

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
Pensacola Division**

STATE OF FLORIDA, FLORIDA
AGENCY FOR HEALTH CARE
ADMINISTRATION, and FLORIDA
DEPARTMENT OF CHILDREN AND
FAMILIES,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, and U.S. CENTERS
FOR MEDICARE AND MEDICAID
SERVICES,

Defendants.

Case No. 23-24758

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs—the State of Florida, the Florida Agency for Health Care Administration, and the Florida Department of Children and Families—bring this civil action against Defendants U.S. Department of Health and Human Services and U.S. Centers for Medicare and Medicaid Services for declaratory and injunctive relief under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and respectfully request expedited review under 28 U.S.C. § 1657(a).

1. On August 28, 2023, the Florida Agency for Health Care Administration submitted a FOIA request to the U.S. Department of Health and Human Services seeking the disclosure and release of federal agency records that implicate matters of public policy—i.e., agency records and/or communications

related to the Department of Health and Human Services and the Florida Health Justice Project, the National Health Law Program, and their attorneys, agents, and employees, regarding the subject matter of litigation against the Florida Agency for Health Care Administration and the Florida Department of Children and Families challenging Medicaid redeterminations of recipient eligibility under 42 U.S.C. § 1396a(3) and its implementing regulation, 42 C.F.R. § 431.210(b).

2. That same day, August 28, 2023, the Florida Agency for Health Care Administration submitted a second FOIA request to the U.S. Centers for Medicare and Medicaid Services similarly seeking the disclosure and release of federal agency records related to the U.S. Centers for Medicare and Medicaid Services and the Florida Health Justice Project, the National Health Law Program, and their attorneys, agents, and employees, regarding the same litigation against the Florida Agency for Health Care Administration and the Florida Department of Children and Families challenging Medicaid redeterminations of recipient eligibility.

3. As explained in more detail below, neither Defendant complied with FOIA in responding to the requests. Both federal agencies failed to issue timely determinations, failed to conduct adequate searches, and failed to disclose responsive, non-exempt records (including segregable portions of records) in accord with the statute. Plaintiffs seek relief from this Court.

Parties

4. Plaintiff State of Florida is a sovereign state. It has the authority and responsibility to safeguard its public fisc and to protect the health, safety, and welfare of its citizens.

5. Plaintiff Florida Agency for Health Care Administration (AHCA) serves as the chief health policy and planning entity for the State of Florida. AHCA is primarily responsible for the State's Medicaid program, which serves millions of Floridians, and the licensure of the State's health care facilities as well as the sharing of health care data through the Florida Center for Health Information and Policy Analysis.

6. Plaintiff Florida Department of Children and Families (DCF) protects vulnerable children, the elderly, and the disabled from abuse and neglect. Among other things, DCF performs Medicaid eligibility determinations.

7. Defendant U.S. Department of Health and Human Services (HHS) is a federal government agency under 5 U.S.C. § 552(f)(1). HHS has possession, custody, and control of agency records requested by AHCA.

8. Defendant U.S. Centers for Medicare and Medicaid Services (CMS) is a federal government agency under 5 U.S.C. § 552(f)(1). CMS has possession, custody, and control of agency records requested by AHCA.

Jurisdiction and Venue

9. The Court has subject matter jurisdiction over this action and personal jurisdiction over the parties under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

10. Venue is appropriate under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because the State of Florida resides everywhere within its sovereign territory. *See California v. Azar*, 911 F.3d 558, 570 (9th Cir. 2018); *Florida v. United States*, No. 3:21-cv-1066, 2022 WL 2431443, at *2 (N.D. Fla. Jan. 18, 2022).

11. Assignment to the Pensacola Division is proper under Local Rule 3.1.

12. This suit is timely as it has been “filed within six years after the right of action first accrue[d].” 28 U.S.C. § 2401(a); *see also Kenney v. DOJ*, 700 F. Supp. 2d 111, 115 (D.D.C. 2010) (explaining that the statute of limitations in Section 2401(a) “is a jurisdictional condition attached to the government’s waiver of sovereign immunity” in FOIA lawsuits).

