

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CAMPAIGN FOR ACCOUNTABILITY,
611 Pennsylvania Avenue SE, #337
Washington, DC 20003

Plaintiff,

v.

Case No. 20-cv-0491

U.S. DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
200 Independence Avenue SW
Washington, DC 20201

Defendant.

COMPLAINT

1. Plaintiff Campaign for Accountability brings this action against the U.S. Department of Health and Human Services under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because Defendant U.S. Department of Health and Human Services has failed to comply with the applicable time-limit provisions of the FOIA, Campaign for Accountability is deemed to have constructively exhausted its administrative remedies pursuant to 5 U.S.C.

§ 552(a)(6)(C)(i) and is now entitled to judicial action enjoining the agency from continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff Campaign for Accountability (“CfA”) is a nonpartisan, non-profit section 501(c)(3) organization primarily engaged in disseminating information to the public. CfA uses research, litigation, and communications to expose misconduct and malfeasance in public life. Through research and FOIA requests, CfA uses the information it gathers, and its analysis of it, to educate the public about the activities and operations of the federal government, local and state governments and other public actors through reports, published analyses, press releases, and other media. The organization is incorporated under the laws of the District of Columbia.

6. Defendant the U.S. Department of Health and Human Services (“HHS”) is a department of the executive branch of the U.S. government headquartered in Washington, DC, and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). HHS has possession, custody, and control of the records that CfA seeks.

STATEMENT OF FACTS

7. Title X is a federal grant program dedicated to providing comprehensive family planning and related preventative healthcare services and is designed to prioritize low-income individuals.

8. On March 4, 2019, HHS’s Office of Population Affairs (“OPA”) published its final rule prohibiting referral for abortion under Title X and requiring “physical and financial separation” between the provision of Title X projects and abortion-related services. HHS required grant recipients to submit assurances and action plans documenting steps to come into compliance with the new rule by August 19, 2019. Those recipients not in compliance, or those voluntarily

withdrawing from the program due to the restrictions, could be required to return or destroy thousands of dollars of contraceptives and medications acquired at a discount through the program.

9. Teen Pregnancy Prevention (“TPP”) Program is a federal grant program providing funding to organizations implementing evidence-based, medically accurate, and age appropriate programs to reduce adolescent pregnancy.

10. Obria Medical Clinics, together with its affiliate Obria Group (collectively “Obria”), is a collection of nonprofit pregnancy centers that do not offer contraceptive choices, including condoms, beyond fertility awareness and oppose abortion without exception.

11. Obria applied for Title X grant funding in fiscal years 2018 and 2019. On March 29, 2019, HHS awarded Obria \$1.7 million in Title X funding for Fiscal Year 2019. As a Title X grantee, Obria is required to submit quarterly financial reports, audits, family planning reports, and annual progress reports.

12. On July 11, 2019, HHS announced the award of \$493,000 to Obria as one of the 29 grantees for TPP funding.

13. In August 2019 Planned Parenthood and other organizations announced their departure from the Title X program and relinquished approximately \$70 million in Title X program funding.

14. On September 13, 2019, HHS notified the remaining Title X recipients that they were eligible to apply for additional funding of up to \$2 million per project. On September 30, 2019, HHS announced the 50 recipients of supplemental grants, totaling \$33.6 million.

15. CfA submitted four separate FOIA requests to HHS seeking documents and records related to application materials submitted to HHS for federal funding under the Title X and TPP

grant programs, and the Title X rule change. The specifics of each request are set out in detail below.

FOIA Request #1 — Identification of Title X Supplemental Funding Applicants

16. On October 7, 2019, CfA submitted a FOIA request to HHS seeking:

Copies of any records sufficient to identify the entities that submitted application materials in response to HHS's notice informing Title X program grantees of their eligibility to apply for additional Title X funding.

17. This request sought all responsive records from August 14, 2019, to the date of the search. A copy of the CfA's October 7, 2019 FOIA request regarding applicants for supplemental Title X funding is attached hereto as Exhibit A and is incorporated herein.

