

September 11, 2018

SENT VIA ELECTRONIC MAIL

Appeals Office
Office of the Chief Privacy Officer
U.S. Department of Education
400 Maryland Avenue, SW, LBJ 2W218-52
Washington, DC 20202-4536
EDFOIAappeals@ed.gov

RE: Freedom of Information Act Appeal FOIA No. 18-02184-F

Dear FOIA Appeals Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(6)(A), and U.S. Department of Education regulations at 34 C.F.R. Part 5, the National Student Legal Defense Network (“NSLDN”) submits the following administrative appeal.

On June 15, 2018, NSLDN submitted a FOIA request (the “Request”) to the Department seeking, generally: “All documents constituting or reflecting communications, **regardless of the subject matter**, between the Department and its employees or representatives, on the one hand, and of ACICS (including its representatives, counsel, and employees).” (emphasis in original). The Request sought communications that took place between April 27, 2018 and June 15, 2018. For purposes of the Request, NSLDN specifically requested that the Department “include at least the following . . . custodians” in its searches:

- Betsy DeVos
- Josh Venable
- Bob Eitel
- James Manning
- Kathleen Smith
- Diane Auer Jones
- Carlos Muniz
- Steven Menashi
- Donna Mangold
- Jed Brinton
- Jeffrey (Justin) Riemer
- Sally Morgan
- Steven Finley
- Herman Bounds (and all staff in the OPE Accreditation Group)
- Beth Daggett
- Lynn Mahaffie

- Jennifer Hong
- Gail McLarnon
- Frank Brogan
- Phil Rosenfelt

In addition, NSLDN requested that the Department include, without limitation, the following search terms to enable the identification of relevant documents:

- ACICS
- Venable
- Michelle
- Edwards
- Allyson
- Baker
- Kenneth
- Ingram
- NACIQI
- Walton
- SDO
- Intervene
- Intervention
- SDNY
- S.D.N.Y.
- NSLDN
- Century
- TCF
- Elson
- Habash

A true and correct copy of the Request is attached hereto as Exhibit A.

The Department subsequently assigned the Request tracking number 18-02184-F. On June 25, 2018, the Department sent a letter to NSLDN stating that: “Your request was assigned to the Offices of FSA, OGC, OPE, OS, OUS within the Department to search for documents that may be responsive to your request.” The letter also granted NSLDN’s request for a fee waiver. A true and correct copy of the June 25 letter is attached hereto as Exhibit B.

On July 19, 2018, the Department sent NSLDN an “initial determination letter” which stated that: “We aim to complete your requests as promptly as possible. At this time, we are unable to provide an estimated completion date, but intend to provide records on a rolling basis as they become available.” A true and correct copy of the July 19 letter is attached hereto as Exhibit C.

On August 27, 2018, the Department issued a “final response” to the Request (“Final Response”) stating: “Your request was forwarded to the appropriate offices to search for documents that may be responsive to your request: Office of Postsecondary Education (OPE) and the Office of Planning, Evaluation and Policy Development (OPEPD). . . . The staff in OPE and OPEPD informed the FOIA Services Center that, after a thorough search of their files, they were unable to locate any documents that were responsive to your request.” Final Response at 1-2. A true and correct copy of the Final Response is attached hereto as Exhibit D.

Consistent with the requirements of 34 C.F.R. § 5.40, NSLDN hereby submits this administrative appeal of the Final Response.

APPEAL OF FINAL RESPONSE

Under FOIA, the Department has a clear obligation to undertake a search that is reasonably calculated to uncover all relevant documents. The reasonableness of the search must be guided in reference to the documents requested. Agencies may not design a search that excludes files where records reasonably may be located, nor may an agency ignore “a lead it cannot in good faith ignore, i.e., a lead that is both clear and certain.” *See Kowalczyk v. U.S. Dep’t of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996). As noted above, after initially assigning the Request “to the Offices of FSA, OGC, OPE, OS, OUS,” and although the Request specifically sought records from individuals assigned to an array of offices (including, without limitation, the Office of the Secretary, the Office of the Undersecretary, the Office of Postsecondary Education, Federal Student Aid, and the Office of the General Counsel), the Department’s Final Response stated that “staff in OPE and OPEPD informed the FOIA Services Center that, after a thorough search of their files, they were unable to locate any documents that were responsive to your request.” This response is plainly inadequate for at least three reasons.