Background

13. On August 22, 2023, three Florida residents filed a class action lawsuit against Secretary Jason Weida at AHCA and against Secretary Shevaun Harris at DCF challenging Medicaid redeterminations of recipient eligibility. *See Chianne D. v. Weida*, No. 3:23-cv-00985-MMH-LLL (M.D. Fla.). The class action lawsuit is still pending.

14. The requested records sought by Plaintiffs under FOIA in this case are relevant to the issues being litigated in the class action lawsuit pending in the Middle District of Florida.

15. Dissemination of information about government activities, particularly with respect to healthcare, is a critical and substantial component of AHCA’s mission. Because doing so is vital to its work, AHCA will disseminate any information obtained from the defendants under FOIA to the public, thus contributing to the public’s enhanced understanding of state and federal government activities.

16. There is urgency for the requested information because the plaintiffs in the pending class action lawsuit, *Chianne D. v. Weida*, are seeking preliminary and permanent injunctions requiring AHCA to reinstate the Medicaid benefits of

recipients who have been determined to be ineligible and prohibiting federally mandated Medicaid eligibility redeterminations.

17. Plaintiffs request that the Court expedite this action under 28 U.S.C. § 1657(a).

Legal Standard

18. FOIA strongly favors openness. *DOJ v. Tax Analysts*, 492 U.S. 136, 142 (1989). “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

19. As Congress “broadly conceived” the statutory purpose, *EPA v. Mink*, 410 U.S. 73, 79–80 (1973), “disclosure, not secrecy, is the dominant objective of the Act,” *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

20. Statutory deadlines. Congress understood that “information is often useful only if it is timely.” H.R. Rep. No. 876 at 126, 93rd Cong., 2d Sess. (Mar. 5, 1974). Indeed, “excessive delay by the agency in its response is often tantamount to denial.” *Id.* FOIA therefore imposes certain timeliness requirements on federal agencies. *See* 5 U.S.C. § 552(a)(6).

21. FOIA requires that an agency respond to a valid request within twenty days (exempting Saturdays, Sundays, and legal public holidays) upon receipt of such request, including notifying the requestor of its determination, the reasons therefor, and the right to appeal any adverse determination. *Id.* § 552(a)(6)(A)(i).

22. In certain circumstances, an agency may provide notice to the requester that “unusual circumstances” merit additional time—up to an additional ten working

days—to respond to the request. *Id.* § 552(a)(4)(viii)(II)(aa). “Unusual circumstances” include, among other things, “the need for consultation” “with another agency” or “among two or more components of the agency” “having a substantial interest” in the determination of the request. *Id.* § 552(a)(6)(B)(iii)(III). If an agency provides notice to the requester of “unusual circumstances” and it is unable to respond to the request within the statutory deadline, the agency must provide the requester “an opportunity to arrange with the agency an alternative time frame for processing the request.” *Id.* § 552(a)(6)(B)(ii).

23. If an agency does not respond to a request within the statutory timeline, the requester is deemed to have exhausted administrative remedies and immediately may pursue judicial review. *Id.* § 552(a)(6)(C)(i). An agency may not eschew this exhaustion rule by simply deciding “to later decide.” *CREW v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013). The agency instead must “at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.” *Id.*

24. “Congress adopted the time limit provision in the FOIA in order to contribute to the fuller and faster release of information, which is the basic objective of the Act.” *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 64 n.8 (D.C. Cir. 1990) (internal quotation marks omitted). “So, within 20 working days (or 30 working days in ‘unusual circumstances’), an agency must process a FOIA request and make a determination” to comply with Section 552(a)(6). *CREW*, 711 F.3d at 189.

25. In general, after an agency responds to a FOIA request, “the requester must exhaust his administrative remedies before seeking judicial review.” *Oglesby*,

920 F.2d at 64. FOIA “provides for an administrative appeal where an agency’s determination is adverse.” *Id.*

26. For administrative appeals, FOIA requires the agency “to make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal.” 5 U.S.C. § 552(a)(6)(A)(ii).

27. If the agency does “not respond within twenty days of the appeal,” the requester “will be deemed to have fully exhausted his administrative remedies.” *Oglesby*, 920 F.2d at 66.

28. FOIA does not require the agency to produce responsive records within the 20- or 30-day statutory time limit. Instead, the agency must make responsive records “promptly available” “upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees, (if any) and procedures to be followed.” 5 U.S.C. § 552(a)(3)(A). An agency’s determination “to comply with a request for records” also will trigger its duty to make such responsive records “promptly available.” *Id.* § 552(a)(6)(C)(i).

