

October 1, 2018

VIA ELECTRONIC MAIL

FOIA Public Liaison
U.S. Department of Education
Office of Management
Office of the Chief Privacy Officer
400 Maryland Ave, S.W.
LBJ 2E320
Washington, D.C. 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 United States Department of Education (“ED” or “the Department”), 34 C.F.R. Part 5, the National Student Legal Defense Network (“NSLDN”) makes the following request for records relating to communications between ED and any non-governmental party regarding the Notice of Proposed Rulemaking (“NPRM”) and the rulemaking process for the proposed 2018 Gainful Employment regulation (hereinafter “the GE rule” or “the GE NPRM”).

Background

On August 14, 2018, ED published its NPRM titled “Program Integrity: Gainful Employment.” 83 Fed. Reg. 40,167 (Aug. 14, 2018). The Department proposed “to rescind the gainfully employment (GE) regulations, which added to the Student Assistance General Provisions requirements for programs that prepare students for gainful employment in a recognized occupation.” *Id.* at 40,167-68. In addition, the Secretary proposed to update the College Scorecard “to provide program-level outcomes for all higher education programs, at all institutions that participate in the programs authorized by title IV of the Higher Education Act of 1965, which would improve transparency and inform student enrollment decisions through a market-based accountability system.” *Id.* at 40,168. The GE NPRM provided for a 30-day public comment period, ending on September 13, 2018. *Id.*

Request

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

1. All communications or correspondence between ED and any non-governmental party, including any calendar invitations or entries related to meetings between ED and such parties, that mention the GE NPRM and/or the GE rule and/or the GE rulemaking process sent on or after August 14, 2018.

We ask that your search for records include, but not be limited to, the following personnel at ED:

- Betsy DeVos
- Diane Auer Jones
- Bob Eitel
- Josh Venable
- Lynn Mahaffie
- Adam Kissel
- Kathleen Smith
- James Manning
- Carlos Muniz
- Elizabeth McFadden
- Jeffrey (Justin) Riemer
- Steve Finley
- Brian Siegel
- Caroline Hong
- Cynthia Hammond
- Jeff Appel
- Julian Schmoke
- Robin Minor
- Barbara Hoblitzell
- Annmarie Weisman
- Brian Smith
- John Kolotos
- Ian Foss
- Scott Filter

FOIA presumes disclosure. Indeed, “[a]gencies bear the burden of justifying withholding of any records, as FOIA favors a ‘strong presumption in favor of disclosure.’” *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, NSLDN requests that you “demonstrate the validity of [each] exemption that [ED] asserts.” *People for the American Way v. U.S. Dep’t of Educ.*, 516 F. Supp. 2d 28, 34 (D.D.C. 2007). To satisfy this burden, you 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).

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); the locations and custodians searched; and any tracking sheets, questionnaires, 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. In addition, ED has a duty to construe a FOIA request liberally.

In conducting a "reasonable search" as required by law you must use the most up-to-date technologies and tools available. 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.

To ensure that this request is properly construed and does not create any unnecessary burden on ED, NSLDN welcomes the opportunity to discuss this request at your earliest convenience, 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 robyn@nslldn.org. We welcome any materials that can be provided on a rolling basis. Nevertheless, NSLDN fully intends to hold ED to the timeframe required by statute for a response to this request.

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

1. The FOIA request specifically relates to the operations or activities of the government. This request seeks communications between the Department of Education and non-governmental parties about the proposed 2018 Gainful Employment rescission. These private communications relate specifically to the operations or activities of the government because such communications may ultimately inform the Department's revised changes to the GE rule.

2. The requested documents will likely contribute to an understanding of those specific operations or activities. The requested communications will contribute to a better understanding of the Department's rationale for its proposed changes to the GE rule, beyond those already made public through the negotiated rulemaking process.

3. The disclosure will contribute to a greater understanding on the part of the public at large. NSLDN seeks this information to aid the public discourse surrounding the GE NPRM and rulemaking process, which is a matter of great public interest. NSLDN has the capacity to analyze any documents provided and disseminate its analysis to the public through its website and other sources.

4. Disclosure will "significantly" contribute to the public's understanding of government activities. This request seeks information that will allow NSLDN to more completely understand the reasons behind the Department's proposed rescission of the GE rule. Moreover, NSLDN's analysis of this information will inform further public discourse and comment on these issues, thereby significantly enhancing the public's understanding of the Department's decision-making process.

Disclosure of Information is Not in the Commercial Interest of NSLDN

This request is fundamentally non-commercial. NSLDN is a non-profit, non-partisan 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, 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 robyn@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,

/s/ Robyn K. Bitner

Robyn K. Bitner*
Counsel

*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.