

March 6, 2018

VIA ELECTRONIC MAIL

U.S. Department of Veterans Affairs
Office of Assistant Secretary for Management
810 Vermont Avenue, NW (004A)
Washington, D.C. 20420
vacofiaservice@va.gov

Re: Freedom of Information Act Request

Dear Sir or Madam:

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 Veteran’s Affairs (the “VA” or “Department”), 38 C.F.R. § 1.500 *et seq.*, the National Student Legal Defense Network (“NSLDN”) makes the following request for records.

Background

The VA provides education benefits to eligible Servicemembers, Veterans, and certain dependents and survivors, who may receive financial support for, *inter alia*, undergraduate and graduate degrees, vocational and technical training, licensing and certification tests, apprenticeships, and on-the-job training. These benefit assist eligible veterans, servicemembers and their families to afford postsecondary education. In FY2017, the VA is “estimated to distribute over \$14 billion in GI Bill benefits to over 1 million eligible participants.” The Role of State Approving Agencies in the Administration of GI Bill Benefits (CRS Report No. R44728) (Dec. 29, 2016) at 1 *available at*:
https://www.everycrsreport.com/files/20161229_R44728_5b5b2eaf2b95d9931c66c6ef99a253c63ec7e2a9.pdf.

Under federal law, the VA “shall not approve the enrollment of an eligible veteran or eligible person in any course offered by an institution which utilizes advertising, sales, or enrollment practices of any type which are erroneous, deceptive, or misleading either by actual statement, omission, or intimation.” 38 U.S.C. § 3696(a). Institution must, in order to “ensure compliance” with this section “maintain a complete record of all advertising, sales, or enrollment materials” used by or on behalf of the institution in the preceding 12 months. *Id.* § 3696(b). Finally, the Secretary of the VA is required to “enter into an agreement” with the Federal Trade Commission to use, where appropriate, is resources in “carrying out investigations and making the Secretary’s determinations” under § 3696(a).

Request

NSLDN hereby requests that VA produce the following within twenty business days. **Each of the requests listed below should be construed as a separate request under FOIA, and the failure to respond timely to any aspect of this request shall be actionable under the Act:**

- (1) A complete copy of the “agreement” with the Federal Trade Commission described in 38 U.S.C. § 3696(c).
- (2) A copy of any “preliminary findings” made by the Federal Trade Commission pursuant to the “agreement” entered into under 38 U.S.C. § 3696(c).
- (3) A copy of any document constituting or reflecting a determination made by the VA and/or the Secretary of the Department that any institution “utilizes advertising, sales, or enrollment practices of any type which are erroneous, deceptive, or misleading either by actual statement, omission, or intimation.” *See* 38 U.S.C. § 3696(a).

As the VA knows, FOIA is “a tool of inquiry and information gathering for various sectors – including the media, businesses, scholars, attorneys, consumers, and activities.” 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/secretary/R41933.pdf>. 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.” *Id.* 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). The Department has a duty to construe a FOIA request liberally.

If VA takes the position that any portion of any requested record is exempt from disclosure, VA must “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, VA 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 via email to info@nslldn.org.

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

In addition to the records requested above, NSLDDN 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, VA 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. NSLDDN 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.

Your search should consider all agency records and should not exclude files kept or maintained in the personal control of employees or officials, such as personal email accounts, text messages, or other electronic forms of communication. Moreover, to the extent searches are conducted of agency emails or other electronic records, such search must consider all appropriate sources – regardless of whether information is archived or otherwise moved after a certain time period. FOIA does not permit an agency to avoid its obligations simply by having moved records to a different electronic source.

In addition, please note that 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 VA’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.

Request for Waiver of Fees

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 38 C.F.R. 1.561(n), NSLDDN 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.

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

In recent years, the government's role in policing issues of consumer protection in higher education has been elevated. As noted in a December 2016 CRS report (R44728), the Department of Veteran's Affairs plays an incredibly important role in providing benefits to veterans and servicemembers to help them afford postsecondary education. This request plainly seeks information regarding the "operations or activities of the government" insofar as it requests information about the role of the VA in protecting student/consumers in their decisions relating to higher education. This request seeks information that is reasonably necessary to better understand the process by which the VA reviews and considers whether institutions of higher education use advertising or sales practices that are deceptive or misleading.

NSLDN seeks this information to aid the public discourse surrounding the Department's consideration of consumer protection issues in higher education and to further public discourse regarding this process. NSLDN, has the capacity to analyze records and the use sought records to inform public discourse of these issues. NSLDN 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.

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 use 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.

* * *

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 dan@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,

Daniel Zibel
Vice President & Chief Counsel
National Student Legal Defense Network