

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

DEFENSE OF FREEDOM INSTITUTE
FOR POLICY STUDIES, INC.

Plaintiff,

v.

U.S. DEPARTMENT OF EDUCATION

Defendant.

Case No. _____

COMPLAINT
FOR DECLARATORY,
INJUNCTIVE, AND
OTHER RELIEF

COMPLAINT

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

INTRODUCTION

1. On April 18, 2022, DFI served a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, on the Department. Notwithstanding the passage of over two years, and its representations that it expected to provide “a large amount of responsive records,” the Department has not produced any documents responsive to this request.

2. DFI's FOIA request seeks records relating to the Department's proposed changes to its Charter Schools Program ("CSP") policies and, in particular, the manner in which outside interest groups may have affected the Department's CSP rulemaking and policy agenda.

3. Since March 14, 2022, the Department's Office of Elementary and Secondary Education ("OESE") has made a series of publications that indicate that the Department intends to discourage charter school grant applications. The Department's actions appear to be aimed at weakening the CSP, which will undermine the national charter movement and severely diminish the role of the States in controlling and administering their own charter school programs.

4. DFI's FOIA request is reasonably calculated to demonstrate the Department's failure to stay within statutory boundaries and its own guidelines for the successful administration of the CSP which benefits the children who attend charter schools, including disadvantaged students whose matriculation in them leads to substantial gains in academic achievement, amounting to weeks or even months of additional classroom learning. The Department's utter failure to provide a complete production of records responsive to DFI's FOIA requests underscores the apparent, impermissible overreach by the Department.

5. 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.

6. This is the fourth lawsuit that DFI has filed against the Department since August 23, 2023 to enforce its FOIA rights in the face of woefully inadequate responses. The four cases relate to seven separate FOIA requests by DFI, to which the Department has produced only three sets of documents responsive to three of the 29 categories contained in these seven requests. In one case, the Department has begun producing documents only after being forced to do so by the Court. The Department has produced no documents responsive to the FOIA requests here.

JURISDICTION AND VENUE

7. 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.

8. Venue is proper in this District pursuant to 5 U.S.C. § 552(a)(4)(B) because the District of Columbia has jurisdiction to enjoin the Department from withholding requested records and to order the production of those records.

9. 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

10. DFI is an independent, nonprofit organization that is tax exempt pursuant to I.R.C. § 501(c)(3) and organized and existing 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, inter alia, 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.

11. 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 FOIA request.

STATEMENT OF FACTS

The Attorney General's FOIA Disclosure Directive

12. 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").

13. 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 FOIA Request

14. On April 18, 2022, DFI submitted to the Department a FOIA request (the “FOIA Request,” attached hereto as **Exhibit A**). The FOIA Request was for particular records relating to records of the Department’s Communications with Teachers Unions regarding the CSP proposed rulemaking announced on March 14, 2022 (Agency/Docket Number: ED-2022-OESE-0006).

15. Despite the passage of 772 days and the Department’s representations to DFI that production of records was underway, the Department has failed to produce any records in response to DFI’s FOIA Request.

16. DFI's FOIA requested records and information related to the CSP's proposed priorities, requirements, definitions, and grant selection criteria and related policies since January 20, 2021, as more fully described in Exhibit A, at 5-6.

17. The release of these records is in the public interest because their disclosure will inform the American people about, inter alia, the Department's interactions with teacher's unions, which are known to be openly hostile to charter schools, and which may have impermissibly shaped the policies and guidelines developed to govern the CSP.

18. On April 18, 2022, the Department provided an electronic FOIA "Request Acknowledgement" notification to DFI (the "Acknowledgement Letter"), confirming receipt of the FOIA Request and assigning it tracking number 22-02518-F. The Acknowledgement Letter indicated that the Request had been "forwarded to the primary responsible office(s) for action." (The Acknowledgement Letter is attached hereto as **Exhibit B**.)

19. On May 13, 2022, the Department electronically notified DFI in its "20-Day Status Notification" (the "20-Day Status Notification," attached hereto as **Exhibit C**), which stated 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."

20. 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.

21. On August 9, 2022, DFI emailed the Department’s FOIA Manager, to inquire about the status of the requested records (the “Production Request Inquiry,” attached hereto as **Exhibit D.**)

22. To date, the Department has failed to provide any records responsive to DFI’s FOIA Request.

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

24. Notwithstanding the commitment the Department made in its 20-Day Status Notification to provide responsive records on a rolling basis, it has failed to explain or otherwise justify its failure to provide any records, either on a rolling basis or otherwise.

