

Defendant has not claimed that the requested information is subject to any FOIA exceptions or privilege and has not advanced any other reason why it should not be disclosed. Despite the clear statutory requirement that an agency respond to a FOIA request within 20 days, and despite the Center's inquiries, Defendant failed to provide a final determination or produce any documents in response to either of the Center's two FOIA requests. The Center seeks to compel Defendant to comply with its obligations under FOIA and promptly produce the requested records.

Plaintiff further alleges as follows:

PARTIES

1. Plaintiff, the Center for Reproductive Rights, is a 501(c)(3) non-profit corporation incorporated under the laws of the State of New York and headquartered at 199 Water Street, New York, NY 10038. The Center for Reproductive Rights is dedicated to using the power of law to advance reproductive rights as fundamental human rights around the world. It is the only global legal advocacy organization dedicated to reproductive rights, and its litigation and advocacy has played a key role in expanding access to reproductive health care around the world.

2. Defendant, U.S. Department of Health and Human Services, is an agency of the United States government under 5 U.S.C. § 552(f)(1) and 5 U.S.C. § 551(1). HHS is headquartered at 200 Independence Avenue, S.W., Washington, D.C. 20201. HHS has possession, custody, and control of the documents that Plaintiff seeks in response to the FOIA requests.

JURISDICTION AND VENUE

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

4. Because Defendant failed to comply with the requirements to respond set forth in 5 U.S.C. § 552(a)(6)(A), the Center 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

Defendant from continuing to withhold responsive records and ordering the production of improperly withheld records, *see* 5 U.S.C. § 552(a)(4)(B).

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

STATEMENT OF FACTS

6. On August 30, 2019, the Center submitted by email and registered mail¹ two FOIA requests to HHS seeking records concerning resource allocation and staffing within HHS' Office for Civil Rights.

A. FOIA Request # 1 – Staffing and Funding the Conscience and Religious Freedom Division

7. The Trump administration has publicly stated that it created the Conscience and Religious Freedom Division (“CRFD”) to “protect the fundamental and unalienable rights of conscience and religious freedom.”² Historically, only a tiny fraction of the complaints the Office for Civil Rights received involved religious concerns.³ However, in both its Fiscal Year 2019 and 2020 budget requests, the HHS Office for Civil Rights sought to increase the budget of the CRFD by over \$1 million,⁴ even as the budgets for its other divisions and the overall budget of the Office

¹ As the Center explained in an August 30, 2019 email to Michael Marquis, the Center was unable to submit its requests through HHS' online portal for FOIA requests because the website had been down for several days. The Center was also unable to contact HHS' FOIA office by phone or leave a message with that office because the voicemail box for the number provided was full.

² Dep't of Health & Human Servs., Office for Civil Rights, *HHS Announces New Conscience and Religious Freedom Division* (Jan. 18, 2018), <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>.

³ *See* Sharita Gruberg, Center for American Progress, *HHS Budget Would Fund Discrimination at Expense of Civil Rights Enforcement* (April 25, 2019), <https://www.americanprogress.org/issues/lgbt/news/2019/04/25/468377/hhs-budget-fund-discrimination-expense-civil-rights-enforcement/>.

⁴ Dep't of Health & Human Servs., Office for Civil Rights, *Fiscal Year 2019 Justification of Estimates for Appropriations Committees* [hereinafter, “OCR FY 2019 Budget Request”] at 19, <https://www.hhs.gov/sites/default/files/fy2019-ocr-congressional-justification-accessible.pdf>; Dep't of Health & Human Servs., Office for Civil Rights, *Fiscal Year 2020 Justification of*

for Civil Rights were considerably reduced.⁵ These changing budget priorities do not appear to have been precipitated by increased enforcement demands: in the 2018 financial year, only two percent of complaints received by the Office implicated religious or conscience-based objections.⁶

8. The Office for Civil Rights explained in its 2019 and 2020 budget justifications that the requested increase for the CRFD was necessary to pay for additional full-time employees.⁷ Accordingly, the Center's first request ("FOIA Request # 1") seeks information about the budget and staffing of the CRFD.

9. A true and correct copy of FOIA Request # 1 is attached as Exhibit A.

10. In a letter dated September 3, 2019, HHS formally acknowledged that it received FOIA Request # 1 on August 30, 2019. The letter further provided a tracking number of 2019-01226-FOIA-OS for this request.

