



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE UNDER SECRETARY

June 24, 2019

Honorable Patty Murray
United States Senate
Washington, DC 20510

Dear Senator Murray:

Thank you for your letter to Secretary DeVos about the U.S. Department of Education's (Department) balancing of student loan borrowers' privacy and law enforcement investigations. Your letter was referred to my office, and I am pleased to respond. An identical response will be sent to the cosigner of your letter.

It appears that your letter is focused on requests for information from State Attorneys General relating to their law enforcement activities in regard to large amounts of data from third-party servicing companies. During Fiscal Year 2019, the Department has received only three such requests including, from the Massachusetts Attorney General, the North Carolina Attorney General, and the Colorado Attorney General. However, most law enforcement requests received by the Department involve requests concerning individual borrowers, often in the context of alleged identity theft, rather than requests concerning broader law enforcement investigations. The Department addresses all of these requests on a case-by-case basis. We have enclosed a chart describing the law enforcement data requests received to date in Fiscal Year 2019.

In your letter, you note that we removed a "routine use" in the recently Modified System of Records Notice (SORN) for the Customer Engagement Management System (CEMS) (18-11-11). Your letter notes that we removed as a routine use of the records in the CEMS SORN "disclosure for use by other law enforcement agencies." You also note that a related SORN, Common Services for Borrowers (CSB) (18-11-16), has retained this same routine use, which could potentially create confusion about our disclosure policy among State Attorneys General.

Your letter also indicates that we have not implemented a provision that addressed this issue in the Senate Report 115-289, which accompanied the Department of Education Appropriations Act, 2019. The report requested that we:

- Respond to "Enforcement Disclosure" requests for records covered by the CSB SORN within 10 days of receipt;
- Publish our policy for responding to such requests on our website; and
- Publish a list of "individual requests made to the Department under the 'Enforcement Disclosure' provision."

Subsection (b) of the Privacy Act of 1974, as amended (Privacy Act) (5 U.S.C. § 552a(b)) gives Federal agencies discretion regarding whether to disclose covered records without the prior written consent of the individual to whom the record pertains. Therefore, when determining whether to make nonconsensual disclosures of records covered by the Privacy Act, the Department seeks to balance a

borrower's interest in privacy with the need for the record. In addition, before disclosing a record, the Department must ensure that the legal requirements for disclosure have been met.

Subsection (b)(3) of the Privacy Act contains a statutory exception to the requirement of prior written consent that provides the Department with the discretion to disclose records covered by the Privacy Act for a "routine use," which is defined in the Privacy Act as meaning the use of such a record for a purpose which is compatible with the purpose for which the record was collected. Subsections (b)(3), (e)(4)(D), and (e)(11) of the Privacy Act also require that a routine use must be published in a system of records notice in the *Federal Register*. We removed a routine use from the CEMS SORN permitting us to disclose records for use by other law enforcement agencies because we were concerned that the use of such records by law enforcement agencies to investigate or prosecute violations of the law or to otherwise enforce the law might not be compatible with the purposes of the FSA Ombudsman in collecting the records. In this respect, we noted that the title of this routine use refers specifically to "Other Law Enforcement Agencies," but the FSA Ombudsman, the component of FSA that manages the CEMS system of records, is not a law enforcement agency. However, we did not remove the "Enforcement Disclosure" routine use from the CEMS SORN, and it continues to permit us, in compliance with the Privacy Act, to disclose records from the CEMS system of records to appropriate law enforcement agencies in the event that information in the CEMS system of records indicates, either on its face or in connection with other information, a violation or potential violation of any applicable statute, regulation, or order of a competent authority, provided that the disclosure would be compatible with the purpose for which the record was collected. As you noted, both routine uses currently remain in the CSB SORN, but we do not have policies or procedures on disclosing records pursuant to these routine uses, because they are discretionary and we evaluate each law enforcement request on a case-by-case basis.

