

August 27, 2021

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 (“Student Defense”) makes the following request for data regarding federal student loan borrowers who have been positively identified as eligible for total and permanent disability (“TPD”) discharges through the Department’s matching agreement with the Social Security Administration (“SSA”).

Under the Higher Education Act (“HEA”), student loan borrowers who are “totally and permanently” disabled are entitled to a complete discharge of their federal student loans.¹ On April 12 2016, the Department announced that it was working with the SSA to complete a data match to identify federal student loan borrowers who are eligible for a TPD discharge (“SSA Process”).² As of February 2020, “approximately 589,000 borrowers were identified through the SSA Process. Of those borrowers, more than 227,000 borrowers with loans totaling \$8.2 billion have been approved for discharges.”³

On May 24, 2021, the Department provided the following data⁴ to Student Defense in response to a FOIA request:

¹ HEA § 437(a); 20 U.S.C. § 1087(a).

² See Press Release, U.S. Dept. of Education (April 12, 2016), available at: <https://www.ed.gov/news/press-releases/us-department-education-acts-protect-social-security-benefits-borrowers-disabilities>.

³ See U.S. Department of Education Responses to Questions for the Record Submitted by Senator Patty Murray Following the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies March 5, 2020 Hearing to Review of the FY2021 Budget Request for the U.S. Department of Education at 40, available at: <https://www.help.senate.gov/download/wordmurrayqfrs5mar20hearingonfy21edbudget>.

⁴ See United States Department of Education, Final Response to Student Defense FOIA Request No. 21-01335-F (May 24, 2021), available at: <https://www.defendstudents.org/foia/disability>.

Total Individuals Matched Through SSA Process	Total Individuals Matched Through SSA Process w/ Debt Discharged	Total Amount Discharged	Total Individuals Matched Through SSA Process but NOT Discharged	Total Amount NOT Discharged
818,074	300,405	\$8,842,264,164	517,669	\$8,036,093,898

On August 19, 2021, the Department announced that it was providing automatic TPD discharges to “over 323,000 borrowers” who were identified by SSA as eligible for a TPD discharge.⁵ The Department stated that these borrowers “will receive more than \$5.8 billion in automatic student loan discharges.”⁶ Asked about the discrepancy between the data provided to Student Defense and the data announced on August 19, the Department reportedly stated on a press call that:

Our understanding is that the [517,000] is essentially the numbers that are accumulated over multiple quarterly matches done over multiple years And so as a result, there are borrowers who may have applied, there are [sic] who may have been double counted because they are essentially showing up in multiple matches. So this 323,000 is our count of who we think will get the discharge is based upon the last quarterly match we did in June, who had not yet applied so those would be the most updating comprehensive numbers there.⁷

Request

Student Defense hereby requests that the Department produce the following within twenty business days:

1. All documents constituting or reflecting communications between or among Department staff regarding the discrepancies between the data provided to Student Defense on May 24, 2021 (see FOIA Request No. 21-01335-F, described and linked to above) and the data provided to the public on August 19, 2021, including but not limited to the discrepancy between the 517,699 eligible borrowers provided to Student Defense and the “over 323,000” borrowers who the Department announced would receive TPD relief.

⁵ See Press Release, U.S. Dept. of Education (Aug. 19, 2021), available at: <https://www.ed.gov/news/press-releases/over-323000-federal-student-loan-borrowers-receive-58-billion-automatic-total-and-permanent-disability-discharges>.

⁶ *Id.*

⁷ Aarthi Swaminathan, “Student loan forgiveness: Education Department discharges \$5.8 billion for disabled borrowers” Yahoo Finance (Aug. 19, 2021), available at: <https://news.yahoo.com/student-loan-forgiveness-disabled-borrowers-150036471.html>.

2. All documents constituting or reflecting communications between the Department and any outside party, including NelNet, regarding the discrepancy described in Request 1.
3. To the extent not called for by the above requests, all documents discussing or describing the discrepancy described in Request 1.

We ask that your search for records include, but not be limited to, all communications involving any of the following: Nelnet, Office of the Secretary (OS), Office of the Undersecretary (OUS), Office of General Counsel (OGC), Office of Communications and Outreach (OCO), and Federal Student Aid (FSA).

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, Student Defense 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 Student Defense 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, Student Defense 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.

Student Defense 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, Student Defense 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@defendstudents.org. We welcome any materials that can be provided on a rolling basis. Nevertheless, Student Defense 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), Student Defense 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 the TPD program under Title IV of the Higher Education Act, and therefore relate specifically to the operations or activities of the government.
- 2. The requested documents will likely contribute to an understanding of those specific operations or activities.** The requested documents are essential to understanding the current status of discharges under the TPD matching programs with the SSA. 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.** Student Defense seeks this information to increase public understanding regarding the Department’s implementation of the TPD program under the SSA Process. Student

Defense 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 Student Defense to more completely understand the scale and status of the Department’s implementation of the TPD regulation under the SSA Process.

Disclosure of Information is Not in the Commercial Interest of Student Defense.

This request is fundamentally non-commercial. Student Defense is a non-profit, non-partisan 501(c)(3) organization. Student Defense’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, Student Defense 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, Student Defense qualifies for a fee waiver.

* * *

Student Defense 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@defendstudents.org. If Student Defense’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

Alexander Elson
Vice President