

EXHIBIT D



December 8, 2020

Via Email: HHS.ACFO@hhs.gov

Mr. Mark Weber
Acting Deputy Agency Chief FOIA Officer
U.S. Department of Health and Human Services Office of the Assistant Secretary for Public
Affairs Room 729H
200 Independence Avenue, S.W.
Washington, DC 20201

Re: Appeal of National Public Radio FOIA request to HHS, Case No. 2020-01689-FOIA-OS

Dear Mr. Weber:

I am a producer at National Public Radio, Inc. (“NPR”) and I am writing to appeal the final response to my August 18, 2020, Freedom of Information Act (“FOIA”) request to the Department of Health and Human Services (“HHS”) seeking records related to the agency’s interactions with TeleTracking Technologies, Inc. (“TeleTracking”), a government vendor tasked with managing COVID-19 data.

The request and the HHS response.

On August 18, 2020, I submitted a FOIA request on behalf of NPR for the following records (Exhibit A):

[Records related to BAA-19-ASPR NEXT-SOL-75A50119R00044]

1. Any White Papers or Full Proposals submitted to HHS under the Broad Agency Announcement (BAA), BAA-19-ASPR NEXT-SOL-75A50119R00044, Area of Interest 4: “Real-Time Healthcare System Capacity Reporting.”
2. HHS written evaluation reports created in response to White Papers or Full Proposals under Area of Interest 4 in BAA-19-ASPR NEXT-SOL-75A50119R00044.

[Records related to TeleTracking Technologies, Inc.]

3. Any white paper submitted to HHS by TeleTracking to HHS between Aug. 1, 2019 and Aug. 1, 2020.

4. A copy of the Non-Disclosure Agreement signed by TeleTracking relating to BAA-19-ASPR NEXT-SOL-75A50119R00044
5. A copy of the contract signed by TeleTracking ASPR-BARDA, Contract No. 75A50120C00042.

[E-mails containing "TeleTracking"]

6. Emails referring to the term "TeleTracking" from February 1, 2020 to August 18, 2020, to, from, or copying the following HHS or CDC officials:
 1. Bryan Shuy
 2. Jose Arrieta
 3. Jim Parker
 4. Dr. Deborah Birx
 5. Robert Redfield
 6. Cameron Hernandez
7. Emails referring to the term 'TeleTracking' from June 1, 2020 to Aug. 18, 2020, to, from, or copying the following HHS officials:
 - Michael Caputo
 - Katherine McKeogh

On August 20, 2020, HHS acknowledged receipt of the request and assigned it tracking number 2020-01689-FOIA-OS. (Exhibit B.) On November 19, 2020, the agency issued its final response. According to that response, the agency located 31 pages of responsive records, which it produced with some redactions (Exhibit C.):

After a careful review of these pages, I have determined to release **24 pages** to you in their entirety, and I am further releasing **7 pages** in part, with portions redacted, pursuant to Exemption (b)(4) and Exemption (b)(6) of the FOIA (5 U.S.C. §552 (b)(4)(b)(6)). I have also determined to withhold **two pages** in their entirety, pursuant to Exemption (b)(4) and Exemption (b)(5) of the FOIA (5 U.S.C. §552 (b)(4)(b)(5)).

HHS provided no details about how it located responsive records, except that a search was conducted by the Assistant Secretary for Preparedness and Response ("ASPR") and the Assistant Secretary for Administration ("ASA").

The production consists of two documents (excerpts attached as Exhibit D):

- 1) Seven pages from an e-mail sent by LCDR Josiah Toepfer on August 10, 2020, with the subject line “10AUG2020 Morning Sync Daily Brief.” Of these seven pages, five pages contain merely e-mail headers and one page was redacted in its entirety pursuant to Exemption (b)(7). The one substantive page is titled “Agenda” and lists the names of some agencies and their officers without any additional context.
- 2) A partially redacted copy of the April 10, 2020 contract between TeleTracking Technologies, Inc. and ASPR-BARDA, an HHS component, award number 75A50120C00042.

