to the public, uses its editorial skills to turn those materials into a distinct work, and distributes that to an audience, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.32(b)(1)(ii).

[REDACTED]



[REDACTED]

Less than a month later, in a nationally-broadcast interview, President Biden unambiguously declared that the “pandemic is over,” effectively removing the Department’s astonishingly ill-fitting justification for issuance of its student loan debt cancellation policies.<sup>8</sup> Despite the President’s unambiguously clear removal of the Department’s dubious legal authority to cancel student loan debt under the HEROES Act, OGC has not issued a supplemental Memorandum or a new Memorandum asserting an alternative legal justification for its sweeping student loan debt cancellation scheme. To DFI’s knowledge, the Department continues to proceed at full speed with its debt cancellation scheme, as if the President had never declared the COVID-19 pandemic to be over.

Interestingly, President Biden and the Department set an October 31, 2022, deadline to apply for a significant part of the massive student loan debt cancellation – mere days before the mid-term election.<sup>9</sup>

[REDACTED]

In DFI’s May 11, 2022, FOIA request,<sup>10</sup> it provided a detailed explanation for its request for records including a thorough description of [REDACTED]

[REDACTED]

Several of those legal matters remain ongoing. [REDACTED] issued by the Department regarding conflicts of interest.

[REDACTED]

<sup>6</sup> 20 U.S.C. § 1098bb(a)(1).

<sup>7</sup> *Id.*

<sup>8</sup> Dan Diamond, “Biden’s Claim that ‘pandemic is over’ complicates efforts to secure funding,” THE WASHINGTON POST (Sept. 19, 2022), <https://www.washingtonpost.com/health/2022/09/18/biden-covid-pandemic-over/>.

<sup>9</sup> [REDACTED]

<sup>10</sup> See Exhibit 1 (FOIA Request No. 22-02728-F).

<sup>11</sup> [REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

12 [REDACTED]



Specifically, DFI requested:

1. Any and all ethics agreements (e.g., ethics pledge(s) and recusal protocol) for [REDACTED]
2. Any and all ethics pledge waivers issued by ED for [REDACTED] (including but not limited to authorizations pursuant to “Personal and business relationships,” at 5 C.F.R. § 2635.502).
3. Identification of the specific factors cited by ED for any and all ethics pledge waivers issued by ED regarding [REDACTED]
4. Any and all records indicating recusal determinations issued by ED regarding [REDACTED]

DFI did not request any “personnel and medical and similar files.”<sup>19</sup>

DFI did not request any records that could be withheld under civil discovery such as those records subject to the deliberative process, attorney-client, or attorney-work product privileges.<sup>20</sup>

### **Records provided by the Department**

On July 1, 2022, DFI received almost entirely redacted records in response to DFI’s FOIA request in an attachment to a letter signed by DeShawn Middleton, Government Information Specialist, Office of the Executive Secretariat.<sup>21</sup>

In its response to DFI’s request for records, the Department provided 40 pages of documents.<sup>22</sup> Unfortunately, that provision of records is virtually meaningless as nearly all of the relevant information requested by DFI was redacted by the Department, which offered in place of its redactions the following meager explanations: “(b)(5); (b)(6).”

Through its essentially hollow response (achieved through unwarranted redactions) the Department deprived the American people of important knowledge relating to then-pending, unprecedented student loan debt cancellation policies.

The extremely limited information provided by the Department’s provision of records included only the following:

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<sup>19</sup> 5 U.S.C. § 552(b)(6).

<sup>20</sup> 5 U.S.C. § 552(b)(5).

<sup>21</sup> See Exhibit 2 (Response to FOIA Request No. 22-02728-F).

<sup>22</sup> See Exhibit 3 (22-02728-F (Ethics) Clean).



- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED] and answers being fully redacted throughout the provided documents.

- [REDACTED]

- [REDACTED]

- [REDACTED]



To summarize, the heavily-redacted records provided by the Department were devoid of substance or other information relevant to DFI's FOIA request. Essentially, the Department's response was unresponsive.

### **Relevant Statutory Provisions**

The following Freedom of Information Act and Code of Federal Regulations provisions apply to this appeal:

Public information; agency rules, opinions, orders, records, and proceedings (when withholding is permissible)

**5 U.S.C. § 552(a)(8)(A)** provides that an agency shall withhold from disclosure information that “the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b) or where disclosure is prohibited by law and that the agency shall “consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible” and that the agency should “take reasonable steps necessary to segregate and release nonexempt information.”

Public information; agency rules, opinions, orders, records, and proceedings (inapplicable to certain inter-agency or intra-agency records)

**5 U.S.C. § 552(b)(5)** provides an exemption from disclosure for “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.”

