

May 21, 2019

VIA ELECTRONIC MAIL

FOIA Public Liaison
U.S. Department of Education
Office of Management
Office of the Chief Privacy Officer
400 Maryland Ave, S.W.
LBJ 2E320
Washington, D.C. 20202
EDFOIAManager@ed.gov

Re: Freedom of Information Act Request

Dear FOIA Public Liaison:

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 and the implementing regulations promulgated thereunder for the United States Department of Education (“ED” or “the Department”), 34 C.F.R. Part 5, the National Student Legal Defense Network (“NSLSDN”) makes the following request for notification and other documents provided to the U.S. Department of Education under the 2016 Borrower Defense to Repayment Regulations.

Background

The background for this Request was set forth by the Department’s Office of Postsecondary Education in a March 15, 2019 Electronic Announcement (“Announcement”). That Announcement is available here:

<https://ifap.ed.gov/eannouncements/030719GuidConcernProv2016BorrowerDefensetoRypmtRegs.html>

Briefly stated, on November 1, 2016, the Department published regulations concerning borrower defense to repayment and other related matters. *See* 81 Fed. Reg. 75,926 (Nov. 1, 2016). The original effective date was delayed by the Department, but by order of the U.S. District Court for the District of Columbia, those regulations are now in effect.

In the Announcement, the Department detailed certain steps regarding the implementation of the 2016 Borrower Defense Rule. More specifically, and related to this request, institutions of higher education were directed to provide, within 60 days of the date of the Announcement, certain notifications to the Department. *See* 34 C.F.R. § 668.171(h). Those notifications were to be sent to a dedicated email address, at FSAFRN@ed.gov.

The Announcement also provided interested parties to comment on the “guidance” posted in the Announcement. Such comments were to be provided by email or mail to Annmarie Weisman at Annmarie.Weisman@ed.gov and Linda Shewack at Linda.Shewack@ed.gov.

On May 15, 2019, NSLDN submitted a Freedom of Information Act Request (later assigned tracking No. 19-01462-F by the Department) seeking, broadly described, documents that were submitted to the FSAFRN@ed.gov email address and other documents constituting notifications submitted by institutions of higher education.

On May 20, 2019, the Department issued an Electronic Announcement regarding the notification requirement contained in the 2016 Borrower Defense rule. In that Announcement, the Department stated that “recently” it “has received a number of inquiries as to the implementation of the guidance in the Electronic Announcement relating to the reporting requirements in the financial responsibility regulations.”

That announcement is available here:

<https://ifap.ed.gov/eannouncements/052019QuestionFinancialResponProvision2016BorrowDefenseRegulate.html>

Request

NSLDN hereby requests that ED produce the following within twenty business days:

1. To the extent not captured by the previously submitted FOIA (No. 19-01462), all documents constituting or reflecting any “inquiry as to the implementation of the guidance in the Electronic Accountement relating to the reporting requirements in the financial responsibility regulations,” as that phrase was used in the May 20, 2019 Electronic Announcement.

FOIA presumes disclosure. Indeed, “[a]gencies bear the burden of justifying withholding of any records, as FOIA favors a ‘strong presumption in favor of disclosure.’” *AP v. FBI*, 256 F. Supp. 3d 82, 2017 U.S. Dist. LEXIS 161516 at *10 (D.D.C. Sept. 30, 2017) (quoting *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991)). Under the FOIA Improvement Act of 2016, an agency is permitted to withhold materials only in one of two limited circumstances, *i.e.*, if disclosure would “harm an interest protected by an exemption” or is otherwise “prohibited by law.” 5 U.S.C. § 552(a)(8)(A)(i). If ED takes the position that any portion of any requested record is exempt from disclosure, NSLDN requests that you “demonstrate the validity of [each] exemption that [ED] asserts.” *People for the American Way v. U.S. Dep’t of Educ.*, 516 F. Supp. 2d 28, 34 (D.D.C. 2007). To satisfy this burden, you may provide NSLDN with a Vaughn Index “which must adequately describe each withheld document, state which exemption the agency claims for each withheld document, and explain the exemption’s relevance.” *Id.* (citing *Johnson v. Exec. Office for U.S. Att’ys*, 310 F.3d 771, 774 (D.C. Cir. 2002)). *See also Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). That index must provide, for each document withheld and each justification asserted, a relatively detailed justification specifically identifying the reasons why

the exemption is relevant. *See generally King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

In addition to the records requested above, NSLDN also requests records describing the processing of this request, including records sufficient to identify search terms used (if any); the locations and custodians searched; and any tracking sheets, questionnaires, emails, or certifications completed by, or sent to, ED personnel with respect to the processing of this request. This specifically includes communications or tracking mechanisms sent to, or kept by, individuals who are contacted in order to process this request.

