EXHIBIT 6

LANDMARK
LEGAL FOUNDATION
THE RONALD REAGAN LEGAL CENTER

Director, New Division
U.S. Department of Health and Human Services
Mary E. Switzer Bldg.
330 C Street, S.W. Rm. 2221
Washington, DC 20201

March 19, 2014

VIA FED EX

Case No. 2013-1136GD

Freedom of Information Act Appeal

To Whom It May Concern:

Landmark Legal Foundation ("Landmark") submits this administrative appeal to the Department of Health and Human Services' ("the Department," "the Agency" or "HHS") determination regarding Landmark's July 16, 2013 Freedom of Information Act ("FOIA") request. (Exhibit 1, attached.)

After six months of inaction, HHS issued a "no records" decision, despite admitting that no meaningful search for responsive records was ever conducted. Moreover, the Department's failure to conduct an adequate search was based on concerns of inconvenience rather than on an evaluation of the FOIA's statutory obligations. Landmark seeks in this appeal an immediate directive that HHS conduct a search reasonably calculated to locate responsive records by all agency personnel subject to this request.

Background

Landmark seeks records relating to HHS employees' use of personal communication services in the conduct of official agency business. Landmark requested, "Records evincing the use of any private or personal email account, text messaging service, instant messaging service,

or any other private electronic communication, included but not limited to those sent via any social media service such as Facebook, Google Plus or other private platform, for the conduct of HHS business from January 20, 2009 to July 15, 2013." Landmark limited application of its request to five specified categories of HHS officials including, but not limited to, political appointees located within the Department's Headquarters and individuals within the Office of the Secretary. (Exhibit 1.)

Landmark also sought expedited processing and a waiver of any fees incurred as a result of processing the request.

On August 1, 2013, HHS denied Landmark's request for expedited processing and delayed reaching a decision on whether to impose any fees "once [the office of Public Affairs] ascertains that the billable costs will exceed our $25.00 billing threshold."

By letter dated February 10, 2014, HHS notified Landmark that it had "determined that no records exist relating to the information you requested within the Department of Health and Human Services (HHS)." (Exhibit 2.) Landmark received this letter on February 19, 2014. On February 27, 2014 Landmark submitted a letter of inquiry to Mr. Garfield Daley in the Department's Office of Public Affairs seeking additional information relating to the search for responsive records. Specifically, Landmark inquired as to what direction was given to identified agency personnel regarding performing a search, what type of search was performed, what search terms were utilized and whether identified agency personnel were asked to search their personal email databases for responsive records. (Exhibit 3.)

On March 4, 2014 Mr. Daley responded via email that the Department's search for responsive records "was based on an earlier FOIA request, which was submitted by the Associated Press." He continued, "In response to [the AP FOIA request], the OCIO [Office of

Chief Information Officer] informed our office that there is no formal mechanism for requesting or approving alternate email addresses and it simply cannot know what request might have been made." (Exhibit 4.)

In response to Landmark's inquiry of whether identified agency personnel were asked to search their personal email databases for responsive records, Mr. Daley explained:

> *Perhaps a search by the approximately all 242 political employees can be performed, but this may be very long and tedious. All 242 may have to perform the search themselves, unless the OCIO has some form of ticket number for specific requests. However, keep in mind that it's not at all clear what the search terms might be for such a request. I can tell you that usually it is not uncommon for HHS employees have different govt (sic) email addresses with different naming formats. Also, as much as the use of personal email addresses to conduct govt (sic) business, is discouraged and not recommended by the OCIO, the OCIO has no real way of knowing if an employee is using his/her own personal email address while performing their duties.* (Emphasis added.)

Landmark submits this administrative appeal because the Department failed to conduct a search reasonably calculated to uncover all responsive records. Moreover, as a result of HHS's insufficient search, it has failed to disclose any responsive records. Mr. Daley acknowledged that it is possible to perform a search of "political employees" to determine the extent to which those individuals used their personal email to conduct agency business. Further, he has acknowledged that HHS has no way of knowing or tracking whether employees use their respective personal emails to conduct agency business. This disclosure, made by HHS's senior FOIA coordinator, makes it all the more important that the agency take affirmative steps to ensure that its employees are complying with their statutory duty to preserve public records.

Landmark insists that HHS fulfill its duties under the FOIA, i.e., "perform a search reasonably calculated to uncover responsive records," by directing the 242 political employees described by Mr. Daley to conduct a search of their personal emails and/or text messages to determine whether these repositories contain any agency records. In the event these individuals

indicate they have utilized their personal emails to conduct agency business, such materials constitute agency records and are thus subject to production under the FOIA.

Analysis

Landmark has identified two issues pertaining to HHS's determination that no agency records exist. One, whether HHS performed a search reasonably calculated to uncover responsive documents; and two, whether emails or other electronic forms of communication constituting official agency activities residing on personal email databases or other electronic storage media constitute official agency records and are thus subject to disclosure.

HHS Failed To Conduct A Search Reasonably Calculated To Uncover Responsive Records.

In conducting a search pursuant to a FOIA request, an agency is required to conduct 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). The test is not whether a search "can be performed." Nor is the test whether a search "may be very long and tedious." The test is whether the agency has a statutory obligation to search for responsive records.

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).