Public information; agency rules, opinions, orders, records, and proceedings (withholding is permissible when personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy)

**5 U.S.C. § 552(b)(6)** provides an exemption from disclosure for “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”

Overview of Standards of Ethical Conduct for Employees of the Executive Branch (Impartiality in Performing Official Duties)

**5 C.F.R. § 2635.501** provides that “employee[s] take[] appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties” and that “unless he receives prior authorization, an employee should not participate in a particular matter involving specific parties which he knows is likely to affect the financial interests of a member of his household, or in which he knows a person with whom he has a covered relationship or represents a party, if he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter.”



**5 C.F.R. § 2635.501(b)** provides that for “an employee who has received an extraordinary severance or other payment from a former employer prior to entering Government service is subject, in the absence of a waiver, to a two-year period of disqualification from participation in particular matters in which that former employer is or represents a party.”

Standards of Ethical Conduct for Employees of the Executive Branch (Impartiality in Performing Official Duties); Personal and business relationships

**34 C.F.R. § 2635.502** provides that where “an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee...”

### **The Department’s unwarranted redactions to the records provided to DFI**

The Department’s redactions based on exemption “(b)(6)”<sup>23</sup> appear to be unwarranted. DFI has not requested records that would disclose ██████ personnel and medical files or similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy. Rather, DFI has requested records required of every federal employee who may have conflicts of interest in significant matters pending within the federal agency in which they serve. ██████ is not excepted from these disclosure requirements and the Department’s improper use of the (b)(6) exemption is a misuse of that statutory exemption in this matter. Neither DFI nor the American people have an interest in the disclosure of information which may violated ██████ personal privacy interests.

In fact, this exemption typically pertains to ordinary understandings of private information, such as that contained in law enforcement records,<sup>24</sup> ██████ home address,<sup>25</sup> or social security records.<sup>26</sup> DFI’s FOIA request sought no such records nor is it interested in ██████ personal financial information. DFI’s FOIA request is for records indicating whether ██████ disclosed potential conflicts of interest to the Department and how the Department responded to those disclosures. The Department’s deliberate avoidance of providing such responsive records is dumbfounding, particularly in light of the vast economic and political significance of its student loan debt cancellation policies.

The Department’s redactions based on exemption “(b)(5)”<sup>27</sup> also appear to be unwarranted. DFI has not requested inter- or intra-agency memoranda or letters that are pre-deliberative, but has

<sup>23</sup> 5 U.S.C. § 552(b)(6).

<sup>24</sup> See, e.g., *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).

<sup>25</sup> See, e.g., *DOD v. Fed. Labor Relations Auth.*, 510 U.S. 487 (1994).

<sup>26</sup> See, e.g., *Coleman v. Lappin*, 680 F. Supp. 2d 192 (D.D.C. 2010).

<sup>27</sup> 5 U.S.C. § 552(b)(5).





requested records indicating [REDACTED] disclosure of potential conflicts of interests to the Department and the Department's determinations regarding those disclosures (if they occurred). This exemption "clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency."<sup>28</sup> Here, the records of conflict-of-interest disclosures and the Department's determinations regarding grants or withholding of waivers regarding those conflicts would routinely and normally be disclosed in such litigation contexts and should be provided in response to DFI's request.<sup>29</sup> DFI seeks only decisional records, not pre-decisional or deliberative records and the Department is obligated to provide precisely those records in response to DFI's records request.<sup>30</sup>

Through its unexplained redactions, the Department appears to be in violation of certain statutory FOIA provisions requiring that an agency shall withhold from disclosure only that information that "the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b) or where disclosure is prohibited by law and that the agency shall *"consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible"* and that the agency should *"take reasonable steps necessary to segregate and release nonexempt information."*<sup>31</sup>

There is no indication in the provided records that the Department has attempted to make partial disclosures where possible or that it has taken any reasonable steps to segregate and protect properly exempted information while correctly providing the remaining information. Of greater concern, the Department has failed to identify a protected interest and has, in place of a proper response, excessively redacted records which are not otherwise arguably subject to such fulsome statutory exemption. Instead, it simply redacted large swaths of information and inserted "(b)(5)" and "(b)(6)" as apparent explanations for the Department's redactions.

In essence, the Department has responded to a lawful FOIA request concerning serious ethical questions surrounding major policy questions (and the handling of those conflict-of-interest questions by the Department) with little more than arrogant disdain. The Department has in place lawful procedures to follow when an employee has a potential conflict of interest or the appearance of self-interest in the Department's outcome. Such questions posed by DFI are hardly new or beyond the pale and are not aimed at divulging [REDACTED] "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."<sup>32</sup> Rather, as explained in DFI's FOIA request, it seeks merely to determine whether [REDACTED] properly disclosed possible conflicts of interest and the Department's response to those disclosures.

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<sup>28</sup> *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

<sup>29</sup> *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975).

<sup>30</sup> *See Pub. Citizen v. OMB*, 598 F.3d 865, 874 (D.C. Cir. 2009).

<sup>31</sup> 5 U.S.C. § 552(a)(8)(A) (emphases added).

<sup>32</sup> 5 U.S.C. § 552(b)(6).



