

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

PROTECT THE PUBLIC’S TRUST)
712 H Street, N.E.)
Suite 1682)
Washington, D.C. 20002,)

Plaintiff,)

v.)

Civil Case No. 1:22-cv-03239

U.S. DEPARTMENT OF HEALTH AND)
HUMAN SERVICES)
200 Independence Avenue, S.W.)
Washington, D.C. 20201,)

Defendant.)

_____)

COMPLAINT

1. Plaintiff Protect the Public’s Trust brings this action against the U.S. Department of Health and Human Services under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the Declaratory Judgement 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 Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

4. Plaintiff Protect the Public’s Trust (“PPT”) is an unincorporated association of retired and former public servants and concerned citizens that is dedicated to restoring public trust in

government by promoting the fair and equal application of the rules and standards of ethical conduct to all public servants. *See* D.C. Code § 29–1102(5). Consistent with Justice Brandeis’s aphorism that “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman,” PPT seeks to promote transparency and broadly disseminate information so that the American people can evaluate the integrity and ethical conduct of those who act in their name. Louis Brandeis, *OTHER PEOPLE’S MONEY AND HOW BANKERS USE IT* (1914), <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v>.

5. Defendant U.S. Department of Health and Human Services (“HHS” or “the Department”) is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1). The Department has possession, custody, and control of records responsive to Plaintiff’s FOIA request.

STATEMENT OF FACTS

6. On May 31, 2022, PPT submitted a FOIA request (attached as Exhibit A) to the Department seeking the following records:
 1. All communications from January 20, 2021 through April 29, 2022 containing the term “anti-racism” or “antiracism” (not case-sensitive) to or from Secretary Xavier Becerra, Administrator of the Center for Medicare and Medicaid Services (CMS) Chiquita Brooks-LaSure, and Chief of Staff Sean McCluskie.
 2. All communications, correspondence, messages or interactions from January 20, 2021 through April 29, 2022 between the Executive Secretariat and any of the officials mentioned above containing the term “anti-racism” or “antiracism” (not case-sensitive).
7. As Attorney General Garland has made clear, FOIA is “a vital tool for ensuring transparency, accessibility, and accountability in government” whose “‘basic purpose . . . is to ensure an informed citizenry,’ which is ‘vital to the functioning of a democratic society [and] needed to check against corruption and to hold the governors accountable to

the governed.” Merrick Garland, *Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines 1* (Mar. 15, 2022),

<https://www.justice.gov/ag/page/file/1483516/download> (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)) (“Garland Memo”).

8. During testimony before Health Subcommittee to the House Energy and Commerce Committee and the House Ways and Means Committee on April 27, 2022, and April 29, 2022, respectively, HHS Secretary Xavier Becerra repeatedly denied awareness of a Center for Medicare and Medicaid Services (“CMS”) plan concerning the creation and implementation of an anti-racism plan. See Breccan F. Thies, *HHS Secretary Falsely Claims Biden Administration Doesn’t Push ‘Anti-Racism’ Policies on Doctors*, *Briertbart* (Apr. 29, 2022), <https://www.breitbart.com/politics/2022/04/29/hhs-secretary-falsely-claims-biden-administration-doesnt-push-anti-racism-policies-on-doctors/>. For example, in response to a question from Representative Gary Palmer, Secretary Becerra stated, “I would challenge you to show me where in our policies we call anything we are doing anti-racism policies.” *Id.* In response to a question from Representative Jason Smith the next day, Secretary Becerra stated “[i]f you can point to me where there is a so-called ‘anti-racism’ plan, I can respond.” *Id.* This FOIA request accepts Secretary Becerra’s “challenge.” This FOIA is in the public interest because it will help illuminate whether Secretary Becerra testified truthfully in two Congressional hearings and will further inform the public’s understanding of how a CMS activity entitled “Create and Implement an Anti-Racism Plan” was developed and adopted. See CMS & HHS, *Medicare Program; CY 2022 Payment Policies Under the Physician Fee Schedule and Other Changes to Part B Payment Policies; Medicare Shared Savings Program Requirements;*

Provider Enrollment Regulation Updates; and Provider and Supplier Prepayment and Post-Payment Medical Review Requirements, 86 Fed. Reg. 64996, 65970 (Nov. 19, 2021) (“Activity Title: create and Implement an Anti-Racism Plan”).