29. Although FOIA does not assign a particular timeframe for an agency to comply with its requirement to make documents “promptly available,” the D.C. Circuit has concluded that, “depending on the circumstances,” this requirement “typically would mean within days or a few weeks of a ‘determination,’ not months or years.” *CREW*, 711 F.3d at 188.

30. Adequacy of the search. An agency responding to a valid request for records “shall make reasonable efforts to search for [such] records.” 5 U.S.C. §

552(a)(3)(C). An agency's search is "adequate" if it "has conducted a search reasonably calculated to uncover all relevant documents." *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

31. In considering the adequacy and reasonableness of a search, no court should accept an agency's "self-imposed limitation" on the scope of its search when that self-imposed limitation inaccurately depicts what the requester really seeks. *Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235, 1253 (11th Cir. 2008). For example, an "agency 'cannot limit its search' to only one or more places if there are additional sources 'that are likely to turn up the information requested.'" *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (quoting *Oglesby*, 920 F.2d at 68).

32. An agency initially may define the scope of its search, but that does not mean that the agency then "may ignore what it cannot help but know." *Kowalczyk v. DOJ*, 73 F.3d 386, 389 (D.C. Cir. 1996). When a requester "clearly states" that it is seeking "all agency records on a subject" regardless of their location, the agency cannot in good faith ignore an apparent lead to other responsive records. *Id.* The agency is "obliged to pursue" that lead. *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999).

33. Exemptions. Public access to records "does not apply to matters" that fall within discrete categories of exemptions identified by the statute. 5 U.S.C. § 552(b). For example, FOIA exempts "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency," except where such records were "created 25 years or more before the date on which the records were requested." *Id.* § 552(b)(5).

34. Courts generally have construed Exemption 5 as allowing an agency to withhold information from documents, or portions of documents, that normally would be “privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The “clear thrust” of Exemption 5 “is simply to ensure that FOIA does not deprive the government of the work-product and attorney-client protections otherwise available to it in litigation.” *Hunton & Williams v. DOJ*, 590 F.3d 272, 278 (4th Cir. 2010).

35. Even if portions of responsive documents are covered by an exemption, FOIA requires that agencies must provide to the requester reasonably segregable portions of those records that are not subject to the exemption. 5 U.S.C. § 552(a)(3)(B). The burden is on the agency to show that no segregable information exists.

HHS Request

36. On August 28, 2023, AHCA submitted a FOIA request to HHS. *See* Exhibit A (attached).

37. AHCA specifically requested:

- Records related to or containing HHS’s communications with or regarding the Florida Health Justice Project and/or the National Health Law Program and litigation challenging Florida’s Medicaid redeterminations of recipient eligibility, including (but not limited to): the adequacy of recipient notification of determination of ineligibility, adequacy of recipient notification for reasons of recipient ineligibility, and recipient income standards.

- Records related to or containing HHS's internal communications concerning Florida's Medicaid redeterminations of recipient eligibility, including (but not limited to): the adequacy of recipient notification of determination of ineligibility, adequacy of recipient notification for reasons of recipient ineligibility, and recipient income standards.
- Records related to or containing HHS's communications concerning Florida's Medicaid redeterminations of recipient eligibility with the following individuals: Katy DeBriere, Miriam Harmatz, Lynn Hearn, Sarah Grusin, Miriam Heard, Amanda Avery, and Jane Perkins.
- Records related to litigation CMS or HHS is currently involved in regarding States' Medicaid redeterminations of recipient eligibility.
- Records related to any subpoena issued or investigation commenced regarding States' redeterminations of recipient eligibility.

38. AHCA confined the scope of any responsive records to a limited time period: January 1, 2023, through the date of HHS's production. *Id.*

39. AHCA requested expedited processing under 45 C.F.R. § 5.27 and 5 U.S.C. § 552(a)(6)(E). And AHCA requested a waiver of fees under 45 C.F.R. § 5.54 and under 5 U.S.C. § 552(a)(4)(A)(iii).

