

April 18, 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 U.S. Department of Education (“ED”), 34 C.F.R. Part 5, the National Student Legal Defense Network (“NLSDN”) makes the following requests for records relating to the memoranda referenced in the Office of Inspector General’s (OIG) December 8, 2017 report “Federal Student Aid’s Borrower Defense to Repayment Loan Discharge Process.”

Background

On December 8, 2017, the OIG issued a report entitled “Federal Student Aid’s Borrower Defense to Repayment Loan Discharge Process” (ED-OIG/I04R0003).¹ The report described changes to the process of granting certain borrower relief claims. For example, the report noted that “From January 20, 2017, through March 2017, BDU continued to review transfer of credit and guaranteed employment claims, and from January 20, 2017, through May 4, 2017, BDU continued to review job placement rate claims where they were able to make preliminary determinations of denial or approval based on existing legal memoranda or reports.” (Report, page 3). The report also describes how the size and scope of the Department’s Defense to Repayment (DTR) program increased dramatically following the collapse of the Corinthian Colleges (“CCI”) chain. DTR has been the subject of several negotiated rulemakings and lawsuits. In a December 20, 2017 Press Release² (hereinafter “the Release”) the Department announced a “new process” to “fairly compensate[]” students “for damages”. As stated in the

¹ The report is available at <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2018/i04r0003.pdf>

² See <https://www.ed.gov/news/press-releases/improved-borrower-defense-discharge-process-will-aid-defrauded-borrowers-protect-taxpayers>. For purposes of this request, the phrase “December 2017 methodology” shall mean the methodology described in the “New Process Fairly Compensates for Damages” section of the December 20, 2017 press release.

Release, the December 2017 Methodology was adopted in direct response to the concerns raised by the Office of the Inspector General.

Request

NSLDN 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 or memoranda constituting "transfer of credit" memoranda developed by the BDU "related to borrowers who attended Heald, Everest, and WyoTech campuses of Corinthian Colleges, California campuses of ITT, and American Career Institute—Massachusetts," as described on pages 7-8 of the OIG report.
2. All documents or memoranda constituting "guaranteed employment claims" memoranda developed by the BDU "related to borrowers who attended Heald, Everest, and WyoTech campuses of Corinthian Colleges, California campuses of ITT, and American Career Institute—Massachusetts," as described on pages 7-8 of the OIG report.
3. All documents consisting of instructions to BDU staff "not to continue developing memoranda on whether additional categories of claims qualify for discharge because the borrower defense policies are being reviewed with the change in administrations" as described on page 10 of the OIG report.
4. All documents or memoranda constituting Office of the Undersecretary's "May 4, 2017 memorandum to the Secretary, OUS and the Chief Financial Officer's Internal Controls Unit" that provides that these offices "are working with FSA to 'develop interim procedures' to review claims," as described on page 34 of the OIG report.

NSLDN does not object to the redaction from such records of any names or personally identifiable information of any individual.

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. Department of Education*, 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), 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, including the request for expedited processing.

Please provide responsive material in electronic format, if possible. Please send any responsive material either via email to info@nslldn.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.

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.** This request seeks documents or memoranda described in the OIG report on processes and procedures for reviewing borrower defense claims. As stated in the Release, the December 2017 Methodology was adopted in direct response to the concerns raised by the Office of the Inspector General. The documents and memoranda referenced in the OIG report relate specifically to the operations or activities of the government.

2. **The requested documents will be likely to contribute to an understanding of those specific operations or activities.** Because of the importance of borrower defense claims, the public must be able to understand the process by which ED reviews and responds to these claims. The Department has stated that there are tens of thousands of defense to repayment claims pending. As stated in the Release, the December 2017 Methodology was adopted in direct response to the concerns raised by the Office of the Inspector General. This Request seeks documents that provide the public with understanding of the basis for the OIG report.

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 borrower defense claims. Borrower defense is currently the topic of a negotiated rulemaking and several lawsuits. 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, including a negotiated rulemaking and several lawsuits. The OIG report itself was made public, along with the response by Federal Student Aid. In the Release, the Department relied on the findings made by the Office of the Inspector General as a precursor to adopting new processes. NSLDN’s analysis of the documents described in the OIG report, and use of these sought records to inform further discourse and comment on these issues, will therefore significantly enhance the public’s understanding of the Department’s decisions.

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

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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, in litigation filings, 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 aaron@nslndn.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/ Martha Fulford

Martha Fulford
Senior Counsel
National Student Legal Defense Network