Subsection (b)(7) of the Privacy Act also contains a statutory exception to the requirement of prior written consent that provides the Department with the discretion to disclose records without consent from a system of records to a government entity within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law and if the head of the government entity (or his or her delegatee) has made a written request to the Federal agency specifying the particular portion desired and the law enforcement activity for which the record is sought. In addition, subsection (b)(11) of the Privacy Act also contains a statutory exception to the requirement of prior written consent that provides the Department with the discretion to disclose records without consent from a system of records pursuant to a court order from a court of competent jurisdiction. However, applicable Federal case law holds that a subpoena is not sufficient to meet this exception unless it is signed by a judge.

With regard to data from or about student loan servicers, we recently published a Notice of Interpretation in the *Federal Register* indicating that some attempts to regulate Federal student loan servicers and the servicers of guaranteed Federal student loans are preempted by Federal law. As a result, we no longer grant such requests for nonconsensual disclosure of records from entities purporting to exercise regulatory or enforcement power that is preempted.

You also asked for information about the law enforcement requests we have received for the current fiscal year to date, as well as their status. Please see the enclosed chart, which summarizes the

information you requested.* Please note that most of the law enforcement data requests received during this fiscal year to date have been pursuant to State or Federal criminal or civil subpoenas not signed by courts for individual borrower information. Therefore, the Department has responded to such subpoenas by requesting additional information in order to determine whether the Department legally may release Privacy Act-protected records in accordance with subsections (b)(3), (b)(7), or (b)(11) of the Privacy Act. The Department also generally has responded to these subpoenas by explaining in writing the need for compliance with the Department's *Touhy* regulations (at 34 C.F.R. §§ 8.1-8.5), where applicable, and the need for a court order or law enforcement request letter allowing the Department to comply with the Privacy Act, the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g and 34 C.F.R. Part 99, and the Higher Education Act of 1965, 20 U.S.C. §§ 1001 *et seq.* (HEA). Accordingly, as shown in the chart attached hereto, when the appropriate information is not provided to the Department in the request, we follow up with the requestor to seek additional information so that the Department can determine whether it can lawfully release the information, including, if applicable, under the Privacy Act and other applicable laws and regulations.

In Fiscal Year 2019, the Department has received 40 law enforcement data requests as of June 12, 2019. Because many or all of these are sensitive law enforcement requests, the Department has not made them publicly available on its website. Nine requests are pending. The average timeline for response between the date on which we received the request and the date on which we provided a response was 23 days. We recognize that this time period exceeds that which was recommended in report language. However, please know that we make a concerted effort to respond as quickly as possible. Also, responsive to Item 3 of your request letter, please find enclosed sample guidance that the Department sent on or about December 27, 2017, to Federal loan servicers and private collection agencies with which it contracts.

If you have additional questions or concerns, please contact the Office of Legislation and Congressional Affairs at (202) 401-0020.

Sincerely,



Diane Auer Jones
Principal Deputy Under Secretary
Delegated the Duties of Under Secretary

Enclosures

* Please note that, unless otherwise specified, the date received column on the enclosed chart reflects the Department's best record of the date that the request was received by or forwarded to the Department's Office of the General Counsel for review and response. In some cases, the original request for Department records was received by a servicer, a private collection agency, or FSA prior to the date indicated on the chart.

Borrower-level Information Requests FSA Guidance

1. Requests from individuals seeking their own Privacy Act protected records or individually identifiable information therein

Privacy Act requests from individuals requesting their own records in a system of records when a person either does not make the request in person or does make the request in person but does not have at least one piece of tangible identification:

- Verification of Identity Statement aka Perjury Statement

2. Requests from individuals seeking the Privacy Act protected records or individually identifiable information therein of a third party

E.g., one former spouse seeking the other's FAFSA information filed on behalf of child, improperly filed subpoena

- Verification of Identity Statement aka Perjury Statement
- Consent to Disclose to third party from individual whose records are sought
- Verification of identity of third person if an individual under 34 CFR 5b.9(a)

(NOTE: If requestor is a parent of a minor or guardian of an individual who is incompetent, FSA also will need to verify the requestor's relationship to the minor or incompetent (e.g., copy of birth certificate or court order) as set forth in 34 CFR 5b.5(b)(2)(iii)), unless FSA already has such evidence).