Those disclosures are of immense economic and political consequence to the American people, who have a right to know whether [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] The records requested by DFI reflect the public's legitimate ongoing concerns regarding Departmental policies of massive economic and political consequence.

The Department's unjustified response to DFI's FOIA request is unworthy of the Department and its disclosure obligations to the American people and should promptly be corrected by the Department.

### **Conclusion**

For the reasons discussed above, DFI respectfully requests that the Department reconsider and supplement its July 1, 2022, response to FOIA Request No. 22-02728-F. As made clear in DFI's FOIA request and, again, in this appeal, DFI does not seek records subject to the exemptions cited by the Department in its heavily-redacted response to DFI. DFI believes the Department erred in its broad assertions of the cited exemptions and also failed to make statutorily requisite efforts to carefully and precisely redact any information within records that might actually qualify under the cited exemptions.

Thank you for your prompt consideration of DFI's appeal in this important matter of vast economic and political significance. If you have any questions, 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.

### **Attachments**

Exhibit 1

Exhibit 2

Exhibit 3

**Exhibit A-4**  
Department's September 30, 2022  
Appeal Acknowledgment Letter



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SECRETARY

*FOIA Service Center*

September 30, 2022

Mr. Paul R Moore  
Senior Counsel  
Defense of Freedom Institute for Policy Studies  
1455 Pennsylvania Ave NW  
Suite 400  
Washington, DC 20004

RE: Appeal – FOIA Request No. 22-02728-F/ Appeal – 22-00055-A

Dear Paul R Moore:

This is to acknowledge receipt of your September 29, 2022 letter appealing the Department's July 1, 2022 decision to deny your request for records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, which was received by this office on May 11, 2022.

An administrative review of our response is underway, and the Department's Chief FOIA Officer will issue a determination on the appeal once it is completed.

Please refer to the appeal tracking number to check the status of your appeal at the link provided below:

<https://foiaexpress.pal.ed.gov/app/CheckStatus.aspx>

If you have a question or concern, please contact the FOIA Office at (202) 401-8365 or [EDFOIAManager@ed.gov](mailto:EDFOIAManager@ed.gov).

Sincerely,

**Art Caliguiran**  
Art Caliguiran  
FOIA Appeals Coordinator  
Office of the Secretary

**Exhibit A-5**  
Department's October 13, 2022  
Determination of Appeal



**UNITED STATES DEPARTMENT OF EDUCATION**

**OFFICE OF THE SECRETARY**

October 13, 2022

Paul R. Moore  
Senior Counsel  
Defense of Freedom Institute for Policy Studies, Inc.  
1455 Pennsylvania Avenue, NW  
Suite 400  
Washington, DC 20004

Re: Appeal No. 22-00055-A – FOIA Request No. 22-02728-F

Dear Paul R. Moore:

I am writing in response to your letter dated September 29, 2022, appealing the U.S. Department of Education's (Department's) July 1, 2022, decision to deny in part the Defense of Freedom Institute for Policy Studies, Inc. (DFI) May 11, 2022, request for records submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

Background

DFI's request sought the following:

1. Any and all ethics agreements (*e.g.*, ethics pledge(s) and recusal protocol) for [REDACTED]
2. Any and all ethics pledge waivers issued by ED for [REDACTED] (including but not limited to authorizations pursuant to "Personal and business relationships," at 5 C.F.R. § 2635.502)
3. Identification of the specific factors cited by ED for any and all ethics pledge waivers issued by ED regarding [REDACTED]
4. Any and all records indicating recusal determinations issued by ED regarding [REDACTED]

Your request was forwarded to the Department's Office of the General Counsel (OGC) to search for records responsive to your request. By letter dated July 1, 2022, the Department granted DFI's request in part and denied its request in part. Specifically, the Department located forty pages of responsive records, which were provided to you on July 1, 2022, with two pages redacted in their entirety and 27 pages redacted in part, pursuant to 5 U.S.C. §§ (b)(5) and (b)(6) (FOIA Exemptions 5 and 6). There are no documents responsive to items 2 and 3 of your FOIA request as listed above. Your appeal ensued.

Determination on Appeal

Paul Moore

Appeal No. 22-00055-A – FOIA Request No. 22-02728-F

Page 2

Based on a careful review of the correspondence, the information at issue in your appeal, and applicable legal precedent, I have decided to deny your appeal. The reasons for my determination are discussed below.

### Discussion

#### *Exemption 5*

Your appeal challenges the use of Exemption 5 on the basis that “[t]he Department’s redactions based on exemption ‘(b)(5)’ also appear to be unwarranted. DFI has not requested inter- or intra-agency memoranda or letters that are pre-deliberative, but has requested records indicating [REDACTED] disclosure of potential conflicts of interests to the Department and the Department’s determinations regarding those disclosures (if they occurred).” You further argue “this exemption ‘clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency.’ Here, the records of conflict-of-interest disclosures and the Department’s determinations regarding grants or withholding of waivers regarding those conflicts would routinely and normally be disclosed in such litigation contexts and should be provided in response to DFI’s request. DFI seeks only decisional records, not pre-decisional or deliberative records and the Department is obligated to provide precisely those records in response to DFI’s records request.” As an initial matter, as indicated above, there are no responsive documents to items 2 and 3, which specifically seek ethics pledge waivers.