11. A true and correct copy of HHS' September 3, 2019 letter acknowledging receipt of FOIA Request # 1 is attached as Exhibit B.

B. FOIA Request # 2 – Allocation of HIPAA Enforcement Funds

12. HHS' Office for Civil Rights is responsible for enforcing the privacy provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Pursuant to its authority, the Office can collect funds obtained through HIPAA enforcement actions. The Office for Civil Rights' budget justifications for FY 2019 and FY 2020 included the expenditure of

Estimates for Appropriations Committees [hereinafter, "OCR FY 2020 Budget Request"] at 213, <https://www.hhs.gov/sites/default/files/fy-2020-cj-compilation.pdf>.

⁵ See Dep't of Health & Human Servs., Office for Civil Rights, *Operating Plan for FY 2019*, <https://www.hhs.gov/sites/default/files/fy-2019-ocr-operating-plan-web-version.pdf> (indicating a budget reduction compared to the 2018 Fiscal Year).

⁶ Gruberg, *supra* n.3.

⁷ OCR FY 2019 Budget Request at 7; OCR FY 2020 Budget Request at 200.

settlement funds from unidentified enforcement actions. Namely, in Financial Year 2019, the Office stated that it “will utilize \$13,477,000 in monetary settlement funds.”⁸ In Financial Year 2020, it stated that it “plans to expend \$15,647,000 in settlement funding” on the Operations and Resources Division, as well as “\$7,429,000 in settlement funding” on the Health Information Privacy Division.⁹

13. The Center’s second request (FOIA Request # 2) seeks records relating to the allocation of funds recovered from actions concerning HIPAA enforcement.

14. A true and correct copy of FOIA Request # 2 is attached as Exhibit C.

15. In a letter dated September 3, 2019, HHS formally acknowledged that it received FOIA Request # 2 on August 30, 2019. The letter further provided a tracking number of 2019-01227-FOIA-OS for this request.

16. A true and correct copy of HHS’ September 3, 2019 letter acknowledging receipt of FOIA Request # 2 is attached as Exhibit D.

C. HHS’ Failure to Adequately Respond to the Center’s Requests

17. On September 3, 2019, Michael Marquis, the Director of HHS’ Freedom of Information and Privacy Acts Division, acknowledged receipt of both of the Center’s FOIA requests.

18. Mr. Marquis further stated that the Center would be “receiving formal acknowledgement letters for the two requests submitted.”

⁸ OCR FY 2019 Budget Request at 7.

⁹ OCR FY 2020 Budget Request at 200.

19. On September 16, 2019, having received no further communications from HHS, the Center emailed Mr. Marquis requesting a status update and tracking numbers for its FOIA requests.

20. On September 17, 2019, Mr. Marquis forwarded two letters from HHS, dated September 3, 2019, acknowledging that Defendant received each request and on August 30, 2019, had “initiated a search to locate records falling within the scope of [the Center’s] request.” *See* Exhibits B and D.

21. To date, the Center has received no further response from HHS related to either request.

22. Pursuant to FOIA, within 20 business days of receipt of the Center’s August 30, 2019 FOIA requests—that is, no later than September 30—HHS was required to “determine . . . whether to comply with such request” and to “immediately notify” the Center of “such determination and the reasons therefor,” and, in the case of an adverse determination, the Center’s appeal rights. 5 U.S.C. § 552(a)(6)(A)(i).

23. As of the date of this complaint, HHS has failed to (a) notify the Center of any determination regarding its 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.

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

COUNT I
Violation of FOIA, 5 U.S.C. § 552 – FOIA Request # 1

25. The Center repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

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

27. Pursuant to FOIA, 5 U.S.C. § 552(a), the Center has a statutory right to access requested, non-exempt agency records.

28. On August 30, 2019, the Center properly requested records within the possession, custody, and control of HHS concerning the staffing and budget of the Conscience and Religious Freedom Division (FOIA Request # 1).

29. HHS failed to comply with the time limits prescribed by FOIA, 5 U.S.C. § 552(a)(6)(A)(i), in responding to FOIA Request # 1.

30. HHS is wrongfully withholding non-exempt agency records requested by the Center by failing to produce materials responsive to FOIA Request # 1.

31. HHS is wrongfully withholding non-exempt agency records requested by the Center by failing to segregate non-exempt information from otherwise exempt records responsive to FOIA Request # 1.

32. When an agency has “improperly withheld” records, this Court may “enjoin the agency from withholding agency records” and “order the[ir] production.” 5 U.S.C. § 552(a)(4)(B).

