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December 11, 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 “composite scores” of institutions of higher education participating in the federal student assistance programs authorized by Title IV of the Higher Education Act.

Background

As stated by the Department on its website (<https://studentaid.ed.gov/sa/about/data-center/school/composite-scores>):

Section 498(c) of the Higher Education Act of 1965, as amended, requires for-profit and non-profit institutions to annually submit audited financial statements to the Department to demonstrate they are maintaining the standards of financial responsibility necessary to participate in the Title IV programs. One of many standards, which the Department utilizes to gauge the financial responsibility of an institution, is a composite of three ratios derived from an institution's audited financial statements. The three ratios are a primary reserve ratio, an equity ratio, and a net income ratio. These ratios gauge the fundamental elements of the financial health of an institution, not the educational quality of an institution.

The composite score reflects the overall relative financial health of institutions along a scale from negative 1.0 to positive 3.0. A score greater than or equal to 1.5 indicates the institution is considered financially responsible.

Schools with scores of less than 1.5 but greater than or equal to 1.0 are considered financially responsible, but require additional oversight. These schools are subject to cash monitoring and other participation requirements.

A school with a score less than 1.0 is considered not financially responsible. However, a school with a score less than 1.0 may continue to participate in the Title IV programs under provisional certification. In addition, this lower score typically requires that the school be subject to cash monitoring requirements and post a letter of credit (equal to a minimum of 10 percent of the Title IV aid it received in the institution's most recent fiscal year).

In the event a school with a composite score less than 1.5 posts a letter of credit equal to 50 percent or more of their Title IV aid received, that school is considered financially responsible. As a result, the school may be free of cash monitoring and other participatory requirements if there are no other substantive problems related to its Title IV participation.

Since the financial factors that influence composite scores can fluctuate from year to year, the Department provides schools with alternative methods to demonstrate their financial responsibility (such as cash monitoring and reporting requirements or posting a letter of credit). These alternative measures allow schools to demonstrate their financial responsibility while offering protection to taxpayers and students.

It should be noted that composite scores are only one of several factors that the Department uses to assess an institution's financial responsibility compliance. The other factors include sufficient institutional cash reserves to make the required refunds, including the return of Title IV funds (these requirements are known as the refund reserve standards); the school is meeting all of its financial obligations, and the school is current in its debt payments. The composite financial score is not a reflection of the quality of education at a given school, and a school that does not achieve a passing financial composite score will be monitored more closely by the Department to determine if additional protections are needed.

In recent years, numerous proprietary institutions of higher education have closed abruptly due to actual or perceived financial difficulties at the institution or a corporation affiliated with the institution. This has been highlighted in recent days by the announcement that institutions owned by the Education Corporation of America are closing.

Although the Department has published numerous years of composite scores on its website, a practice that must continue going forward, that information does not appear to have been updated in recent years. For that reason, NSLDN is making the following request.

Request

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

1. Any communication to an institution of higher education informing such institution of its financial responsibility composite score for any fiscal year ending between 7/1/2016 and 6/30/2017.
2. Any communication to an institution of higher education informing such institution of its financial responsibility composite score for any fiscal year ending between 7/1/2017 and 6/30/2018. Although the Department's regulations would not require all institutions with fiscal years ending in this timeframe to have submitted an audited financial statement as of the date of this request, to the extent that any communications are available, those should be provided.

To the extent this request is unduly burdensome on the Department, and without waiving any rights for full compliance with this request, NSLDN would be willing to receive a detailed log in lieu of the documents themselves, so long as the log provides the following information:

- OPEID
- Institution Name
- City
- State
- Zip Code
- Institution Type
- School Group Name
- Institution Fiscal Year End
- Composite Score (for the appropriate fiscal year)

NSLDN is aware that the Department has previously been able to provide such information, as is currently available on the Department's website at: <https://studentaid.ed.gov/sa/about/data-center/school/composite-scores>.

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. We note again that the Department may provide summary information in lieu of the documents requested.

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

This request seeks information that is reasonably necessary to better understand the financial stability of institutions participating in the Title IV, student aid programs. It also seeks information that is reasonably necessary to understand the composite score calculation, and the extent to which the Department has been able to use the composite score calculation to identify substantial risks to students and taxpayers. The Department has regulated in this area previously and is part of the public discourse. 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

FOIA Public Liaison

Page 6 of 6

December 11, 2018

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,

/s/ Daniel Zibel

Daniel A. Zibel
Vice President & Chief Counsel
National Student Legal Defense Network