

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

CAMPAIGN FOR ACCOUNTABILITY, 611 Pennsylvania Avenue SE, #337 Washington, DC 20003)	
)	
)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Case No. 20-cv-0583
)	
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, 200 Independence Avenue SW Washington, DC 20201)	
)	
)	
)	
<i>Defendant.</i>)	
)	

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. 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.

9. 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.

10. As a Title X grantee, Obria is required to submit quarterly financial reports, audits, family planning reports, and annual progress reports.

11. CfA submitted two separate FOIA requests to HHS seeking documents and records related to Obria's required reporting and communications under its Title X grant. The specifics of each request are set out in detail below.

FOIA Request #1 — Obria Program Reporting

12. On January 2, 2020, CfA submitted a FOIA request to HHS seeking:

All Quarterly Financial Reports, Single Audits, Family Planning Reports, and Annual Progress Reports submitted to the agency by Title X recipient The Obria Group, Inc.

13. This request sought all responsive records from October 28, 2019, to the date of the search. A copy of CfA's January 2, 2020 FOIA request regarding Obria's Title X reporting is attached hereto as Exhibit A and is incorporated herein.

14. On January 3, 2020, HHS sent CfA an acknowledgment letter assigning tracking number 2020-00388-FOIA-OS.

15. On January 10, 2020, HHS sent CfA a second acknowledgement letter assigning updated tracking number 2020-00434-FOIA-PHS.

16. On February 3, 2020 and again on February 26, 2020 CfA emailed HHS requesting an update regarding the status of this request. HHS has sent no response.

FOIA Request #2 — Obria Communications and Reporting

17. On October 28, 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 received by any HHS employee or representative from, sent by any HHS employee or representative to, or exchanged between any HHS employee or

representative and any employee or representative of Obria Group or Obria Medical Clinics.

All program reporting correspondence and materials, sliding fee schedules, evaluations, documentations, audit reports, accounting records, and action plans received by HHS from, sent by HHS to, or exchanged by HHS and the following organizations: Obria Group or Obria Medical Clinics.

All “Assurance and Action Plans Documenting Steps to Come into Compliance” and “Statements and Supporting Evidence with Compliance Requirements” submitted by Obria Group or Obria Medical Clinics.

18. This request sought all responsive records from April 4, 2019, to the date of the search. A copy of CfA’s October 28, 2019 FOIA request regarding communication with Obria and HHS’s evaluation and reports regarding Obria’s Title X application is attached hereto as Exhibit B and is incorporated herein.

19. HHS has not sent CfA any acknowledgment of, tracking number for, or communication concerning this request. On December 18, 2019, January 16, 2020, and again on February 26, 2020 CfA emailed HHS requesting an update regarding the status of this request. HHS has sent no response.

Exhaustion of Administrative Remedies

20. 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.

21. 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

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

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

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

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

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

27. 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

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

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

30. 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.

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

32. 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.

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

34. 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 27, 2020

Respectfully submitted,

/s/ Alice Clare Campbell Huling
Alice Clare Campbell Huling
CAMPAIGN FOR ACCOUNTABILITY
611 Pennsylvania Ave. SE, #337
Washington, D.C. 20003
(202) 780-5750
ahuling@campaignforaccountability.org

*Counsel for Plaintiff
Campaign for Accountability*

EXHIBIT A

C A M P A I G N F O R

ACCOUNTABILITY

January 2, 2020

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 all Quarterly Financial Reports, Single Audits, Family Planning Reports, and Annual Progress Reports submitted to the agency by Title X recipient The Obria Group, Inc., within 20 business days:

Please provide all responsive records from October 28, 2019 to present.

By way of background, on March 29, 2019 HHS announced an award of \$1.7 million in Title X family planning funding to the Obria Group for Fiscal Year 2019.¹ Obria is a nonprofit chain of pregnancy clinics that do not offer contraceptive choices, including condoms, beyond fertility awareness and opposes abortion, without exception.² Obria models itself as an alternative to Planned Parenthood, and currently has clinics in six states.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 completed by individual custodians or components to determine whether they possess responsive

¹ *HHS Title X Family Planning Service Grants Award by State; Fiscal Year 2019 Grantees*, HHS.GOV, available at <https://www.hhs.gov/opa/grants-and-funding/recent-grant-awards/index.html>.

² *Id.*; 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/>.

³ *Id.*

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 up-to-date technologies to search for responsive information and take steps to ensure that 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>.

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@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.

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 whether Obria is fulfilling the Title X program requirements and how many patients Obria’s Title X project has served.

