

March 26, 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 copies of all requests for data or information submitted or requested by any member (including alternate member) of either the Borrower Defenses and Financial Responsibility Negotiated Rulemaking Committee 2017-2018 or the Gainful Employment Negotiated Rulemaking Committee 2017-2018.

Background

On June 16, 2017, the Department published a notice in the Federal Register announcing its intention to establish a negotiated rulemaking committee to prepare proposed regulations for the Federal Student Aid programs authorized under title IV of the Higher Education Act of 1965, as amended (HEA). This notice announced two public hearings at which interested parties may comment on the topics suggested by the Department in the notice and suggest additional topics for consideration for action by the negotiated rulemaking committee.

On August 30, 2017, the Department published a notice requesting nominations for negotiators to serve on two negotiated rulemaking committees that will address 1) gainful employment issues; and 2) borrower defenses to repayment of Federal student loans and other matters, the authority of guaranty agencies in the Federal Family Education Loan Program to charge collection costs to a defaulted borrower who enters into a repayment agreement with the guaranty agency, and limited financial responsibility issues, which will be addressed by a subcommittee. In addition, the notice requested nominations for individuals with pertinent expertise to participate on the financial responsibility subcommittee.

With respect to the negotiated rulemaking on Borrower Defense and Financial Responsibility, the Department conducted three sessions of negotiated rulemaking, *i.e.*, November 13-15, 2017,

January 8-11, 2018, and February 12, 2018. With respect to the negotiated rulemaking on Gainful Employment, the three sessions were held on December 4-7, 2017, February 5-8, 2018, and March 12-15, 2018.

As part of the negotiated rulemaking processes, the negotiations including a process by which members of the committee (including alternates) could submit data or information requests to the Department. For example, during the December 4, 2017 Gainful Employment opening session, Javier Ramirez, the FMCS facilitator retained by the Department was asked when the “right time” to make a “data request” is. In response, he stated that “at the end of each issue, we could see what information is needed for that issue.” Dec. 4 GE Reg. Neg. Transcript at 112. And during the Borrower Defense negotiated rulemaking, Department staffer Annemarie Weisman repeatedly made mention of putting in, or responding to, requests for data. *See, e.g.*, Nov. 14, 2017 BD Reg. Neg. Transcript at 173.

Request

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

1. All documents constituting or reflecting data or information requests submitted by members (including alternates) of the negotiated rulemaking committee for the 2017-2018 Borrower Defense and Financial Responsibility Negotiated Rulemaking.
2. All documents constituting or reflecting responses to data or information requests submitted by members (including alternates) of the negotiated rulemaking committee for the 2017-2018 Borrower Defense and Financial Responsibility Negotiated Rulemaking.
3. All documents constituting or reflecting data or information requests submitted by members (including alternates) of the negotiated rulemaking committee for the 2017-2018 Gainful Employment Negotiated Rulemaking.
4. All documents constituting or reflecting responses to data or information requests submitted by members (including alternates) of the negotiated rulemaking committee for the 2017-2018 Gainful Employment Negotiated Rulemaking.

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@nsltn.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

As noted above, on June 16, 2017, the Department published a notice in the Federal Register announcing its intention to establish a negotiated rulemaking committee to prepare proposed regulations for the Federal Student Aid programs authorized under title IV of the HEA. On August 30, 2017, the Department published a notice requesting nominations for negotiators to serve on two negotiated rulemaking committees that will address 1) gainful employment issues; and 2) borrower defenses to repayment of Federal student loans and other matters, the authority of guaranty agencies in the Federal Family Education Loan Program to charge collection costs to a defaulted borrower who enters into a repayment agreement with the guaranty agency, and limited financial responsibility issues, which will be addressed by a subcommittee. And between November 2017 and March 2018, the Department conducted negotiating rulemakings regarding these two issues.

This request seeks information that is reasonably necessary to better understand not only the process by which the Department conducts negotiated rulemaking (including its process for responding to information sought by the members of the committee – *i.e.*, the “individuals with pertinent expertise,” but also the information that such individuals believe to be pertinent and important to the issues that were being discussed by these committees. Although the Department has publicized transcripts of the proceedings themselves, NSLDN understands that some requests for data and information may have been submitted via email and/or been requested in a manner that would not have been captured by the transcript.

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NSLDN seeks this information to aid the public discourse surrounding the Department's use of negotiated rulemaking under the Higher Education Act, as well as the issues surrounding Gainful Employment, Borrower Defense, and Financial Responsibility. 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.

* * *

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@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,

A handwritten signature in black ink, appearing to read 'D A Z', with a stylized flourish at the end.

Daniel Zibel
Vice President & Chief Counsel
National Student Legal Defense Network
dan@nsldn.org