25. As a result of the Department’s failure to timely or otherwise provide records responsive to DFI’s FOIA Request in accordance with the Department’s statutory obligations, DFI has constructively exhausted its administrative remedies. DFI thus seeks immediate judicial review of this matter.

The Department’s Violation of the Garland Directive

26. The Department’s failure to timely or otherwise produce non-exempt records responsive to DFI’s FOIA Request directly violates the Garland Directive

regarding the FOIA obligations of departments and agencies within the executive branch of the federal government, including the Department.

CAUSE OF ACTION

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

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

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

29. 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 FOIA 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.

30. After the passage of 772 days, the Department has provided no such lawful reason for withholding responsive records and has demonstrably ignored DFI's FOIA Request, the Department's statutory obligations under FOIA, and the Garland Directive.

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

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

WHEREFORE, DFI respectfully requests that this Court:

- a. Assume jurisdiction in this matter and maintain jurisdiction until the Department complies with its statutory FOIA production obligations and any and all orders of this Court;
- b. Declare the Department 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 FOIA Request;
- c. Order the Department 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 FOIA Request;
- d. Enjoin the Department from continuing to withhold any and all non-exempt records responsive to DFI's FOIA 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 28th day of May, 2024, at Washington, DC.

Respectfully submitted,

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

/s /Donald A. Daugherty, Jr.

Donald A. Daugherty, Jr.

DC Bar No.: 900002288

Martha Angelique Astor

DC Bar No.: 90002288

1455 Pennsylvania Avenue, N.W.

Suite 400
Washington, DC 20004
Telephone: (414) 559-6902
Email: don.daugherty@dfipolicy.org
Telephone: (321) 390-2707
Email: martha.astor@dfipolicy.org

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

Exhibit A

April 18, 2022 FOIA Request



April 18, 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: FOIA Request: Records of Teachers' Union(s) Communications on Charter Schools Program Proposed Rulemaking
(DFI FOIA No. 100-14-22)

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.

On March 14, 2022, the U.S. Department of Education's ("ED") Office of Elementary and Secondary Education ("OESE") published a notice concerning proposed priorities, requirements, definitions, and grant selection criteria relating to the award of federal grants to applicants in its Charter School Program ("CSP").¹

ED proposes priorities, requirements, definitions, and grant selection criteria that would discourage charter school grant applications², require charter school sponsorship by a traditional public school, require community impact analyses designed to undermine the ability of underserved students to attend charter schools, institute grant selection criteria designed to favor awards to less innovative charter schools, and severely diminish the role of States in the control and administration of their own charter school programs. The proposed priorities, requirements,

¹ See <https://www.federalregister.gov/documents/2022/03/14/2022-05463/proposed-priorities-requirements-definitions-and-selection-criteria-expanding-opportunity-through>.

² Editorial Board, "Opinion: The Biden administration's sneak attack on charter schools," THE WASHINGTON POST (April 2, 2022), <https://www.washingtonpost.com/opinions/2022/04/02/biden-administrations-sneak-attack-charter-schools/>.



definitions, and grant selection criteria would place undue burdens on State education agencies (“SEAs”), other State entities, subgrantees, and other charter grant applicants, and it would replace important statutory oversight of subgrantees by SEAs and other State entities with ED’s new centralized grant applicant requirements. Each of the proposed priorities, requirements, definitions, and grant selection criteria appears counter to Congress’s unambiguous statutory requirements for ED’s administration of the CSP. The proposed priorities, requirements, definitions, and grant selection criteria constitute impermissible rulemaking by attempting to remake CSP laws through the insertion of its own policy goals (where no statutory ambiguity was present and the proposed rule runs counter to the CSP laws). In addition, the proposed priorities, requirements, definitions, and grant selection criteria fail to realistically project likely burdens on States, subgrantees (charter schools), and other CSP grant applicants.

ED’s proposed priorities, requirements, definitions, and grant selection criteria were published just days after bipartisan Congressional passage of the Fiscal Year (“FY”) 2022 Omnibus Appropriations Bill.³ That law provided level funding of \$440 million for the Charter Schools Program, even as a 7% increase in charter school enrollment occurred nationwide during the 2020-2021 school year.⁴ The timing of the proposed rule raises questions about whether ED delayed publishing to avoid having Congress use the Omnibus Appropriations Bill to thwart its attempt to rewrite CSP laws through the regulatory process.

