

July 8, 2021

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 (“Student Defense”) makes the following request for records relating to refunds provided to student loan borrowers whose wages have been garnished since March 13, 2020.

Background

On March 27, 2020, Congress passed and former President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”). In doing so, Congress and the President acknowledged that administrative wage garnishment (AWG) was unsustainable for student loan borrowers during the pandemic. As such, the law directed the Secretary to stop garnishing wages of certain federal student loan borrowers.

Despite the CARES Act, the Department continued to seize wages from distressed federal student loan borrowers. The Department also failed to refund the wages garnished from tens of thousands of borrowers after the CARES Act became law.

On April 30, 2020, Student Defense filed a class action lawsuit on behalf of two named plaintiffs challenging the Department’s CARES Act violations. *See Barber v. DeVos*, No. 20-cv-1137-CJN (D.D.C). On June 22, 2020, the *Barber* Court issued a Minute Order directing the Department to submit biweekly status reports, “apprising the Court of: (1) the percentage of borrowers whose wages are being garnished; (2) the percentage of refunds issued; (3) the means the Department is using to contact employers continuing to garnish wages; (4) how many borrowers do not have a valid address on file; and (5) a description of the Department’s attempts to reach them.”

According to the final status report, filed on January 25, 2021:

As of January 21, 2021, the Department has now issued AWG refunds totaling over \$186 million to over 381,000 borrowers, representing over 97% of the wages garnished since March 13, 2020. Refunds for the remaining borrowers have been initiated by FSA and are either being actively processed or on hold because the borrowers owed a refund have an invalid address on file. The Department continues to refund any payments that are received from employers and to refund payments to borrowers once a valid address is received for the borrower.

Barber, Dkt. 51 at 2-3. The final status report further stated that, as of January 21, 2021, there were “fewer than 23,250 borrowers without valid addresses on file.” *Id.* at 3.

Request

Student Defense hereby requests that ED produce the following in the time and manner required under the Freedom of Information Act and the Department’s regulations. Records sufficient to show:

1. The total number of borrowers who have received refunds of wages garnished since March 13, 2020 and the total dollar value of those refunds.
2. Of the borrowers who have not received refunds of wages garnished since March 13, 2020, the total number who do not have valid addresses on file with the Department.

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, Student Defense 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 Student Defense 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’y’s*, 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, Student Defense 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.

Student Defense 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, Student Defense 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 abigail@defendstudents.org. We welcome any materials that can be provided on a rolling basis. Nevertheless, Student Defense 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), Student Defense 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. As part of its management of the federal student loan program, the Department possesses extensive extrajudicial collection powers, including the authority to garnish federal

student loan borrowers' wages without a court order following default on their student loans. The Higher Education Act ("HEA") and the Debt Collection Improvement Act ("DCIA") authorize this practice. *See* HEA § 488A, 20 U.S.C. § 1095a; 31 U.S.C. § 3720D. The CARES Act required the Department to stop garnishing wages. This request therefore relates directly to the operation of government.

2. The requested documents will likely contribute to an understanding of those specific operations or activities. The requested documents will contribute to the public's understanding of how, and to what extent, the federal government provided the refunds that it promised to borrowers whose wages were garnished after March 13, 2020.

3. The disclosure will contribute to a greater understanding on the part of the public at large. Student Defense seeks this information to aid the public discourse surrounding the wage garnishment program, and the Department's ability to identify borrowers whose wages are being garnished and provide them refunds. Student Defense has the capacity to analyze documents provided and to 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 great public interest. Tens of thousands of borrowers had their wages garnished after the Department stated that such wage garnishments would stop. As of January 25, 2021, there were still tens of thousands of borrowers who had not received refunds of wages garnished after March of 2020, and the Department was unable to contact approximately 23,250 such borrowers. These failures were the subject of multiple news stories in 2020. Student Defense's analysis of the sought records, and use of the records to inform further discourse and comment on these issues, will significantly enhance the public's understanding of the Department's actions.

Disclosure of Information is Not in the Commercial Interest of Student Defense

This request is fundamentally non-commercial. Student Defense is a non-profit, non-partisan 501(c)(3) organization. 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, litigation filings, and regulatory comments to government agencies. For these reasons, Student Defense qualifies for a fee waiver.

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Student Defense 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

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abigail@defendstudents.org. If Student Defense's request for a fee waiver is not granted, and any fees will be in excess of \$25, please contact me immediately.

Sincerely,

/s/ Abigail Moats

Abigail Moats
Intake & Digital Advocacy Manager
National Student Legal Defense Network