18. On October 11, 2019, HHS sent CfA an acknowledgment letter assigning tracking number 2020-00059-FOIA-PHS. On October 24, 2019, CfA was notified that the FOIA request status was "In Process." On November 15, 2019, December 23, 2019, and again on January 16, 2020 CfA emailed HHS requesting an update regarding the processing of this request. HHS has sent no response.

FOIA Request #2 — Obria's and Beacon Christian Community Health Center's Supplemental Funding Applications

19. On October 3, 2019, CfA submitted a FOIA request to HHS seeking:

Copies of any application materials submitted in response to HHS's notice informing Title X program grantees of their eligibility to apply for additional Title X funding by Obria Group, Obria Medical Clinics, or Beacon Christian Community Health Center.

20. This request sought all responsive records from August 14, 2019, to the date of the search. A copy of the CfA's October 3, 2019 FOIA request regarding Obria and Beacon Christian

Community Health Center's applications for supplemental Title X funding is attached hereto as Exhibit B and is incorporated herein.

21. On October 11, 2019, HHS sent CfA a letter that FOIA request 2020-00042-FOIA-OS had been referred to the HHS Program Support Center (PSC). On October 24, 2019, CfA was notified that the request was acknowledged, and the request status has been updated to "In Process." The request was assigned the tracking number 2020-00036-FOIA-PHS. On November 15, 2019, December 23, 2019, and again on January 16, 2020 CfA emailed PSC requesting an update regarding the processing of this request. HHS has sent no response.

FOIA Request #3 — Title X Drug Pricing Policies

22. On August 1, 2019, CfA submitted a FOIA request to HHS seeking:

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.

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 340 products.

23. This request sought all responsive records from January 1, 2019, to the date of the search. A copy of the CfA's August 1, 2019 FOIA request regarding the new Title X rule and the 340B Drug Pricing Program is attached hereto as Exhibit C and is incorporated herein.

24. HHS did not send CfA any acknowledgment of, tracking number for, or communication concerning this request, despite follow-up communications sent by CfA to HHS.

On November 15, 2019, CfA emailed HHS to request an update regarding the status of this request. In response, HHS committed to searching its tracking system and to follow-up with possible next steps. On December 3, 2019, having received no further update, CfA again emailed HHS to request the status of this request. On December 3, 2019 HHS replied that record of CfA's request could not be located and CfA's inquiry was forwarded to PSC. On January 16, 2020, CfA again emailed HHS and emailed PSC requesting an update regarding the processing of this request. PSC responded on January 17, 2020 asking CfA to resubmit the request. CfA submitted the request again on January 17, 2020. On January 25, 2020 the request was assigned the tracking number 2020-00445-FOIA-PHS and the request is "In Process."

FOIA Request #4 — HHS for Obria's TPP Application

25. On July 19, 2019, CfA submitted a FOIA request to HHS seeking:

Copies of any and all application materials submitted by The Obria Group, Inc. ("Obria"), in response to the HHS, Office of the Assistant Secretary for Health ("OASH") Funding Opportunity Announcement for the Replication of Programs Proven Effective through Rigorous Evaluation to Reduce Teenage Pregnancy, Behavioral Risk Factors Underlying Teenage Pregnancy, or Other Associated Risk Factors (Tier 1) – Phase 1 ("TPP Program").

All scorecard material and scoring methodology used and/or created by HHS OASH in its consideration and selection of Obria as a TPP Program awardee.

26. This request sought all responsive records from April 15, 2019, to the date of the search. A copy of the CfA's July 19, 2019 FOIA request regarding Obria's TPP application is attached hereto as Exhibit D and is incorporated herein.

27. On August 26, 2019, CfA reached out to the HHS FOIA office requesting an update on the status of this request. HHS informed CfA that it could not locate any record of CfA's request. CfA resubmitted the request and received acknowledgement on August 27, 2019. On

August 30, 2019, HHS sent an email indicating that the request was being processed, that responsive records had been located, and that this request was in line for additional review. On November 14, 2019, HHS informed CfA that the records were then undergoing Second Tier Review. On November 12, 2019, December 6, 2019, December 17, 2019, January 16, 2020, and February 4, 2020, CfA emailed HHS for a further update on the status of this request. HHS has sent no response.

