

EXHIBIT 4



Garfield Daley
Government Information Specialist
FOI/Privacy Acts Division
Office of Public Affairs
Department of Health and Human Services

February 27, 2014

VIA FED EX

Case NO. 2013-1136GD

Dear Mr. Daley:

Landmark Legal Foundation (“Landmark”) is in receipt of your letter, dated February 10, 2014, and received on February 19, 2014 regarding Landmark’s Freedom of Information Act (“FOIA”) request (“Request”). Landmark is seeking records relating to the use of personal email from identified employees of the Department of Health and Human Services (“HHS” or “Department”).

You state, “It has been determined that no records exist relating to the information you requested within [HHS]. Therefore, there are no responsive records to your request.” You then refer Landmark to HHS policies regarding the use of information technology within the Department. Landmark requests a more fulsome explanation of the search your office coordinated and/or performed in reaching the determination that the Department has no responsive records.

HHS Policy 2013-0004 (HHS Policy for Personal Use of Information Technology Resources) permits “limited acceptable personal use of Department IT resources by [HHS personnel].” It thus stands to reason that HHS personnel – at least some of the time – access their personal email systems through the use of Department IT resources and, conceivably could use their personal email systems to conduct agency business.

As you are aware, in conducting a search pursuant to a FOIA request, an agency is required to conduct a one that is “reasonably calculated to uncover all responsive records.” *Fontanez v. U.S. Customs Service*, 293 F. Supp. 2d 51 (D.D.C. 2003). When challenged, an agency may rely on affidavits provided by appropriate agency officials, that are “reasonably detailed... setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched.” *Wilderness Soc. v. U.S. Dep. Of Interior*, 344 F. Supp. 2d 1 (D.D.C. 2004), quoting *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321 326 (D.C. Cir. 1999).

Considering the representation from HHS that it identified no responsive records and the Department's policy on permitting "limited personal use" of IT resources, Landmark respectfully requests your response to the following inquiries:

1. What direction was given to identified agency personnel regarding performing a search of whether they were in possession of records evincing the use of personal email (or text message or instant message) to conduct agency business?
2. What type of search was performed by your office for responsive records?
3. What search terms were utilized to identify responsive records?
4. What repositories of information were searched to determine whether responsive records existed?
5. Were identified agency personnel asked to search their personal email databases for responsive records?

Thank you for your attention to this important matter. Your timely responsive to this inquiry will aid in determining whether Landmark will appeal the February 10, 2014 response. Landmark would appreciate a response to this letter by March 7, 2014.

Please feel free to contact me with any questions you may have. You may contact me via email or by phone at Landmark's Virginia office.

Sincerely,



Michael J. O'Neill
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Assistant General Counsel