

July 26, 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 Regarding the Department’s Implementation of the New FAFSA
(DFI FOIA No. 100-7-24)

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.

New FAFSA

The FAFSA Simplification Act of 2020 directed the U.S. Department of Education (the “Department” or “ED”) to revise the Free Application for Federal Student Aid (“FAFSA”) for the purpose of simplifying and streamlining the application process for federal student aid in higher education.¹ Through this law, Congress sought to create a “New FAFSA” form with fewer questions that leverages tax data directly from the Internal Revenue Service and ultimately makes the process less cumbersome for students and their families.²

¹ FAFSA Simplification Act, Pub. L. No. 116-260, 134 Stat. 1182 (2020).

² *Id.*



Although the Biden Administration initially predicted a timeline of two years to implement the new form,³ Federal Student Aid's ("FSA") implementation of the New FAFSA was a colossal failure by any measure. FSA could not resolve technical challenges and could not fix errors disrupting the release of New FAFSA, leading the agency to delay its publication well past its usual release date.⁴ Consequently, students and families were left scrambling to submit their aid requests in a timely manner, resulting in widespread uncertainty and unpredictability about financial aid availability.⁵

Moreover, FSA added to this mass confusion with its changes to the Student Aid Index ("SAI") calculation method. The Department replaced the Expected Family Contribution ("EFC") with the SAI as a more accurate reflection of a family's ability to pay for college, but it rolled out the SAI with insufficient training and resources for financial aid administrators.⁶ The predictable result was widespread misunderstanding and errors in aid calculations, further delaying the financial aid process for many students.

The cumulative effect of these issues has been a chaotic and unreliable system that has left students and families struggling to navigate the financial aid landscape.

Failure of Education Department to Respond to Oversight Requests

Congress bears the responsibility of overseeing federal programs, including the Department's administration of the New FAFSA. In January 2024, House Committee on Education and the Workforce ("HEW") Chairwoman Virginia Foxx and Senate Committee on Health, Education, Labor, and Pensions ("HELP") Ranking Member Bill Cassidy requested an investigation by the Government Accountability Office ("GAO") into the New FAFSA's botched rollout.⁷ Despite repeated requests, the Department delayed providing the necessary information, prompting Chairwoman Foxx and Ranking Member Cassidy to express concerns about the Department's lack

³ Erica L. Green, *As FAFSA Changes Spur Confusion, Education Department Faces Criticism*, N.Y. Times (May 20, 2024), <https://www.nytimes.com/2024/05/20/us/politics/fafsa-application-education-department.html>.

⁴ Eric Hoover, *Better Late Than Broken: Associations Say Fully Functional FAFSA Is Paramount for the Fall*, Chron. Higher Educ. (July 25, 2023), <https://www.chronicle.com/article/better-late-than-broken-associations-say-fully-functional-fafsa-is-paramount-for-the-fall>.

⁵ Anemona Hartocollis, *FAFSA Changes Leave Students and Colleges Scrambling*, N.Y. Times (May 5, 2024), <https://www.nytimes.com/2024/05/05/us/fafsa-college-financial-aid.html>.

⁶ Maria Carrasco, (Jan. 23, 2024).

⁷ Letter from Virginia Foxx, Chairwoman, U.S. House Comm. on Educ. & the Workforce, to Miguel Cardona, Sec'y, U.S. Dep't of Educ. (July 25, 2024), https://www.help.senate.gov/imo/media/doc/letter_to_gao_re_fafsa.pdf.



of cooperation.⁸ This stonewalling, which has hindered congressional oversight duties, has led to bipartisan requests for updates and calls for investigations.⁹

The lack of responsiveness from the Department has been a persistent issue. For instance, on May 31, 2024, a letter from Chairwoman Foxx and Ranking Member Cassidy highlighted the Department's failure to provide full and complete information to the GAO, interfering with Congress's constitutionally mandated oversight responsibilities.¹⁰ Despite weekly FAFSA conference calls between the Department and Committee staff, many requests for information remain unfulfilled, demonstrating a clear disregard for transparency and accountability.¹¹

Public Interest in the Information

The public has a substantial interest in understanding the failures of the FAFSA rework and ensuring accountability in the Department of Education's operations. These issues directly affect students and families nationwide, who rely on timely and accurate provision of financial aid applications to make informed decisions about their education.¹² Moreover, Congress must be able to conduct effective oversight, ensuring that federal agencies adhere to their mandates and operate transparently.¹³ Keeping the public informed about the progress and challenges of the New FAFSA rollout is crucial for maintaining trust in the education system and ensuring that similar issues are addressed promptly. The recent issuance of subpoenas by Congress underscores the need for greater transparency and responsiveness from the Department to address these critical concerns.