As you may be aware, Exemption 5 encompasses the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. To qualify for Exemption 5 protection, a government document “must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.” *Dep’t of the Interior v. Klamath*, 532 U.S. 1, 8 (2001) (Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency). Courts have recognized that Exemption 5 protects, as a general rule, materials which would be protected under the attorney-client privilege, the attorney work-product privilege, and the deliberative process privilege. *See Coastal State Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

Here, the information redacted under Exemption 5 contains communications to and from [REDACTED] seeking ethics advice and guidance from the Ethics Division concerning pursuit of an outside activity. Because of the back-and-forth nature of these communications—gathering facts and assessing the application of the ethics laws and regulations—the Department withheld much of this information under Exemption 5, as being protected by the deliberative process privilege. For the deliberative process privilege to be invoked, the communication must be both pre-decisional and deliberative. *See Mapother v. DOJ*, 3 F.3d 1533, 1537 (D.C. Cir. 1993).

The role of Department ethics officials is to provide advice and counseling to Department employees, which includes the application of the ethics laws and regulations to a specific set of factual circumstances. Employees ask for this advice and counseling in order to determine the

Paul Moore

Appeal No. 22-00055-A – FOIA Request No. 22-02728-F

Page 3

appropriate course of action as it relates to their official duties. The decision-making process for the employee is deliberative with the final result being the employee's course of action in relation to the ethics advice provided. Because the presentation of information to the employee may appear final due to how it is presented, it is not conclusive evidence that the Department is making a final decision. The legal advice is provided in response to the question raised by the employee, and relevant to a specific course of action the employee is contemplating but sought out ethics guidance to determine the application of the law to that course of action. Accordingly, to the extent the records reflect the Ethics Division's advice and recommendations to individual employees, including those selective facts that were relied upon in making the recommendations and which would reveal the nature of the advice and recommendations if revealed, the information is protected by the deliberative process privilege. I find that Exemption 5 was properly applied to these discussions.<sup>1</sup>

### *Exemption 6*

You also contend that the Department's redactions based on Exemption 6 are "unwarranted" and "a misuse of that statutory exemption" because DFI did not request records "that would disclose [REDACTED] personnel and medical files or similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." DFI contends that it "has requested records required of every federal employee who may have conflicts of interest in significant matters pending within the federal agency in which they serve. [REDACTED] is not excepted from these disclosure requirements[.]"

You contend that "DFI did not request any 'personnel and medical and similar files.'" However, the records you requested do in fact constitute "similar files" as defined by the Supreme Court *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1982). In that case, the Court established a broad interpretation of the term "similar files" and held that all information that "applies to a particular individual" meets the threshold requirement for Exemption 6 protection. *Id.* at 601. As all records DFI requests explicitly pertain to [REDACTED], the Exemption 6 threshold requirement has been met. Determining whether the records or information are exempt from disclosure under Exemption 6 requires a two-step analysis focusing on: (1) the identification of privacy interests implicated in the records requested; and (2) where such a privacy interest is identified, the balancing of that interest against the public interest, if any, to be served by disclosure. *See Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

The information redacted from the records provided to you does disclose personal information that would constitute a clearly unwarranted invasion of [REDACTED] privacy. To the extent that the records contain personal contact information, signatures, or financial, business, or personal information, I find that [REDACTED] and others have a measurable privacy interest. *See DOD v. FLRA*, 510 U.S. 487, 500 (1994) (finding that federal employees' home addresses are protected); *Consumers' Checkbook, Ctr. For the Study of Servs. v. U.S. Dep't of Health & Human Servs.*, 554 F.3d 1046, 1050 (D.C. Cir. 2009) ("[A]n individual has a substantial privacy interest under FOIA in his information, including income"); *Stern v. F.B.I.*, 737 F.2d 84, 91 (D.C. Cir. 1984)

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<sup>1</sup> This addresses many of the concerns you outlined in the bullet points on page 6 of your appeal.



Paul Moore

Appeal No. 22-00055-A – FOIA Request No. 22-02728-F

Page 4

(recognizing that “an employee had at least a minimal privacy interest in his or her employment history and job performance evaluations”).