33. The Center is therefore entitled to declaratory and injunctive relief requiring HHS to promptly produce all non-exempt records responsive to FOIA Request # 1 and to provide a *Vaughn* index explaining, with specificity, the bases on which any responsive records are withheld as exempt.

COUNT II
Violation of FOIA, 5 U.S.C. § 552 – FOIA Request # 2

34. The Center repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

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

36. Pursuant to FOIA, 5 U.S.C. § 552(a), the Center has a statutory right to access requested, non-exempt agency records.

37. On August 30, 2019, the Center properly requested records within the possession, custody, and control of HHS concerning the allocation of HIPAA settlement funds (FOIA Request # 2).

38. HHS failed to comply with the time limits prescribed by FOIA, 5 U.S.C. § 552(a)(6)(A)(i), in responding to FOIA Request # 2.

39. HHS is wrongfully withholding non-exempt agency records requested by the Center by failing to produce materials responsive to FOIA Request # 2.

40. HHS is wrongfully withholding non-exempt agency records requested by the Center by failing to segregate non-exempt information from otherwise exempt records responsive to FOIA Request # 2.

41. When an agency has “improperly withheld” records, this Court may “enjoin the agency from withholding agency records” and “order the[ir] production.” 5 U.S.C. § 552(a)(4)(B).

42. The Center is therefore entitled to declaratory and injunctive relief requiring HHS to promptly produce all non-exempt records responsive to FOIA Request # 2 and to provide a *Vaughn* index explaining, with specificity, the bases on which any responsive records are withheld as exempt.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment for Plaintiff and award the following relief:

- a. Order Defendant, by a date certain, to conduct a search that is reasonably likely to lead to the discovery of any and all records responsive to Plaintiff's FOIA requests;
- b. Order Defendant, by a date certain, to demonstrate that it has conducted an adequate search;
- c. Order Defendant, by a date certain, to produce to Plaintiff any and all non-exempt records or portions of records responsive to Plaintiff's FOIA requests, as well as a *Vaughn* index of any records or portions of records withheld due to a claim of exemption;
- d. Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA requests;
- e. Award Plaintiff its costs and attorneys' fees reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- f. Grant Plaintiff such other and further relief as the Court may deem just and proper.

October 15, 2019

Respectfully submitted,

/s/ Kalpana Kotagal

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Alice Buttrick (*pro hac vice* application
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abuttrick@cohenmilstein.com

*Attorneys for Plaintiff Center for
Reproductive Rights*

Exhibit A



August 30, 2019

Via Mail and E-Mail

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

Re: Request under the Freedom of Information Act

Dear Mr. Marquis:

The Center for Reproductive Rights makes this request pursuant to the Freedom of Information Act, 5 U.S.C. §552, and implementing regulations of the U.S. Department of Health and Human Services (“HHS”), 45 C.F.R. Part 5.

Under the Trump administration, HHS created a new division within the Office for Civil Rights (“OCR”) known as the Conscience and Religious Freedom Division (“CRFD”). In both its Fiscal Year 2019 and 2020 budget requests, the OCR sought to increase the budget of the CRFD by over \$1 million,¹ even as the budgets for other divisions of the OCR, as well as the

¹ Dep’t of Health & Human Servs., Office for Civil Rights, Fiscal Year 2019 Justification of Estimates for Appropriations Committees [hereinafter, “OCR FY 2019 Budget Request”] at 19, <https://www.hhs.gov/sites/default/files/fy2019-ocr-congressional-justification-accessible.pdf>; Dep’t of Health & Human Servs., Office for Civil Rights, Fiscal Year 2020 Justification of Estimates for Appropriations Committees [hereinafter, “OCR FY 2020 Budget Request”] at 20, <https://www.hhs.gov/sites/default/files/fy-2020-cj-compilation.pdf>.

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OCR's overall budget, were considerably reduced.² The CRFD explained in its 2019 and 2020 budget justifications that its requested increase was necessary to pay for additional full-time employees.³

The Center for Reproductive Rights seeks to better understand the staffing and resources allocated to the CRFD.

Records Requested

Please provide all responsive records from January 20, 2017 through the present. As used herein, the word "records" means all records as defined in 22 C.F.R. §171.1(b)(1). Additionally, as used herein, any reference to the OCR or CRFD encompasses all regional offices as well as the central offices located in Washington, D.C.