40. On September 6, 2023, HHS acknowledged receipt of AHCA's request. *See Exhibit B (attached).*

41. In its letter to AHCA, HHS confirmed that it had received the request on August 28, 2023, and HHS stated that it also would refer the request to the CMS. *Id.*

42. Because AHCA requested records that may require a search within another office—e.g., the Office for Civil Rights—HHS stated that “unusual circumstances” warranted additional time. *Id.* (citing 5 U.S.C. § 552(a)(6)(B)(i)–(iii)).

43. HHS offered AHCA the “opportunity” to narrow its request, explaining that narrowing the request could allow the agency “to respond to the request sooner.” *Id.*

44. On September 22, 2023, HHS then sent a “clarification letter” to AHCA, explaining that the agency had placed the FOIA request in a “tolled” status. Exhibit C (attached).

45. The agency asked AHCA to further “clarify and describe the records” that it seeks. *Id.* HHS stated that, if the agency receives “emails and or titles for Katy DeBriere, Miriam Harmatz, Lynn Hearn, Sarah Grusin, Miriam Heard, Amanda Avery, and Jane Perkins, [the agency] can run the search.” *Id.*

46. HHS also stated that, if “all the parameters (timeframes, key words, etc.) are the same, [the agency] can run the search against multiple custodians simultaneously.” *Id.* HHS identified no other reason why the agency could not proceed with its search.

47. If AHCA failed to contact HHS “within 30 business days from the date of [its] letter,” the agency stated that the FOIA “request will be administratively closed.” *Id.*

48. On October 6, 2023, AHCA responded to HHS’s letter by providing the agency the email addresses and titles of the individuals identified in HHS’s letter. *See* Exhibit D (attached). HHS did not respond to AHCA.

49. On October 16, 2023, AHCA sent a follow-up email to HHS explaining that it had “heard nothing further regarding either the receipt of [its] clarification or a response” from the agency. Exhibit E (attached). AHCA requested that HHS “please confirm” that the agency had received its clarification email and that the agency had started to process its FOIA request. *Id.*

50. Later that day—October 16, 2023—HHS responded to AHCA’s email. Exhibit F (attached). A FOIA intake officer explained that she had “been working with Office of the Chief Information Officer (OCIO), one of the divisions who would possibly have records responsive to [AHCA’s] request.” *Id.* But, contrary to the agency’s earlier position, the intake officer stated that HHS could “*not* run a search of emails as none of the names and or emails provided are *HHS employees/domains.*” *Id.* (emphasis added).

51. The FOIA intake officer suggested that the Office of the Chief Information Officer had confronted “technology constraints.” *Id.* HHS could not “run a blind search against all users in HHS or an operating/staff division.” *Id.* “Electronic searches run against [HHS’s] live email system and a search against all HHS employees would crash [the agency’s] system.” *Id.*

52. The FOIA intake officer requested that AHCA instead provide the names of “any HHS employees” or “HHS employee emails/domain names” so that the agency could conduct “a search for emails.” *Id.*

53. On November 2, 2023, AHCA responded to the agency, explaining that AHCA personnel had discussed the problem—“(that the proposed search as provided was too broad without knowing the specific HHS employee recipients or their email addresses)”—“along with possible solutions.” Exhibit G (attached).

AHCA expressed its “concern” that the information requested “(i.e., the names and/or email addresses of personnel within HHS connected to the information we are seeking)” would be “impossible for us to satisfy.” *Id.* “In short,” AHCA stated that it had submitted its FOIA request to HHS “precisely because we know almost nothing about the possible communications requested except the names and email addresses of the outside parties (employees with Florida Health Justice Project and the National Health Law Program) and the topic of discussion (Medicaid Redeterminations).” *Id.*

54. AHCA further stated: “Who these individuals may have communicated with at HHS and what they discussed is exactly what” AHCA seeks to learn. *Id.* Even though AHCA neither agreed with nor understood “the stated technical challenges of locating the information as previously requested, to resolve this impasse,” AHCA suggested that HHS should search only “for those emails to or from the individuals previously identified in [its] first request.” *Id.* And AHCA suggested that HHS should search for emails sent between January 1, 2023, and the date it submitted its request, August 28, 2023. *Id.* Again, AHCA provided HHS the list of individuals with email addresses. *See id.*

