

May 10, 2024

VIA ELECTRONIC MAIL

U.S. Department of Education
Office of the Executive Secretariat
FOIA Service Center
400 Maryland Ave. SW, LBJ 7W106A
Washington, D.C. 20202-4536
EDFOIAManager@ed.gov
ATTN: FOIA Public Liaison

Re: FOIA REQUEST: Records Related to U.S. Department of Education Telework Policies and Practices
(DFI FOIA 100-5-2024)

Dear FOIA Public Liaison:

The Defense of Freedom Institute for Policy Studies (“DFI”) is a 501(c)(3) nonprofit, nonpartisan organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting civil and constitutional rights at schools and in the workplace. DFI includes former U.S. Department of Education (“Department” or “ED”) and other federal agency officials who are experts in education law and policy and the operation of the Department. For the benefit of the public, DFI’s mission includes obtaining records related to the consideration and implementation of policies imposed by the federal government and its officials on the American people.

On March 12, 2024, Secretary Cardona issued an email to ED staff indicating that non-bargaining unit employees would be required to work on-site for at least five days per pay period starting April 22, 2024.¹ Despite noting a need for “‘increased collaboration and innovation to solve complex problems, enhance capabilities, increase efficiency and improve processes[,]” roughly 92% of eligible ED employees are still teleworking, with the majority working remotely for almost the entirety of the 14-day pay period.² The Secretary’s email to ED staff highlights the inefficacy of its current teleworking practices and how they obstruct the Department’s ability to carry out its basic statutory obligations. For example, the Department’s implementation of the 2024-25 Free Application for Federal Student Aid (FAFSA) was significantly delayed and resulted in severely reduced FAFSA application rates.³ The delay and lack of communication from ED employees

¹ Federal News Network Staff, *Updated 3/13 with Education Dept: A running list of agencies’ return-to-office plans*, FEDERAL NEWS NETWORK (Dec. 19, 2023), <https://federalnewsnetwork.com/workforce/2023/12/heres-what-we-know-so-far-about-agencies-return-to-office-plans/>.

² *Id.*; OFF. OF PERSONNEL MGMT., STATUS OF TELEWORK IN THE FEDERAL GOVERNMENT REPORT TO CONGRESS FISCAL YEAR 2022 (2023), <https://www.opm.gov/telework/documents-for-telework/2023-report-to-congress.pdf>.

³ Oyin Adedoyin, *College Financial-Aid Applications Fall 57%*, THE WALL STREET JOURNAL (Feb. 6, 2024), <https://www.wsj.com/personal-finance/fafsa-financial-aid-applications-college-down-23bc2933>.



caused confusion and effected countless students' access to federal financial aid.⁴ The Department's teleworking policies and the refusal of many employees to comply with those policies are deeply concerning and exceedingly harmful to sound agency operations and employee collaboration. The public is entitled to those records that shed light on the Department's telework policies, its implementation of those policies, and intentions regarding management of agency employees.

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations of ED, 34 C.F.R. Part 5 ("Availability of Information to the Public"), DFI thus makes the following requests for provision of records within your possession and/or control:

Requested Records

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

1. All communications, including but not limited to electronic mail ("email"), email attachments, texts, letters, memoranda, and other documentation, between the Custodians listed below and the following individual and entities, dated from October 1, 2023, through the date the search is conducted, that reference "telework policies" or "telework" or "work from home" or "virtual work" or "MOU" or "Memorandum of Understanding" **and** "changes" or "on site" or "return-to-office" or "March 12, 2024" or "April 22, 2024:"
 - a. American Federation of Government Employees (AFGE)
 - b. Sheria Smith, AFGE, President of Local 252
 - c. Edward James, Executive Vice President of Local 252
 - d. Jacob Griffith, Treasurer of Local 252
 - e. Brittany Coleman, National (Chief) Shop Steward of Local 252
 - f. Tashell Jenkins, Regional Vice President – East of Local 252
 - g. Val Fields, Regional Vice President – West of Local 252
 - h. Breneé Johnson, Secretary of Local 252
2. All records, including but not limited to electronic mail ("email"), email attachments, texts, letters, memoranda, and other documentation, between the Custodians listed below and any Member of Congress or congressional staff (to include anyone using an email address ending in "mail.house.gov" or "senate.gov"), dated October 1, 2023, through the date the search is conducted, that reference "telework policies" or "telework" or "work from home" or "virtual work" or "MOU" or "Memorandum of Understanding" **and** "changes" or "on site" or "return-to-office" or "March 12, 2024" or "April 22, 2024:"

⁴ Press Release, U.S. SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS, RANKING MEMBER CASSIDY SOUNDS ALARM OVER BIDEN ADMIN DELAYING FAFSA INFORMATION, HARMING STUDENTS' ACCESS TO FINANCIAL AID (Jan. 30, 2024), <https://www.help.senate.gov/ranking/newsroom/press/ranking-member-cassidy-sounds-alarm-over-bidenadmin-delaying-fafsa-information-harming-students-access-to-financial-aid>.