We request the following to be produced within twenty business days:

1. Records sufficient to identify all employee positions allocated either in full or in part to the CRFD, or otherwise tasked with conducting the work of that division, including records sufficient to show:
 - a. The title and classification for each position;
 - b. The job description and required qualifications;
 - c. The salary range for each position;
 - d. Whether the position was full- or part-time;
 - e. The location of each position;
 - f. Whether the position shared responsibilities with any other OCR division; and

² See Office for Civil Rights Operating Plan for FY 2019, <https://www.hhs.gov/sites/default/files/fy-2019-ocr-operating-plan-web-version.pdf> (indicating a budget reduction compared to the 2018 Fiscal Year).

³ OCR FY 2019 Budget Request at 7; OCR FY 2020 Budget Request at 7.

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8. Records sufficient to identify any contractors working with the CRFD, including records sufficient to show:
 - a. The number of contractors;
 - b. The employers of each individual and the identity of each entity;
 - c. The location of each contractor;
 - d. The role and responsibilities of each contractor; and
 - e. The payment terms for each contractor;
9. All records, documents, memoranda, and communications concerning CRFD's retention of contractors, including any records discussing the justification for using contractors, and the process for recruiting and selecting contractors;
10. Records sufficient to show with specificity the amount and sources of funding received or used by the CRFD, including records identifying personnel and non-personnel funds from the following sources:
 - a. Funds allocated to the OCR generally;
 - b. Funds allocated to the CRFD specifically; and
 - c. Funds originating from enforcement actions or settlement agreements conducted by any division or agency; and
11. Records sufficient to show the CRFD's monthly and annual allocation and use of personnel and non-personnel funds.

The Center for Reproductive Rights 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.

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In addition to the records requested above, the Center for Reproductive Rights also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. 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.

Please search all records regarding agency business. You may not exclude searches of files or emails in the personal custody of your 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. 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; the Center for Reproductive Rights has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.

Please note that in conducting a “reasonable search” as required by law, you 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 your agency’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. 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 your agency’s archiving tools would capture that email under Capstone.

Accordingly, the Center for Reproductive Rights requests that your agency 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. The Center for Reproductive Rights is available to work with you 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.

We request that you produce all responsive materials in their entirety; however, should you determine the materials contain information which falls within the statutory exemptions provided in 5 U.S.C. §552 or 22 C.F.R. §171.11, we request the information be reviewed for possible discretionary disclosure. We furthermore request that all reasonably segregable portions of the exempt material be provided. We request that any deleted material be described in detail, and that you specify the statutory basis for the denial as well as your

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reasons for believing that the alleged statutory justification applies in this instance. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination.

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.” If it is your position that any portion of the requested records is exempt from disclosure, the Center for Reproductive Rights 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.”⁴ 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.”⁵ 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.”⁶

You should institute a preservation hold on information responsive to this request. The Center for Reproductive Rights intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, your agency is on notice that litigation is reasonably foreseeable.

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, the Center for Reproductive Rights welcomes an opportunity to discuss their request with you before you undertake your search or incur search or duplication costs. By working together at the outset, the Center for Reproductive Rights and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Waiver or Limitation of Fees

We request a waiver (or, in the alternative, a reduction) of all fees under 5 U.S.C. § 552(a)(4)(A)(iii) because disclosure of the information would be in the public interest by

⁴ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁵ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987) (emphasis in original).

⁶ *Id.* at 224 (internal quotation marks omitted).

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contributing significantly to the public understanding of the staffing and resource allocation of the OCR and the CRFD.

The Center for Reproductive Rights does not make this request for commercial use. 45 C.F.R. § 5.54(b)(3). As a 501(c)(3) nonprofit organization, the Center for Reproductive Rights does not have a commercial purpose and the release of the information requested is not in the organization's financial interest.

Founded in 1992, the Center for Reproductive Rights is the only global legal advocacy organization dedicated to reproductive rights, and its litigation and advocacy has played a key role in expanding access to reproductive health care around the world. The Center for Reproductive Rights uses information gathered, and its analysis of information gathered, to educate the public through reports, press releases, or other media, as discussed above. Likewise, the Center for Reproductive Rights also makes the materials gathered available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter. The Center for Reproductive Rights has demonstrated commitment to the public disclosure of documents and creation of editorial content.

Accordingly, the Center for Reproductive Rights qualifies for a fee waiver.