The proposed priorities, requirements, definitions, and grant selection criteria reflect the hostility to charter schools by the labor unions representing teachers, “which hold significant sway in the [Democratic] party, [and] are among the [charter school] movement’s fiercest critics.”⁵ During the 2020 campaign, President Biden reversed his historical support for charter schools and began to oppose them.⁶ The parallels between the proposed rule and teacher unions’ public positions on charter schools raise questions about how and how much labor unions influenced the proposed rule.

Charter schools tripled in nationwide enrollment between 2005 and 2017, with the “biggest gains [in student performance] for African Americans and for students of low socioeconomic status.”⁷

³ Tony Romm, “Senate passes bill to avert shutdown, extend \$14 billion in Ukraine aid,” THE WASHINGTON POST (March 10, 2022), <https://www.washingtonpost.com/us-policy/2022/03/10/senate-vote-funding-ukraine-russia/>.

⁴ Debbie Veney and Drew Jacobs, “Voting With Their Feet: A State-Level Analysis of Public Charter School and District Public School Trends,” NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS (September 2021), https://www.publiccharters.org/sites/default/files/documents/2021-09/napcs_voting_feet_rd6.pdf.

⁵ Laura Meckler, “Biden administration proposes tougher rules for charter school grants,” THE WASHINGTON POST (March 21, 2022), <https://www.washingtonpost.com/education/2022/03/21/biden-charter-schools-funding/>.

⁶ *Id.*

⁷ M. Danish Shakeel and Paul E. Peterson, “Charter Schools Show Steeper Upward Trend in Student Achievement than District Schools: First nationwide study of trends shows large gains



Other studies have revealed that charter schools “benefit disadvantaged students who attend them as well as the students who don’t” and “substantial gains in academic achievement, especially for lower-income and minority students, amounting to weeks, or even months, of additional classroom learning each year.”⁸

Despite these objectively measurable benefits for racial minorities and socioeconomically disadvantaged students, the American Federation of Teachers’ (“AFT”) President Randi Weingarten has accused supporters of charter schools of racist motives: “[t]his privatization and disinvestment are only slightly more polite cousins of segregation.”⁹ Weingarten’s comments appear to conflict with the views of former President Barack Obama, given his strong support for charter schools as an alternative for low-income families to failing public schools (in his 2008 campaign, he called for doubling funding for the CSP and “prioritizing” states most successfully supporting the expansion of charter schools¹⁰).

In his 2016 National Charter Schools Week proclamation, President Obama praised charter schools as “play[ing] an important role” in “[s]upporting some of our Nation’s underserved communities,” while noting that his “Administration’s commitment of resources to the growth of charter schools has enabled a significant expansion of educational opportunity, enabling tens of thousands of children to attend high-quality public charter schools.”¹¹ Indeed, support for charter schools was, until now, reflective of a “bipartisan drive for accountability” and offered an option to “children of color from low-income families – assigned to low-performing schools.”¹² Undermining Weingarten’s hyperbolic accusation of racist motives, Shavar Jeffries, president of Democrats for Education Reform and Education Reform Now, reports that “communities of color want a variety

for African Americans at charters,” EDUCATION NEXT (Winter 2021), <https://www.educationnext.org/charter-schools-show-steeper-upward-trend-student-achievement-first-nationwide-study/>.

⁸ Max Eden, “Issues 2020: Charter Schools Boost Results for Disadvantaged Students and Everyone Else,” MANHATTAN INSTITUTE (January 28, 2020), <https://www.manhattan-institute.org/issues-2020-charter-schools-benefits-for-low-income-minority-students>.

⁹ Selim Algar, “Teachers union president calls charter schools ‘polite cousin of segregation,’” NEW YORK POST (July 21, 2017), <https://nypost.com/2017/07/21/teachers-union-president-calls-charter-schools-polite-cousin-of-segregation/>.

¹⁰ See <https://www.politifact.com/truth-o-meter/promises/obameter/promise/246/double-funding-for-federal-charter-school-program/>.

¹¹ See <https://obamawhitehouse.archives.gov/the-press-office/2016/04/29/presidential-proclamation-national-charter-schools-week-2016>.