If the records or information is protected by FERPA (it is Personally Identifiable Information from a student's education records at a school), then FERPA (34 CFR 99.30) also requires the consent to specify the records to be disclosed, identify the party to whom the disclosure will be made, and state the purpose for the disclosure.

If the request is for FSA's electronic FAFSA records, please contact Ron Sann or Caroline Hong in OGC to ensure that the disclosure is permissible under the use restriction in the Higher Education Act of 1965, as amended (HEA), at 20 U.S.C. 1090a(a)(3)(E).

3. Subpoenas duces tecum demanding Privacy Act protected records or individually identifiable information

In addition to Privacy Act, FERPA, and HEA privacy requirements, these requests must also comply with Touhy regulations at 34 CFR Part 8, as identified by OGC. Please note the need to ensure that OGC has a copy of the subpoena and has denied the subpoena for not complying with the Touhy regulations before fulfilling the subpoena according to process outlined in # 1 or #2 above. For Federal subpoenas, please note that ED only has 14 days from service of the subpoena to object to it. However, when a subpoena is improperly filed, it will be fulfilled according to the processes outlined in #1 or #2 above.

4. Requests for Privacy Act protected records or individually identifiable information therein from Federal, State or local law enforcement entities within the US (including subpoenas duces tecum)

Where possible, these records shall be provided under the law enforcement exception to the Privacy Act at 5 U.S.C. 552a(b)(7), which requires the head of the Federal, State, or local law enforcement agency to make the written request or else someone who has been delegated the authority to do so AND is at least at section chief/branch chief level. Such a written request also must specify the records requested and what the civil or criminal law enforcement activity is.

FSA shall perfect the request according to OGC guidance and applicable legal requirements, such as the Privacy Act, FERPA, the use restriction in the Higher Education Act of 1965, as amended (20 U.S.C. 1090(a)(3)(E)), and then forward the perfected request to Nicole Gardner of OIG.

In the event that FSA receives any requests for information from law enforcement agencies seeking information pertaining to national security, those requests will be immediately forwarded to Nicole Gardner of OIG for fulfillment (unless another contact is identified).

In the event that the records requested would be protected by FERPA (e.g. FAFSA form data or aid-related data) or by the use restriction in the Higher Education Act of 1965, as amended (20 U.S.C. 1090(a)(3)(E)), FSA will work directly with OGC and notify OIG in the event that OIG to ensure compliance with any other applicable law(s) before disclosing any records to the requestor.

FY	Agency	Request Type	Received	Responded	Response
2019	Caddo, LA Sheriff's Office	Subpoena	10/29/2018	11/20/2018	Requested compliance with Touhy regulations. Received notification that subpoena was withdrawn due to new information leading to closure of investigation.
2019	Massachusetts Attorney General	Civil Investigative Demand	11/1/2018	12/19/2018	Information Release Approved
2019	Colorado Attorney General	Civil Investigative Demand	11/5/2018	12/18/2018	Information Release Approved
2019	Olmsted Falls, OH Police Department	Grand Jury Subpoena	12/7/2018	12/14/2018	Requested compliance with Touhy regulations, as well as a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. Have not received court order or further response in compliance with Touhy instruction letter.
2019	McDonough, GA Police Department	Grand Jury Subpoena	12/11/2018	12/26/2018	Requested compliance with Touhy regulations, as well as a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. Released records with Privacy Act consent on 3/6/19.
2019	Columbus, GA Police Department	Subpoena	12/14/2018	1/25/2019	Requested compliance with Touhy regulations, as well as a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. Released records with Privacy Act consent.