For example, on page six of your appeal, you referenced how on page three of the release, [REDACTED]

[REDACTED]

In situations where some risk of disclosure of personal privacy exists if the record is fully disclosed, it is necessary to further examine whether a relevant public interest is involved in the disclosure to determine whether the public interest outweighs the privacy interest. The requestor bears the burden of establishing that disclosure would serve the public interest. For purposes of this analysis, the public interest to be considered in the analysis is limited to FOIA’s core purpose of shedding light on the activities of a government agency in the performance of its statutory duties. *See Dep’t of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). You argue the “disclosures are of immense economic and political consequence to the American people, who have a right to know whether senior political appointees in the current administration [REDACTED]

[REDACTED]

Your argument is unpersuasive in that it presumes a failure to disclose a conflict of interest. There is no evidence to suggest that a such a disclosure was not made. The mere fact that Department released forty pages of responsive documents in response to your FOIA request in response to items 1 and 4 of your request is inconsistent with your presumption that there was a “failure to disclose” a conflict of interest. The information redacted from these materials is also not evidence of a “failure to disclose” a conflict of interest. Consequently, to the extent that the redacted information would reveal an employee’s personal contact information or signatures, or financial, business, or personal information, I find that the public interest would not outweigh the individual’s privacy in nondisclosure and am denying your appeal.

Moreover, you requested [REDACTED] Public Financial Disclosure Report (OGE Form 278e). Public financial disclosure reports are not available through the Freedom of Information Act at 5 U.S.C. § 552. These reports are subject to the Ethics in Government Act of 1978, which requires the Department to make copies of public financial disclosure reports available to the public within 30 days of the date such report is received. 5 U.S.C. app. § 105(b)(1). Because you requested the OGE Form 278e through your FOIA request, Exemption 6 was invoked to protect [REDACTED] privacy interests to the extent that the report contained personal contact information or financial, business, or personal information. However, pursuant to the Ethics in

Paul Moore

Appeal No. 22-00055-A – FOIA Request No. 22-02728-F

Page 5

Government Act of 1978, on October 4, 2022, you requested a “copy of the most recent Public Financial Disclosure Report OGE Form 278e, including any OGE Form 278-Ts, for [REDACTED]” On October 7, 2022, the Department provided you with documents responsive to your request. Consequently, your appeal regarding [REDACTED] OGE Form 278e is moot, and therefore, your FOIA appeal regarding that document is also denied.

In your September 29, 2022, letter you note that the Department did not respond to your request for expedited processing, which we interpret as an appeal of the Department’s constructive denial of your request. Upon review, the Department has determined that you did not demonstrate a compelling need for the information nor substantiate that there existed an urgency to inform the public concerning any actual or alleged Federal Government activity. Your appeal regarding expedited processing is therefore denied.

#### Notice of Other Rights

You have the right to seek assistance and/or dispute resolution services from the Department’s FOIA Public Liaison or the Office of Government Information Services (OGIS). The FOIA Public Liaison is responsible, among other duties, for assisting in the resolution of FOIA disputes. OGIS, which is outside the Department of Education, offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to appeals or litigation. Contact information follows:

Mail	FOIA Public Liaison Office of the Secretary U.S. Department of Education 400 Maryland Ave., SW, LBJ 7W104 Washington, DC 20202-4536	Office of Government Information Services National Archives and Records Administration 8601 Adelphi Road Room 2510 College Park, MD 20740-6001
E-mail	<a href="mailto:robert.wehausen@ed.gov">robert.wehausen@ed.gov</a>	<a href="mailto:OGIS@nara.gov">OGIS@nara.gov</a>
Phone	202-205-0733	301-837-1996; toll free at 1-877-684-6448
Fax	202-401-0920	301-837-0348

If you are dissatisfied with my action on your appeal, you may file a lawsuit in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,



Deborah O. Moore, Ph.D.  
Chief FOIA Officer

**Exhibit B-1**  
DFI's May 12, 2022  
FOIA Request



May 12, 2022

**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: EXPEDITED PROCESSING FOIA REQUEST: Records Related to the U.S. Department of Education’s Communications with [REDACTED]**  
[REDACTED]  
(DFI FOIA No. 100-20-22)

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. 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 U.S. Department of Education (“ED”) has engaged in significant policy and enforcement efforts regarding federal student aid for students who attend for-profit schools,<sup>1</sup> including anticipated rulemaking related to ED’s Borrower Defense to Repayment regulations.<sup>2</sup> Pursuant to its new policies, ED has liberally applied its “Closed School Discharge<sup>3</sup>” and “Borrower Defense Loan Discharge<sup>4</sup>” programs to eliminate significant amounts of student loan debt incurred by students attending for-profit colleges. For example, in February 2022, ED approved \$415 Million in borrower defense claims, thereby discharging the repayment obligations

\_\_\_\_\_

[REDACTED]



of more than 16,000 borrowers.<sup>5</sup> That discharge followed ED’s August 2021 elimination of more than \$1.1 Billion in student loan debt under the Closed School Discharge program.<sup>6</sup>

ED’s unprecedented unilateral “elimination” of student loan debt under these programs appears to be part of a much wider effort by the Biden Administration to “forgive” student loan debt<sup>7</sup> and its repeated suspension of its obligation to collect student loan debt.<sup>8</sup> As President Biden’s press secretary recently noted, “[n]ot a single person in this country has paid a dime on federal student loans since the president took office.”<sup>9</sup> Sen. Elizabeth Warren (D-MA) has called for ED to cancel as much as \$50,000 in student loan debt for each borrower<sup>10</sup> even if “the bottom 60% of households receive only 34% of the benefit,”<sup>11</sup> as noted in a study published by the Brookings Institution.

