

June 15, 2018

VIA ELECTRONIC MAIL

FOIA Public Liaison
U.S. Department of Education
Office of Management
Office of the Chief Privacy Officer
400 Maryland Ave, SW LBJ 2E320
Washington, DC 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 (“NSLDN”) makes the following requests for records relating to the Accrediting Council for Independent Colleges and Schools (“ACICS”).

Background

The background surrounding ACICS’s status as a recognized accreditor is familiar to the Department, as it has been the subject of numerous Secretarial orders, FOIA requests, and federal lawsuits, including suits brought under FOIA against the Department.

Briefly stated, on December 12, 2016, ED terminated the Department’s recognition of ACICS as a nationally recognized accreditor after finding that ACICS was pervasively noncompliant with numerous criteria required of such entities (the “December 2016 Decision”).

On March 21, 2018, while an application for initial recognition submitted by ACICS was still pending with the Department, The Century Foundation (“TCF”) submitted a FOIA request (the “Staff Report FOIA Request”) seeking a copy of the draft staff report and analysis that was provided to ACICS on or around March 13, 2018.

Separately, on March 23, 2018, the United States District Court for the District of Columbia issued an Order remanding (but not vacating) the December 2016 Decision to the Secretary for consideration of what the court termed ACICS’s “Part II response” or “Part II Submission.” In a FOIA that was assigned tracking number 18-01472-F, NSLDN previously sought the release of that Part II response. To date, the Department has refused to release it under FOIA and on May 22, 2018, NSLDN, along with the Project on Predatory Student Lending of the Legal Services Center of Harvard Law School, filed suit to enforce its rights under FOIA. *See NSLDN et al. v. U.S. Dep’t of Ed.*, Case No. 1:18-cv-1201 (D.D.C.).

On April 3, 2018, Secretary DeVos issued an Order (the “April 3 Order”) vacating the December 2016 Decision and restoring ACICS’s status as a recognized accreditor. The April 3 Order also stated that “the Department will not conduct any further review of the full petition for recognition submitted by ACICS in December 2017.”¹

In the April 3 Order, the Secretary acknowledged that she was directed by the United States District Court to review ACICS’s “Part II submission,” and would “consider the Part II submission in reaching a recognition decision on remand.”² The April 3 Order further provided:

ACICS may respond to this information [i.e., the information ACICS itself submitted] and may include additional relevant evidence. In particular, ACICS should explain whether and to what extent the Part II submission documents are relevant to its compliance with the regulatory criteria or its ability to come into compliance within 12 months. Additionally, ACICS may provide additional evidence that is relevant to these issues. Any additional evidence ACICS includes should relate to the regulatory criteria that the [Senior Department Official] identified as noncompliant prior to the 2016 Decision, and ACICS should provide an explanation of its relevance to particular criteria. ACICS shall file its written submission and exhibits no later than May 30, 2018.³

On April 23, 2018, TCF sued the Department in the U.S. District Court for the Southern District of New York in response to the Department’s failure to comply with its statutory and regulatory obligations with respect to the Staff Report FOIA Request. Shortly after TCF’s suit was filed, the Department announced that it would “promptly” release the sought records in full.

On April 26, 2018, however, counsel for ACICS filed a motion in TCF’s lawsuit seeking permission “to appear as counsel for proposed intervenor [ACICS].” It was not until May 18, 2018 that the Department, in a letter to the Court, asked for further instructions regarding the release of the draft staff report.⁴ The Court then held a telephonic hearing on May 24, 2018, where the parties agreed to an in-camera review of the draft staff report before release. ACICS was to provide suggested redactions to the Court by June 8, but on June 5 it withdrew its request to intervene. ED released the draft staff report on June 8, 2018.

¹ See Order in the Recognition Proceeding of Accrediting Council for Independent Coll. & Sch., U.S. Dep’t of Educ., 1 (Sec’y of Educ. Apr. 3, 2018), <https://www2.ed.gov/documents/press-releases/acics-docketno-16-44-0.pdf>.

² *Id.* at 2.

³ *Id.*

⁴ Letter from Dep’t of Educ. to the Honorable Naomi Reice Buchwald, *Century Found. v. U.S. Dep’t of Educ.*, No. 18-cv-3581 (S.D.N.Y. May 18, 2018), ECF No. 17.

Request

NSLNDN hereby requests that ED produce the following in the time and manner required under the Freedom of Information Act and the Department's regulations:

1. All documents constituting or reflecting communications, **regardless of the subject matter**, between the Department and its employees or representatives, on the one hand, and of ACICS (including its representatives, counsel, and employees).

