

C A M P A I G N F O R

ACCOUNTABILITY

December 20, 2018

By Fax: FOIARequest@hhs.gov

Michael Marquis
Freedom of Information Officer
Department of Health and Human Services
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue SW
Washington, D.C. 20201

Re: Freedom of Information Request

Dear Mr. Marquis:

Campaign for Accountability (“CfA”) makes this request for records pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. §§552, et seq., and the Department of Health and Human Services (“HHS”) implementing regulations, 45 C.F.R. Part 5.

Specifically, CfA requests that HHS produce the following within 20 business days:

All calendars or calendar entries for Diane Foley, Deputy Assistant Secretary for Population Affairs, from the date that Ms. Foley joined HHS to the date the search is conducted, including any calendars maintained on her behalf (e.g., by an administrative assistant or a scheduler).

For calendar entries created in Outlook or similar programs, the documents should be produced in “memo” form to include all invitees, any notes, and all attachments. Please do not limit your search to Outlook calendars. CfA requests that the production of any calendar—paper or electronic, whether on government-issued or personal devices—used to track or coordinate how Ms. Foley allocates her time on agency business.

By way of background, as Deputy Assistant Secretary for Population Affairs Ms. Foley leads the office responsible for administering the Title X Federal Family Planning Program.¹ Prior to her appointment Ms. Foley served as president and CEO of Life Network, which operated two crisis pregnancy centers that oppose abortion and certain types of contraception.²

In addition to the records requested above, please provide records reflecting the processing of this request, including any tracking sheets; records sufficient to identify search terms used, and

¹ Ally Boguhn, *Trump’s HHS Installs Fake Clinic Leader to Oversee Family Planning Funds*, REWIRE.NEWS (May 30, 2018), available at <https://rewire.news/article/2018/05/30/trumps-hhs-installs-fake-clinic-leader-oversee-family-planning-funds/>.

² *Id.*

locations and custodians searched. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

CfA seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions. Our request includes any attachments to these records. No category of material should be omitted from search, collection, and production.

Please search all records regarding agency business. Please do not exclude searches of files or emails in the personal custody of agency officials, such as personal email accounts. Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.³ It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; CfA has a right to access those files even if they have not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.⁴

In addition, please note that in conducting a “reasonable search” as required by law, HHS must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered HHS’s prior FOIA practices unreasonable. In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.⁵ Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but HHS’s archiving tools would capture that email under Capstone. Accordingly, CfA insists that HHS use the most up-to-date technologies to search for responsive information and take steps to ensure that the most

³ See *Competitive Enterprise Institute v. Office of Science & Tech. Policy*, 827 F.3d 145, 149—150 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955—956 (D.C. Cir. 2016).

⁴ See *Competitive Enterprise Institute v. Office of Science & Tech. Policy*, 827 F.3d 145, 149—150 (D.C. Cir. 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

⁵ Presidential Memorandum – Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), available at <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), available at <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

complete repositories of information are searched. CfA is available to work with HHS to craft appropriate search terms. However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”⁶ If it is your position that any portion of the requested records is exempt from disclosure, CfA requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”⁷ Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”⁸ Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”⁹

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.¹⁰ Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, CfA welcomes an opportunity to discuss its request with HHS before you undertake your search or incur search or duplication costs. By working together at the outset, CfA and HHS can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format via email at ahuling@campaignforaccountability.org. Alternatively, our mailing address is Campaign for Accountability, 611 Pennsylvania Avenue SE, #337, Washington DC 20003. If it will accelerate the release, please also provide responsive material on rolling basis.

⁶ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).

⁷ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁸ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

⁹ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

¹⁰ *Mead Data Central*, 566 F.2d at 261.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 45 C.F.R. § 5.54, CfA requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute significantly to a better understanding of relevant government procedures by the general public. Moreover, the request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii).¹¹

CfA requests a waiver of fees because disclosure of the requested information is in the public interest because it is “likely to contribute significantly to public understanding of the operations or activities of the government.”¹² The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how officials conduct the public’s business.

The records CfA seeks will help the public understand whose interests HHS is considering as it makes decisions that have a profound effect on the ability of individuals, and especially women, to make their own family planning choices.

This request is primarily and fundamentally for non-commercial purposes. As a 501(c)(3) organization, CfA does not have a commercial purpose and the release of the information requested is not in CfA’s financial interest. CfA is committed to protecting the public’s right to be aware of the activities of government officials and to ensuring the integrity of those officials. CfA uses a combination of research, litigation, and advocacy to advance its mission. CfA will analyze the information responsive to this request, and will share its analysis with the public, either through memoranda, reports, or press releases. In addition, CfA will disseminate any documents it acquires from this request to the public through its website, www.campaignforaccountability.org.

Accordingly, CfA qualifies for a fee waiver.

News Media Fee Waiver Request

CfA also asks that it not be charged search or review fees for this request because CfA qualifies as a “representative of the news media” pursuant to the FOIA and HHS regulation 45 C.F.R. §5.53. In *Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989), the Court of Appeals for the District of Columbia Circuit found the National Security Archive was a representative of the news media under the FOIA, relying on the FOIA’s legislative history, which indicates the phrase “representative of the news media” is to be interpreted broadly; “[i]t is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected . . . In fact, *any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a ‘representative of the news media.’*” 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (emphasis added), cited in *id.* CfA meets this test.

¹¹ See, e.g., *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

¹² 45 C.F.R. § 5.54(a).

CfA routinely and systematically “gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.”¹³ It does so by regularly posting documents it receives through open records laws, including the FOIA, to its website,¹⁴ analyzing those documents, and publishing reports, letters, and further requests based those documents.¹⁵ Based on its publication activities, CfA qualifies as a “representative of the news media” under the FOIA and agency regulations.

Conclusion

CfA looks forward to working with HHS on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact me at 202-780-5750. Further, if CfA’s request for a fee waiver is not granted in full, please contact me immediately upon making such a determination.

Thank you for your assistance.

Sincerely,



Alice C.C. Huling
Counsel

¹³ 45 C.F.R. § 5.3; 5 U.S.C. § 552(a)(4)(A)(ii)(III).

¹⁴ Letter from Alice C.C. Huling, Counsel, Campaign for Accountability, to Daniel R. Levinson, Inspector General, U.S. Department of Health & Human Services (Dec. 17, 2018), *available at* <https://campaignforaccountability.org/work/complaint-against-office-of-refugee-resettlement-for-proselytizing-impeding-access-to-abortion/>; Letter from Daniel Stevens, Executive Director, Campaign for Accountability, to Thomas B. Pahl, Acting Director, Bureau of Consumer Protection, Federal Trade Commission (July 19, 2017), *available at* <https://campaignforaccountability.org/work/ftc-solar-complaint/>.

¹⁵ Alice C.C. Huling, *Pro-Choice or Anti-Abortion, We Should All Agree Women Need Real Healthcare*, MEDIUM, (Nov. 13, 2018), *available at* <https://campaignforaccountability.org/pro-choice-or-anti-abortion-we-should-all-agree-women-need-real-healthcare/>; Campaign for Accountability, Utah Commission for the Stewardship of Public Lands (Sept. 7, 2017), *available at* <https://campaignforaccountability.org/work/utah-commission-stewardship-public-lands/>; CfA Complaints Against the Heidi Group (Sept. 26, 2017), *available at* <https://campaignforaccountability.org/work/cfa-complaints-against-the-heidi-group/>.