55. On November 13, 2023, HHS thanked AHCA for its clarification. HHS explained that it was “still waiting to hear from a division” as to whether that division had located any responsive records. Exhibit H (attached). However, HHS stated that it still could not run a search for communications that agency personnel had with the individual names and emails addresses from “an outside organization.” *Id.* The FOIA intake officer explained that “is not how our system functions especially because HHS is decentralized.” *Id.* If AHCA wanted “to know what emails Katy

DeBriere has had with HHS,” the intake officer suggested that HHS “would need to know an HHS employee or HHS domain name which to search for those possible conversations.” *Id.*

56. Nonetheless, the intake officer stated that she had “been working with other divisions to get possible responsive records.” *Id.*

57. On November 22, 2023, HHS issued what the agency described as its “final response” to AHCA’s FOIA request. Exhibit I (attached).

58. HHS stated that the Office of General Counsel had reviewed “276 pages of responsive records.” *Id.* Yet HHS refused to release those records or release portions of those records. The agency withheld the records in their entirety under 5 U.S.C. § 552(b)(5), the statutory exemption that “protects inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency.” *Id.*

59. HHS provided no additional information as to which records were responsive to the five separate subparts of AHCA’s request. Nor did the agency provide any information as to whether it searched for the names and email addresses that AHCA previously provided in response to HHS’s “clarification letter” sent on September 22, 2023.

60. HHS did explain, however, that the Office of Civil Rights and the Office of the Chief Information Officer had “conducted a search” and reported that “there are no records responsive to [AHCA’s] request.” *Id.*

61. The agency notified AHCA of its right to file an administrative appeal, challenging the searches and the withholding of responsive records under Exemption 5. *See id.*

62. On December 15, 2023, AHCA submitted an administrative appeal to HHS.

CMS Request

63. On August 28, 2023, AHCA submitted a FOIA request to CMS. *See* Exhibit J (attached).

64. AHCA specifically requested:

- Records related to or containing CMS's communications with or regarding the Florida Health Justice Project and/or the National Health Law Program and litigation challenging Florida's Medicaid redeterminations of recipient eligibility, including (but not limited to): the adequacy of recipient notification of determination of ineligibility, adequacy of recipient notification for reasons of recipient ineligibility, and recipient income standards.
- Records related to or containing CMS's internal communications concerning Florida's Medicaid redeterminations of recipient eligibility, including (but not limited to): the adequacy of recipient notification of determination of ineligibility, adequacy of recipient notification for reasons of recipient ineligibility, and recipient income standards.
- Records related to or containing CMS's communications concerning Florida's Medicaid redeterminations of recipient eligibility with the following individuals: Katy DeBriere, Miriam Harmatz, Lynn Hearn, Sarah Grusin, Miriam Heard, Amanda Avery, and Jane Perkins.
- Records related to litigation HHS or CMS is currently involved in regarding States' Medicaid redeterminations of recipient eligibility.

- Records related to any subpoena issued or investigation commenced regarding States' redeterminations of recipient eligibility.

65. AHCA confined the scope of any responsive records to a limited time period—i.e., January 1, 2023, through the date of CMS's production. *Id.*

66. AHCA requested expedited processing under 45 C.F.R. § 5.27 and under 5 U.S.C. § 552(a)(6)(E). And AHCA requested a waiver of fees under 45 C.F.R. § 5.54 and under 5 U.S.C. § 552(a)(4)(A)(iii).

67. On August 30, 2023, CMS acknowledged receipt of the request. *See* Exhibit K (attached). CMS assigned an internal control number to the request and explained that the agency would complete an “initial analysis” of the request before it would “initiate a search for responsive records.” *Id.*

68. CMS further explained that it would contact AHCA if it determined that the agency needed further clarification. *Id.* Citing 5 U.S.C. § 552(a)(6), CMS suggested that “unusual circumstances” potentially “may affect” the agency’s “ability to fulfill a FOIA request within 20 business days.” *Id.* Yet CMS did not identify any particular unusual circumstances applicable to AHCA’s request.

69. On October 16, 2023, AHCA sent a follow-up email to CMS explaining they had reviewed the status of the August 28, 2023, request through the CMS FOIA portal and they had learned that the anticipated response date was “Undetermined.” Exhibit L (attached). CMS responded to AHCA’s email on the same day by first asking for the control number and then advising, “The records have been located and they will assign them to an analyst for review.” Exhibit M (attached).