9. On May 31, 2022, the Department acknowledged receipt of Plaintiff’s request and assigned it tracking number 2022-00817-FOIA-OS.
10. On June 3, 2022, the Department sent an acknowledgement letter for Plaintiff’s request that claimed “[b]ecause you seek records which require a search in another office, ‘unusual circumstances’ apply to your request, automatically extending the time limit to respond to your request for ten additional days. . . . Further, we estimate needing more than 10 additional days to respond to your request and so, in the next paragraph of this letter we are offering you an opportunity to narrow your request” (citation omitted). The Department’s offer of “an opportunity to narrow” Plaintiff’s request stated “[y]our request is assigned to the complex track. In an effort to speed up our records search, you may wish to narrow the scope of your request to limit the number of potentially responsive records or agree to an alternative time frame for processing, should records be located. You may also wish to await the completion of our records search to discuss either of these options.” At no point did the Department actually suggest a way for Plaintiff to narrow its request to receive a faster response.
11. Also on June 3, 2022, the status of Plaintiff’s request was updated to “[i]n process.”
12. On September 26, 2022, Plaintiff reached out to the Department regarding the status of Plaintiff’s request.
13. Plaintiff has received no additional information from the Department.

14. As the Garland Memo makes clear, “Timely disclosure of records is also essential to the core purpose of FOIA.” Garland Memo at 3.
15. As of today, Plaintiff’s request has been pending for more than 140 days – well beyond the statutory period for federal agencies to make a determination with respect to a FOIA request. 5 U.S.C. § 552(a)(6)(A)-(B).
16. The Department has not made a determination of whether it will comply with Plaintiff’s request. *See Citizens for Responsibility and Ethics in Washington v. FEC*, 711 F.3d 180 (D.C. Cir. 2013). The Department has not produced responsive documents to the Plaintiff, has not communicated to the Plaintiff the scope of the documents it intends to produce and withhold, along with the reasons for such withholding, and has not informed Plaintiff of its ability to appeal any adverse portion of its determination.
17. Given these facts, it appears that absent litigation the Department has not and does not intend to meet its statutory obligations to provide the requested records.
18. Through the Department’s failure to make a determination within the time period required by law, PPT has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I

Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

19. PPT repeats and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
20. PPT properly requested records within the possession, custody, and control of the Department.

21. The Department is an agency subject to FOIA, and therefore has an obligation to release any non-exempt records and provide a lawful reason for withholding any materials in response to a proper FOIA request.
22. The Department is wrongfully withholding non-exempt agency records requested by PPT by failing to produce non-exempt records responsive to its request.
23. The Department is wrongfully withholding non-exempt agency records requested by PPT by failing to segregate exempt information in otherwise non-exempt records responsive to the PPT FOIA request.
24. The Department's failure to provide all non-exempt responsive records violates FOIA.
25. Plaintiff PPT is therefore entitled to declaratory and injunctive relief requiring Defendant to promptly produce all non-exempt records responsive to its FOIA request and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

Protect the Public's Trust respectfully requests this Court:

- (1) Assume jurisdiction in this matter, and maintain jurisdiction until the Defendant complies with the requirements of FOIA and any and all orders of this Court.
- (2) Order Defendant to produce, within ten days of the Court's order, or by other such date as the Court deems appropriate, any and all non-exempt records responsive to PPT's FOIA request and indexes justifying the withholding of all or part of any responsive records withheld under claim of exemption.
- (3) Enjoin the Defendant from continuing to withhold any and all non-exempt responsive records.

- (4) Award PPT the costs of this proceeding, including reasonable attorney's fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E).
- (5) Grant PPT other such relief as the Court deems just and proper.

Dated: October 24, 2022

Respectfully submitted,

PROTECT THE PUBLIC'S TRUST
By Counsel:

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