Further, the Center for Reproductive Rights will disseminate the information to “a reasonably broad audience of persons” through our social media accounts and our websites. If a waiver or reductions in fees is not granted on the basis of the disclosure being in the public interest, we request a waiver (or, in the alternative, a reduction) of all fees under the “representative of the news media” exception in 5 U.S.C. § 552(a)(4)(A)(ii)(II). The term, “representative of the news media,” as used in the Freedom of Information Act, is defined as any person or entity “that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii).

The Center for Reproductive Rights publishes a regular newsletter that currently has over 215,000 subscribers. Additionally, the Center for Reproductive Rights routinely gathers information from government and other sources and uses that information to publish reports, briefing papers, fact sheets, periodicals, articles, blog posts, and other educational materials, which are readily available to the public through the Center for Reproductive Rights' website (www.reproductiverights.org) and social media accounts (for example, on the Center's Twitter stream @reprorights). During a representative month in 2018, the Center for Reproductive Rights has had over 60,000 visits leading to over 110,000 page views – of which nearly 40,000 were unique visitors. Additionally, the Center has well over 95,000 followers on Twitter.

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Accordingly, the Center for Reproductive Rights requests that we be accorded “representative of news media” status and that any fees accrued for this request be waived, or alternatively, reduced.

In the event that you determine you are unable to waive the fees, please provide us with prior notice if the total fees authorized will exceed \$200 so that we can discuss arrangements.

* * *

Conclusion

The Center for Reproductive Rights looks forward to working with your agency on this request. Thank you for your prompt attention to this matter.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the Center for Reproductive Rights requests that responsive materials be provided electronically by email or in PDF or TIF format on a USB drive. Please send any responsive material being provided and acknowledgement of receipt of this request to:

Katherine Gillespie
Center for Reproductive Rights
1634 Eye Street, NW
Washington, DC 20006
Phone: (917) 637-3718
Email: kgillespie@reprorights.org

If it will accelerate release of responsive records, please also provide responsive material on a rolling basis.

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 Katherine Gillespie at (917) 637-3718. Thank you for your assistance.

Sincerely,

Katherine Gillespie
Senior Federal Policy Counsel
Center for Reproductive Rights

Exhibit B

**DEPARTMENT OF HEALTH & HUMAN SERVICES**

Office of the Secretary

Assistant Secretary for Public Affairs
Washington, D.C. 20201Refer to: Request Number **2019-01226-FOIA-OS**

September 03, 2019

Ms. Katherine Gillespie
Senior Federal Policy Counsel
Center for Reproductive Rights
1634 Eye Street, NW
Washington, DC 20006

Dear Ms. Katherine Gillespie:

This acknowledges receipt of your **August 30, 2019**, Freedom of Information Act (FOIA) request, submitted to the Department of Health and Human Services (HHS), FOI/Privacy Acts Division concerning:

"..The Center for Reproductive services seeks to better understand the staffing and resources allocated to the CRFD...any reference to the OCR or CRFD encompasses all regional offices as well as the central offices located in Washington, DC... (Date Range for Record Search: From 1/20/2017 to 9/3/2019)".

We received your request on **August 30, 2019** and have initiated a search to locate records falling within the scope of your request. If our searching units advise us that you have requested a voluminous amount of records that require extensive search and examination, my staff will contact you shortly to discuss your willingness to modify your request.

The FOIA requires that we respond to your request within 20 working days of its receipt in this office. Please note the following unusual and exceptional circumstances that will impact our response time: (1) we will need to search for and collect records from components and/or field offices external to this office; and (2) because we receive a very heavy volume of FOIA requests, we will process your request in line with our established policy of "first in, first out" case processing. If either of these circumstances prevents our office from responding within the 20 working day timeframe, we will utilize a 10 working day extension to process your request, as permitted pursuant to the FOIA. This policy is consistent with court decisions regarding FOIA's time limits.

The law authorizes us to collect fees for responding to FOIA requests and assume you are willing to pay any applicable fees for processing this request unless you have stated otherwise. If at any time the fee for processing your request is estimated to exceed \$250.00, we will send you an invoice for the estimated fee and suspend further processing until payment of the invoiced amount is received. If the estimated processing fee does not exceed \$250.00, we will send you an invoice for the actual fee with our response.

