

August 15, 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 Referencing DFI or our Employees
(DFI FOIA No. 100-9-2024)

Dear FOIA Public Liaison:

The Defense of Freedom Institute for Policy Studies, Inc. (“DFI”) is a 501(c)(3) nonprofit, nonpartisan organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting civil and constitutional rights at schools and in the workplace. For the benefit of the public, DFI’s mission includes obtaining records related to the consideration and implementation of policies imposed by the federal government and its officials on the American people.

Since February 2, 2022, DFI has submitted in excess of 50 Freedom of Information Act (FOIA) requests to the U.S. Department of Education (“the Department”). The FOIA requests seek records on numerous issues critical to the public’s understanding of the administration’s policies and encompass such topics as Title IX rulemaking and enforcement, HEA Section 117 enforcement, student loan forgiveness, grants administration and its FAFSA implementation failure. Attorney General Merrick Garland underscored the importance of FOIA requesters such as DFI when he issued his March 15, 2022, memorandum to executive departments and agencies (including the Department) and 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.’”¹

Despite our requests and the Attorney General’s directive, however, the Department has deflected its FOIA compliance responsibilities and intentionally obstructed DFI’s right to public records that would assist us in fulfilling our mission to educate the public. This vexatious conduct has

¹ Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines, Memo Att’y Gen (2022) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).



constrained DFI to commence FOIA enforcement litigation against the Department in four different proceedings, with more to follow.

DFI thus seeks records on internal communication including any references to the Defense of Freedom Institute (“DFI”) or our employees since September 1, 2021.

Requested Records

1. All records, including but not limited to electronic mail (“email”), texts, letters, memoranda, attachments to emails and texts, and other documentation, to or from any of the Custodians (defined *infra*) from September 1, 2021, through the date the search is conducted that reference “Defense of Freedom Institute for Policy Studies” or “Defense of Freedom Institute” or “DFI” or “Eitel” or “Blew” or “Bailey” or “Lee” or “Zimmerman” or “Daugherty” or “Astor” or “Hill” or “Morabito”. The requested records exclude emails, texts, and letters received by the Custodians from DFI employees.
2. All records provided by the Department in response to FOIA request no. 22-03126-F (from Benjamin Kaufman of the Student Borrower Protection Center submitted on July 8, 2022).

Custodians

The search for records described in Item 1 should be limited to the White House Liaison and the Department officials within the Office of the Secretary, the Office of the Deputy Secretary, the Office of Legislation and Congressional Affairs, the Office of Communications and Outreach, the Office of the General Counsel, the Office of Civil Rights, the Office of the Under Secretary, the Office of Postsecondary Education who are classified as any of the following or referenced with the following job titles:

- a. “PAS” (Presidential Appointments Requiring Senate Confirmation)
- b. “PA” (Presidential Appointments Not Requiring Senate Confirmation)
- c. “NC-SES” (Non-Career Senior Executive Service)
- d. “SES” (Career Senior Executive Service)
- e. “SC” (Schedule C Confidential or Policymaking Positions)

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.”² Upon

² *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).



request, ED must “promptly” make the requested records available to the requester.³ Notably, covered agency records include materials provided to ED by both private and governmental organizations.⁴ 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,⁵ ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.⁶ 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.”⁷

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.⁸

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

³ 5 U.S.C. § 552(a)(3)(A).

⁴ *Id.* at 144.

⁵ 5 U.S.C. § 552(a)(3)(A)(i).

⁶ *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

⁷ 5 U.S.C. § 552(a)(3)(B).

⁸ 5 U.S.C. § 552(a)(6)(A)(i).



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"⁹ 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 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.

⁹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



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 how the Department communicates on litigation targeting them and how the Department regards conservative organization like DFI, 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. Disclosure of the requested materials will illuminate the Department's communication 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 Department operations and governance), but will benefit the general public and other groups and entities with non-commercial interests in the Department's operations and governance.

DFI will review and analyze the requested records and may 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 Department 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.”¹⁰ 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 the Department, DFI may 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 may 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 the Department’s prompt attention to this request for records pursuant to FOIA, which will provide important information to the American people and DFI regarding the Department’s communication about DFI and our employees.

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

¹⁰ See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



Defense of Freedom Institute
for Policy Studies