

EXHIBIT C

C A M P A I G N F O R

ACCOUNTABILITY

August 1, 2019

By EMAIL: 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:

1. All communications, meeting notices, meeting agendas, informational materials, draft legislation, talking points, reports, disclosures, or other documents sent to, received by, or exchanged with any employee of the HHS Office of Population Affairs, regarding the implementation date of the final revised Title X rule.¹
2. All communications, meeting notices, meeting agendas, informational materials, draft legislation, talking points, reports, disclosures, or other documents sent to, received by, or exchanged with any employee of the HHS Office of Population Affairs, regarding the Health Resources & Services Administration 340B Drug Pricing Program and the responsibility of clinics to maintain, distribute, or dispose of 340B products.²

Please provide all responsive records from January 1, 2018, to the date the search is conducted.

By way of background, in May 2018, the Trump Administration first announced a proposal to bar “clinics that provide abortion services or referrals” from receiving Title X family planning

¹ See HHS Release Final Title X Rule Detailing Family Planning Grant Program, HHS.GOV, (Feb. 22, 2019), available at <https://www.hhs.gov/about/news/2019/02/22/hhs-releases-final-title-x-rule-detailing-family-planning-grant-program.html>.

² See Health Resources & Services Administration, *340B Drug Pricing Program*, HRSA.GOV, (May 2019), available at <https://www.hrsa.gov/opa/index.html>.

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funding.³ HHS announced on February 22, 2019 the final rule change is “designed to increase the number of patients served and improve the quality of their care.”⁴ The final rule change solidified a number of issues, specifically requiring financial and physical separation between Title X programs and abortion facilities, and prohibited referral for “abortion as a method of family planning.”⁵ A federal appeals court allowed the new rule to go into effect as a series of legal challenges are litigated.⁶ On July 16, 2019 certain Title X recipients began announcing they would withdraw from the Title X program, instead of complying with the Trump administration’s new Title X requirements.⁷ Since the announcement of withdrawal by certain Title X recipients, Politico has reported health clinics planning to exit the Title X program may have to “destroy or return tens of thousands of dollars of contraceptives and other medications.”⁸

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 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

³ See Ariana Eunjung Cha, Juliet Eilperin, and Josh Dawsey, *Trump Administration Will Pull Funds from Groups That Perform Abortions or Provide Referrals*, THE WASHINGTON POST, (May 18, 2018), available at https://www.washingtonpost.com/news/to-your-health/wp/2018/05/18/planned-parenthood-likely-to-lose-millions-under-trump-administrations-new-title-x-family-planning-rules/?utm_term=.883876621139.

⁴ See *supra* note 1.

⁵ *Id.*

⁶ See Jonathan Stempel, *Trump Abortion Referral ‘Gag Rule’ Survives Demands for Emergency Halt*, Reuters, (July 11, 2019), available at <https://www.reuters.com/article/us-usa-abortion-ruling/trump-abortion-referral-gag-rule-survives-demand-for-emergency-halt-idUSKCN1U62JX>.

⁷ See Sarah McCammon, *Planned Parenthood Officials Say They’ve Halted Use of Title X Family Planning Funds*, NPR, (July 17, 2019), available at <https://www.npr.org/2019/07/17/742841170/planned-parenthood-officials-say-theyve-halted-use-of-title-x-family-planning-fu>.

⁸ See Rachel Roubein and Alice Miranda Ollstein, *Clinics Exiting Family Planning Program May Have to Destroy Contraceptives*, Politico, (July 26, 2019), available at <https://www.politico.com/story/2019/07/26/family-planning-clinics-trump-rules-1617956>.

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the Federal Records Act and FOIA.⁹ 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.¹⁰

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.¹¹ 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 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.”¹² 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.”¹³ 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

⁹ 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).

¹⁰ 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)).

¹¹ 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>.

¹² *FOIA Improvement Act of 2016* § 2 (Pub. L. No. 114–185).

¹³ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

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information.”¹⁴ 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.’”¹⁵

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.¹⁶ 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.

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).¹⁷

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.”¹⁸ 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.

¹⁴ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223—24 (D.C. Cir. 1987) (emphasis in original).

¹⁵ *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)).

¹⁶ *Mead Data Central*, 566 F.2d at 261.

¹⁷ *See, e.g., McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

¹⁸ 45 C.F.R. § 5.54(a).

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HHS changed the long-standing directives of awarding Title X funding, noting the changes are “designed to increase the number of patients served and improve the quality of their care.”¹⁹ With the Title X changes, certain health care clinics are prioritizing the provision of comprehensive family planning services without the imposed restraints, and are foregoing the federal funding they were awarded. The records CfA seeks will help the public understand whose interest’s HHS is considering as it makes decisions that have a profound effect on the ability of individuals 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.

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.”²⁰ It does so by regularly posting documents it receives through open records laws, including the FOIA, to its website,²¹ analyzing those documents, and publishing reports, letters,

¹⁹ See *supra* note 2.

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

²¹ 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

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and further requests based those documents.²² 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 x. 103. 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,

A handwritten signature in cursive script that reads "Julia C. Long".

Julia C. Long
Research Associate

Thomas B. Pahl, Acting Director, Bureau of Consumer Protection, Federal Trade Commission (July 19, 2017), *available at* <https://campaignforaccountability.org/work/ftc-solar-complaint/>.

²² 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/>.