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED] Subject to ethics obligations and related recusal requirements, President Biden is entitled to place the political appointees of his choosing at ED. The public, however, has a right to know about the influence of outside organizations [REDACTED] on ED's policies, particularly as ED prepares to impose significant new rulemaking related to its Borrower Defense and other student loan debt policies.

DFI thus seeks ED's expedited processing of records related to ED's communications with [REDACTED] and [REDACTED] personnel since January 20, 2021.

**Expedited Processing Request**

I, the undersigned, hereby certify to the truth of the circumstances described herein, pursuant to the requirements of 35 C.F.R. § 5.21(i)(2)(iii):

As discussed *supra*, issuance of ED's impactful Borrower Defense rulemaking is pending<sup>18</sup> and ED has already engaged in and apparently plans to be further engaged in unprecedented applications of its Closed School Discharge and Borrower Defense Loan Discharge programs, repeated suspension of its student loan debt collection responsibilities, and consideration of student

[REDACTED]





loan debt forgiveness. These policies, potentially involving more than \$1.75 trillion,<sup>19</sup> affect millions of students, borrowers, lenders, families, and taxpayers. Implementation of ED's student loan debt policies is of enormous consequence to all Americans.

Therefore, pursuant to 35 C.F.R. § 5.21(i)(2)(i)(B), there is an urgent need for DFI to inform the public about actual and alleged Federal Government activity, thereby justifying EXPEDITED PROCESSING of this request. As discussed *infra*, DFI is primarily engaged in disseminating such information to inform the public about actual and alleged Federal Government activities such as those policy and rulemaking activities by ED (described in detail herein). In addition, pursuant to 35 C.F.R. § 5.21(i)(2)(i)(C), ED may find that "other circumstances" demonstrate a compelling need for expedited processing, to include the considerable impact of ED's student loan debt enforcement policies (as described *supra*) [REDACTED]

I, the undersigned, hereby certify to ED that the circumstances described herein are true and accurate to the best of my knowledge and belief, so justifying expedited processing of this request for records, as required by 35 C.F.R. § 5.21(i)(2)(iii).

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 request for expedited provision of records within your possession and/or control:

### **Requested Records**

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

1. All records, including but not limited to electronic mail ("email"), texts, letters, memoranda, and other documentation *to ED Officials* (see Custodians, *infra*) from the following entities and associated individuals from January 20, 2021, through the date the search is conducted, which reference [REDACTED] or "student loan cancellation" or "forgiveness" or "BD" or "BDR" or "borrower defense rule" or "borrower defense" or "borrower defense process" or "borrower defense applications" or "unresolved borrower defense claims" or "sham borrower defense process" or [REDACTED] or "seizure of borrower tax refunds" or "unlawful partial relief methodologies" or "gainful employment" or "GE" or "negotiated rulemaking" or "neg reg" or "collecting" or "collections" or "default" or "extensions" or "student loan payment pause" or "cancellation" or "student borrowers" or "defrauded borrowers" or "partial relief" or "discharge" or "Pell Grants" or "for-profit" or "Consumer Financial Protection Bureau" or "CFPB" or [REDACTED]

<sup>19</sup> [REDACTED]







[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] or “deposition” or “sanctions” or “contempt”:

### **Custodians**

The search for records described in Item 1 should be limited to “ED 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 Enforcement Officer, Federal Student Aid
- i. Chief Financial Officer, Federal Student Aid
- j. Executive Assistant to the Chief Operating Officer, Federal Student Aid
- k. Chief of Staff, Federal Student Aid
- l. Senior Advisor for Management, Federal Student Aid
- m. Senior Advisor, Federal Student Aid
- n. Ombudsman, Federal Student Aid
- o. Congressional Team Lead, Federal Student Aid

### **Definitions**

Absent contrary statutory directives, words and phrases contained herein should be accorded their usual, plain, and ordinary meaning. Please note the following statutory definition:

“**Records**” are defined at 44 U.S.C. § 3301(a)(1-2) as including “all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them” and further “includes all traditional forms of records, regardless of physical form or characteristics, including information created, manipulated,



communicated, or stored in digital or electronic form, such as 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.

### **Identification and Production of the Requested Records**

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>20</sup> 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.”<sup>21</sup> Upon request, ED must “promptly” make the requested records available to the requester.<sup>22</sup> Notably, covered agency records include materials provided to ED by both private and governmental organizations.<sup>23</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>24</sup> ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.<sup>25</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>26</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>27</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.

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<sup>20</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).

<sup>21</sup> *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

<sup>22</sup> 5 U.S.C. § 552(a)(3)(A).

<sup>23</sup> *Id.* at 144.

<sup>24</sup> 5 U.S.C. § 552(a)(3)(A)(i).

<sup>25</sup> *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

<sup>26</sup> 5 U.S.C. § 552(a)(3)(B).