3. All records, including but not limited to electronic mail (“email”), email attachments, texts, letters, memoranda, and other documentation, between the Custodians listed below and any and all ED officials, dated from October 1, 2023, through the date the search is conducted, that reference and/or disclose any studies or reports conducted by the Department and/or that assess the impact of teleworking on workplace productivity and efficiency.
4. All records, including but not limited to electronic mail (“email”), email attachments, texts, letters, memoranda, and other documentation, produced by the Custodians listed below, dated from October 1, 2023, through the date the search is conducted, which reference the Department’s policies, procedures, and protocols for safeguarding sensitive data while ED employees telework or otherwise work remotely.

Custodians

The search for records described in Items 1 and 2 should be limited to “ED officials” within the Office of the Secretary (to include the FOIA Service Center), Office of the Deputy Secretary, Office of Finance and Operations, Office of Legislation and Congressional Affairs, and Office of the General Counsel, who are classified as any of the following or referenced with the following job titles:

- a. “PAS” (Presidential Appointments Requiring Senate Confirmation)
- b. “NC-SES” (Non-Career Senior Executive Service)
- c. “SC” (Schedule C Confidential or Policymaking Positions)
- d. Any employee of whatever classification in the Office of Legislation and Congressional Affairs
- e. Any employee of whatever classification in the Office of Human Resources, Office of Finance and Operations
- f. Any employee of whatever classification in the Labor and Employee Relations Team

Statutory Disclosure Requirements

FOIA imposes a burden on ED, as a covered agency under 5 U.S.C. § 551(1), to timely disclose requested agency records to the requestor⁵ 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.”⁶ Upon request, ED must “promptly” make the requested records available to the requester.⁷ Notably, covered agency records include materials provided to ED by both private and governmental organizations.⁸ 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

⁵ 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).

⁶ *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144–45 (1989).

⁷ 5 U.S.C. § 552(a)(3)(A).

⁸ *Id.* at 144.



followed,⁹ ED must conduct a search calculated to find responsive records in ED's control at the time of the request.¹⁰ 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."¹¹

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.¹²

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

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

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

- ED should timely provide entire records responsive to this request, broadly construing what information may constitute a "record" and avoid unnecessarily omitting portions of potentially responsive records as they may provide important context for the requested records.
- ED should narrowly construe and precisely identify the statutory basis for any constraint which it believes may prevent disclosure.
- If ED determines that any portions of otherwise responsive records are statutorily exempt from disclosure, DFI requests that ED disclose reasonably segregable portions of the records.
- For any responsive records withheld in whole or part, ED should provide a clear and precise enumeration of those records in index form presented with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA"¹³ and provide a sufficiently detailed justification and rationale for each non-disclosure and the statutory exemption upon which the non-disclosure relies.

⁹ 5 U.S.C. § 552(a)(3)(A)(i).

¹⁰ *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

¹¹ 5 U.S.C. § 552(a)(3)(B).

¹² 5 U.S.C. § 552(a)(6)(A)(i).

¹³ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



- Please provide responsive records in electronic format by email, native format by mail, or PDF or TIF format on a USB drive. If it helps speed production and eases ED's administrative burden, DFI welcomes provision of the records on a rolling basis. Responsive records sent by mail should be addressed to the Defense of Freedom Institute for Policy Studies, 1455 Pennsylvania Avenue NW, Suite 400, Washington, D.C. 20004.

Fee Waiver Request

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

Disclosure of the requested records is in the public interest.

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

The disclosed materials are likely to contribute significant information to the public's understanding of ED's teleworking policies and its ability to fulfill its statutory obligations. These are issues which are of significant interest to American students, families, teachers, and taxpayers across the country who are affected by the Department's ability to run efficiently.

This information does not otherwise appear to be in the public domain (in duplicative or substantially identical form).

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

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



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

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

DFI is a representative of the news media.

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

FOIA (as amended) provides that a representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that to an audience.”¹⁴ DFI provides exactly this service to the general public and other audiences with an interest in those materials and analyses. Upon receipt of the requested materials from ED, DFI will review and analyze those materials and will extract and otherwise distill particularly useful information from those materials for the benefit of the general public and other interested audiences.

DFI will provide its analyses to the general public and other interested audiences through publication on DFI’s website and social media platforms such as Facebook and X (distribution functions it has already demonstrated a capacity to provide since its formation in September 2021). DFI personnel also frequently appear as guests or panelists to offer commentary and analysis on radio and television news programs and in various other public forums.

As a qualified non-commercial public education and news media requester with demonstrated ability to review and analyze publicly available information and to provide insight regarding that information, DFI is thus entitled to a fee waiver under FOIA as a representative of the news media.

Conclusion

The subject of this request regards the Department of Education’s failure to run its programs effectively while most of its employees continue to telework. The Department’s inability to maintain sufficient communications and operations or properly manage its financial resources is highly relevant to the interests of American students, families, teachers, and taxpayers. The requested records concern a matter that has been statutorily entrusted to the Secretary and are worthy of transparency in service of the public’s right to know.

DFI appreciates ED’s prompt attention to this request for records pursuant to FOIA, which will provide important information to the American people regarding the Department’s operation of federal student loan programs.

¹⁴ See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115–16 (D.C. Cir. 2015).



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

If you have any questions or I can further clarify DFI's request, please contact me at your earliest convenience at martha.astor@dfipolicy.org or (321) 390-2707.

Sincerely,

A handwritten signature in black ink, appearing to read 'Martha', is written above a horizontal line.

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