

March 8, 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" or "Department"), 34 C.F.R. Part 5, the National Student Legal Defense Network ("NSLDN") makes the following requests for records relating to records provided by the U.S. Department of Education to Navient Corporation pursuant to a subpoena issued in *Consumer Financial Protection Bureau v. Navient Corporation*, 3:17-cv-00101 (M.D. Pa).

Background

On January 18, 2017, the Consumer Financial Protection Bureau ("CFPB") filed a Complaint in the U.S. District Court for the Middle District of Pennsylvania against Navient Corporation. *See CFPB v. Navient Corporation et al.*, Case No. 3:17-cv-00101-RDM (hereinafter "the Litigation"). As the CFPB stated in their press release announcing the litigation:

Today the Consumer Financial Protection Bureau (CFPB) is suing the nation's largest servicer of both federal and private student loans for systematically and illegally failing borrowers at every stage of repayment. For years, Navient, formerly part of Sallie Mae, created obstacles to repayment by providing bad information, processing payments incorrectly, and failing to act when borrowers complained. Through shortcuts and deception, the company also illegally cheated many struggling borrowers out of their rights to lower repayments, which caused them to pay much more than they had to for their loans. The Bureau seeks to recover significant relief for the borrowers harmed by these illegal servicing failures.

"For years, Navient failed consumers who counted on the company to help give them a fair chance to pay back their student loans," said CFPB Director Richard Cordray. "At every stage of

repayment, Navient chose to shortcut and deceive consumers to save on operating costs. Too many borrowers paid more for their loans because Navient illegally cheated them and today's action seeks to hold them accountable.”

See: <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment/>

On January 18, 2018, the Court held a Telephone Conference regarding the case, a transcript of which is publicly available on PACER, *see* Dkt. No. 76, and at: <https://www.courtlistener.com/recap/gov.uscourts.pamd.110329/gov.uscourts.pamd.110329.76.0.pdf>. During that teleconference, counsel for Navient stated that Navient had: “served ... a subpoena on the Department of Education” seeking the production of certain documents and “the Department of Education did not object to that subpoena on relevance of proportionality grounds.” In that same hearing, counsel for Navient stated to the Court: “Navient – I think the best analogy here – Navient is really a marionette that is being held by the Department of Education.”

Request

NSLDN hereby requests that ED produce the following within twenty business days:

1. All documents produced by the U.S. Department of Education to Navient Corporation, Navient Solutions, Inc., or Pioneer Credit Recovery, Inc., pursuant to any discovery request, subpoena, or other request issued in, or in connection with, the Litigation.
2. All communications or correspondence between the U.S. Department of Education or the U.S. Department of Justice, on the one hand, and counsel for any defendant in the Litigation regarding any discovery or subpoena request issued in the Litigation.

With respect to Request 2, we ask that you search records of all personnel in the Office of General Counsel who are reasonably likely to have responsive documents. This includes but is not limited to the General Counsel or Acting General Counsel, any Deputy General Counsel, any Special Counsel, and any attorney in the Division of Postsecondary Education.

Any search for documents in response to Request #2 above can be limited to the period commencing on the date of the subpoena or discovery request pursuant to which documents were produced, continuing to the date of this request.

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.” 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>. 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 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 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 via email to info@nsldn.org.

NSLDN 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, 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.

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 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.

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

According to recent reports, the Trump Administration and Secretary DeVos are “preparing to issue a declaration that companies collecting federal student loans are off limits for state lawmakers and regulators.”¹ Indeed, on January 8, 2018, the United States submitted a “Statement of Interest” in a case pending in Suffolk County Superior Court in which the United States contended that assertions by the Commonwealth of Massachusetts that a federal student loan servicer violated state law were, in fact, preempted by the Higher Education Act.

Accordingly, this request seeks information that is reasonably necessary to better understand the relationship between the Department and loan servicers, and the degree to which the Department does, or does not, consider Navient to be acting as a “marionette” for the Department.

¹ Michael Stratford, Trump administration fights states’ crackdown on student loan collectors (2/26/2018) *available at*: <https://www.politico.com/story/2018/02/26/education-department-student-loans-state-regulators-366033>

NSLDN seeks this information to aid the public discourse surrounding the Department's apparent attempts to assert that federal law, through the Higher Education Act, preempts the application of state consumer protection laws over servicers of Federal Direct Loans. NSLDN has the capacity to analyze records and to use the sought records to inform public discourse regarding issues currently pending at the Department. 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, including those raised by the Department's processes for handling FOIA requests.

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@nsldn.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,



Alexander Elson
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National Student Legal Defense Network
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