

April 18, 2023

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](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 U.S. Department of Education (“ED” or “Department”), 34 C.F.R. Part 5, the National Student Legal Defense Network (“Student Defense”) makes the following requests for records relating to letters of credit held by the Department pertaining to 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/loc>):

Section 498(c) of the Higher Education Act (HEA) of 1965, as amended, requires institutions to submit financial statements to the Department of Education when applying to start participation, to determine compliance annually with the standards of financial responsibility, or to continue participation after a change in ownership, in the various Title IV programs. The regulations establish general standards of financial responsibility, and also provide for the Department to determine the financial responsibility of an institution each year by calculating composite financial scores. The regulations specify that certain amounts reported in the institution's financial statements are used as required elements to calculate the composite score.

The most common reason why an institution is required to remit a letter of credit (LOC) to the Department is because they have a failing financial responsibility composite score (generally a score of 1.4 or less on a scale of -1.0 to +3.0) and are not deemed financially responsible. In accordance with 34 CFR 668.175, an institution with a composite score of 1.4 or less may

continue to participate in the Title IV programs under the Provisional certification alternative. Institutions participating under provisional certification are subject to heightened cash monitoring, and may be required to submit an irrevocable LOC of not less than 10 percent of the Title IV aid the institution received during its most recently completed fiscal year. *Institutions that passed the score in the previous year may score from 1.0 to 1.4 for up to three consecutive years without providing a LOC, provided other reporting conditions are met. Institutions that score below a 1.0 are required to submit a LOC of not less than 10 percent of the Title IV aid the institution received during its most recently completed fiscal year.*

A LOC may also be required by institutions that are cited for failure of other portions of the financial responsibility standards noted under 34 CFR Part 668 Subpart L.

Student Defense submitted FOIA Request No. 21-02118-F on July 7, 2021, requesting a log of all letters of credit held by the Department as of July 7, 2021; FOIA Request No. 22-00622-F on November 1, 2021, requesting two logs of all letters of credit, one as of September 30, 2021, and another as of October 31, 2021; FOIA Request No. 22-01134-F on December 2, 2021, requesting a log of all letters of credit as of November 30, 2021; FOIA Request No. 22-01564-F on January 13, 2022, requesting a log of all letters of credit as of December 31, 2021; FOIA Request No. 22-01859-F on February 4, 2022, requesting a log of all letters of credit as of January 31, 2022; FOIA Request No. 22-02163-F on March 7, 2022, requesting a log of all letters of credit as of February 28, 2022; FOIA Request No. 22-02589-F on April 26, 2022, requesting a log of all letters of credit as of March 31, 2022; FOIA Request No. 22-02690-F on May 5, 2022, requesting a log of all letters of credit as of April 30, 2022; FOIA Request No. 22-03124-F on July 7, 2022, requesting a log of all letters of credit as of June 30, 2022; FOIA Request No. 22-03294-F on August 2, 2022, requesting a log of all letters of credit as of July 31, 2022; FOIA Request. No. 22-03610-F on September 8, 2022 requesting a log of all letters of credit as of August 31, 2022; FOIA Request No. 23-00059-F on October 5, 2022, requesting a log of all letters of credit as of September 30, 2022; FOIA Request No. 23-00265-F on November 3, 2022, requesting a log of all letters of credit as of October 31, 2022; FOIA Request No. 23-00556-F on December 13, 2022, requesting a log of all letters of credit as of November 30, 2022; FOIA Request No. 23-00711-F on January 9, 2023, requesting a log of all letters of credit as of December 31, 2022; FOIA Request No. 23-01018-F on February 13, 2023, requesting a log of all letters of credit as of January 31, 2023; and FOIA Request No. 23-01294-F on March 20, 2023, requesting a log of all letters of credit as of February 28, 2023.

On September 30, 2021, the Department produced documents in response to FOIA Request No. 21-02118-F. On May 16, 2022, the Department produced documents in response to FOIA Request No. 22-01134-F. On October 17, 2022, the Department produced documents in response to FOIA Request No. 22-02163-F. On October 18, 2022, the Department produced documents in response to FOIA Request No. 22-

01564-F. On October 24, 2022, the Department produced documents in response to FOIA Request No. 22-01859-F. On March 28, 2023, the Department produced documents in response to FOIA Requests Nos. 22-02589-F, 22-02690-F, 22-03124-F, 22-03294-F, 22-03610-F, and 23-00059-F. Student Defense has not received productions for any of the other FOIA requests seeking letters of credit logs.

### **Request**

Student Defense hereby requests that ED produce a log, consisting of every letter of credit held by the Department as of March 31, 2023, that has been posted by, or on behalf of, any institution participating in one or more Title IV, HEA programs, including the following information:

- OPEID
- Institution Name
- State
- Institution Type
- Institution Fiscal Year End Date
- LOC Request Date
- Reason LOC Requested
- LOC Received Date
- LOC Amount
- LOC Percent Requested
- Notes

Student Defense is aware that the Department has previously been able to provide such information publicly, as is currently available on the Department's website (for Award Year 2018) at <https://studentaid.gov/sites/default/files/ay18-letters-of-credit.xls>.

We also request that the Department produce these documents in native format (i.e., Microsoft Excel or .csv file) in addition to (or in lieu of) producing as PDFs.

### **Fee Waiver Request**

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency's regulations, Student Defense requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes.

Student Defense requests a waiver of fees because disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government."<sup>1</sup> The public has a significant interest in these

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<sup>1</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

letters of credit, particularly as many are consumers of educational programs. Records with the potential to shed light on LOCs held by the Department would contribute significantly to public understanding of IHE compliance with Title IV standards and regulations. Student Defense has the capacity to analyze records and to use the sought records to inform public discourse regarding issues currently pending at the Department. Student Defense 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.

This request is primarily and fundamentally for non-commercial purposes.<sup>2</sup> Student Defense is a non-profit, non-partisan 501(c)(3) organization.<sup>3</sup> Student Defense’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, Student Defense 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, Student Defense qualifies for a fee waiver.

### **Guidance Regarding the Search & Processing of Requested Records**

In connection with its request for records, Student Defense provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- In conducting your search, please understand the terms “record” in its 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 and transcripts, notes, or minutes of any meetings, telephone conversations or discussions.
- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in

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<sup>2</sup> See 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>3</sup> See *About Us*, NATIONAL STUDENT LEGAL DEFENSE NETWORK, <https://www.defendstudents.org/about>.

files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.<sup>4</sup> It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; Student Defense has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.<sup>5</sup>

- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to government-wide requirements to manage agency information electronically,<sup>6</sup> and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

## **Conclusion**

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<sup>4</sup> See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

<sup>5</sup> See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

<sup>6</sup> Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://www.federalregister.gov/documents/2011/12/01/2011-31096/managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

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If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to Student Defense, please do not hesitate to contact Student Defense to discuss this request. Student Defense welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, Student Defense and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Please send any responsive material being sent by email to [info@defendstudents.org](mailto:info@defendstudents.org). If it will accelerate release of responsive records to Student Defense, please also provide responsive material on a rolling basis.

Student Defense looks forward to working with your agency on this request. If you do not understand any part of this request, or anticipate any problems in complying with this request please contact me at [santora@defendstudents.org](mailto:santora@defendstudents.org). Also, if Student Defense's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

/s/ Emily Santora

Emily Santora  
Paralegal  
National Student Legal Defense Network