HHS has not provided any type of details regarding the search it performed for records evincing the use of personal emails (or the use of any other medium such as texting) to conduct agency business. It has also failed to provide the search terms that it utilized in determining that

no records exist. Mr. Daley's March 4, 2014, email states that the response to Landmark's request "was based on an earlier FOIA" submitted by the Associated Press ("AP"). The AP request sought records concerning the establishment of alias emails for political appointees. While Landmark has submitted a request regarding political appointees' alias email accounts, the request in question in this appeal involves the use of personal emails to conduct official agency business. Therefore the details related to the AP request are irrelevant.

Mr. Daley concedes that it would be possible for the approximately 242 covered employees to perform a search of their personal emails. He also concedes that OCIO (and by extension HHS) has no "real way of knowing if an employee is using his/her personal email address while performing their duties." In light of the fact that HHS doesn't know whether employees use their personal email to conduct agency business and that it's possible to perform such a search, HHS should – at a minimum – conduct an inquiry as to whether employees use their personal email to conduct official agency business. Should any of those covered employees acknowledge using their personal emails, the FOIA requires a search of those repositories for any "agency records."

Any Emails Or Other Forms Of Electronic Communication Such As Text Messages Originating From Personal Emails Or Personal Texts Involving Official Agency Business Constitute Agency Records Under The FOIA.

Actual possession of the documents is not the proper test of whether a record is within the agency's control. When an agency employee creates a record "in the legitimate conduct of [his] official duties" at the agency, and the agency does not indicate that it "lacks authority over, or the ability to retrieve [the records]," such records are "within the agency's control for purposes of the FOIA." *Judicial Watch v. Dept. of Energy*, 412 F.3d 125, 133 (D.C. Cir. 2005). HHS's

policy, however, abdicates the agency's responsibility to maintain or secure control over its officials' public records.

It is crucial to note, the "burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not agency records." *Tax Analysts v. Department of Justice*, 492 U.S. 136, 142 n. 3 (1998). Moreover, should an analysis of whether a document constitutes an "agency record" provide an inconclusive result, the document would constitute an "agency record" and would be subject to production under the FOIA. *Judicial Watch v. United States Secret Service*, 726 F.3d 208, 220 (D.C. Cir. 2013).

As explained by the Supreme Court, the term "agency records" encompasses those documents that an agency "create[s] or obtain[s]," and "control[s]... at the time the FOIA request [was] made." *Judicial Watch v. United States Secret Service*, 726 F.3d 208, 216 ((D.C. Cir. 2013) *citing Tax Analysts v. Dept. of Justice*, 492 U.S. 136, 144-45. (1998)). Courts consider four factors to determine whether an agency has sufficient control over a document to make the document an "agency record" courts consider four factors: (1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which the agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files. *Tax Analysts v. Dept. of Justice*, 845 F.2d 1060, 1069 (D.C. Cir. 1988).

Although these factors are routinely utilized to determine whether a record is within the agency's control, it is not necessary for all four factors to be given equal weight nor is it necessary for all four factors to be present. While the D.C. Circuit stated in *Tax Analysts* that, "all four factors must be present before an agency has sufficient 'control' over a document to

make it an 'agency record.'" *Tax Analysts*, 845 F.2d at 1069. It has also stated that "its descriptions [of the four factor test] do not make clear whether the factors should receive equal weight." *Judicial Watch v. United State Secret Service*, 726 F.3d at 220. The application of these four factors "reveals its considerable indeterminacy." *Judicial Watch*, 726 F.3d at 220. Thus, "In some cases [the D.C. Circuit has] heeded the suggestion in *Tax Analysts*, finding that documents were not 'agency records' when fewer than all four factors pointed in that direction. In other cases we have found that documents were 'agency records' even though fewer than four factors indicated as much." Id.

Mr. Daley states that the OCIO has "no real way of knowing if an employee is using his/her own personal email address while performing their duties." HHS Policy for Records Management for Emails (HHS-OCIO-2008-0002.01) states, in relevant part, "all email records must be maintained in a manner that allows each to be accessible and readable for its NARA (National Archives and Records Act) – approved retention period." Moreover, 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]." Thus, the Department is statutorily obligated to: (1) be aware whether its employees are using personal email addresses while performing their duties: and (2) ensure those employees are taking the necessary steps to preserve any emails or other communications such as text messages are preserved.

If employees have taken steps to "relinquish control" over any relevant emails by transferring those emails into an HHS database, it is incumbent upon the Department to inform FOIA requesters of such action. An employee who uses his/or her personal email to conduct official agency business maintains the "ability to use and dispose the record." Further,

communications transferred to or from an employee's personal email account are presumably read and relied upon by the employee in question. Finally, the Department has no way of knowing whether personnel have integrated emails or text messages from non-government accounts into HHS record systems.

Conclusion

The records sought by Landmark's July 16, 2013 FOIA request constitute agency records under all applicable tests. HHS must conduct an adequate search for all responsive records whether maintained in government, private or personal electronic repositories. All such records relating to HHS business are "agency records" subject to disclosure under the FOIA.

Landmark requests your office direct covered agency personnel to search all personal email or any other personal communication media used to conduct official agency business during the time period relevant to Landmark's request. Given the extensive and unexplained delay in responding to this request, HHS should be directed to expedite processing of this request. Finally, full production of appropriate agency records must also be directed.

Thank you for your attention to this important matter.

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