A. HHS conducted an inadequate search for records relating to BAA-19-ASPR NEXT-SOL-75A50119R00044 or TeleTracking.

HHS has conducted an inadequate search for responsive records. “An inadequate search for records constitutes an improper withholding under the FOIA.” *Dean v. U.S. Dep’t of Justice*, 141 F. Supp. 3d 46, 48 (D.D.C. 2015). Under FOIA, agencies are required “to make more than perfunctory searches and, indeed, to follow through on obvious leads to discover requested documents.” *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999). An agency fulfills its obligations under FOIA if it “can demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents.” *Id.* The burden falls on the agency “to set forth the search terms used and the search conducted, as well as to describe the structure of the file systems searched.” *Int’l Counsel Bureau v. U.S. Dep’t of Def.*, 657 F. Supp. 2d 33, 38 (D.D.C. 2009) (citations omitted). As explained further below, HHS has failed to meet those standards here.

1. HHS returned no records relating to white papers, proposals, or written evaluations related to BAA-19-ASPR NEXT-SOL-75A50119R00044.

On August 19, 2019, the Office of the Assistant Secretary for Preparedness (“ASPR”), an HHS component, publicly issued Broad Agency Announcement BAA-19-ASPR NEXT-SOL-75A50119R00044 (“the BAA”), which solicited white papers and proposals for research and development projects.¹ As you know, under the Broad Agency Announcement process, offerors must first submit a white paper that provides a “brief technical discussion” of the project. The agency reviews the white papers and invites certain offerors to submit a “full proposal.” After further agency evaluation and negotiation, the agency may award a contract to fund the proposal.

In my August 18 FOIA request, I requested “[a]ny White Papers or Full Proposals” as well as all “written evaluation reports” relating to one of the areas of interest listed in the BAA: “AOI-4: Real-Time Healthcare System Capacity Reporting.” I received no records in response to my request: no white papers, no proposals, and no agency evaluations.

It is difficult to believe that ASPR-BARDA did not receive a single white paper about “Real-Time Healthcare System Capacity Reporting.” In fact, we know of at least one such white paper — TeleTracking’s own. According to an August 3, 2020 letter that TeleTracking sent via counsel to Senators Charles Schumer and Patty Murray (Exhibit E), TeleTracking submitted a

¹ See <https://beta.sam.gov/opp/826a435bbae7570b1f9f66ab3fcb54bf/view#general>.

white paper in response to the BAA in September 2019. TeleTracking also submitted a proposal pursuant to the BAA in March 2020, which resulted in a contract executed on April 10, 2020. The heading for this contract is “COVID-19 RAPID DEPLOYMENT PLAN FOR *REAL-TIME HEALTHCARE SYSTEM CAPACITY REPORTING*.” (Emphasis added.) Ex. D.

Thus, any search “reasonably calculated to uncover all relevant documents” should have revealed, at the very least, the white papers, full proposals, and written evaluations relating to TeleTracking’s publicly-disclosed BAA submissions. Yet HHS says that it came up empty-handed. Nor does HHS offer any indicia suggesting that its search was adequate. In its November 19 response letter, HHS merely asserts that ASPR conducted a search. For example, HHS provides no information about what databases it searched, what search terms it used, or what folders it examined. I therefore ask that ASPR conduct another, more thorough search for white papers, full proposals, and written evaluations relating to the August 2019 BAA.

2. *HHS returned no records relating to TeleTracking’s own white paper submissions to HHS, but an adequate search would have revealed those records.*

An adequate search would have revealed TeleTracking’s own white paper submissions to HHS. In my FOIA request, I specifically asked for “Any white paper submitted to HHS by TeleTracking to HHS between Aug. 1, 2019 and Aug. 1, 2020.” As discussed above, TeleTracking has publicly disclosed the existence of at least one such white paper, submitted to ASPR-BARDA in September 2019 pursuant to BAA-19-ASPR NEXT-SOL-75A50119R00044. Ex. E. Despite this “obvious lead[],” *Valencia-Lucena* at 325, HHS’s search failed to discover any of TeleTracking’s submitted white papers.

I therefore ask that ASPR conduct another search for any white papers submitted by TeleTracking to any HHS component pursuant to any Broad Agency Announcement, as I requested, and to detail the methods used to search for these records.