¹² Laura Meckler, “Democrats abandon charter schools as ‘reform’ agenda falls from favor,” THE WASHINGTON POST (June 25, 2019), https://www.washingtonpost.com/local/education/democrats-abandon-charter-schools-as-reform-agenda-falls-from-favor/2019/06/25/3cf4817e-904e-11e9-aadb-74e6b2b46f6a_story.html.



of public school choice options, including public charter schools – with 86 percent of African-American and 67 percent of Latino voters in support.”¹³

Indeed, the measurable educational successes of charter schools may be the primary reason that the AFT and other public employee unions are now aligned in opposition to the CSP. For example, “New York’s charter school students are predominantly black and Hispanic and live in low-income neighborhoods. In 2019, most students in the city’s public schools failed to pass the statewide tests in mathematics and English. But most of the city’s charter school students passed in both subjects The success of New York City’s charter schools is not only a threat to educational dogmas. Competition from charter schools is [also] an existential threat to traditional public schools in low-income minority communities, which tend to have even lower educational outcomes than traditional public schools as a whole.”¹⁴ Weingarten’s vociferous opposition to charter schools is not a surprise, given the relative educational successes and growing popularity of charter schools.

Thus, despite – or perhaps because of - the demonstrable success of charter schools in boosting the educational performance of previously underserved students, ED now proposes “new rules to sabotage”¹⁵ federal grant awards for charter schools. The proposed priorities, requirements, definitions, and grant selection criteria appear designed to diminish the role of charter schools at a time when “American public education is broken”¹⁶ and the National Assessment of Educational Progress continues to show steady declines in key academic measurements among students in traditional public schools.¹⁷

ED officials have proposed significant changes to ED’s Charter Schools Program policies. The public has an interest in knowing which outside interest groups may be affecting ED’s CSP rulemaking and policy agenda, particularly regarding ED’s anticipated rulemaking concerning the CSP, announced on March 14, 2022 (Agency/Docket Number: ED-2022-OESE-0006). DFI is

¹³ See <https://www.the74million.org/article/jeffries-warrens-plan-to-end-charter-school-program-rejects-obamas-legacy-and-undercuts-opportunity-for-underserved-students/>.

¹⁴ Thomas Sowell, “Charter Schools’ Enemies Block Black Success: Teachers unions are gaining in their fight to stop students and resources from moving toward what works,” THE WALL STREET JOURNAL (June 18, 2020), <https://www.wsj.com/articles/charter-schools-enemies-block-black-success-11592520626>.

¹⁵ Editorial Board, “A Case of Charter School Sabotage: Biden’s regulators find another way to undermine school choice,” THE WALL STREET JOURNAL (March 27, 2022), <https://www.wsj.com/articles/charter-school-sabotage-biden-teachers-union-public-school-achievement-gap-hispanic-black-students-charter-schools-program-rules-11648224610>.

¹⁶ Michael R. Bloomberg, “Why I’m Backing Charter Schools: The public school system is failing. My philanthropy will give \$750 million to a proven alternative,” THE WALL STREET JOURNAL (December 1, 2021), <https://www.wsj.com/articles/michael-bloomberg-why-im-backing-charter-schools-covid-19-learning-loss-teachers-union-11638371324>.

¹⁷ See <https://nces.ed.gov/nationsreportcard/>.



particularly concerned that the proposed CSP rulemaking will remove educational opportunities for racial minorities and other socioeconomically disadvantaged students.

DFI thus seeks records and information related to ED's Charter Schools Program proposed priorities, requirements, definitions, and grant selection criteria and related policies since January 20, 2021.

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 records within your possession and/or control:

Requested Records

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

1. All records, including but not limited to electronic mail ("email"), texts, letters, memoranda, and other documentation from the following entities to ED officials (see "Custodians" *infra*), from January 20, 2021, through the date the search is conducted, which reference "Charter Schools Program" or "Public Charter Schools" or "Charter Schools" or "Public Charters" or "Charters" or "CSP" or "CMO applicants" or "SE applicants" or "SE grants" or "SEA subgrantees" or "Developer Grants" or "SE subgrant applicants" or "Title X, Part C" or "20 USC 7221" or "20 USC 7221b" or "20 USC 7221b(f)(2)" or "20 USC 7221i" or "Proposed Application Requirement(s)" or "charter school community engagement" or "grant applicant community engagement" or "Proposed Priority 1" or "community asset requirement" or "collaboration with traditional public school" or "collaboration with school district" or "charter management organizations" or "CMO(s)" or "for-profit education management organizations" or "EMO(s)" or "CMO conflict of interest" or "EMO conflict of interest" or "conflict of interest requirement" or "substantial control" or "community impact" or "community impact requirement" or "Proposed Priority 2" or "collaborative culture" or "Proposed Requirement 6" or "selection criteria" or "community-centered approach(es)" or "additional criteria" or "statutory criteria" or "20 USC 7221b(g)(1)":
 - a. American Federation of Teachers (AFT)
 - b. California School Employees Association (CSEA)
 - c. California Teachers Association (CTA)
 - d. Chicago Teachers Union (CTU)
 - e. Connecticut Education Association (CEA)
 - f. Fairfax Education Association
 - g. Fairfax County Federation of Teachers (FCFT)
 - h. Florida Education Association (FEA)
 - i. Hawaii State Teachers Association (HSTA)
 - j. Illinois Education Association (IEA)
 - k. Illinois Federation of Teachers (IFT)