⁸ *Id.*

⁹ Press Release, U.S. Senate Comm. on Health, Educ., Lab. & Pensions, Bipartisan Committee Leaders in Senate and House Raise Concerns Over Rollout of Next Year's FAFSA (May 7, 2023), <https://www.help.senate.gov/ranking/newsroom/press/bipartisan-committee-leaders-in-senate-and-house-raise-concerns-over-rollout-of-next-years-fafsa>.

¹⁰ Letter from Bill Cassidy, Ranking Member, Senate Comm. on Health, Educ., Lab. & Pensions, & Virginia Foxx, Chairwoman, House Comm. on Educ. & the Workforce, to Miguel Cardona, Sec'y of Educ. (May 31, 2024), https://www.help.senate.gov/imo/media/doc/rr_letter_to_secretary_cardona_fafsa_may_31.pdf.

¹¹ *Id.*

¹² Nick Anderson, *FAFSA Rollout Delays Leave Students and Colleges in Limbo*, Wash. Post (Feb. 12, 2024), <https://www.washingtonpost.com/education/2024/02/12/fafsa-rollout-delays-student-colleges-impact/>.

¹³ Thomas Jipping, *Improving Congressional Oversight*, Fed. Soc'y Blog (Jan. 31, 2022), <https://fedsoc.org/commentary/fedsoc-blog/improving-congressional-oversight>.



Requested Records

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

1. All documents referenced below and developed between June 1, 2023, and March 8, 2024, and described in the Award Eligibility Determination (“AED”) Quality Assurance Surveillance Plan:

- a) Meeting minutes for AED Product Increment (“PI”) Planning meetings
- b) Quality Management Reports

2. The most recent Issues’ Tracker for the Department’s AED contract (as described by the AED Quality Assurance Surveillance Plan), including all open and closed issues.

3. The most recent AED requirements’ documents capturing all system Epics, Features, and Supplemental Data Element and edit information.

4. AED Requirement Review Stage Gate artifacts and approval signatures (as described in the FSA Requirements Review Stage Gate Process Guide, version 1.6, March 20, 2018), specifically: (1) all applicable requirements artifacts provided to reviewers (*e.g.*, those called for in Section 2 of the Requirements Review Stage Gate Process Guide); and (2) the artifacts listed in the “Review Document Name(s)/Versions” and “Change Request #’s” fields of Requirements Review Stage Gate Summary dated 11/27/2023.

5. All AED testing documentation referenced below for all AED products as called for by FSA’s Enterprise Test Management Standards:

- a) AED Unit testing artifacts (including test plans, test suites, test reports, test metrics, and defect reports) and FSA Project Manager approval of those artifacts.
- b) AED Integration testing artifacts (including test plans, test suites, test reports, test metrics, and defect reports) and FSA Project Manager approval of those artifacts.

6. Artifacts and related approvals from any other AED project testing (*e.g.*, post implementation verification usability, compatibility) not covered in the above requests, including test plans, test suites, test reports, test metrics, and defect reports.

7. Artifacts and approval signatures for any Technical Design Stage Gate reviews for all AED products (as described in the Technical Design Stage Gate Process Description, version 3.7.8, dated September 18, 2019).

8. The most recent AED Requirements Roadmap as described by the AED Requirements



Management Plan version 1.0.

9. Documents sufficient to show and which describe how the AED Requirements Roadmap aligns with the Requirements Traceability Matrix.

10. The most recent AED Baseline Change Request Log or Change Control Reports as described by the FSA Investment, Program, Project Management Artifact Guidance version 1, dated September 2018.

