

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL STUDENT LEGAL DEFENSE
NETWORK,

1015 15th St NW, Ste 600
Washington, D.C. 20005

Plaintiff,

v.

UNITED STATES DEPARTMENT
OF EDUCATION,

400 Maryland Ave SW
Washington, D.C. 20202

Defendant.

Civil Action No. 21-cv-1994

COMPLAINT

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1. Plaintiff National Student Legal Defense Network (“Student Defense”) brings this action against the United States Department of Education (“the Department”) under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

4. Student Defense is a nonpartisan, non-profit organization incorporated in the District of Columbia. 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. To further its mission, Student Defense gathers information, including through responses to FOIA requests submitted to government agencies, in order to inform the public via, inter alia, its website, social media, press releases and other comments to the media, and regulatory comments to government agencies.

5. Student Defense has its principal place of business at 1015 15th Street NW, Suite 600, Washington, DC, 20005, which is located within this District.

6. Defendant is a department of the executive branch of the United States government headquartered in Washington, D.C., and an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1). The Department, in its current form, was created by the Department of Education Organization Act of 1979, 20 U.S.C. § 3401 et seq. The Department has possession, custody, and control of the records that Student Defense seeks to obtain and which the Department is unlawfully failing to disclose.

STATEMENT OF FACTS

7. Since its inception, Student Defense has conducted a research and transparency program designed to monitor the Department's oversight of institutions of higher education participating in Title IV of the Higher Education Act of 1965, 20 U.S.C. §§ 1070 et seq., and to inform the public of its findings.

8. As part of this program, Student Defense has conducted research on the extent to which the Department has exercised its statutory responsibility to ensure that institutions of

higher education meet the “financial responsibility” requirements for participation in federal student aid programs, including whether schools can “meet all of [their] financial obligations,” including “for liabilities and debts incurred in programs administered by the Secretary.” HEA § 498(c)(1), 20 U.S.C. § 1099c(c)(1).

9. The work that Student Defense has done in this area has garnered substantial public interest. For example, in June 2021, Student Defense released an extensive report describing the ways in which the Department has failed to both adequately require institutions to meet their financial obligations and protect taxpayers from unnecessary financial losses.¹ This report was covered by numerous media outlets, including CNN and CNBC.²

10. At the beginning of 2021, Student Defense submitted FOIA requests to the Department regarding several accountability and oversight issues.

Transition Communications FOIA Request

11. As part of Student Defense’s investigation into the Department’s financial oversight role and federal higher education policy, Student Defense submitted a FOIA request to ascertain, *inter alia*, the extent to which, and how, issues surrounding financial oversight of institutions and other higher education policy issues were presented by the Department to individuals on the Biden-Harris transition team.

¹ Daniel A. Zibel, Aaron S. Ament & Kirin Jessel, *The Missing Billion*, Student Defense 1 (June 2021), available at:

https://www.defendstudents.org/news/body/NSLDN_paper_Missing_Billion.pdf.

² See Annika Kim Constantino, *U.S. government fails to collect over \$1 billion in debt from nearly 1,300 colleges, report says*, CNBC (June 24, 2021), available at:

<https://www.cnbc.com/2021/06/24/us-government-fails-to-collect-over-1-billion-in-debt-from-nearly-1300-colleges-report-says.html>; Katie Lobosco, *Department of Education has let colleges off the hook for \$1 billion owed to taxpayers*, CNN (June 24, 2021), available at:

<https://www.cnn.com/2021/06/24/politics/for-profit-college-student-debt/index.html>.

12. Specifically, on January 25, 2021, Student Defense submitted a request under FOIA to receive copies of communications between the Department and members of the Biden-Harris presidential transition team. The FOIA submission sought:

- a. “From November 4, 2020, to January 20, 2021, any documents constituting or reflecting communications between the Department and the members of the Biden- Harris transition team (‘the transition team’)” (“Request 1”); *and*
- b. “All emails **to** and **from** the transition email domain—jbrpt.org—from November 4, 2020, to January 20, 2021” (“Request 2”).

13. On January 26, 2021, the Department acknowledged its receipt of the FOIA submission, stated that it had “forwarded” the FOIA submission “to the primary responsible office(s) for action,” and assigned tracking number 21-00809-F to the request.

14. On February 1, 2021, the Department granted Student Defense’s request for a fee waiver.

15. On February 22, 2021, Student Defense requested an update from the Department via email about the status of the FOIA submission. On February 26, 2021, Student Defense received a reply email from EDFOIAManager@ed.gov informing them that the status of the FOIA submission was “pending.”

16. On February 24, 2021, Student Defense received a letter via email from the Department’s FOIA Service Center entitled “20-DAY NOTIFICATION 21-00809-F.” The letter stated that “[t]his is the Department of Education’s (the Department) initial determination letter to your request dated, January 26, 2021, seeking information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Your request was forward to the appropriate office(s) within the Department for any responsive documents they may have.” The letter continues: “We

aim to complete your requests as promptly as possible. At this time, we are unable to provide an estimated completion date, but intend to provide records on a rolling basis as they become available.”

17. On May 3, 2021, Student Defense received an email from the Department requesting additional information regarding Request 1, stating: “Please provide a topic and/or search terms regarding the communications sought in order to complete an accurate search of records.” Student Defense replied later that day, agreeing to narrow Request 1 to have the following specified offices search for responsive documents from the specified domain (@jbrpt):

- Office of the Undersecretary
- Office of the General Counsel
- Office of the Secretary
- Office of Policy Planning and Development
- Office of Postsecondary Education
- Office of Federal Student Aid

18. On May 17, 2021, Student Defense requested a second update from the Department via email about the status of the FOIA submission. Later that same day, Student Defense received a reply email from Deshawn.Middleton@ed.gov informing them that the search for responsive records was still pending.