- l. Maryland State Education Association (MSEA)
 - m. Massachusetts Teachers Association (MTA)
 - n. Michigan Education Association (MEA)
 - o. Montana Education Association – Montana Federation of Teachers (MEA-MFT)
 - p. National Education Association (NEA)
 - q. National Education Association of Rhode Island (NEARI)
 - r. New Jersey Education Association (NJEA)
 - s. New York State United Teachers (NYSUT)
 - t. Ohio Education Association (OEA)
 - u. Ohio Federation of Teachers (OFT)
 - v. Oregon Education Association (OEA)
 - w. Pennsylvania State Education Association (PSEA)
 - x. Seattle Education Association (SEA)
 - y. Texas State Teachers Association (TSTA)
 - z. United Federation of Teachers (UFT)
 - aa. United Teachers of Los Angeles (UTLA)
 - bb. Virginia Education Association (VEA)
 - cc. Washington Education Association (WEA)
 - dd. Wisconsin Education Association Council (WEAC)
2. All records, including but not limited to electronic mail (“email”), texts, letters, memoranda, and other documentation from ED officials (see “Custodians” *infra*), to any and all of the entities listed in Item 1 from January 20, 2021, through the date the search is conducted, which reference “Charter Schools Program” or “Public Charter Schools” or “Charter Schools” or “Public Charters” or “Charters” or “CSP” or “CMO applicants” or “SE applicants” or “SE grants” or “SEA subgrantees” or “Developer Grants” or “SE subgrant applicants” or “Title X, Part C” or “20 USC 7221” or “20 USC 7221b” or “20 USC 7221b(f)(2)” or “20 USC 7221i” or “Proposed Application Requirement(s)” or “charter school community engagement” or “grant applicant community engagement” or “Proposed Priority 1” or “community asset requirement” or “collaboration with traditional public school” or “collaboration with school district” or “charter management organizations” or “CMO(s)” or “for-profit education management organizations” or “EMO(s)” or “CMO conflict of interest” or “EMO conflict of interest” or “conflict of interest requirement” or “substantial control” or “community impact” or “community impact requirement” or “Proposed Priority 2” or “collaborative culture” or “Proposed Requirement 6” or “selection criteria” or “community-centered approach(es)” or “additional criteria” or “statutory criteria” or “20 USC 7221b(g)(1)”.

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 Elementary & Secondary Education,



Office of the General Counsel, Office of Communications and Outreach, and Office of Legislation and Congressional Affairs, who are classified as any of the following or referenced with the following job title:

- 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. Director, Charter School Programs, Office of Discretionary Grants and Support Services, Office of Elementary and Secondary Education

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 requestor¹⁸ 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.”¹⁹ Upon request, ED must “promptly” make the requested records available to the requester.²⁰ Notably, covered agency records include materials provided to ED by both private and governmental organizations.²¹ Upon receipt of a FOIA request that “reasonably” describes the records sought

¹⁸ 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).

¹⁹ *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

²⁰ 5 U.S.C. § 552(a)(3)(A).

