NATIONAL STUDENT
LEGAL DEFENSE NETWORK

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September 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, 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 ("NSLDN") makes the following request for records relating to the repayment status of borrowers who submitted borrower defense claims prior to 2015.

Background

The Student Loan Reform Act of 1993 (Public Law 103-66) amended the Higher Education Act of 1965 ("HEA") to establish the William D. Ford Federal Direct Loan Program. Section 455(h) of the HEA, as amended, requires the Secretary to specify through regulation the acts or omissions of a borrower's school that a borrower may assert as a defense to repayment of a Direct Loan. This is commonly referred to as "borrower defense."

The Department established regulations covering borrower defense at 34 C.F.R. § 685.206(c), effective July 1, 1995. The regulations specified that a borrower may assert as a defense against repayment any act or omission of the borrower's school that would give rise to a cause of action against the school under applicable state law.

Although the regulation has existed since 1995, borrowers rarely used it until 2015, when Corinthian Colleges, Inc. ("Corinthian"), a publicly-traded company operating numerous postsecondary schools that enrolled over 70,000 students at more than 100 campuses nationwide, filed for bankruptcy and closed. Although Department statistics vary on the precise number, it is clear that only a handful of claims were filed between 1995 and 2015. *See, e.g.,* U.S. Dep't of Educ., Office of the Inspector Gen., *ED-OIG/I04R0003*, *Federal Student Aid's Borrower Defense to Repayment Loan Discharge Process* 6 (Dec. 8, 2017) (stating that from July 1, 1995 through June

24, 2015, the Department received five borrower defense claims); U.S. Dep't of Educ., Office of Postsecondary Educ., *Borrower Defense Claims: Data Analysis* 3 (Nov. 2017) ("The bulk of the claims were received starting in 2015; the database contains less than 10 claims prior to that."); U.S. Dep't of Educ., *Overview of Proposed Institutional Accountability Regulations* 1 (July 25, 2018) (noting that, prior to the collapse of Corinthian, "an average of fewer than 10 claims were received [by ED] each year").

The Department is currently rewriting the borrower defense regulation. In a Notice of Proposed Rulemaking released on July 25, 2018, the Department proposed to allow borrower defense claims only when asserted as a defense to repayment during certain enumerated Department collection proceedings. In support of that proposal, the Department explained: "The proposed regulations revert back to the plain meaning of the regulation, as it had been implemented prior to 2015, such that only those borrowers in a collection proceeding would have a mechanism by which they could exercise defenses to repayment." U.S. Dep't of Educ., Notice of Proposed Rulemak*ing, Borrower Defense Institutional Accountability* 247 (July 25, 2018), *available at* https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-15823.pdf. *See also, id.* at 69 ("The proposal to allow borrowers to assert defenses to repayment during the enumerated Department collection proceedings, and not as affirmative claims at any point in time, aligns with the Department's 20 year prior practice.").

Request

NSLDN hereby requests that ED produce the following in the time and manner required under the Freedom of Information Act and the Department's regulations:

1. For each of the borrower defense claims received by ED prior to 2015, documents sufficient to show whether the borrower submitting the application was in a collection proceeding at the time the application was submitted. NSLDN is not requesting personal information that would be exempt pursuant to 5 U.S.C. §552 (b)(6) of the FOIA. Indeed, in lieu of redacting personally identifiable information or producing any documents at all, NSLDN will accept completion of a simple chart listing the year that the pre-2015 claim was received and a "yes or no" response to whether the borrower was in a collection proceeding when the claim was submitted. Such a chart would contain no personally identifiable information. NSLDN has provided a sample chart below:

Year Claim Received	**Was the Borrower in a Collection Proceeding When the Claim was Submitted (Y/N)**

If the Department elects to produce records in response to this request, rather than a chart, NSLDN does not object to the redaction from such records of any names or personally identifiable information of any individual.

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 ED "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 used in the processing of this Request. This includes any questionnaires, tracking sheets, emails, or certifications completed by, or sent to, ED or OIG 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. Please send any responsive material via email to robyn@nsldn.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.** This request seeks information relating to the processes and procedures for reviewing borrower defense claims. The review of borrower defense claims is conducted exclusively by the Department of Education and therefore relate specifically to the operations or activities of the government.

2. **The requested documents will likely contribute to an understanding of those specific operations or activities.** With the recent notice of proposed rulemaking, the Department is proposing significant changes to the borrower defense claim process that would have "far-reaching [implications] for taxpayers and borrowers." *See* Press Release, U.S. Dep't of Educ., "U.S. Department of Education Takes Action to Protect Student Borrowers, Hold Higher Education Institutions Accountable for Deceptive Practices" (July 25, 2018), *available at:* https://www.ed.gov/news/press-releases/us-department-education-takes-action-protect-student-borrowers-hold-higher-education-institutions-accountable-deceptive-practices. According to recent records, the Department has received over 165,000 borrower defense claims. That number continues to grow. Borrower defense claims are critically important, and the public must be able to understand the process by which ED reviews and responds to those claims. This request seeks information that will provide the public with a better understanding of the basis for the Department's proposed changes to that process.

3. **The disclosure will contribute to a greater understanding on the part of the public at large.** NSLDN seeks this information to aid the public discourse surrounding the Department's proposed changes to the borrower defense process. The Department is currently responding to public comment on these proposed changes, and these materials will help the public

to better understand the Department's position. Moreover, these materials will help the public to understand the history of the government's approach to borrower defense claims more generally. NSLDN has the capacity to analyze the 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, including a negotiated rulemaking, public comment period, and several lawsuits. Numerous national newspapers, including the *New York Times*, *Washington Post*, *Wall Street Journal*, and others published stories immediately following the release of the NPRM on July 25, 2018. Further, the Department issued its own press release, which discussed the proposed changes to the borrower defense process at length and specifically called for comment on its proposed "approaches to accepting borrower defense to repayment claims," including "[a]ccepting 'defensive' claims only, which limit borrower defense claims to defaulted borrowers who are in a collections proceeding." *See* Press Release, U.S. Dep't of Educ., "U.S. Department of Education Takes Action to Protect Student Borrowers, Hold Higher Education Institutions Accountable for Deceptive Practices" (July 25, 2018), *available at:* https://www.ed.gov/news/press-releases/us-department-education-takes-action-protect-student-borrowers-hold-higher-education-institutions-accountable-deceptive-practices. NSLDN's analysis of the documents will be used to inform further discourse on these issues, therefore significantly enhancing the public's understanding of the Department's proposals.

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, 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 NSLDN counsel Robyn Bitner at robyn@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/ Robyn K. Bitner

Robyn K. Bitner*
Counsel
National Student Legal Defense Network

*Member of New York Bar only; practicing in the District of Columbia under supervision of members of the D.C. Bar while D.C. Bar application is pending.