Please note the following:

If you believe we should expedite the processing of your request because the requested records are needed in light of a compelling need; i.e., an imminent threat to the life and safety of an individual; an urgency to inform the public concerning government activity (provided you are a member of the media); a deadline in litigation; a deadline for commenting on proposed regulations; or other urgent matters, you must ask for expedited processing in writing and provide to this office as much relevant information as possible. In line with 5 U.S.C. § 552(a)(6)(E)(vi), you must demonstrate the compelling need in a statement certified to be true and correct to the best of your knowledge and belief. Attach any supporting documentation to your statement, including a court scheduling order if your request is based upon a litigation deadline. (Fax supporting documentation to the FOIA/PA Division at (202) 690-8320).

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Request Number: 2019-01226-FOIA-OS

If your request seeks a waiver or reduction of the fees that we would customarily charge for furnishing agency records and your request does not contain sufficient information to enable us to determine whether a waiver or reduction of fees is warranted, you should provide such information to this office within 10 working days of receipt of this letter. In line with 45 C.F.R. § 5.45, such information must include a detailed explanation of how disclosure to you: (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) is not primarily in the commercial interest of the requester. I especially need to know how you intend to disseminate the information to the public.

When submitting this additional information, please refer to the case number listed at the top left-hand corner of this letter, and send it to:

FOI/Privacy Acts Division
U.S. Department of Health and Human Services
200 Independence Avenue S.W.
Room 729H
Washington, DC 20201

If you are not satisfied with any aspect of the processing and handling of this request, you have the right to seek dispute resolution services from:

HHS FOIA/PA Public Liaison
FOI/Privacy Acts Division
Assistant Secretary for Public Affairs (ASPA)
Office of the Secretary (OS)
U.S. Department of Health and Human Services (HHS)
200 Independence Avenue, SW, Suite 729H
Washington, DC 20201

Telephone: (202) 690-7453
Fax: (202) 690-8320
E-mail: [HHS FOIA Public Liaison@hhs.gov](mailto:HHS_FOIA_Public_Liaison@hhs.gov)

and/or:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road – OGIS
College Park, MD 20740-6001

Telephone: 202-741-5770
Toll-Free: 1-877-684-6448
E-mail: ogis@nara.gov
Fax: 202-741-5769

Any questions regarding the status of this request should be directed to our office at 202-690-7453.

Sincerely yours,



Brandon J. Gaylord
Supervisory Government Information Specialist
and HHS FOIA/PA Public Liaison

Exhibit C



August 30, 2019

Via Mail and E-Mail

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

Re: Request under the Freedom of Information Act

Dear Mr. Marquis:

The Center for Reproductive Rights submits this request pursuant to the Freedom of Information Act, 5 U.S.C. §552, and implementing regulations of the U.S. Department of Health and Human Services (“HHS”), 45 C.F.R. Part 5.

Records Requested

Please provide all responsive records from January 20, 2017 through the present. As used herein, the word “records” means all records as defined in 22 C.F.R. §171.1(b)(1). Additionally, as used herein, any reference to HHS’s Office for Civil Rights (“OCR”) encompasses all regional offices as well as the central offices located in Washington, D.C.

We request the following to be produced within twenty business days:

1. Records sufficient to identify all recoveries from actions concerning enforcement of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”),

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including settlements and judgments reached or paid in full or in part to the OCR from January 20, 2017 through the present, including records sufficient to show:

- a. The date of the settlement or judgment;
 - b. The monetary amount agreed to which the parties agreed;
 - c. The payment schedule; and
 - d. The monetary amount received.
2. Records sufficient to show the accounting for funds received as a result of HIPAA enforcement actions, including records sufficient to show:
 - a. The receipt of such funds;
 - b. The accounts in which those funds are maintained; and
 - c. The segregation of such funds from funds received from other sources.
 3. Records sufficient to show with specificity the allocation and expenditure of funds received as a result of HIPAA enforcement actions, including records sufficient to show:
 - a. Which agency, division, or individual received such funds; and
 - b. The purpose to which such funds were put; and
 4. Any records, documents, memoranda, or communications concerning the allocation of funds received from HIPAA enforcement settlements.

The Center for Reproductive Rights 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.

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In addition to the records requested above, the Center for Reproductive Rights also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. 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.

Please search all records regarding agency business. You may not exclude searches of files or emails in the personal custody of your 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. 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; the Center for Reproductive Rights has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.

Please note that in conducting a “reasonable search” as required by law, you 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 your agency’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. 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 your agency’s archiving tools would capture that email under Capstone.

Accordingly, the Center for Reproductive Rights requests that your agency 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. The Center for Reproductive Rights is available to work with you 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.