For purposes of this request, we ask that the Department include at least following individuals in custodians required to conduct a search:

- Betsy DeVos
- Josh Venable
- Bob Eitel
- James Manning
- Kathleen Smith
- Diane Auer Jones
- Carlos Muniz
- Steven Menashi
- Donna Mangold
- Jed Brinton
- Jeffrey (Justin) Riemer
- Sally Morgan
- Steven Finley
- Herman Bounds (and all staff in the OPE Accreditation Group)
- Beth Daggett
- Lynn Mahaffie
- Jennifer Hong
- Gail McLarnon
- Frank Brogan
- Phil Rosenfelt

In addition, we specifically ask that the Department include **without limitation** the following terms as search terms to enable the Department to identify relevant documents:

- ACICS
- Venable
- Michelle
- Edwards
- Allyson
- Baker

- Kenneth
- Ingram
- NACIQI
- Walton
- SDO
- Intervene
- Intervention
- SDNY
- S.D.N.Y.
- NSLDN
- Century
- TCF
- Elson
- Habash

Finally, through this request, NSLDN is only seeking documents constituting or reflecting communications that took place between April 27, 2018 and June 15, 2018.⁵

NSLDN does not object to the redaction from such records of any names or personally identifiable information of any individual, as required by law.

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 the Department 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 [the Department] 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).

⁵ In the interest of efficiency, NSLDN excludes from this request all documents that are responsive and which will be released in response to the FOIA request submitted by NSLDN on May 31, 2018, which has been assigned the tracking number 18-02042-F.

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), and locations and custodians searched and any tracking sheets used to track the processing of this Request. This includes any questionnaires, tracking sheets, 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, the Department 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**, in addition to searches by individual custodians likely to have responsive information. 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 the Department, 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 provide responsive material in electronic format, if possible. Please send any responsive material via email to alex@nsldn.org. We welcome any materials that can be provided on a rolling basis. Nevertheless, NSLDN fully intends to hold the Department 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. Please note that NSLDN submitted a separate FOIA request, bearing FOIA Request No. 18-01466-F, in which different communications were requested. That request was submitted on April 4, 2018, and to date, the

Department has not responded. Nevertheless, on April 16, 2018, the Department granted NSLDN's request for a fee waiver with respect to that request. The same decision should be made here.

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

1. **The FOIA specifically relates to the operations or activities of the government.** As noted above, ACICS's status as a recognized accreditor has been the subject of numerous decisions of the Secretary, numerous decisions of federal courts, and a host of Freedom of Information Act requests. This particular request seeks information that is reasonably necessary to understand the Department's recognition process, the extent to which it coordinates with accreditors during the recognition process, and the release of documents related to that process.

2. **The requested documents will be likely to contribute to an understanding of those specific operations or activities.** Because of the importance of accrediting agencies as gatekeepers to billions of taxpayer dollars, the public must be able to understand the process by which ED reviews and communicates with accreditors under review by the Department.

3. **The disclosure will contribute to a greater understanding on the part of the public at large.** NSLDN seeks this information to aid the public discourse surrounding the process by which the Department considers accreditation agencies under review. NSLDN has the capacity to analyze documents provided and to 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.** As noted above, the subject of this request is a matter of great public interest. Accrediting agencies such as ACICS serve as the gatekeepers to billions of taxpayer dollars, and recent failures have had devastating consequences to taxpayers and students alike. Whether these accreditors should be recognized is a matter of critical importance to taxpayers as well as thousands of students across the country. *See, e.g., The Century Foundation v. Betsy DeVos & U.S. Dep't of Educ.*, Case No. 1:18-cv-00128-PAC, TRO Order at 9-10 (S.D.N.Y. Feb. 15, 2018) (explaining that it would "impose a hardship on the public at large" if "ACICS has not improved its practices in the past year, and it receives federal recognition again despite its many deficiencies"). Indeed, it is of such significance that ACICS sued ED after it lost its recognition in December 2016. It is also of such significance that The Century Foundation has twice sued the Department for access to other information regarding ACICS, and, on both of those occasions, ACICS sought to intervene in TCF's litigation. NSLDN has previously sued the Department for additional materials that the Department has failed to provide under FOIA. ACICS's accreditation has also been the subject of numerous stories in national media outlets. NSLDN's analysis of the sought records, and use of the records to inform further discourse and comment on these issues, including the process by which ED accredits institutions, will significantly enhance the public's understanding of the Department's actions.

Disclosure of Information is Not in Commercial Interest of NSLDN

This request is fundamentally non-commercial. NSLDN is a non-profit, non-partisan organization with recognition pending with the IRS as a 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, litigation filings, and regulatory comments to government agencies. For these reasons, NSLDN qualifies for a fee waiver.

* * *

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 alex@nslDN.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,

/s/ Alexander Elson
Senior Counsel*

/s/ Margaret Vogel
Law Clerk**

National Student Legal Defense Network

*Member of New York Bar only; practicing in the District of Columbia under supervision of members of the D.C. Bar while D.C. Bar application is pending.

**Not admitted to practice law