FY	Agency	Request Type	Received	Responded	Response
2019	Pasquotank, NC Sheriff's Office	Subpoena	1/10/2019	3/27/2019	Requested compliance with Touhy regulations, as well as a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. Have not received court order or further response in compliance with Touhy instruction letter. Please note that the delay in the Department's response letter was due to an administrative error.
2019	FBI	Federal Grand Jury Subpoena	1/16/2019	1/25/2019	Requested a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. In the alternative, requested a law enforcement request letter if not seeking FERPA-protected records and for a permissible use under the HEA. Have not received court order or law enforcement request.
2019	Granbury, TX Police Department	Law Enforcement Request Letter	1/22/2019	1/22/2019	Released Records.
2019	FBI	Federal Grand Jury Subpoena	1/23/2019	3/22/2019	Requested a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. In the alternative, requested a law enforcement request letter if not seeking FERPA-protected records and for a permissible use under the HEA. Have not received court order or law enforcement request.
2019	CFPB	Supervisory Examination Review Request	1/30/2019	Pending	Note that this was a detailed examination review request requiring a servicer to prepare aggregate reports in response. Office of the General Counsel notified on 5/17/2019.

FY	Agency	Request Type	Received	Responded	Response
2019	Hanover County, VA Sheriff's Office	Grand Jury Subpoena	2/21/2019	3/28/2019	Requested compliance with Touhy regulations, as well as a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. In the alternative, requested a law enforcement request letter if not seeking FERPA-protected records and for a permissible use under the HEA. Have not received court order, law enforcement request, or further response in compliance with Touhy instruction letter.
2019	FBI	Federal Grand Jury Subpoena	2/25/2019	3/25/2019	Requested a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. In the alternative, requested a law enforcement request letter if not seeking FERPA-protected records and for a permissible use under the HEA. Have not received court order or law enforcement request.
2019	U.S. Postal Inspection Service	Federal Grand Jury Subpoena	3/4/2019	3/18/2019	Requested a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. In the alternative, requested a law enforcement request letter if not seeking FERPA-protected records and for a permissible use under the HEA. Have not received court order or law enforcement request.
2019	District Attorney for Dekalb County , GA	Privacy Act Consent Form	3/5/2019	3/6/2019	Request approved and documents being processed for release.

FY	Agency	Request Type	Received	Responded	Response
2019	FBI	Federal Grand Jury Subpoena	3/5/2019	3/21/2019	Requested a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. In the alternative, requested a law enforcement request letter if not seeking FERPA-protected records and for a permissible use under the HEA. Have not received court order or law enforcement request.
2019	FBI	Background Investigation	3/7/2019	3/21/2019	Information Release Approved
2019	IRS	Summons	3/11/2019	3/25/2019	Requested a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. In the alternative, requested a law enforcement request letter if not seeking FERPA-protected records and for a permissible use under the HEA. Received law enforcement request letter on 4/23/2019. Processing.
2019	U.S. Postal Inspection Service	Federal Grand Jury Subpoena	3/13/2019	4/10/2019	Requested a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. In the alternative, requested a law enforcement request letter if not seeking FERPA-protected records and for a permissible use under the HEA. Have not received court order or law enforcement request.
2019	Minnesota Commerce Department	Request Letter regarding termination of contractor employee.	3/13/2019	4/10/2019	Requested a law enforcement request letter. Received on 4/10/2019. Approved for release.
2019	FTC	Law Enforcement Request Letter	3/19/2019	4/10/2019	Information Release Approved and documents being processed for release.

FY	Agency	Request Type	Received	Responded	Response
2019	Smith County, TX Sheriff's Office	Grand Jury Subpoena	3/21/2019	4/10/2019	Requested compliance with Touhy regulations, as well as a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. In the alternative, requested a law enforcement request letter if not seeking FERPA-protected records and for a permissible use under the HEA. Received law enforcement request letter including Touhy compliance language on 4/11/2019. Request approved and documents being processed for release.
2019	IRS	Summons	3/25/2019	Pending	After discussions with IRS regarding whether Privacy Act is implicated, requested a law enforcement request letter. Have not yet received law enforcement request letter.
2019	Greene County, OH - Wright State University Police Department	Grand Jury Subpoena	3/26/2019	4/10/2019	Requested compliance with Touhy regulations, as well as a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. In the alternative, requested a law enforcement request letter if not seeking FERPA-protected records and for a permissible use under the HEA. Have not received court order, law enforcement request or further response in compliance with Touhy instruction letter.
2019	State of North Carolina Attorney General	Civil Investigative Demand	4/4/2019	Pending	This is a follow up to a previously denied October 4, 2018 request to the Pennsylvania Higher Education Assistance Authority (PHEAA) for aggregate borrower information concerning the Public Service Loan Forgiveness and TEACH grant programs. The request is being reconsidered.