<sup>27</sup> 5 U.S.C. § 552(a)(6)(A)(i).



- 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 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<sup>28</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.

### **Disclosure of the requested records is in the public interest.**

I further certify to ED that 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 involvement and impact of [REDACTED] regarding its student loan debt policies that are highly relevant to the interests of students, families, and taxpayers. Disclosure of the requested materials will illuminate ED's policies and planning (e.g., rulemaking and enforcement decisions). 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 and more recently, a March 2022 analysis of DOJ policies distributed by a leading news magazine.

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<sup>28</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



DFI personnel also frequently offer commentary and analyses on radio and television news programs and in various public forums).

As an organization primarily engaged in the dissemination of information to inform the public about actual or alleged Federal Government activities and the urgent (i.e., timely) need to so inform the public, **DFI satisfies the criteria for expedited processing of its request.**

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.**

I further certify to ED that, 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>29</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 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 distributed by a leading news magazine. DFI personnel have also offered commentary and analyses on radio news programs and in various 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>29</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 identifiable operations and activities of ED and, more specifically, the involvement and impact of outside organizations and associated individuals in the formulation of important ED litigation and policy matters regarding its student loan debt policies. Provision of the requested records will meaningfully inform the general public about significant developments in wide-ranging ED policies and rulemaking, which affect millions of American students, families, and taxpayers. These are significant policy issues with tremendous impact on the general public and 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.

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 formation and execution of ED's policies and related rulemaking, 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 or if DFI's request for expedited processing is not granted.

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](mailto:paul.moore@dfipolicy.org).

Sincerely yours,

*/s/ Paul R. Moore*

Paul R. Moore, Senior Counsel

Defense of Freedom Institute for Policy Studies, Inc.

## **Exhibit B-2**

Department's May 13, 2022  
FOIA Acknowledgment Letter



Paul Moore <paul.moore@dfipolicy.org>

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## Request Acknowledgement by Department of Education

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**EDFOIManager@ed.gov** <EDFOIManager@ed.gov>  
To: paul.moore@dfipolicy.org

Fri, May 13, 2022 at 3:42 PM

Dear Paul Moore,

Your request has been received by the Department of Education and forwarded to the primary responsible office(s) for action. The request has been assigned tracking #22-02740-F, please log into your account and review your submission.

The application address is <https://foiexpress.pal.ed.gov/>.

Please refer to the tracking number to check the status of your FOIA request at the link provided below:

<https://foiexpress.pal.ed.gov/app/CheckStatus.aspx>

For any future correspondence, status updates or questions regarding your request, please contact the FOIA Public Liaison via email to [EDFOIManager@ed.gov](mailto:EDFOIManager@ed.gov)

Thank you,

Department of Education



## **Exhibit B-3**

Department's June 13, 2022  
20-Day Status Notification



**UNITED STATES DEPARTMENT OF EDUCATION**

OFFICE OF THE SECRETARY

FOIA Service Center

June 13, 2022

Mr. Paul R Moore  
 Defense of Freedom Institute for Policy Studies  
 1455 Pennsylvania Ave NW  
 Suite 400  
 Washington, DC 20004

**RE: 20 –DAY NOTIFICATION 22-02740-F**

Dear Paul Moore:

This is the Department of Education’s (the Department) initial determination letter to your request dated, May 12, 2022, seeking information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Your request was forwarded to the appropriate office(s) within the Department for any responsive documents they may have.

Due to the unusual circumstances that exist with your FOIA requests as defined by U.S.C. § 552(a)(6)(B)(i)(ii), the Department will not be able to respond by the 20 day statutory requirement. The scope of your FOIA requests requires the Department to conduct a vast search across multiple program offices, which we anticipate will result in a large amount of responsive records.

You can check on the status of your FOIA request at the link provided below:

<https://foiaexpress.pal.ed.gov/app/CheckStatus.aspx>

You have the right to seek assistance and/or dispute resolution services from the Department’s FOIA Public Liaison or the Office of Government Information Services (OGIS). The FOIA Public Liaison is responsible, among other duties, for assisting in the resolution of FOIA disputes. OGIS, which is outside the Department of Education, offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation.

They can be contacted by:

Mail	FOIA Public Liaison Office of the Executive Secretariat U.S. Department of Education 400 Maryland Ave., SW, LBJ 7C132 Washington, DC 20202-4500	Office of Government Information Services National Archives and Records Administration 8601 Adelphi Road College Park, MD 20740-6001
E-mail	<a href="mailto:robert.wehausen@ed.gov">robert.wehausen@ed.gov</a>	<a href="mailto:OGIS@nara.gov">OGIS@nara.gov</a>
Phone	202-205-0733	202-741-5770; toll free at 1-877-684-6448
Fax	202-401-0920	202-741-5769