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 ext. 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 28, 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. All communications, meeting notices, meeting agendas, informational materials, draft legislation, talking points, reports, disclosures, or other documents received by any HHS employee or representative from, sent by any HHS employee or representative to, or exchanged between any HHS employee or representative and any employee or representative of:
 - a. Obria Group; or
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2. All program reporting correspondence and materials, sliding fee schedules, evaluations, documentations, audit reports, accounting records, and action plans received by HHS from, sent by HHS to, or exchanged by HHS and the following organizations:
 - a. Obria Group; or
 - b. Obria Medical Clinics
3. All “Assurance and Action Plans Documenting Steps to Come into Compliance” and “Statements and Supporting Evidence with Compliance Requirements” submitted by:
 - a. Obria Group; or
 - b. Obria Medical Clinics

Please provide all responsive records from April 4, 2019, to the date the search is conducted.

By way of background, HHS's Office of Population Affairs ("OPA") announced the March 2019 rule titled *Compliance With Statutory Program Integrity Requirements* ("Final Rule").¹ Under the Final Rule, OPA removes the Title X "requirement for nondirective abortion counseling and referral, to prohibit referral for abortion" and "require physical and financial separation to ensure clarity regarding the purpose of Title X and complaint with statutory program integrity provisions."² On March 29, 2019 HHS announced an award of \$1.7 million in Title X family planning funding to the Obria Group for Fiscal Year 2019.³ Obria Medical Clinics are affiliated with the Obria Group (collectively "Obria").⁴

To ensure compliance with the Final Rule, HHS required Title X grant recipients to submit an "Assurance and Action Plan Documenting Steps to Come into Compliance" with the new rule by August 19, 2019⁵ and a "Statement and Supporting Evidence with Compliance Requirements" due to HHS by September 18, 2019.⁶

Obria is a nonprofit chain of pregnancy clinics that do not offer contraceptive choices, including condoms, beyond fertility awareness and opposes abortion, without exception.⁷ Obria models itself as an alternative to Planned Parenthood, and currently has clinics in five states.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.

¹ Office of the Assistant Secretary for Health, Office of the Secretary, HHS, *Complaint with Statutory Program Integrity Requirements*, FEDERAL REGISTER, March 3, 2019, available at <https://www.federalregister.gov/documents/2019/03/04/2019-03461/compliance-with-statutory-program-integrity-requirements>.

² *Id.*

³ *HHS Title X Family Planning Service Grants Award by State; Fiscal Year 2019 Grantees*, HHS.GOV, available at <https://www.hhs.gov/opa/grants-and-funding/recent-grant-awards/index.html>.

⁴ Kenneth P. Vogel and Robert Pear, *Trump Administration Gives Family Planning Grant to Anti-Abortion Group*, THE NEW YORK TIMES, (Mar. 29, 2019), available at <https://www.nytimes.com/2019/03/29/us/politics/trump-grant-abortion.html>.

⁵ *SAMPLE Title X Grantee Compliance Plan for 2019 Title X Regulations: Assurance and Action Plan Documenting Steps to Come into Compliance – due August 19, 2019*, HHS.GOV, available at <https://www.hhs.gov/opa/sites/default/files/sample-compliance-plan-part-1.pdf>.

⁶ *SAMPLE Title X Grantee Compliance Plan for 2019 Title X Regulations: Statement and Supporting Evidence with Compliance Requirements - Due by September 18, 2019*, HHS.GOV, available at <https://www.hhs.gov/opa/sites/default/files/sample-compliance-plan-part-2.pdf>.

⁷ *Id.*; 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/>.

⁸ *Id.*

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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.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

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>.

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 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 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.

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).

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.

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.

HHS required all Title X grant recipients to submit the Assurance and Action Plan Documenting Steps to Come into Compliance¹⁹ and the Statement and Supporting Evidence with Compliance Requirements²⁰ to demonstrate efforts to comply with the Final Rule.²¹ In addition to these two compliance plans, the records CfA seeks will help the public understand whether Obria is fulfilling the Title X program requirements to update HHS on their progress throughout the fiscal year 2019 funding period.

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

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).

¹⁹ *SAMPLE Title X Grantee Compliance Plan for 2019 Title X Regulations: Assurance and Action Plan Documenting Steps to Come into Compliance – due August 19, 2019*, HHS.GOV, available at <https://www.hhs.gov/opa/sites/default/files/sample-compliance-plan-part-1.pdf>.

²⁰ *SAMPLE Title X Grantee Compliance Plan for 2019 Title X Regulations: Statement and Supporting Evidence with Compliance Requirements - due by September 18, 2019*, HHS.GOV, available at <https://www.hhs.gov/opa/sites/default/files/sample-compliance-plan-part-2.pdf>.

²¹ *Id.*

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.”²² It does so by regularly posting documents it receives through open records laws, including the FOIA, to its website,²³ analyzing those documents, and publishing reports, letters, and further requests based those documents.²⁴ 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,

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

²³ 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/>.

²⁴ 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/>.

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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,

A handwritten signature in cursive script that reads "Julia C. Long". The signature is written in black ink and is positioned to the right of the typed name.

Julia C. Long
Research Associate