We request that you produce all responsive materials in their entirety; however, should you determine the materials contain information which falls within the statutory exemptions provided in 5 U.S.C. §552 or 22 C.F.R. §171.11, we request the information be reviewed for possible discretionary disclosure. We furthermore request that all reasonably segregable portions of the exempt material be provided. We request that any deleted material be described in detail, and that you specify the statutory basis for the denial as well as your

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reasons for believing that the alleged statutory justification applies in this instance. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination.

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.” If it is your position that any portion of the requested records is exempt from disclosure, the Center for Reproductive Rights 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.”¹ 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.”² 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.”³

You should institute a preservation hold on information responsive to this request. The Center for Reproductive Rights intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, your agency is on notice that litigation is reasonably foreseeable.

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, the Center for Reproductive Rights welcomes an opportunity to discuss their request with you before you undertake your search or incur search or duplication costs. By working together at the outset, the Center for Reproductive Rights and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Waiver or Limitation of Fees

We request a waiver (or, in the alternative, a reduction) of all fees under 5 U.S.C. § 552(a)(4)(A)(iii) because disclosure of the information would be in the public interest by contributing significantly to the public understanding of OCR’s use and allocation of HIPAA enforcement funds.

¹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

² *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987) (emphasis in original).

³ *Id.* at 224 (internal quotation marks omitted).

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The Center for Reproductive Rights does not make this request for commercial use. 45 C.F.R. § 5.54(b)(3). As a 501(c)(3) nonprofit organization, the Center for Reproductive Rights does not have a commercial purpose and the release of the information requested is not in the organization's financial interest.

Founded in 1992, the Center for Reproductive Rights is the only global legal advocacy organization dedicated to reproductive rights, and its litigation and advocacy has played a key role in expanding access to reproductive health care around the world. The Center for Reproductive Rights uses information gathered, and its analysis of information gathered, to educate the public through reports, press releases, or other media, as discussed above. Likewise, the Center for Reproductive Rights also makes the materials gathered available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter. The Center for Reproductive Rights has demonstrated commitment to the public disclosure of documents and creation of editorial content.

Accordingly, the Center for Reproductive Rights qualifies for a fee waiver.

Further, the Center for Reproductive Rights will disseminate the information to “a reasonably broad audience of persons” through our social media accounts and our websites. If a waiver or reductions in fees is not granted on the basis of the disclosure being in the public interest, we request a waiver (or, in the alternative, a reduction) of all fees under the “representative of the news media” exception in 5 U.S.C. § 552(a)(4)(A)(ii)(II). The term, “representative of the news media,” as used in the Freedom of Information Act, is defined as any person or entity “that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii).

The Center for Reproductive Rights publishes a regular newsletter that currently has over 215,000 subscribers. Additionally, the Center for Reproductive Rights routinely gathers information from government and other sources and uses that information to publish reports, briefing papers, fact sheets, periodicals, articles, blog posts, and other educational materials, which are readily available to the public through the Center for Reproductive Rights' website (www.reproductiverights.org) and social media accounts (for example, on the Center's Twitter stream @reprorights). During a representative month in 2018, the Center for Reproductive Rights has had over 60,000 visits leading to over 110,000 page views – of which nearly 40,000 were unique visitors. Additionally, the Center has well over 95,000 followers on Twitter.

Accordingly, the Center for Reproductive Rights requests that we be accorded “representative of news media” status and that any fees accrued for this request be waived, or alternatively, reduced.

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In the event that you determine you are unable to waive the fees, please provide us with prior notice if the total fees authorized will exceed \$200 so that we can discuss arrangements.

* * *

Conclusion

The Center for Reproductive Rights looks forward to working with your agency on this request. Thank you for your prompt attention to this matter.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the Center for Reproductive Rights requests that responsive materials be provided electronically by email or in PDF or TIF format on a USB drive. Please send any responsive material and acknowledgement of receipt of this request to:

Katherine Gillespie
Center for Reproductive Rights
1634 Eye Street, NW
Washington, DC 20006
Phone: (917) 637-3718
Email: kgillespie@reprorights.org

If it will accelerate release of responsive records, please also provide responsive material on a rolling basis.

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 Katherine Gillespie at (917) 637-3718. Thank you for your assistance.