19. On June 10, 2021, Student Defense requested another update from the Department via email about the status of the FOIA submission. Student Defense did not receive a response or any further communications from the Department until nearly one month later, on July 8, 2021.

20. On July 8, 2021, Student Defense received an email from the Department that stated: “Please find attached above an interim response to your FOIA request.” The attached letter specified that the interim response included “15 pages of documents responsive to your request” from the Office of the Secretary and Office of the Undersecretary. The letter also noted

that “certain information has been withheld according to FOIA exemptions (b)(5) and (b)(6)[.]” The interim response consisted of 15 pages of non-substantive email correspondence.

21. On July 19, 2021, Student Defense received a second email from the Department that stated: “Please find attached above an interim response to your FOIA request.” The attached letter specified that the second interim response included 27 pages of documents from the Office of Planning, Evaluation and Policy Development. The second interim response, similar to the first, consisted of 27 pages of primarily non-substantive email correspondence.

22. The Department’s miniscule interim productions do not constitute compliance with FOIA because the Department still has not issued a final response. As of the filing of this Complaint—six months after the FOIA request was submitted—Student Defense has not received a final response to its FOIA submission.

Office of Hearings and Appeals Filings FOIA Request

23. On February 24, 2021, Student Defense submitted a FOIA request to the Department seeking “all filings for any cases pending before OHA or the Secretary under 34 C.F.R. Part 667 Subparts G or H[.]”

24. On February 25, 2021, the Department acknowledged its receipt of the FOIA submission, stated that it had “forwarded” the FOIA submission “to the primary responsible office(s) for action,” and assigned tracking number 21-01030-F to the request.

25. On March 4, 2021, the Department granted Student Defense’s request for a fee waiver.

26. On March 25, 2021, Student Defense received a letter via email from the Department’s FOIA Service Center entitled “20-DAY NOTIFICATION 21-01030-F.” The letter stated that “[t]his is the Department of Education’s (the Department) initial determination letter

to your request dated, February 25, 2021, seeking information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Your request was forward to the appropriate office(s) within the Department for any responsive documents they may have.” The letter continues: “We aim to complete your requests as promptly as possible. At this time, we are unable to provide an estimated completion date, but intend to provide records on a rolling basis as they become available.”

27. On May 12, 2021, Student Defense received an email from the Department stating that it had identified responsive documents, requesting that Student Defense prioritize which schools it would like documents for first, and noting that it would begin a rolling release of documents. Student Defense replied later that day, requesting that the Department prioritize the release of documents pertaining to five schools in particular: Professional Career Training Institute, Deckmer, Daymar, Charlotte School of Law, and Drake College of Business. The Department confirmed receipt of Student Defense’s email and indicated that it would begin producing documents.

28. As of the filing of this Complaint, Student Defense has not received any further communication from the Department regarding the OHA Request. No documents have been produced in response to the OHA Request.

Exhaustion of Administrative Remedies

29. The Department has failed to (a) notify Student Defense of a final determination regarding the FOIA submissions, including the scope of any responsive records ED intends to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

30. By the Department's failure to respond to the FOIA submissions within the time period required by law, Student Defense has constructively exhausted its administrative remedies and seeks judicial review.

COUNT I
Violation of FOIA, 5 U.S.C. § 552
Failure to Conduct Adequate Search for Responsive Records with respect to
Student Defense's FOIA Submissions

31. Student Defense repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

32. Through the FOIA submissions, Student Defense properly requested records within the possession, custody, and control of the Department.

33. The Department is an agency subject to FOIA, and it must, therefore, make reasonable efforts to search for requested records.

34. The Department has failed to promptly review agency records for the purpose of locating those records that are responsive to the FOIA submissions.

35. The Department's failure to conduct adequate searches for responsive records violates FOIA.

36. Student Defense is therefore entitled to declaratory and injunctive relief requiring the Department to promptly make reasonable efforts to search for records responsive to the FOIA submissions.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Records with respect to
Student Defense's FOIA Submissions

37. Student Defense repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

38. Through the FOIA submissions, Student Defense properly requested records within the possession, custody, and control of the Department.

39. The Department is an agency subject to FOIA and must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

40. The Department is wrongfully withholding non-exempt records requested by Student Defense by failing to produce records responsive to the FOIA submissions.

41. The Department's failure to provide all non-exempt responsive records violates FOIA.

42. Student Defense is therefore entitled to declaratory and injunctive relief requiring the Department to promptly produce all non-exempt records responsive to the FOIA submissions and provide an index justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, Student Defense respectfully requests the Court to:

(1) Order the Department to conduct a search or searches reasonably calculated to uncover all records responsive to Student Defense's FOIA requests;

(2) Order the Department to produce, by such date as the Court deems appropriate, any and all non-exempt records responsive to Student Defense's FOIA requests and an index justifying the withholding of any responsive records withheld under claim of exemption;

(3) Enjoin the Department from continuing to withhold any and all non-exempt records responsive to Student Defense's FOIA requests;

(4) Award Student Defense attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); *and*

(5) Grant Student Defense such other relief as the Court deems just and proper.

Respectfully Submitted,

/s/ Eric Rothschild

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