3. *HHS returned no records relating to TeleTracking’s non-disclosure agreement.*

In my FOIA request, I also asked HHS for “the Non-Disclosure Agreement signed by TeleTracking relating to BAA-19-ASPR NEXT-SOL-75A50119R00044.” TeleTracking disclosed the existence of this document in its August 3 letter to Senators Schumer and Murray, describing it as “a broad Non-Disclosure Agreement (NDA) that restricts TeleTracking’s release of non-public information, including, but not limited to, confidential privileged and procurement-sensitive information.” Ex. E. TeleTracking told the Senators that “[g]iven the NDA, questions regarding the Contract [No. 75A50120C00042] should be directed to HHS.” *Id.*

Since the TeleTracking NDA plainly exists, it should have been found and produced. I therefore ask that HHS conduct another search for this NDA, and to detail the methods used to search for this record.

4. *HHS conducted an inadequate search for e-mails referencing “TeleTracking.”*

In my FOIA request, I asked for e-mails containing the term “TeleTracking” that were sent or received by any of the following eight top HHS or CDC officials:

1. Bryan Shuy
2. Jose Arrieta
3. Jim Parker
4. Dr. Deborah Birx
5. Robert Redfield
6. Cameron Hernandez
7. Michael Caputo
8. Katherine McKeogh

HHS incorrectly conducted its e-mail search.

In its final response, HHS produces only a fragment of one e-mail: A morning briefing sent from LCDR Josiah Toepfer to over 60 recipients on August 10, 2020. This e-mail should have been produced in its entirety, as I requested e-mails, not parts of e-mails. Four of the eight named HHS or CDC figures were recipients of that e-mail: Bryan Shuy, Jim Parker, Robert Redfield, Michael Caputo. I received no e-mails involving any of other four people requested: Jose Arrieta, Dr. Deborah Birx, Cameron Hernandez, Katherine McKeogh.

Any reasonable agency search of these officials' e-mail accounts should have discovered more than a single e-mail containing the word "TeleTracking." TeleTracking is crucial in the federal government's efforts to combat COVID-19. HHS has outsourced to TeleTracking the responsibility of tracking positive cases during the COVID-19 pandemic, a responsibility traditionally shouldered by the CDC.² Given TeleTracking's key role as the federal government's main conduit for COVID-19 data, there should exist dozens, if not hundreds of e-mails to and from top HHS officials mentioning the company.

I therefore request that HHS conduct another, more-thorough e-mail search, and to detail the methods used to search for responsive records. As I requested, I would like a copy of any e-mails — in their entirety — sent or received by any of the aforementioned eight HHS or CDC officials, between February 1, 2020 and August 18, 2020.

B. HHS improperly redacted the produced records.

In addition to the inadequate search, HHS improperly redacted the records it found. FOIA was enacted "to promote the 'broad disclosure of Government records' by generally requiring federal agencies to make their records available to the public on request," *DiBacco v. U.S. Army*, 795 F.3d 178, 183 (D.C. Cir. 2015) (citing *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988)), and its exemptions "are explicitly made exclusive and must be narrowly construed," *Milner v. U.S. Dep't of Navy*, 562 U.S. 562, 565 (2011). As such the agency invoking an exemption has the burden "to establish that the requested information is exempt." *Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 352 (1979).

² See, e.g. Dina Temple-Raston and Tim Mak, *Irregularities In COVID Reporting Contract Award Process Raise New Questions*, NPR, July 29, 2020, <https://www.npr.org/2020/07/29/896645314/irregularities-in-covid-reporting-contract-award-process-raises-new-questions>.

In its final response on November 19, HHS redacted several pages pursuant to FOIA Exemptions 4 and 5 without justification. I ask that HHS reconsider these redactions because they are not permitted under FOIA.