70. On November 2, 2023, AHCA emailed the agency seeking the status of the request and an anticipated completion date. Exhibit N (attached). AHCA

stressed the need for expedited processing as well given the relationship of the request to ongoing federal court litigation. *Id.*

71. CMS responded to AHCA on November 6, 2023, stating that no information could be released at that time and that there were no updates available. Exhibit O (attached). Additionally, CMS cited *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976) as justification to handle FOIA requests (such as this one) on a “first-in, first-out” processing basis. *Id.* AHCA responded the same day seeking an explanation as to why CMS was now providing an inconsistent explanation for its delay in processing and unwillingness to release reviewed records, especially considering the exigency of the request. Exhibit P (attached). CMS’ response was that the records were, in fact, located. However, because they “*may* contain a high amount of PII and PHI which needs to be redacted[,]” the agency determined the records could only be processed by a FOIA specialist (who was not yet assigned), and the request was effectively stalled. Exhibit Q (attached)(emphasis added).

72. CMS has not contacted AHCA since November 6, 2023. Nor has CMS issued a determination under 5 U.S.C. § 552(a)(6)(A)(i). CMS has produced no responsive records.

Claims for Relief

COUNT I

Unlawful Withholding of Agency Records in Violation of FOIA, 5 U.S.C. § 552(a)

73. Plaintiffs reallege and incorporate by reference each of the preceding allegations, contained in paragraphs 1–72, as if fully set forth here.

74. FOIA requires Defendants to process requests within express statutory deadlines, *see* 5 U.S.C. § 552(a)(6), and to promptly provide the requested records or the reasonably segregable portions of records not subject to a FOIA exemption to the requester, *see id.* § 552(a)(3).

75. AHCA submitted two FOIA requests on August 28, 2023. HHS identified “unusual circumstances” warranting additional time for the agency to issue its determination as to AHCA’s request, but HHS did not comply with the 30-day statutory deadline. Within 30 working days from receipt of AHCA’s request, HHS did not issue a determination under 5 U.S.C. § 552(a)(6) that, at the very least, stated that the agency had (i) gathered and reviewed documents, (ii) determined and communicated the scope of the documents it intended to produce and withhold, and the reasons for withholding any documents, and (iii) informed AHCA that it can appeal whatever portion of the determination was adverse. *CREW*, 711 F.3d at 188.

76. CMS similarly did not comply with the statutory deadline to issue a determination. Even assuming unusual circumstances warranted additional time (something CMS never directly stated), within 30 working days from receipt of AHCA’s request, CMS did not issue a final determination under 5 U.S.C. § 552(a)(6) that, at the very least, stated that the agency had (i) gathered and reviewed documents, (ii) determined and communicated the scope of the documents it intended to produce and withhold, and the reasons for withholding any documents, and (iii) informed AHCA that it can appeal whatever portion of the determination was adverse. *CREW*, 711 F.3d at 188.

77. The agencies also violated the statutory deadline for producing records promptly to AHCA. Neither HHS nor CMS made records “promptly available” to AHCA. 5 U.S.C. § 552(a)(3)(A). No records were produced.

78. HHS stated that the agency reviewed 276 pages of responsive records, but the agency claimed that the entirety of those responsive records is exempt from disclosure under 5 U.S.C. § 552(b)(5). *See id.* This claim fails for several reasons.

79. As a threshold issue, no agency may ignore “the first condition of Exemption 5, that the communication be ‘intra-agency or inter-agency.’” *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 12 (2001). Nor may an agency apply Exemption 5 as “a label to be placed on any document the Government would find it valuable to keep confidential.” *Id.*

80. Because Exemption 5 explicitly exempts only “inter-agency or intra-agency” communications, 5 U.S.C. § 552(b)(5), it does not apply to agency communications with outside parties, *see, e.g., Am. Oversight v. HHS*, 380 F. Supp. 3d 45, 55 (D.D.C. 2019).

81. To the extent that HHS purportedly relied on attorney-client privilege to withhold responsive records, the agency has not adequately demonstrated that “the information in those documents was communicated to or by an attorney as part of a professional relationship” or that the information was confidential. *Mead Data Cent. Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 253 (D.C. Cir. 1977).

