



NATIONAL STUDENT LEGAL DEFENSE NETWORK

February 12, 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 (“NSLDN”) makes the following requests for records relating to the Department’s receipt and processing of requests submitted by one or more members of the public under FOIA.

As the Department knows, FOIA is “a tool of inquiry and information gathering for various sectors – including the media, businesses, scholars, attorneys, consumers, and activities.”¹ For that reason FOIA “allows any person—individual or corporate, citizen or not—to request and obtain, without explanation or justification, existing, identifiable, and unpublished agency records on any topic.”² According to the most recent annual FOIA report published by ED on its website, the Department received 2,445 FOIA requests during FY 2016 and processed 2,307 requests during that year.³ When combined with the 370 requests that were pending at the start of that fiscal year, at the end of FY 2016, 508 requests remained open with the Department.⁴ According to this same report, during FY 2016, the Department received 38 requests for expedited processing of FOIA requests, only 4 of which (approximately 10.5%) were approved.

In addition to annual reports, the Department has also made public a FOIA Request Status Log (“Request Status Log”) for FY 2018 that details the “status of all FY2018 FOIA Requests” and

¹ Ginsberg, W. (2014) *The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues* (CRS Report No. R41933) available at <https://fas.org/sgp/crs/secrecy/R41933.pdf>.

² *Id.*

³ <https://ed.gov/about/reports/annual/foia/foia-fy16.pdf>

⁴ *Id.*

“all open requests for prior years as of 1/4/2018.”⁵ According to the report dated January 4, 2018, approximately 1,352 requests were either submitted during FY 2018 or were considered “open,” but submitted in a prior fiscal year.

NSLDN hereby requests that the Department produce the following documents in strict accordance with the timeframes established by FOIA and the Department’s implementing regulations:

- (a) A copy of each request for documents listed in the Request Status Log.

To the extent this request is unduly burdensome on the Department, and without waiving any rights for full compliance with this request, NSLDN would be willing to receive a more detailed log of the Request Status Log, so long as such a log included, at a minimum:

- Request ID
- Requester Name
- Requester Organization
- Request Description
- Received Date
- Request Status

If the Department is willing to produce such a log or other similar document, NSLDN may be able to reduce the volume of documents ultimately sought under this request.

- (b) For each request for which expedited processing was requested in FY 2018, FY 2017, FY 2016, and FY 2015, please provide a copy of the request for expedited processing (including the underlying request for documents), a copy of the Department’s determination/decision regarding the request for expedition, and a copy of all written communication between the requester of an expedited request and the Department regarding the expedited request (including any documents relating to an appeal of the determination on the request for expedition).

FOIA presumes disclosure and the Department “bear[s] the burden of justifying withholding of any records.” *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, ED must “demonstrate the validity of [each] exemption that [the Department] asserts.” *People for*

⁵ See generally <https://ed.gov/policy/gen/leg/foia/request-status-log.pdf>

the American Way v. U.S. Department of Education, 516 F. Supp. 2d 28, 34 (D.D.C. 2007). To satisfy this burden, ED 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).

To ensure that this request is properly construed and does not create any unnecessary burden, we welcome the opportunity to discuss this request, 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 to NSLDN via email at info@nsldn.org.

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 disclosure of the requested information: (1) 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) is not primarily in the commercial interest of the requester.

I. The Request Specifically Relates to the Operations or Activities of the Government and Disclosure of Information is Likely to Contribute Significantly to Public Understanding of Such Operations or Activities.

As detailed above, the FOIA statute requires agencies to produce information to the public. ED releases annual and periodic reports on its operations under FOIA. This request is simply for raw information that comprises the reports already disclosed by the Department. There can be no serious question that this FOIA does not relate to the operation or activity of the government in responding to FOIA requests. Moreover, because the information already released by ED—in the form of its annual reports and periodic updates to requests—can be more fully understood with the information sought by this request, the requested documents will undoubtedly contribute to an understanding of the Department’s operations and activities relating to the responses to FOIA requests.

II. The Disclosure of Information Sought Will Contribute to a Greater Understanding of the Part of the Public At Large and Will Significantly Contribute to the Public’s Understanding of Government Activities.

NSLDN seeks this information to aid the public discourse surrounding the Department’s approach to handling requests submitted under FOIA and also to further the public discourse

regarding many of the matters that are likely the subject of pending requests. By its very nature, the subject of this request is a matter of great public interest, as the Department receives thousands of requests under FOIA every year. NSLDN has the capacity to analyze the requested records and to use them to inform public discourse regarding issues currently pending at the Department. NSLDN also has the capacity to broadcast its analysis through the news, its website, and via social media – thus “significantly” contributing to the public understanding of issues present at the Department, including those raised by the Department’s processes for handling FOIA requests.

III. 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, 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 alex@nslan.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,



Alex Elson
Senior Counsel
National Student Legal Defense Network