

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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