

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL STUDENT LEGAL
DEFENSE NETWORK,
1015 15th Street N.W., Suite 600
Washington, D.C. 20005

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
EDUCATION,
400 Maryland Avenue S.W.
Washington, D.C. 20202

Defendant.

Case No. 19-cv-3473

COMPLAINT

INTRODUCTION

1. Plaintiff National Student Legal Defense Network (“Student Defense”) brings this action against Defendant United States Department of Education (“ED”) under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because Defendant has failed to comply with the applicable time limit provisions of FOIA, Student Defense is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action

enjoining the agency from continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff Student Defense is a nonpartisan, non-profit organization incorporated in the District of Columbia. Student Defense's mission is to work, through a variety of means, to advance students' rights to educational opportunity and ensure that higher education provides a launching point for economic mobility. To further its mission, Student Defense gathers information, including through responses to FOIA requests submitted to government agencies, and publicizes these responses on, *inter alia*, its website, social media, press releases and other comments to the media, and regulatory comments to government agencies.

6. Defendant ED is a department of the executive branch of the United States government headquartered in the District of Columbia and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). ED has possession, custody, and control of the records that Student Defense seeks.

STATEMENT OF FACTS

7. Under ED's "Gainful Employment" regulations, 34 C.F.R. Part 668 Subpart Q, eligibility of certain programs to participate in Title IV federal student aid is tied to debt-to-earnings rates. These rates, which are calculated in part using earnings data provided by the Social Security Administration ("SSA"), *see* 34 C.F.R. § 668.405(d), should be issued on an annual basis via a "notice of determination." That notice includes the final debt-to-earnings rates for each program subject to the regulations.

8. SSA provides the earnings data necessary to calculate these final rates pursuant to a Memorandum of Understanding ("MOU") between the two agencies, which expired in May 2018. According to ED, the MOU was not renewed, at least in part, due to

allegations that ED had misused the earnings data to calculate partial loan forgiveness for defrauded student loan borrowers.

9. Prior to the MOU's expiration, in January 2017, ED issued the first round of final debt-to-earnings rates required by the "Gainful Employment" regulations. Those rates related to the 2015 Award Year.

10. Despite the requirements of the "Gainful Employment" regulations, ED never issued a "notice of determination" for the next Award Year's debt-to-earnings rates or the debt-to-earnings rates for any subsequent year.

11. In July 2019, ED published a final rule repealing the "Gainful Employment" regulations.

12. On May 3, 2019, Student Defense submitted a FOIA request to ED seeking information ED had received pursuant to the MOU with SSA (hereinafter, the "Request").

13. The Request sought the following records:

a. Any output provided by the SSA to ED regarding "gainful employment" programs. For purposes of this request, "output" means any data or set-up data, regardless of form, that includes aggregate, program-level data on mean earnings, median earnings, and/or debt-to-earnings rates.

b. Any statistical reports provided by the SSA to ED about the matching rate or other assessment of the success of any data match, pursuant to an MOU and computer matching agreement between ED and SSA.

14. ED assigned the Request tracking number 19-01400-F.

15. On May 20, 2019, ED notified Student Defense that it was "unable to respond within 20 working days of having received the [R]equest."

16. On August 13, 2019, ED granted Student Defense's request for a fee waiver.

17. ED's website shows that Student Defense's Request is still "In Process." See U.S. Dep't of Educ., FOIA Request Status,

<https://foiaexpress.pal.ed.gov/app/CheckStatus.aspx> (last visited Oct. 28, 2019).

18. Student Defense has not received any further communication from ED regarding the Request.

19. As of the date of this complaint, ED has failed to (a) notify Student Defense of any determination regarding its Request, including the scope of any responsive records ED intends to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

20. Through ED's failure to respond to Student Defense's FOIA Request within the time period required by law, Student Defense has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I
Violation of FOIA, 5 U.S.C. § 552
Failure to Conduct Adequate Search for Responsive Records

21. Student Defense repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

22. Student Defense properly requested records within the possession, custody, and control of ED.

23. ED is an agency subject to FOIA and must therefore make reasonable efforts to search for requested records.

24. ED has failed to promptly review agency records for the purpose of locating those records that are responsive to Student Defense's FOIA Request.

25. ED's failure to conduct an adequate search for responsive records violates FOIA.

26. Plaintiff Student Defense is therefore entitled to injunctive and declaratory relief requiring Defendant to promptly make reasonable efforts to search for records responsive to Student Defense's FOIA Request.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

27. Student Defense repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

28. Student Defense properly requested records within the possession, custody, and control of ED.

29. ED is an agency subject to FOIA and must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

30. ED is wrongfully withholding non-exempt agency records requested by Student Defense by failing to produce non-exempt records responsive to its FOIA Request.

31. ED is wrongfully withholding non-exempt agency records requested by Student Defense by failing to segregate exempt information in otherwise non-exempt records responsive to Student Defense's FOIA Request.

32. ED's failure to provide all non-exempt responsive records violates FOIA.

33. Plaintiff Student Defense is therefore entitled to declaratory and injunctive relief requiring Defendant to promptly produce all non-exempt records responsive to its FOIA Request and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF:

WHEREFORE, Student Defense respectfully requests the Court to:

A. Order Defendant to conduct a search or searches reasonably calculated to uncover all records responsive to Student Defense's FOIA Request;

B. Order Defendant to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive

to Student Defense's FOIA Request and indexes justifying the withholding of any responsive records withheld under claim of exemption;

C. Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Student Defense's FOIA Request;

D. Award Student Defense the costs of this proceeding, including reasonable attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); *and*

E. Grant Student Defense such other relief as the Court deems just and proper.

Dated: November 18, 2019

Respectfully submitted,

/s/ Robyn K. Bitner

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