82. “Like all privileges” protected by FOIA, courts have “narrowly construed” the attorney-client privilege by limiting its application “to those situations in which its purposes will be served.” *Coastal States Gas Corp. v. DOE*,

617 F.2d 854, 862 (D.C. Cir. 1980). HHS has not carried its burden in this case to withhold records under the attorney-client privilege. *See* 5 U.S.C. § 552(a)(4)(B).

83. As to the work-product privilege, “it has uniformly been held to be limited to documents prepared in contemplation of litigation.” *Coastal States*, 617 F.2d at 864. HHS invoked the work-product privilege without any meaningful explanation as to how it applies here. Consequently, HHS has not carried its burden to demonstrate that it properly has withheld information under the work-product privilege. *See* 5 U.S.C. § 552(a)(4)(B).

84. To the extent that HHS purported to rely on “the deliberative process privilege” to withhold records, the agency failed to establish that the responsive records are “both predecisional and deliberative.” *CREW v. U.S. Postal Serv.*, 557 F. Supp. 3d 145, 155 (D.D.C. 2021). “The deliberative process privilege does not shield documents that simply state or explain a decision the government has already made.” *Id.* Nor does deliberative process privilege apply to agency communications with outside parties.

85. Even if some portions of the responsive records potentially may qualify for the deliberative process privilege, HHS still “must show that the disclosures of information withheld would harm the agency’s deliberative process.” *Danik v. DOJ*, 463 F. Supp. 3d 1, 10 (D.D.C. 2020). HHS failed to do that here: the agency merely “found that it is reasonably foreseeable that disclosure would harm *an interest* protected by *one or more* of the exemptions to the FOIA’s general rule of disclosure and/or that disclosure is prohibited by law.” Exhibit I (emphasis added). HHS made no particular showing of harm.

86. To make the requisite showing, HHS must “identify *specific harms* to the relevant protected interests that it can reasonably foresee would actually ensue from disclosure of the withheld materials” and “connect[] the harms in [a] meaningful way to the information withheld.” *Danik*, 463 F. Supp. 3d at 10 (emphasis added). HHS did not do that. The agency identified no specific harm and no particular privilege implicated by disclosure. Nor did HHS explain in any meaningful way how it connected the unspecified harm to the 276 pages of responsive records that the agency entirely withheld.

87. Moreover, records covered by the deliberative process privilege under Exemption 5 must reflect the “deliberative process that precedes most decisions of government agencies.” *Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1047 (D.C. Cir. 1982). The privilege does not cover “factual information contained in [such] document[s].” *Coastal States Gas Corp.*, 617 F.2d at 867.

88. An agency “must disclose those portions of predecisional and deliberative documents that contain factual information that does not inevitably reveal the government’s deliberations.” *Public Citizen, Inc. v. OMB*, 598 F.3d 865, 877 (D.C. Cir. 2010) (internal quotation marks omitted); *accord Reporters Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 366–67 (D.C. Cir. 2021).

89. In its final response to AHCA’s request, HHS withheld 276 pages of responsive records *in their entirety* under Exemption 5 without disclosing any factual information from those records. Indeed, HHS has disclosed *no information* responsive to AHCA’s request. CMS similarly has provided no responsive records to AHCA.

90. Based upon information and belief, it is not possible that the responsive records identified by HHS include no factual information. FOIA requires HHS to segregate factual portions of responsive records. *See* 5 U.S.C. § 552(a)(3)(B). HHS has not carried its burden to demonstrate that no such factual information can be segregated.

91. This Court “has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld.” 5 U.S.C. § 552(a)(4)(B).

COUNT II

Failure to Conduct Searches Reasonably Calculated to Locate All Responsive Records, in Violation of FOIA, 5 U.S.C. § 552(a)(3)

92. Plaintiffs reallege and incorporate by reference each of the preceding allegations, contained in paragraphs 1–72, as if fully set forth here.

93. FOIA requires HHS and CMS to conduct searches for records that are “reasonably calculated to uncover all relevant documents.” *Weisberg*, 705 F.2d at 1351.

94. HHS and CMS have not provided AHCA with all responsive, non-exempt records in response to the FOIA requests because the agencies have failed to conduct searches reasonably calculated to uncover all relevant documents.