²¹ *Id.* at 144.



and is in compliance with ED's published rules regarding the time, place, any fees, and procedures to be followed,²² ED must conduct a search calculated to find responsive records in ED's control at the time of the request.²³ 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."²⁴

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.²⁵

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

- ED should immediately act to protect and preserve all records potentially responsive to this request, notifying any and all responsible officials of this preservation request and verifying full compliance with the preservation request. This matter may be subject to litigation, making the immediate initiation of a litigation hold on the requested materials necessary.
- ED should search all record systems that may contain responsive records, promptly consulting with its information technology (IT) officials to ensure the completeness of the records search by using the full range of ED's IT capabilities to conduct the search. To constitute an adequate search for responsive records, ED should not rely solely on a search of a likely custodian's files by the custodian or representations by that likely custodian, but should conduct the search with applicable IT search tools enabling a full search of relevant agency records, including archived records, without reliance on a likely custodian's possible deletion or modification of responsive records.
- ED should search all relevant records and information retention systems (including archived recorded information systems) which may contain records regarding ED's business operations. Responsive records include official business conducted on unofficial systems which may be stored outside of official recording systems and are subject to FOIA. ED should directly inquire, as part of its search, if likely custodians have conducted any such official business on unofficial systems and should promptly and fully acquire and preserve those records as ED's official records. Such unofficial systems include, but are not limited to, governmental business conducted by employees using personal emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or

²² 5 U.S.C. § 552(a)(3)(A)(i).

²³ *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

²⁴ 5 U.S.C. § 552(a)(3)(B).

²⁵ 5 U.S.C. § 552(a)(6)(A)(i).



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”²⁶ 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.

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

²⁶ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



disclosure of the information contained within the requested records is not primarily in the commercial interests of DFI.

The disclosed materials are likely to contribute significant information to the public's understanding of ED's proposed Charter Schools Program rulemaking and policies, which ED has indicated are about to undergo significant revisions and which policies are highly relevant to the interests of students, families, and taxpayers. Disclosure of the requested materials will illuminate ED's Charter Schools Program 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 have also offered commentary and analyses on radio news programs and in various public forums).

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

DFI is a representative of the news media.

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

FOIA (as amended) provides that a representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that to an audience."²⁷ DFI provides exactly this service to the general public and other audiences with an interest in those materials and

²⁷ See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



analyses. Upon receipt of the requested materials from ED, DFI will review and analyze those materials and will extract and otherwise distill particularly useful information from those materials for the benefit of the general public and other interested audiences.

DFI will provide its analyses to the general public and other interested audiences through publication on DFI's website and social media platforms such as Facebook and Twitter (distribution functions it has already demonstrated a capacity to provide since its formation in September 2021, including a detailed news story on ED policies widely distributed by one of the nation's largest news providers in February 2022 and more recently, a March 2022 analysis of DOJ policies 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 input of specific outside interest groups regarding ED's proposed Charter Schools Program Rulemaking (Agency/Docket Number: ED-2022-OESE-0006). Provision of the requested records will meaningfully inform the general public about significant developments in ED's CSP policies and proposed rulemaking, which affect millions of American students, their families, and taxpayers. These are significant 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 ED's Charter Schools Program policies and proposed rulemaking, which policies and rules are of tremendous interest to students, families, and taxpayers.

Please contact me immediately if DFI's request for a fee waiver is not granted in full.

If you have any questions or I can further clarify DFI's request, please contact me at your earliest convenience at paul.moore@dfipolicy.org.



Sincerely yours,

/s/ Paul R. Moore

Paul R. Moore, Senior Counsel

Defense of Freedom Institute for Policy Studies, Inc.

Exhibit B

April 18, 2022 FOIA
Request Acknowledgment



Request Acknowledgement by Department of Education

1 message

From: <EDFOIAManager@ed.gov>
Date: Mon, Apr 18, 2022 at 5:20 AM
Subject: Request Acknowledgement by Department of Education
To: <paul.moore@dfipolicy.org>

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 #'22-02518-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 EDFOIAManager@ed.gov

Thank you,

Department of Education

Exhibit C

May 13, 2022
20-Day Status Notification



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE SECRETARY

FOIA Service Center

May 13, 2022

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

RE: 20 –DAY NOTIFICATION 22-02518-F

Dear Paul R Moore:

This is the Department of Education’s (the Department) initial determination letter to your request dated, April 17, 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://foiexpress.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 |
| Email | robert.wehausen@ed.gov | OGIS@nara.gov |
| Phone | 202-205-0733 | 202-741-5770; toll free at 1-877-684-6448 |
| Fax | 202-401-0920 | 202-741-5769 |

Sincerely

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

Exhibit D

August 9, 2022
Production Request Inquiry



August 9, 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 Manager

**Re: Production Request Inquiry 22-02518-F
Records of Teachers' Union(s) Communications on Charter Schools Program
Proposed Rulemaking
(DFI FOIA No. 100-14-22)**

Dear FOIA Manager:

On **April 18, 2022**, the Defense of Freedom Institute for Policy Studies, Inc. ("DFI") electronically submitted a request for records within the possession and control of the U.S. Department of Education ("ED" or "Department"), pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations of ED at 34 C.F.R. Part 5 ("Availability of Information to the Public").

