

October 25, 2024

VIA ELECTRONIC MAIL

Re: FOIA REQUEST: Records Pertaining to USMA’s Teachings and Policies on Race and Gender

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 federal agency officials who are experts in federal law and policy. 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.

DFI and the public have an interest in knowing how U.S. Military Academy (USMA) are being taught about race and gender, and what USMA leaders believe about these sensitive topics.

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations of HHS, 45 C.F.R. Part 5 (“Freedom of Information Regulations”). Disclosure of the records will help inform the public about important policies and decisions at USMA related to race and gender, under the banner of Title VI of the Civil Rights Act of 1964.

Requested Records

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

1. Syllabi for the following courses:
 - a. EN 352 Power and Difference (Spring 2025)
 - b. SS 392 Politics – Race, Gender, Sexuality (Spring 2025)
 - c. HI 463 Race, Ethnicity, Nation (Spring 2025)
 - d. PL 377 Social Inequality (Fall 2024)
 - e. SS 468 Political Participation (Fall 2024)
2. All communications and correspondence, including but not limited to electronic mail (“email”), email attachments, texts, letters, memoranda, calendar invitations, calendar entries, training materials, virtual meeting recordings, originating from or received by U.S. Military Academy personnel (identified below) from April 15, 2024 through the time the search is conducted, which contain any of the following terms:



- a. Trans
- b. Transgender
- c. Gender Identity
- d. LGBTQ
- e. Inclusive
- f. Inclusion
- g. Equitable
- h. Equity
- i. BIPOC
- j. Indigenous

Custodians

The search for records described in Item 2 should be limited to:

- A. Dr. Morten Ender, Co-chair of Diversity and Inclusion Studies Minor
- B. Ms. Lisa Benitez, Chief Engagement and Retention Officer
- C. Dr. Joel Cartwright, Research Psychologist and Laboratory Director
- D. Mr. Amos Maldonado, Engagement, Retention, Program & Training Coordinator
- E. Mr. Austin Wilson, Instructor
- F. Lakeysia Harvin, Assistant Professor
- G. Dr. Jeffrey Peterson, Senior Advisor for Character
- H. sharp@westpoint.edu

Statutory Disclosure Requirements

FOIA imposes a burden on USMA, as a covered agency under 5 U.S.C. § 551(1), to timely disclose requested agency records to the requestor¹ if USMA (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 request, USMA must “promptly” make the requested records available to the requester.³ Notably, covered agency records include materials provided to USMA by both private and governmental organizations.⁴ Upon receipt of a FOIA request that “reasonably” describes the records sought and is in compliance with USMA’s published rules regarding the time, place, any fees, and procedures to be followed,⁵ USMA must conduct a search calculated to find responsive records in their control at the time of the request.⁶ In addition, the records produced by USMA are required to be provided in “any form or format requested . . . if the record is readily reproducible

¹ 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).

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

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).



by the agency in that form or format.”⁷

Upon receipt of this request, USMA have **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 USMA.⁸

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

- USMA 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.

- USMA 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.
- USMA should narrowly construe and precisely identify the statutory basis for any constraint which it believes may prevent disclosure.
- If USMA determines that any portions of otherwise responsive records are statutorily exempt from disclosure, DFI requests that USMA disclose reasonably segregable portions of the records.
- For any responsive records withheld in whole or part, USMA 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 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 USMA’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.

⁷ 5 U.S.C. § 552(a)(3)(B).

⁸ 5 U.S.C. § 552(a)(6)(A)(i).

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. Indeed, other federal agencies recognizes that DFI is entitled to a fee waiver under the applicable authorities.

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 USMA's teachings and policies regarding matters of race and gender. These are issues which are of significant interest to the American public whose national security is affected by military leaders' beliefs and practices regarding race and gender.

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 USMA's operations and governance) but will benefit the general public and other groups and entities with non-commercial interests in USMA'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 federal 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 federal 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 45 C.F.R. § 5.3(2).

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 USMA, 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 is USMA’s teachings and policies regarding matters of race and gender.

DFI appreciates USMA’s prompt attention to this request for records, which will provide important information to the American people regarding the agency’s application and enforcement of Title IX.

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 Astor
Counsel

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

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