FY	Agency	Request Type	Received	Responded	Response
2019	FBI	Federal Grand Jury Subpoena	4/9/2019	5/1/2019	Requested a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. In the alternative, requested a law enforcement request letter if not seeking FERPA-protected records and for a permissible use under the HEA. Have not received court order or law enforcement request.
2019	Montgomery County Sheriff, Dayton, OH	Municipal Court Order	4/15/2019	5/21/2019	Sent Privacy Act Consent Forms to Sheriff's Office, which they will submit soon. Records will then be processed for release with subject's consent.
2019	Washington State Department of Financial Institutions	Directive to Provide Documents and Explanation	4/25/2019	Pending - attempting to obtain Privacy Act Consent from Complainant	
2019	U.S. Attorney for Western District of North Carolina	Law Enforcement Request Letter	5/7/2019	5/30/2019	Requested confirmation that the law enforcement request letter was signed by the U.S. Attorney's designee, as required by regulation. Awaiting confirmation.
2019	U.S. Attorney for Eastern District of Kentucky	Civil Subpoena	5/13/2019	6/3/2019	Requested a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. In the alternative, requested a law enforcement request letter if not seeking FERPA-protected records and for a permissible use under the HEA. Have not received court order or law enforcement request.

FY	Agency	Request Type	Received	Responded	Response
2019	State's Attorney's Office for Allegany County, Maryland	Summons to Obtain Evidence	5/17/2019	6/11/2019	Requested compliance with Touhy regulations, as well as a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. In the alternative, requested a law enforcement request letter if not seeking FERPA-protected records and for a permissible use under the HEA. Have not received court order or law enforcement request.
2019	California Department of Social Services	Investigative Subpoena	5/20/2019	5/24/2019	Requested a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. In the alternative, requested a law enforcement request letter if not seeking FERPA-protected records and for a permissible use under the HEA. Have not received court order or law enforcement request.
2019	U.S. District Court for the Middle District of Florida	Subpoena to Testify at a Hearing or Trial in a Criminal Case	5/21/2019	5/21/2019	Approved pursuant to ongoing communications with the IRS and U.S. Attorney's Office. Subpoena does not seek Privacy Act or FERPA-protected information. Trial was delayed.
2019	Minnesota Attorney General	Information Request related to individual borrower	5/22/2019	Pending	
2019	Indiana Attorney General	Information Request related to individual borrower	5/22/2019	Pending	

FY	Agency	Request Type	Received	Responded	Response
2019	Colorado Attorney General	Information Request related to individual borrower	5/22/2019	6/5/2019	Provided Privacy Act consent forms and referred borrower to FSA's Ombudsman's Office.
2019	U.S. Attorney's Office, Western District of Louisiana	Federal Grand Jury Subpoena	5/30/2019	6/11/2019	Requested a court order so that the Department's release of information would not be restricted under FERPA, the Privacy Act, or the use restrictions under the HEA. In the alternative, requested a law enforcement request letter if not seeking FERPA-protected records and for a permissible use under the HEA. Have not received court order or law enforcement request.
2019	CFPB	Civil Investigative Demand	6/3/2019	Pending	
2019	Indiana Attorney General	Subpoena seeking individual borrower information	6/3/2019	Pending	
2019	Tuscaloosa, Alabama Police Department	Subpoena	6/7/2019	Pending	