Page 2 - Paul R Moore  
FOIA Request No. 22-02740-F

Sincerely

ED FOIA Manager  
FOIA Service Center  
U.S. Department of Education

**Exhibit B-4**  
Department's October 13, 2022  
Denial of Expedited  
Processing  
Erroneously dated June 13, 2023



**UNITED STATES DEPARTMENT OF EDUCATION**

OFFICE OF THE SECRETARY

FOIA Service Center

June 13, 2023

Paul R. Moore  
Senior Counsel  
Defense of Freedom Institute for Policy Studies  
1455 Pennsylvania Ave NW  
Suite 400  
Washington, DC 20004

RE: FOIA Request No. 22-02740-F

Dear Paul R. Moore:

This letter is in response to your request dated May 12, 2022, requesting information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Your request was received in this office on May 13, 2022. Your request has been assigned to the appropriate office(s) within the Department to search for documents that may be responsive to your request.

You have asked for expedited processing of your request. That request is denied. The Department has concluded that you have not demonstrated a compelling need for the information. In addition, you have not substantiated that there is an urgency to inform the public concerning any actual or alleged Federal Government activity.

Enclosed with this letter is a general informational sheet for Expedited Processing. Should you still wish to claim that your request should be granted expedited processing, you must provide more specific and detailed evidence to support your claims under each statutory requirement described in our FOIA regulations available on the internet at: <https://www2.ed.gov/policy/gen/leg/foia/foiatoc.html> and outlined in the attachment to this letter.

You have the right to seek assistance and/or dispute resolution services from the Department's FOIA Public Liaison or the Office of Government Information Services (OGIS). The FOIA Public Liaison is responsible, among other duties, for assisting in the resolution of FOIA disputes. OGIS, which is outside the Department of Education, offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation.

They can be contacted by:

Mail	FOIA Public Liaison Office of the Secretary U.S. Department of Education 400 Maryland Ave., SW LBJ 7W104 Washington, DC 20202-4500	Office of Government Information Services National Archives and Records Administration 8601 Adelphi Road, Room 2510 College Park, MD 20740-6001
E-mail	<a href="mailto:robert.wehausen@ed.gov">robert.wehausen@ed.gov</a>	<a href="mailto:OGIS@nara.gov">OGIS@nara.gov</a>
Phone	202-205-0733	202-741-5770; toll free at 1-877-684-6448
Fax	202-401-0920	202-741-5769

Page 2 – Paul R. Moore  
FOIA Request 22-02740-F

Lastly, you have the right to appeal this determination. You must submit any appeal within 90 calendar days after the date of this letter. Using the services described above does not affect your right, or the deadline, to pursue an appeal. An appeal must be in writing and must include a detailed statement of all legal and factual bases for the appeal; it should be accompanied by a copy of this letter, the initial letter of request, and any documentation that serves as evidence or supports the argument you wish the Department to consider in resolving your appeal.

Appeals may be submitted using the on-line form available at [www.ed.gov/policy/gen/leg/foia/foia-appeal-form.pdf](http://www.ed.gov/policy/gen/leg/foia/foia-appeal-form.pdf).

Appeals can also be submitted by:

E-mail: [EDFOIAappeals@ed.gov](mailto:EDFOIAappeals@ed.gov)  
Fax: 202-401-0920  
Mail: Appeals Office  
Office of the Secretary  
U.S. Department of Education  
400 Maryland Avenue, SW, LBJ 7W104  
Washington, DC 20202-4500

If you have any questions, please contact the FOIA Requester Service Center at (202) 401-8365 or via e-mail at [EDFOIAManager@ed.gov](mailto:EDFOIAManager@ed.gov) (please include the case number).

Sincerely,

*DeShawn Middleton*  
Government Information Specialist  
Office of the Secretary

Enclosure

Freedom of Information Act  
**EXPEDITED PROCESSING CRITERIA**  
(Department of Justice General Information)

**Compelling Need**

Expedited processing is provided if the requester demonstrates a compelling need. A requester can show compelling need in one of two ways: by establishing that his or her failure to obtain the records quickly could reasonable be expected to pose an imminent threat to the life or physical safety of an individual; or, if the requester is a person primarily engaged in disseminating information, by demonstrating that an urgency to inform the public concerning actual or alleged Federal Government activity exists.

**Loss of Substantial Due Process Rights**

As a general rule, a request also should be expedited if it is shown that substantial due process rights of the requester would be impaired by the failure to process immediately and that the information sought is not otherwise available. It is not sufficient, however, for a requester merely to allege that requested records are needed in connection with some judicial or administrative proceeding; rather, the immediate use of the FOIA must be shown to be critical to the preservation of a substantial right.

**Other Considerations**

Beyond these two categories, it is unclear to what extent agencies have the discretion to grant requests for expedition under any other circumstances. Moreover, agencies should not forget the interests of all requesters in having their requests treated equitably, as well as the public interest in the integrity of FOIA processing. Because a decision to take a FOIA request out of turn necessarily entails further delay for other requesters waiting patiently in line, simple fairness demands that it be made only upon careful scrutiny of truly exceptional circumstances.