

July 29, 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 Section 117 and the Department’s Removal of the Real-time Data Portal from the Reporting Site
(DFI FOIA No. 100-8-24)

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.

Background on Section 117 of the Higher Education Act

Purpose of Section 117

Section 117 of the Higher Education Act of 1965 (“HEA”) requires higher education institutions in the United States to report any gifts from or contracts with foreign sources that exceed \$250,000 within a calendar year.¹ This provision aims to promote transparency and accountability by ensuring that significant foreign contributions to U.S. educational institutions are publicly disclosed. The overarching goal is to safeguard national security and academic integrity by monitoring and mitigating potential undue foreign influence on American higher education.²

The key purposes of Section 117 include:³

¹ Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965).

² U.S. Department of Education, *Guidance on Section 117 Reporting*, (1987).

³ *Ibid.*



1. **Transparency:** By mandating disclosure of large foreign gifts and contracts, Section 117 seeks to provide transparency regarding the financial relationships between U.S. higher education institutions and foreign entities.
2. **National Security:** Ensuring that foreign funding sources are transparent helps protect national security interests by identifying and scrutinizing substantial foreign investments that might influence academic research, policy, and curricula.
3. **Academic Integrity:** The provision aims to preserve the integrity of academic institutions by preventing undisclosed foreign influence that could potentially bias research outcomes or academic agendas.

History of Section 117

Congress added Section 117 to the HEA through the Higher Education Amendments of 1986⁴ in response to growing concerns over the potential for foreign governments and entities to exert undue influence on American colleges and universities.⁵ During the Cold War, there was heightened awareness of the risks associated with foreign investments and donations potentially being used to sway academic research and policy directions in ways that could be detrimental to U.S. interests.⁶

Over the years, the U.S. Department of Education (the “Department”) has issued various guidance documents and regulations to facilitate compliance with Section 117.⁷ These include detailed instructions on how institutions should report foreign gifts and contracts, as well as periodic updates to ensure that the reporting process remains effective and transparent.⁸

Key developments in the history of Section 117 include:

1. **Initial Implementation (1986):** The initial focus was on establishing a clear framework for reporting and ensuring that institutions understood their obligations under the law.⁹
2. **Guidance and Clarifications (1990s-2000s):** The Department provided additional guidance and clarification to address ambiguities and improve compliance.¹⁰

⁴ Higher Education Amendments of 1986, Pub. L. No. 99-498, 100 Stat. 1268 (1986).

⁵ *Ibid.*

⁶ U.S. Senate Committee on Governmental Affairs, *Report on Foreign Influence in U.S. Universities*, (1986).

⁷ U.S. Department of Education, *Guidance on Section 117 Reporting*, (1987).

⁸ 85 Fed. Reg. 319 (Jan. 4, 2020),

⁹ Higher Education Amendments of 1986, Pub. L. No. 99-498, 100 Stat. 1268 (1986).

¹⁰ U.S. Department of Education, *Additional Guidance on Section 117 Reporting* (1998).



3. **Increased Scrutiny and Investigations (2010s):** Heightened geopolitical tensions and increasing foreign investments in higher education led to more rigorous enforcement and investigations into non-compliance.¹¹
4. **Modernization and Portal Launch (2020):** The launch of a new online reporting portal aimed to streamline the submission process and enhance transparency.¹²

Issues Surrounding Recent Failures to Comply with Section 117

During the previous Administration, investigations by the Department revealed significant non-compliance with Section 117 reporting requirements among research universities.¹³ A comprehensive review in 2019 identified that many institutions failed to disclose substantial foreign gifts and contracts, totaling over \$6.5 billion in unreported funding.¹⁴

Some institutions claimed they were unaware of the reporting requirements or did not fully understand what they needed to report. Some also claimed that the process of tracking and reporting foreign gifts and contracts can be administratively burdensome, particularly for large institutions with numerous funding sources. Whether due to negligence or intentional refusal to comply, this nondisclosure of foreign funding poses a danger to the integrity of American higher education particularly because it can lead to conflicts of interest, potentially influencing academic research and policy in ways that may not align with U.S. interests.¹⁵

Decision to Remove the Interactive Data Table

On June 26, 2024, the Department announced the decommissioning of the Section 117 interactive data table, effective June 28. The Department explained that decommissioning the interactive data table arose from a “contract change.”¹⁶ It failed to provide detailed reasoning for why or how the contract change affected the implementation and continued maintenance of the table. Furthermore, the Department did not explain how the new method of examining data, excel spreadsheets supported meaningful public access to the information. These sheets were designed to allow the

¹¹ U.S. Department of Education, *Report on Foreign Gift and Contract Reporting* (Oct. 2019).