11. The most recent AED program schedule as well as all previous baseline versions of the schedule.

12. All documents supporting the Investment Management Board/Investment Review Board's review, approval, and notification of the Investment Request associated with AED/FAFSA Processing System (FPS). This request refers to Step 3 as described on page 4, Management Stage Gate 1: Investment Review (SOP 001), SOP-001 version 2.1.

13. The Decision Record Memo (DRM) documenting the completion of the Management Stage Gate 2 for AED/FPS. This request refers to the DRM described on page 1, Section 1 (Purpose) of Management Stage Gate: 2 SOP-002 version 2.

14. Documents sufficient to show the support of the delivery of the DRM to the Investment Management Board and acceptance as described in FSA Investment, Program, and Project Management Artifact Guidance and Management Stage Gate 2: Project Execution SOP 002.

15. The most recent charters for all Department of Education IT governance boards (excluding FSA IT governance boards requested above. (e.g., Investment Management Board (IMB), Planning and Investment Review Working Group (PIRWG), Enterprise Investment Management Board (EIMB), Enterprise Review Board (ERB)).

16. Documents sufficient to show the aggregate data on the number of FAFSA submissions and completions for the current award cycle to date, and comparable data for the same period last year (broken down by original v. renewal applications).

17. Documents sufficient to show the Department's Supporting Statement for Paperwork Reduction Act Submission (OMB Number: 1845-0179) estimates that indicate 3,500 individuals would go through the non-SSN process of FSA ID account creation annually.

18. Documents sufficient to show any summary or debriefing information from additional "FAFSA Support Site Visits" associated with department visits to Greensboro, NC, and Arizona.



19. Documents sufficient to show the Department’s rationale/approval for waiving public comments and alternative plans to solicit stakeholder input in lieu of the public comment process.

20. Documents sufficient to show the number of reprocessed ISIRs indicated in GENERAL- 24-38 by Student Aid Index (SAI) Impact Indicator (*i.e.*, number that resulted in increased SAI, decreased SAI, no change, weren’t subject to reprocessing, may change, and will no longer be blank).

a) Documents sufficient to show that for SAIs that increased, the average amount of the SAI increase for affected applicants.

21) All documents produced by the Department in response to any subpoena to the Department issued by the Committee on Education and the Workforce of the U.S. House of Representatives.

Statutory Disclosure Requirements

FOIA imposes a burden on ED, as a covered agency under 5 U.S.C. § 551(1), to timely disclose requested agency records to the requestor 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.”¹⁴ Upon request, ED must “promptly” make the requested records available to the requester.¹⁵ Notably, covered agency records include materials provided to ED by both private and governmental organizations.¹⁶ 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,¹⁷ ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.¹⁸ 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.”¹⁹

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.²⁰

¹⁴ *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

¹⁵ 5 U.S.C. § 552(a)(3)(A).

¹⁶ *Id.* at 144.

¹⁷ 5 U.S.C. § 552(a)(3)(A)(i).

¹⁸ *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

¹⁹ 5 U.S.C. § 552(a)(3)(B).

²⁰ 5 U.S.C. § 552(a)(6)(A)(i).



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 X (which was formerly known as 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”²¹ and provide a sufficiently detailed justification and rationale for each non-disclosure and the statutory exemption upon which the nondisclosure 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.

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 Department’s **(new rule or issue)** that are highly relevant to the interests of American students, families, teachers, and taxpayers. Disclosure of the requested materials will illuminate ED’s policies and planning considerations. Further, the requested information does not otherwise appear to be in the public domain (in duplicative or substantially identical form).

²¹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



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

DFI will review and analyze the requested records and make the records and analyses available to the general public and other interested groups through publication on DFI's website and social media platforms such as Facebook and X (which is 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.”²² 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. DFI personnel also frequently appear as guests or panelists to offer commentary and analyses on radio and television news programs and in various other public forums.

²² See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



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

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 implementation of the FAFSA Simplification Act and compliance with congressional oversight requests, which are both 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 martha.astor@dfipolicy.org or (321) 390-2707.

Sincerely,

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