First, the Request is not limited to records that may exist with “staff in OPE and OPEPD.” Rather, the Request sought copies of communication from Department officials from multiple offices, including but not limited to the OGC, OUS, OS, and FSA. The Department recognized so much in its June 25, 2018 letter to NSLDN, which stated specifically that the Request “was assigned to the Offices of FSA, OGC, OPE, OS, OUS.”

The Department has not explained why it conducted such a narrow search and has not come close to providing an adequate justification for the search methodology. An agency “cannot limit its search to only one or more places if there are additional sources that are likely to turn up the information requested.” *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 3226 (D.C. Cir. 1999) (internal quotation marks omitted). In this case, the Department’s only explanation and response is that “staff in *OPE and OPEPD* informed the FOIA Services Center that, after a thorough search of their files, they were unable to locate any documents that were responsive to your request.” Final Response at 2 (emphasis added). The Department has provided no detail regarding which staff, which subcomponent offices, or why no other offices were consulted. Moreover, the Department provided no explanation for why it removed FSA, OGC, OUS, and OS from the list of offices that were originally assigned to the Request. Nor has the Department

indicated whether staff in FSA, OGC, OUS, and OS had any responsive documents. This is especially troubling given that, as discussed below, the Department is aware that responsive documents exist in these offices. Both the search and the justification for that search are therefore deficient.

Second, it would appear from the face of the Final Response that the Department conducted its search by asking “staff” from OPE and OPEPD whether they had responsive documents. Final Response at 2. The Department did not provide any further information to explain what steps these custodians took to conduct a good faith, reasonable search for the requested records. Nor did the Department provide any insight as to which staff, or what categories of OPE and OPEPD staff, were asked to search for responsive records. This is particularly troubling because NSLDN specifically requested records describing how the Request was processed. Request at 5. Because the Department has failed to produce records sufficient to show how the search was conducted, NSLDN is left only with the sparse and conclusory statements from “staff” who were unable to locate responsive records.

Third, the Department’s assertion that it was “unable to locate any documents that were responsive to your request,” is belied by the public record. Indeed, in response to a separate FOIA request submitted by an unrelated party, the Department, on August 22, 2018—a mere *five days prior* to submitting the August 27, 2018 Final Response at issue here—released numerous records that are directly responsive to this Request including, but not limited, to:

- A May 31, 2018 letter from Allyson Baker to Donna Mangold, cc’ing (among others) Michelle Edwards re: “Accrediting Council for Independent Colleges and Schools.” The letter included custodian Donna Mangold and numerous search terms, including: “ACICS,” “Allyson,” “Baker,” “Michelle,” and “Edwards.”
- An email chain spanning from May 30, 2018 to June 1, 2018 with the subject: “Docket No. 16-44-0 – ACICS Recognition – ACICS Response to Order.” The email chain included custodians Donna Mangold, Diane Jones, Jeffrey Riemer, and Sally Morgan, as well as numerous search terms, including “ACICS” and “Venable.”
- A May 30, 2018 letter from Michelle Edwards to Secretary DeVos, cc’ing (among others) Sally Morgan, Donna Mangold, and Allyson Baker re: “ACICS Response to April 3, 2018 Order of the Secretary.” The letter included custodians Secretary DeVos, Sally Morgan, and Donna Mangold and numerous search terms, including: “ACICS,” “Allyson,” and “Baker.”
- A May 22, 2018 email chain with the subject: “ACICS – Docket 16-44-0.” The email chain included custodians Donna Mangold and Sally Morgan and search terms such as “ACICS.”

See Interim Response to FOIA Request 18-02106-F.

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For the reasons stated above, NSLDN cannot take seriously ED's contention that, five days after releasing numerous responsive documents, it was "unable to locate any documents that were responsive to your request." As the publicly-released documents described above reveal, there are indeed documents in the Department's possession that are directly responsive to the Request. NSLDN therefore appeals this determination insofar as it represents nothing more than ED's failure to conduct a reasonable search.

CONCLUSION

In light of the facts described above, NSLDN requests that ED promptly conduct adequate searches for the materials requested in FOIA Request No. 18-02184-F and promptly disclose all non-exempt materials.

Thank you for your consideration of this appeal. As provided in 5 U.S.C. §552(a)(6)(A)(ii), we look forward to your determination on our appeal within twenty working days. For questions regarding any part of this appeal, or the underlying request for records, please do not hesitate to contact me at alex@nslndn.org or at (202) 734-7495.

Sincerely,



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National Student Legal Defense Network

*Member of New York Bar only; practicing in the District of Columbia under supervision of members of the D.C. Bar while D.C. Bar application is pending.