¹² Federal Student Aid, U.S. Department of Education, *Reminder to Report Ownership/Control by and Contracts/Gifts From Foreign Sources*, Knowledge Center (June 22, 2020).

¹³ U.S. Department of Education, *Report on Foreign Gift and Contract Reporting* (Oct. 2019).

¹⁴ *Ibid.*

¹⁵ U.S. Senate Committee on Governmental Affairs, *Report on Foreign Influence in U.S. Universities* (1986).

¹⁶ Electronic Announcement ID GENERAL-24-79, *Federal Student Aid, Reminder – July 31 Reporting Deadline for Section 117 of the Higher Education Act of 1965; Decommission of the Section 117 Interactive Data Table* (June 26, 2024).



public to access the interactive data table so they could conduct their own investigations on Section 117 compliance.¹⁷

Withdrawal of the Interactive Data Table Undercuts Transparency and Accountability

The interactive data table was a crucial tool for transparency and public oversight, key objectives of Section 117 of the HEA and facilitated easy access and real-time analysis of data on foreign gifts and contracts, allowing stakeholders, including policymakers, researchers, and the public, the ability to monitor foreign influence in U.S. higher education institutions effectively.^{18 19}

The interactive nature of the data table allowed users to filter and search for specific information, providing a more nuanced understanding of foreign funding patterns and their potential implications. This capability is essential for ensuring compliance and for conducting detailed analyses that support the broader goals of transparency and accountability in higher education funding.²⁰

Negative Impact of the Decision

The removal of the interactive data table will have several negative impacts on achieving the transparency and accountability objectives of Section 117:

1. **Reduced Accessibility:** The transition to Excel spreadsheets limits the ease with which users can access and analyze data. Although spreadsheets are useful for large data sets, they lack the interactive features that allow for quick filtering and sorting, which are vital for detailed analysis.
2. **Increased Complexity for Users:** Researchers, journalists, and other stakeholders who relied on the interactive data table for quick access to specific data points will find the new format more cumbersome. This increased complexity can deter thorough investigations and reduce the frequency and depth of analyses conducted by non-technical users.
3. **Potential for Decreased Transparency:** The centralization of data into a non-interactive format is a step back in terms of transparency. The ease of accessing detailed, specific information is crucial for holding institutions accountable and ensuring that foreign influences are appropriately disclosed and scrutinized.

¹⁷ Published Guidance, *Federal Student Aid, Section 117 Foreign Gift and Contract Reporting* (May 15, 2023).

¹⁸ *Ibid.*

¹⁹ RealClearEducation, *The Education Department Should Reverse Its Decision and Provide Real-Time Access to University Foreign Funding Disclosures.*

²⁰ *Ibid.*



4. **Impact on Compliance Monitoring:** The table played a significant role in helping Congress, the public, institutions, and the Department monitor compliance with Section 117 requirements. Its removal will certainly hinder the ability to quickly identify and address reporting issues, potentially leading to lapses in compliance and enforcement.