Exhaustion of Administrative Remedies

28. As of the date of this Complaint, HHS has failed to (a) notify CfA of a final determination regarding any of the FOIA requests, including the scope of any responsive records HHS intends to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

29. Through HHS's failure to respond to CfA's FOIA requests within the time period required by law, CfA has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I

Violation of FOIA, 5 U.S.C. § 552

Failure to Conduct Adequate Searches for Responsive Records

30. CfA repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

31. CfA properly requested records within the possession, custody, and control of HHS.

32. HHS is an agency subject to FOIA and must therefore make reasonable efforts to search for requested records.

33. HHS has failed to promptly review agency records for the purpose of locating those records that are responsive to CfA's FOIA requests.

34. HHS's failure to conduct adequate searches for responsive records violates FOIA.

35. Plaintiff CfA is therefore entitled to declaratory and injunctive relief requiring Defendant to promptly make reasonable efforts to search for records responsive to CfA's FOIA requests.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Records

36. CfA repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

37. CfA properly requested records within the possession, custody, and control of HHS.

38. HHS is an agency subject to FOIA and must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

39. HHS is wrongfully withholding non-exempt agency records requested by CfA by failing to produce records responsive to its FOIA requests.

40. HHS is wrongfully withholding non-exempt agency records requested by CfA by failing to segregate exempt information in otherwise non-exempt records responsive to CfA's FOIA requests.

41. HHS's failure to provide all non-exempt responsive records violates FOIA.

42. Plaintiff CfA is therefore entitled to declaratory and injunctive relief requiring Defendant to promptly produce all non-exempt records responsive to its FOIA requests and provide an index justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, CfA respectfully requests the Court to:

- (1) Order Defendant to conduct a search or searches reasonably calculated to uncover all records responsive to CfA's FOIA requests;
- (2) Order Defendant to produce, by such date as the Court deems appropriate, any and all non-exempt records responsive to CfA's FOIA requests and an index justifying the withholding of any responsive records withheld under claim of exemption;
- (3) Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to CfA's FOIA requests;
- (4) Award CfA the costs of this proceeding, including reasonable attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (5) Grant CfA such other relief as the Court deems just and proper.

Dated: February 20, 2020

Respectfully submitted,

/s/ Alice Clare Campbell Huling
Alice Clare Campbell Huling
D.C. Bar No. 1644296

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*Counsel for Plaintiff
Campaign for Accountability*

EXHIBIT A

C A M P A I G N F O R

ACCOUNTABILITY

October 7, 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. Copies of any records sufficient to identify the entities that submitted application materials in response to HHS’s notice informing Title X program grantees of their eligibility to apply for additional Title X funding.

Please provide all responsive records from August 14, 2019, to the date the search is conducted.

By way of background, Planned Parenthood announced on August 14, 2019 the organization would be ending its participation in the federal Title X program on August 19, 2019.¹ According to a September 13, 2019 *Politico* article, HHS sent a funding memo to all remaining Title X grantees stating they were eligible to apply for an “additional \$2 million each to expand their services by Sept. 19.”² On September 30, 2019, HHS issued a press release announcing the 50 recipients of the supplemental grants, totaling \$33.6 million.³

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

¹ Arianna Eunjung Cha, *Planned Parenthood to Exit Federal Program Aug. 19 Over Abortion ‘Gag Rule’ Unless Court Rules in its Favor*, THE WASHINGTON POST, Aug. 14, 2019.

² Alice Miranda Ollstein, *HHS Puts Up \$20M to Fill gaps in Family Planning Program*, POLITICO, Sep. 13, 2019.

³ Alice Miranda Ollstein, *HHS Awards \$33.6M to Plug Holes in Family Planning Network*, POLITICO, Sep. 30, 2019.