DFI's FOIA request was for records between certain ED officials and particular outside organizations known to have publicly expressed particularly strong views to the Department regarding the Charter Schools Program proposed rulemaking (views that appear to align with the Department's rulemaking), from January 20, 2021, through the date the records search is conducted. As explained in DFI's FOIA request, the requested records were important to meaningfully inform the public about the Department's pending rulemaking. In fact, the Department issued its new rules¹ on July 6, 2022² and the rule became effective on August 5, 2022. Timely provision of the requested records to DFI did not occur.

The statutory burden imposed on ED for responding to FOIA requests is clear: upon receipt of the FOIA 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

¹ Valerie Strauss, "What the Biden administration's new rules for charter schools say," THE WASHINGTON POST (July 5, 2022), <https://www.washingtonpost.com/education/2022/07/05/new-rules-us-charter-school-program/>.

² 87 Fed. Reg. 40,406 (July 6, 2022).



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.³

On March 15, 2022, U.S. Attorney General Merrick Garland issued guidance to federal agencies, clarifying the statutory obligation of those agencies, including ED, to timely disclose information “in the faithful application of FOIA” to “enable information about federal government operations to be more readily available to all.” Attorney General Garland emphasized that “[t]imely disclosure of records is also essential to the core purpose of FOIA” and that “[a]gency FOIA professionals should continue to work with FOIA requesters in a spirit of cooperation” and “work with requesters to remove barriers to access”⁴

On **April 18, 2022**, ED’s FOIA Manager acknowledged receipt of DFI’s request and indicated that it was “forwarded to the primary responsible office(s) for action.” Production of the requested records (or a rolling portion thereof, as DFI indicated it would accept) should have occurred within 20 business days (*i.e.*, **May 16, 2022**).

On **May 13, 2022**, just before the date when the records were statutorily required to be produced, ED provided DFI with a 20-day notification letter.⁵ If ED had commenced production of responsive records within 20 days of the 20-day notification letter, production would have occurred or begun to occur on **June 13, 2022** – nearly two months ago.

The Department has now used identical language in responding to virtually all of DFI’s FOIA requests (to date, DFI has received responsive records in only 22 of 25 pending FOIA requests). In DFI’s view, this practice appears inconsistent with the statutory requirements of 5 U.S.C. § 552 *et seq.*, ED’s regulatory requirements, the Attorney General’s recent guidance to federal agencies, and the spirit of the FOIA laws.

The American people have a right to be meaningfully informed regarding ED’s Charter School Program policies, particularly as they involve rulemaking and enforcement decisions which are of profound interest to the American people.

The requested records concern current policy formulations and rulemaking by ED with profound impact on the Charter School Program and America’s students, families, and taxpayers.

Please advise DFI at your earliest convenience of the following:

- a. Has ED commenced its search for the requested records?

³ 5 U.S.C. § 552(a)(6)(A)(i).

⁴ See <https://www.justice.gov/ag/page/file/1483516/download> (emphasis added).

⁵ The letter stated that “[d]ue to the unusual circumstances that exist with your FOIA requests . . . 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.”



- b. If so, when did the search occur?
- c. On what date will production of the requested records occur or begin to occur?

Thank you for your prompt attention to this matter.

Sincerely yours,

/s/ Paul R. Moore

Paul R. Moore, Senior Counsel

Defense of Freedom Institute for Policy Studies, Inc.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CLEAR FORM

DEFENSE OF FREEDOM INSTITUTE FOR POLICY STUDIES

Plaintiff

v.

U.S. DEPARTMENT OF EDUCATION,

Defendant

)
)
)
)
)
)
)

Civil Action No. 1:24-cv-

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* United States Department of Education
Attn: Dr. Miguel A. Cardona or other authorized representative
400 Maryland Ave., S.W.
Washington D.C., 20202

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Martha A. Astor
Defense of Freedom Institute for Policy Studies, Inc.
1455 Pennsylvania Avenue, NW
Suite 400
Washington, DC 20004

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 1:24-cv-

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*: _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Print

Save As...

Reset