1. *HHS improperly redacted information under Exemption 4*

HHS improperly redacted information under Exemption 4. FOIA's Exemption 4 allows an agency to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). A trade secret is "narrowly defined as 'a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.'" *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 93 F. Supp. 2d 1, 8 (D.D.C. 2000) (quoting *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C.Cir.1983)). "Confidential" refers to information that "is both [1] customarily and actually treated as private by its owner and [2] provided to the government under an assurance of privacy." *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019). In addition, under the 2016 amendments to FOIA, HHS may not withhold information under an exemption unless HHS "reasonably foresees that disclosure would harm an interest protected an exemption," which it has not done here. 5 U.S.C. § 552(a)(8)(A)(i)(I).

Here, citing Exemption 4, HHS redacts portions of the TeleTracking contract that describe the very work that TeleTracking is being paid to perform. For instance, HHS withholds the entire "Deliverables" section of the contract, which is the only section that explains in detail what TeleTracking will accomplish. Ex. D. In another place, the contract calls for TeleTracking to establish a "big data platform" — but HHS redacts what data the platform will contain. Ex. D.

HHS does not explain whether it believes the redacted information to be either a trade secret or otherwise "confidential." But this information falls into neither category. It is plainly not a trade secret because TeleTracking is not engaged in the production of "trade commodities." *Ctr. For Auto Safety* at 8. Nor is this information "confidential." Unlike the confidential sales data in *Food Marketing Institute*, which "only small groups of employees usually have access to," 139 S. Ct. at 2363, the redacted information here involves TeleTracking's capabilities as a company. This is hardly the kind of data that is closely held. To run a company where the main product is a mystery would be commercial folly. Indeed, TeleTracking's own website contains a page dedicated to 16 case studies describing the company's COVID-19 work.³

Finally, even if the information were a "trade secret" or "confidential" (which it is not), HHS has failed to meet its burden to show how the release of this information would cause foreseeable harm.

I therefore ask that the agency reconsider these Exemption 4 redactions, which currently obscure the obligations of the company that serves as the sole conduit for federal COVID-19 data.

³ See

<https://www.teletracking.com/resources?q=&featured=true&roles=&categories=f5c17efc61024c5ca93bde7412c68621&types=&page=0>

2. *HHS improperly withheld information under Exemption 5*

HHS also improperly withheld information under Exemption 5. To qualify for the deliberative process privilege, and consequently for withholding pursuant to Exemption 5, the material at issue must be both “predecisional and deliberative,” meaning that it must have been generated *before* the adoption of an agency policy *and* “intended to facilitate or assist development of the agency’s final position on” that policy. *Nat’l Sec. Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014). But “[t]he point is not to protect Government secrecy pure and simple.” *Klamath*, 532 U.S. at 9. The deliberative process privilege is intended to protect the integrity of the federal government’s policy decision-making process. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975); *Wolfe v. Dep’t of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988). If, as here, the withheld material “could not reasonably be said to reveal an agency’s or official’s mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable.” *Petroleum Info. Corp. v. Dep’t of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). Further, records “containing purely factual material are generally not protected by Exemption (b)(5).” *Russell v. Dep’t of Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982). Like all FOIA exemptions, Exemption 5 must be interpreted narrowly. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (Exemption 5 “is to be applied ‘as narrowly as consistent with efficient Government operation.’”) (citation omitted). HHS must also follow the “foreseeable harm” standard. 5 U.S.C. § 552(a)(8)(A)(i)(I). The agency still must produce any “reasonably segregable portion of a record” that does not contain exempt material. 5 U.S.C. § 552(b)(5).

Here, HHS redacted an entire page from an August 10, 2020 e-mail to top HHS officials, citing Exemption 5’s deliberative process privilege. But it is doubtful that the deliberative process privilege applies. Since the TeleTracking contract was executed on April 10, 2020, any discussions of TeleTracking on August 10 would be *post*-decisional and disqualified from the deliberative process privilege. Furthermore, FOIA requires agencies to identify and “foreseeable harm” and “reasonably segregate” nonexempt portions of records. If the redacted page contains any “purely factual” material, those sections must be produced.

I ask that the agency reconsider this redaction.

Conclusion

For the reasons above, I respectfully request that the agency grant the instant appeal. I look forward to your response within twenty (20) working days from the date you receive this appeal, as required by 5 U.S.C. § 552(a)(6)(A)(ii).

Thank you for your attention in this matter.

Sincerely,

Jingnan Huo

NPR