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.⁴ 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.⁵

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.⁶ 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

⁴ 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).

⁵ 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)).

⁶ 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>.

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.”⁷ 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.”⁸ 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.”⁹ 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.’”¹⁰

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.¹¹ 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 jlong@camapignforaccountability.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.

⁷ *FOIA Improvement Act of 2016* § 2 (Pub. L. No. 114–185).

⁸ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁹ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹⁰ *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)).

¹¹ *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).¹²

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.”¹³ 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 to whom the government is applying to use federal money, and the effect that will have 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.’*”

¹² See, e.g., *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

¹³ 45 C.F.R. § 5.54(a).

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.”¹⁴ It does so by regularly posting documents it receives through open records laws, including the FOIA, to its website,¹⁵ analyzing those documents, and publishing reports, letters, and further requests based those documents.¹⁶ 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,



Julia C. Long
Research Associate

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

¹⁵ 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/>.

¹⁶ 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/>.

EXHIBIT B

C A M P A I G N F O R

ACCOUNTABILITY

October 3, 2019

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:

1. Copies of any application materials submitted in response to HHS’s notice informing Title X program grantees of their eligibility to apply for additional Title X funding by:
 - a. Obria Group;
 - b. Obria Medical Clinics; or
 - c. Beacon Christian Community Health Center.

Please provide all responsive records from August 14, 2019, to the date the search is conducted.

By way of background, Planned Parenthood announced on August 14, 2019 the organization would be ending its participation in the federal Title X program on August 19, 2019.¹ According to a September 13, 2019 *Politico* article, HHS sent a funding memo to all remaining Title X grantees stating they were eligible to apply for an “additional \$2 million each to expand their services by Sept. 19.”² On September 30, 2019, HHS issued a press release announcing the 50 recipients of the supplemental grants, totaling \$33.6 million.³ While Obria refused to confirm or

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³ Alice Miranda Ollstein, *HHS Awards \$33.6M to Plug Holes in Family Planning Network*, POLITICO, Sep. 30, 2019.

deny if they applied for the supplemental funding, Beacon confirmed its application was submitted.⁴

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.

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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.⁷ Furthermore, agencies that have adopted the National Archives and

⁴ *Id.*

⁵ *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).

⁶ *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)).

⁷ 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->

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."⁸ 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."⁹ 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."¹⁰ 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.'"¹¹

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.¹² 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.

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>.

⁸ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹⁰ *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

¹¹ *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)).

¹² *Mead Data Central*, 566 F.2d at 261.

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 jlong@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).¹³

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.”¹⁴ 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 how Obria and Beacon Christian Community Health Center plan to use federal money, and the effect that will have 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.

¹³ See, e.g., *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

¹⁴ 45 C.F.R. § 5.54(a).

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.”¹⁵ It does so by regularly posting documents it receives through open records laws, including the FOIA, to its website,¹⁶ analyzing those documents, and publishing reports, letters, and further requests based those documents.¹⁷ 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,

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

¹⁶ 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/>.

¹⁷ 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/>.

Department of Health and Human Services

October 3, 2019

Page 6

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". The signature is written in black ink and is positioned above the printed name and title.

Julia C. Long
Research Associate

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>.

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>.

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).

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).

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

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/>.

EXHIBIT D

C A M P A I G N F O R

ACCOUNTABILITY

July 19, 2019

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:

1. Copies of any and all application materials submitted by The Obria Group, Inc. (“Obria”), in response to the HHS, Office of the Assistant Secretary for Health (“OASH”) Funding Opportunity Announcement for Replication of Programs Proven Effective through Rigorous Evaluation to Reduce Teenage Pregnancy, Behavioral Risk Factors Underlying Teenage Pregnancy, or Other Associated Risk Factors (Tier 1) – Phase I (“TPP Program”).¹
2. All scorecard material and scoring methodology used and/or created by HHS OASH in its consideration and selection of Obria as a TPP Program awardee.²

Please provide all responsive records from April 15, 2019, to the date the search is conducted.

