

May 3, 2019

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 (“NSLSDN”) makes the following request for documents and data provided to the Department by the Social Security Administration (“SSA”) pursuant to a Memorandum of Understanding (“MOU”) between SSA and ED.

Background

The Higher Education Act ties the eligibility of certain institutions and programs to those that prepare students for “gainful employment in a recognized occupation.” Under the Department’s Gainful Employment regulation – which remains the law of the land – the Department submits a list of career program completers to the SSA for the calculation of mean and median earnings data. *See* 34 C.F.R. § 668.405. The rule requires the Department to use this data to calculate the rates required by regulation.

As noted in a letter dated October 18, 2018 from five U.S. Senators to the Department, “[a]greement No. 10012 between the Department and SSA allowed for this necessary cooperation. The agreement, however, expired May 24, 2018, before the Department met its legal obligation to produce the latest round of D/E rates.”

Request

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

1. Any output provided by the Social Security Administration to the U.S. Department of Education regarding “gainful employment” programs. For purposes of this request, “output” means any data or set up data, regardless of form, that includes aggregate, program-level data on mean earnings, median earnings, and/or debt-to-earnings rates.
2. Any statistical reports provided by the Social Security Administration to the U.S. Department of Education about the matching rate or other assessment of the success of any data match, pursuant to a memorandum of understanding and computer matching agreement between the U.S. Department of Education and the Social Security Administration.

For purposes of this request, we are seeking only documents that were provided by SSA to the Department after January 1, 2017. We do not anticipate any data suppression, redaction, or privacy protection needs to be applied to the data prior to release, because the data are intended to be provided to the Education Department in an aggregate and privacy-suppressed format.

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, in the format that was provided by SSA to the Department. Please send any responsive material via email to dan@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. The documents requested herein relate directly to the Department’s management and operation of programs under Title IV of the Higher Education Act. The Department’s “Gainful Employment” regulations have been the subject of much debate and discussion in recent years. In December 2017, the Department commenced the third round of negotiated rulemaking in the past nine years. In 2018, the Department issued a Notice of Proposed Rulemaking proposing to repeal these regulations. This request is designed to increase understanding of the operation of the existing Gainful Employment regulation.

2. The requested documents will likely contribute to an understanding of those specific operations or activities. The requested documents are essential to understanding the process by which institutions of higher education participate in Title IV programs, as well as the nature and scope of the Department's consideration of the Gainful Employment requirement enshrined in the Higher Education Act. As such, they will contribute to a greater understanding of this central Department of Education function.

3. The disclosure will contribute to a greater understanding on the part of the public at large. NSLDN seeks this information to increase public understanding of the process by which regulated entities participate in Title IV. 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 Gainful Employment regulations. NSLDN has submitted comments in response to the Department's 2018 NPRM regarding Gainful Employment and has the capacity to analyze the information provided, thereby enhancing the public's understanding of the Title IV program participation process. Disclosure of this information will therefore significantly contribute to the public's understanding of this core Department of Education activity.

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, 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 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,

Daniel A. Zibel
Chief Counsel