95. In violation of FOIA, HHS impermissibly limited the scope of its search by refusing to search for agency communications with the names and email addresses of the outside parties (employees with Florida Health Justice Project and the National Health Law Program) and the topic of discussion (Medicaid redeterminations), which AHCA “reasonably described” in its request and in

subsequent communications with the agency. *Kidder v. FBI*, 517 F. Supp. 2d 17, 23 (D.D.C. 2007).

96. When responding to a FOIA request, an agency cannot intentionally exclude from its searches a platform or location that may contain responsive records. HHS, however, appears to have done that here. There is no evidence that HHS “properly searched the files of all potential custodians who reasonably could have possessed” responsive records. *Heffernan v. Azar*, 417 F. Supp. 3d 1, 12 (D.D.C. 2019).

97. In conducting its search, HHS located and reviewed responsive records, but the agency never explained in any meaningful way where it searched or whether it could have expanded the scope of its search to confirm or to refute the existence of the other responsive records. HHS’s search was inadequate.

98. As to the CMS Request, the agency has not communicated anything to AHCA by way of a final determination.

Prayer for Relief

Plaintiffs pray that this Court:

A. Declare that the defendant agencies violated the statutory deadlines to issue a determination, 5 U.S.C. § 552(a)(6), and to make records promptly available, *id.* § 552(a)(3)(A);

B. Declare that the defendant agencies unlawfully withheld entire documents, or portions of responsive records, in violation of 5 U.S.C. § 552(a)(3)(B);

C. Declare that the defendant agencies failed to conduct searches reasonably calculated to locate all responsive records in violation of 5 U.S.C. § 552(a)(3);

D. Order the defendant agencies to immediately conduct reasonable searches for all records responsive to the requests, as required by 5 U.S.C. § 552(a)(3)(C);

E. Order the defendant agencies to immediately and expeditiously provide plaintiffs with all records responsive to the requests;

F. Award reasonable costs and attorney's fees as provided in 5 U.S.C. § 552(a)(4)(E) and/or 28 U.S.C. § 2412(d);

G. Fully expedite this action pursuant to 28 U.S.C. § 1657(a); and

H. Grant such other relief as the Court may deem just and proper.

December 19, 2023

Respectfully submitted,

ANDREW T. SHEERAN, GENERAL
COUNSEL, AGENCY FOR HEALTH CARE
ADMINISTRATION

/s/ Christopher C. Torres
CHRISTOPHER C. TORRES
Chief Litigation Counsel
Florida Bar I.D. No. 0479209
Christopher.Torres@ahca.myflorida.com
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop #3
Tallahassee, Florida 32308
Telephone: (850) 412-3646
Facsimile: (850) 921-0158

/s/ Andrew T. Sheeran
Andrew T. Sheeran
Fla. Bar No. 0030599
GENERAL COUNSEL
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop #3
Tallahassee, Florida 32308
(850) 412-3670
Andrew.Sheeran@ahca.myflorida.com

/s/ Jeffrey S. Beelaert
Jeffrey S. Beelaert*
STEIN MITCHELL BEATO & MISSNER LLP
2000 K Street NW, Suite 600
Washington, DC 20006
Tel: (202) 661-0923
Fax: (202) 296-8312
Email: jbeelaert@steinmitchell.com

* Pro hac vice admission pending

*Counsel for Florida Agency for Health Care
Administration*

Ashley Moody
ATTORNEY GENERAL

/s/ James H. Percival
James H. Percival (FBN 1016188)
CHIEF OF STAFF

Henry C. Whitaker (FBN 1016188)
SOLICITOR GENERAL

Natalie P. Christmas (FBN 1031175)
Counselor to the Attorney General

Office of the Attorney General
The Capitol, PI-01
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 410-2672 (fax)
james.percival@myfloridalegal.com
Counsel for the State of Florida

Counsel for Plaintiffs

Andrew J. McGinley
/s/ Andrew J. McGinley
(FBN 1013545)
General Counsel

Office of the General Counsel
Florida Department of Children and Families
2415 North Monroe St.
Suite 400
Tallahassee, FL 32303
(850) 717-4118
Andrew.McGinley@myflordiafamilies.com

*Counsel for Plaintiffs Florida
Department of Children & Families*