By way of background, on July 11, 2019, HHS announced Obria is one of 29 new grantees to receive a total award of \$13,566,000 for the Replication of Teenage Pregnancy Prevention

¹ See Department of Health and Human Services Office of the Assistant Secretary for Health, *Announcement of Availability of Funds for Replication of Programs Proven Effective through Rigorous Evaluation to Reduce Teenage Pregnancy, Behavioral Risk Factors Underlying Teenage Pregnancy, or Other Associated Risk Factors (Tier 1) Phase I*, GRANTS.GOV, (Feb. 13, 2019), available at <https://www.grants.gov/web/grants/view-opportunity.html?oppId=312883>.

² See Department of Health and Human Services, Office of the Assistant Secretary for Health Press Office, *OPA Awards \$13.5 Million in Grants to Replicate Teenage Pregnancy Prevention Programs*, HHS.COM, (July 17, 2019), available at <https://www.hhs.gov/ash/oah/news/news-releases/2019-tpp-tier1-award-grantees/index.html>.

Programs.³ The funded grantees' responsibility includes replicating evidence-based, data-proven teen pregnancy prevention programs that have been rigorously evaluated.⁴

Obria is a nonprofit chain of pregnancy clinics that do not offer contraceptive choices, including condoms, beyond fertility awareness and opposes abortion, without exception.⁵ Obria currently receives Title V funding to provide "Sexual Risk Avoidance Education," commonly referred to as "abstinence-only education," at its affiliated clinics and public schools.⁶ Obria models itself as an alternative to Planned Parenthood and currently has clinics in five states.⁷

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 the Federal Records Act and FOIA.⁸ 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.⁹

³ *Id.*

⁴ *Id.*

⁵ See Victoria Colliver, *Anti-Abortion Clinics Tapping Into Federal Funds Under Trump*, POLITICO (Dec. 16, 2018), available at <https://www.politico.com/story/2018/12/16/abortion-pregnancy-centers-planned-parenthood-1007765>; see also Sarah Varney, 'Contraception Deserts' Likely to Widen Under New Trump Administration Policy, KAISER HEALTH NEWS (Sept. 28, 2018), available at <https://khn.org/news/contraception-deserts-likely-to-widen-under-new-trump-administration-policy/>.

⁶ *Id.*

⁷ *Id.*

⁸ 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).

⁹ 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

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.¹⁰ 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.”¹¹ 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.”¹² 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.”¹³ 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.’”¹⁴

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)).

¹⁰ 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>.

¹¹ *FOIA Improvement Act of 2016* § 2 (Pub. L. No. 114–185).

¹² *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹³ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹⁴ *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)).

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.¹⁵ 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 jlong@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).¹⁶

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.”¹⁷ 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.

Obria seeks federal funding, intended to provide health education to young people, despite its stated opposition to the use of FDA-approved contraceptives, like birth control pills or condoms.¹⁸ Funding Obria for the purpose of preventing teen pregnancy could interfere with young people’s

¹⁵ *Mead Data Central*, 566 F.2d at 261.

¹⁶ *See, e.g., McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

¹⁷ 45 C.F.R. § 5.54(a).

¹⁸ *See* Victoria Colliver, *Anti-Abortion Clinics Tapping into Federal Funds Under Trump*, POLITICO (Dec. 16, 2018), available at <https://www.politico.com/story/2018/12/16/abortion-pregnancy-centers-planned-parenthood-1007765>.

access to comprehensive reproductive health education.¹⁹ The records CfA seeks will help the public understand how Obria plans to use federal money, and the effect that will have on the ability of individuals, and especially young people, to make their own sexual and reproductive 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 Sarah Varney, 'Contraception Deserts' Likely to Widen Under New Trump Administration Policy, KAISER HEALTH NEWS (Sept. 28, 2018), available at <https://khn.org/news/contraception-deserts-likely-to-widen-under-new-trump-administration-policy/>.

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

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. 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,



Julia Long
Research Associate

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/>.