Requested Records

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

1. All decision memoranda, directives, policy interpretations, or policy guidance that any of the Custodians (defined *infra*) signed, approved, adopted, or implemented in connection with the decision to decommission the Section 117 interactive data table.
2. All records since January 20, 2021, through the date of the agency’s search (including but not limited to emails, texts, attachments to emails and texts, correspondence, letters, notes, memoranda, and other documentation, including drafts of each of the foregoing) drafted, written, or authored by any of the Custodians (defined *infra*) relating in any way to the agency’s decision, as set forth in Electronic Announcement ID GENERAL-24-79, *Federal Student Aid, Reminder – July 31 Reporting Deadline for Section 117 of the Higher Education Act of 1965; Decommission of the Section 117 Interactive Data Table (June 26, 2024)*, to decommission the Section 117 Interactive Data Table.
3. All communications since January 20, 2021, through the date of the agency’s search for records (including but not limited to emails, texts, attachments to emails and texts, correspondence, letters, notes, memoranda, and other documentation, including drafts of each of the foregoing) between any of the Custodians (defined *infra*) and the following higher education industry representatives that reference “Section 117” or “Interactive Data Table” or “Foreign Gifts and Contracts” or “20 U.S.C. 1011f” or “Donor Anonymity” or “Anonymous Donors” or “Foreign Sources” or “34 CFR Part 668” :
 - a. Email addresses ending in “acenet.edu”
 - b. Ted Mitchell, ACE President
 - c. Terry Hartle, ACE Senior Vice President
 - d. Derrick Anderson, ACE Senior Vice President
 - e. Nick Anderson, ACE Vice President for Higher Education Partnerships & Improvement
 - f. Zenitta Anderson, ACE Senior Vice President and Chief Administrative Officer
 - g. Steven Bloom, ACE Assistant Vice President
 - h. Jessie Brown, ACE Vice President and Chief of Staff
 - i. Gailda Pitre Davis, ACE Assistant Vice President and Executive Director
 - j. Jon Fansmith, ACE Senior Vice President



- k. Emmanuel Guillory, ACE Senior Director Government Relations
- l. Anne Meehan, ACE Assistant Vice President
- m. Mushtaq Gunja, ACE Carnegie Classification Systems and Senior Vice President
- n. Janice Lambert, ACE Vice President of Finance and Chief Financial Officer
- o. Peter McDonough, ACE Vice President and General Counsel
- p. Sarah Spreitzer, ACE Assistant Vice President and Chief of Staff
- q. Jesse O'Connell, ACE Chief Advancement Officer
- r. Hironao Okahana, ACE Assistant Vice President and Executive Director Education Futures
- s. Monica Pemberton, ACE Vice President and Chief Information Officer
- t. Michele Spires, ACE Assistant Vice President, National Service and Defense Solutions
- u. Heidi Tseu, ACE Assistant Vice President National Engagement
- v. Terry W. Hartle, ACE Senior Fellow

Custodians

The search for records described in Item 1 should be limited to “ED officials” within the Office of the Secretary, Office of the Under Secretary, Federal Student Aid, Office of Postsecondary Education, Office of the General Counsel, Office of Legislation and Congressional Affairs, and Office of Communications and Outreach, who are classified as any of the following or referenced with the following job titles:

- a. “PAS” (Presidential Appointments Requiring Senate Confirmation)
- b. “PA” (Presidential Appointments Not Requiring Senate Confirmation)
- c. “NC-SES” (Non-Career Senior Executive Service)
- d. “SC” (Schedule C Confidential or Policymaking Positions)
- e. Chief Operating Officer, Federal Student Aid
- f. Deputy Chief Operating Officer, Federal Student Aid
- g. Executive Assistant to the Chief Operating Officer, Federal Student Aid
- h. Chief of Staff, Federal Student Aid
- i. Senior Advisor for Management, Federal Student Aid
- j. Senior Advisor, Federal Student Aid
- k. Ombudsman, Federal Student Aid
- l. Chief Information Officer, Office of the Chief Information Officer
- m. Chief Privacy Officer, Office of the Chief Information Officer



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 requestor¹⁶ 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.”²¹ Upon request, ED must “promptly” make the requested records available to the requester.²² Notably, covered agency records include materials provided to ED by both private and governmental organizations.²³ 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,²⁴ ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.²⁵ 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.”²⁶

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.²⁷

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

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

²² 5 U.S.C. § 552(a)(3)(A).

²³ *Id.* at 144.

²⁴ 5 U.S.C. § 552(a)(3)(A)(i).

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

²⁶ 5 U.S.C. § 552(a)(3)(B).

²⁷ 5 U.S.C. § 552(a)(6)(A)(i).



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 (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"²⁸ and provide a sufficiently detailed justification and rationale for each non-disclosure and the statutory exemption upon which the nondisclosure relies.

²⁸ *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 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 Section 117 and the removal of the real-time portal 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).

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.”²⁹ 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 formerly known as Twitter. 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.

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 removal of the data portal that is 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.

²⁹ See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



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
Defense of Freedom Institute
for Policy Studies