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December 4, 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](mailto: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 the Department’s Final Program Review Determinations and Final Audit Determinations containing the term “regular and substantive interaction.”

**Background**

Under the Title IV of the Higher Education Act of 1965 (“HEA”) (as amended), 20 U.S.C. §§ 1070 *et seq.*, and its implementing regulations, institutions of higher education must agree to administer Title IV programs in accordance with all statutory provisions of the HEA, *see* 34 C.F.R. § 668.16, as well as to act as a fiduciary, subject to the highest standard of care and diligence, *see id.* § 668.82(a)-(b). Institutions that offer distance education programs must meet a requirement known as “regular and substantive interaction” between students and the instructor. *See* 20 U.S.C. § 1003(7)(a)(ii). If a particular program does not meet this requirement, the program is considered correspondence education under the HEA, which can result in the program or the institution losing access to federal student aid. *See* 20 U.S.C. § 1002(1), (3). To assess institutions’ compliance with the “regular and substantive interaction” requirement, the Department of Education, *inter alia*, issues findings through Final Program Review Determinations and Final Audit Determinations.

Within the Department, the office of Program Compliance (“PC”) at Federal Student Aid (“FSA”) is “responsible for administering a program of monitoring and oversight of the institutions (i.e., schools, guaranty agencies, lenders, and servicers) participating in the Department of Education’s Federal Student Aid programs.” *See* U.S. Dep’t of Educ., Principal Office Functional Statements, Program Compliance (last modified Nov. 25, 2016), *available at*: [https://www2.ed.gov/about/offices/list/om/fs\\_po/fsa\\_program.html](https://www2.ed.gov/about/offices/list/om/fs_po/fsa_program.html). Within PC, the School Eligibility Service Group (“SESG”) is responsible for “administering a program” of “oversight of schools.” As part of its efforts, the SESG is responsible for monitoring schools’ compliance with

Title IV regulations and conducting program reviews of schools. *See generally* 20 USC § 1099c-1(a) (requiring the Secretary to “provide for the conduct of program reviews”).

### **Request**

NSLDN hereby requests that FSA produce, from 2012-present, the following in the time and manner required under FOIA and the Department’s regulations:

1. All documents constituting Final Program Review Determinations that contain the term “regular and substantive interaction;” *and*
2. All documents constituting Final Audit Determinations that contain the term “regular and substantive interaction.”

NSLDN believes that PC, and more specifically SESG, is the most likely custodian of these records.

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

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 ED “demonstrate the validity of [each] exemption that [ED] asserts.” *People for the Am. Way v. U.S. Dep’t of Educ.*, 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).

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 used. This includes any questionnaires, tracking sheets, emails, or certifications completed by, or sent to, ED or OIG 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 ED’s 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, ED 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 ED’s response.

Please provide responsive material in electronic format, if possible. Please send any responsive material via email to [robyn@nslan.org](mailto:robyn@nslan.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; 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 documents relating to the Department’s Final Program Review Determinations and Final Audit Determinations that contain the term “regular and substantive interaction.” These final determinations are used by the Secretary to make decisions about institutions’ ongoing eligibility to participate in Title IV, HEA programs and, therefore, relate specifically to the operations or activities of the government.

**2. The requested documents will contribute to an understanding of those specific operations or activities.** This request seeks documents that will contribute to the understanding of the circumstances under which the Department finds an institution to be out of compliance with the “regular and substantive interaction” requirement under Title IV of the HEA.

**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 issues related to distance education programs. This is especially critical in the coming year, given that the

Department's negotiated rulemaking proposes to change the requirements of distance education programs. 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.** As noted above, the subject of this request is a matter of public interest. This request seeks information that will allow NSLDN to more completely understand the instances under which the Department makes findings that an institution offering distance education programs has not complied with Title IV requirements, beyond that information already made available to the public. 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 oversight of institutions participating in Title IV programs under the HEA.

*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 providing 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.

\* \* \*

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](mailto: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.