Sincerely,

Katherine Gillespie
Senior Federal Policy Counsel
Center for Reproductive Rights

Exhibit D

**DEPARTMENT OF HEALTH & HUMAN SERVICES**

Office of the Secretary

Assistant Secretary for Public Affairs
Washington, D.C. 20201

Refer to: Request Number **2019-01227-FOIA-OS**

September 03, 2019

Ms. Katherine Gillespie
Senior Federal Policy Counsel
Center for Reproductive Rights
1634 Eye Street, NW
Washington, DC 20006

Dear Ms. Katherine Gillespie:

This acknowledges receipt of your August 30, 2019, Freedom of Information Act (FOIA) request, submitted to the Department of Health and Human Services (HHS), FOI/Privacy Acts Division concerning:

"...Records sufficient to identify all recoveries from actions concerning enforcement of the "Health Insurance Portability and Accountability Act of 1996 (HIPAA)... (Date Range for Record Search: From 1/20/2017 to 9/3/2019)".

We received your request on **August 30, 2019** and have initiated a search to locate records falling within the scope of your request. If our searching units advise us that you have requested a voluminous amount of records that require extensive search and examination, my staff will contact you shortly to discuss your willingness to modify your request.

The FOIA requires that we respond to your request within 20 working days of its receipt in this office. Please note the following unusual and exceptional circumstances that will impact our response time: (1) we will need to search for and collect records from components and/or field offices external to this office; and (2) because we receive a very heavy volume of FOIA requests, we will process your request in line with our established policy of "first in, first out" case processing. If either of these circumstances prevents our office from responding within the 20 working day timeframe, we will utilize a 10 working day extension to process your request, as permitted pursuant to the FOIA. This policy is consistent with court decisions regarding FOIA's time limits.

The law authorizes us to collect fees for responding to FOIA requests and assume you are willing to pay any applicable fees for processing this request unless you have stated otherwise. If at any time the fee for processing your request is estimated to exceed \$250.00, we will send you an invoice for the estimated fee and suspend further processing until payment of the invoiced amount is received. If the estimated processing fee does not exceed \$250.00, we will send you an invoice for the actual fee with our response.

Please note the following:

If you believe we should expedite the processing of your request because the requested records are needed in light of a compelling need; i.e., an imminent threat to the life and safety of an individual; an urgency to inform the public concerning government activity (provided you are a member of the media); a deadline in litigation; a deadline for commenting on proposed regulations; or other urgent matters, you must ask for expedited processing in writing and provide to this office as much relevant information as possible. In line with 5 U.S.C. § 552(a)(6)(E)(vi), you must demonstrate the compelling need in a statement certified to be true and correct to the best of your knowledge and belief. Attach any supporting documentation to your statement, including a court scheduling order if your request is based upon a litigation deadline. (Fax supporting documentation to the FOIA/PA Division at (202) 690-8320).

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Request Number: 2019-01227-FOIA-OS

If your request seeks a waiver or reduction of the fees that we would customarily charge for furnishing agency records and your request does not contain sufficient information to enable us to determine whether a waiver or reduction of fees is warranted, you should provide such information to this office within 10 working days of receipt of this letter. In line with 45 C.F.R. § 5.45, such information must include a detailed explanation of how disclosure to you: (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) is not primarily in the commercial interest of the requester. I especially need to know how you intend to disseminate the information to the public.

When submitting this additional information, please refer to the case number listed at the top left-hand corner of this letter, and send it to:

FOI/Privacy Acts Division
U.S. Department of Health and Human Services
200 Independence Avenue S.W.
Room 729H
Washington, DC 20201

If you are not satisfied with any aspect of the processing and handling of this request, you have the right to seek dispute resolution services from:

HHS FOIA/PA Public Liaison
FOI/Privacy Acts Division
Assistant Secretary for Public Affairs (ASPA)
Office of the Secretary (OS)
U.S. Department of Health and Human Services (HHS)
200 Independence Avenue, SW, Suite 729H
Washington, DC 20201

Telephone: (202) 690-7453
Fax: (202) 690-8320
E-mail: [HHS FOIA Public Liaison@hhs.gov](mailto:HHS_FOIA_Public_Liaison@hhs.gov)

and/or:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road – OGIS
College Park, MD 20740-6001

Telephone: 202-741-5770
Toll-Free: 1-877-684-6448
E-mail: ogis@nara.gov
Fax: 202-741-5769

Any questions regarding the status of this request should be directed to our office at 202-690-7453.

Sincerely yours,



Brandon J. Gaylord
Supervisory Government Information Specialist
and HHS FOIA/PA Public Liaison