NSLDN seeks all responsive records, regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages, transcripts, notes, or minutes of any meetings, telephone conversations, or discussions. Our request includes any attachment to these records. In addition, ED has a duty to construe a FOIA request liberally.

In conducting a “reasonable search” as required by law you must use the most up-to-date technologies and tools available. Recent technology advances may render ED’s prior FOIA practices unreasonable. Moreover, not only does this request require the agency to conduct a search, but individual custodians must conduct their own searches in order to make sure that documents are appropriately collected.

To ensure that this request is properly construed and does not create any unnecessary burden on ED, NSLDN welcomes the opportunity to discuss this request at your earliest convenience, consistent with and without waiving the legal requirements for the timeframe for your response.

Please send any responsive material via email to dan@nsldn.org. We welcome any materials that can be provided on a rolling basis. Nevertheless, NSLDN fully intends to hold ED to the timeframe required by statute for a response to this request.

Request for Waiver of Fees

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.33(a), NSLDN requests a waiver of fees associated with the processing of this request because: (1) disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; *and* (2) disclosure of the information is not primarily in the commercial interest of the requester.

Disclosure of Information is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government

1. The FOIA request specifically relates to the operations or activities of the government. The documents requested herein relate directly to the Department's management and operation of programs under Title IV of the Higher Education Act. The 2016 Borrower Defense regulation has been the subject of substantial litigation, including ongoing litigation, and including a federal court ruling that the Department's delay of that rule was unlawful. Meanwhile, the Department has proposed to modify the 2016 Borrower Defense regulation, including the financial responsibility components that are the subject of the Announcement. This request is designed to increase understanding of the Department's implementation of the Borrower Defense Regulation, as well as the need for the financial responsibility component of that regulation.

2. The requested documents will likely contribute to an understanding of those specific operations or activities. The requested documents are essential to understanding the process by which institutions of higher education participate in Title IV programs, as well as the nature and scope of the Department's consideration of the Borrower Defense regulation and financial responsibility standards. As such, they will contribute to a greater understanding of this central Department of Education function.

3. The disclosure will contribute to a greater understanding on the part of the public at large. NSLDN seeks this information to increase public understanding of the process by which regulated entities participate in Title IV as well as the Department's oversight of the financial responsibility of institutions. NSLDN has the capacity to analyze any documents provided and disseminate its analysis to the public through its website and other sources.

4. Disclosure will "significantly" contribute to the public's understanding of government activities. This request seeks information that will allow NSLDN to more completely understand the effect of the 2016 Borrower Defense regulations, the Department's implementation of those regulations, and the Department's enforcement of its own standards for participation in Title IV programs. NSLDN has submitted numerous comments in response to the Department's 2018 NPRM regarding Borrower Defense and has the capacity to analyze the information provided, thereby enhancing the public's understanding of the Title IV program participation process. Disclosure of this information will therefore significantly contribute to the public's understanding of this core Department of Education activity.

Disclosure of Information is Not in the Commercial Interest of NSLDN

This request is fundamentally non-commercial. NSLDN is a non-profit, non-partisan 501(c)(3) organization. NSLDN's mission is to work, through a variety of means, to advance students' rights to educational opportunity and to ensure that higher education provides a launching point for economic mobility. We also believe that transparency is critical to fully understanding the government's role in student protections and promoting opportunity. As noted above, NSLDN has the capacity to make the information it receives available to the public through reports, social media, press releases, and regulatory comments to government agencies. For these reasons, NSLDN qualifies for a fee waiver.

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NSLDN looks forward to working with you on this request. If you have any questions or concerns, or anticipate any problems in complying with this request, please contact me at dan@nslldn.org. If NSLDN's request for a fee waiver is not granted, and any fees will be in excess of \$25, please contact me immediately.

Sincerely,

Daniel A. Zibel
Chief Counsel