

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES; CENTERS FOR MEDICARE &
MEDICAID SERVICES,

Defendants.

Civil Action No. 1:16-cv-03854

COMPLAINT FOR INJUNCTIVE RELIEF

Preliminary Statement

1. This is an action under the Freedom of Information Act (“FOIA”) seeking the release of agency records relating to complaints against Catholic hospitals for denying appropriate care and information to pregnant women seeking reproductive health care, in violation of federal law. Upon information and belief, these complaints describe serious harm – including major blood loss and life-threatening infection – that women experienced after being denied appropriate care by Catholic hospitals.

2. Catholic hospitals are increasingly prevalent throughout the country. As of 2016, one in six hospital beds is in a facility that adheres to Catholic restrictions on care. These restrictions, known as the Ethical and Religious Directives for Catholic Health Care Services (“Directives”), are issued by the U.S. Conference of Catholic Bishops. They prohibit clinicians from providing reproductive health care such as sterilization and abortion, even when the woman’s health or life is in danger.

3. Catholic hospitals receive billions of dollars in federal Medicare and Medicaid funding. For example, in 2016, the top four Catholic health systems alone in the U.S. received more than \$90 billion in combined Medicare and Medicaid patient charges.

4. As a condition of receiving Medicare funding, hospitals with emergency rooms must comply with a federal law called the Emergency Medical Treatment and Active Labor Act (“EMTALA”). This law requires hospitals to provide patients experiencing emergency medical conditions with appropriate stabilizing care. For some women, the appropriate care required to stabilize an emergency medical condition within the meaning of EMTALA is termination of the pregnancy.

5. Furthermore, the Centers for Medicare & Medicaid Services (“CMS”) have issued a federal regulation called the Conditions of Participation in Medicare and Medicaid (“COP”), which establishes the health and safety requirements that hospitals must meet to participate in the Medicare and Medicaid programs. Among other things, the COP provide that hospital patients have the right to receive information about their condition and request treatment, including reproductive health care.

6. Complaints alleging violations of EMTALA and/or the COP may come from a number of sources, including patients, physicians, other hospitals, and state agencies. CMS’s regional offices screen these complaints to determine whether an investigation is warranted. An investigation includes: a review of the emergency department log and a sample of patient records, including the complaint case; interviews with hospital staff and physicians involved in the reported incident; and an exit conference.

7. On information and belief, a number of complaints have been filed with CMS regarding serious EMTALA and COP violations by Catholic hospitals that refuse to

provide appropriate treatment to women experiencing emergency pregnancy complications. For example, one woman experiencing a miscarriage was discharged to the Catholic hospital's parking lot, picked up by a relative, and driven to another facility, where she received an emergency abortion and was treated for major blood loss. Another woman miscarried by herself on the toilet, after a Catholic hospital gave her Tylenol to treat a potentially deadly pregnancy-related infection and sent her home (twice).

8. On November 5, 2014, Plaintiff American Civil Liberties Union ("ACLU") requested documents under the FOIA from Defendant CMS regarding complaints the agency has received about Catholic hospitals. The ACLU received few documents in response, and appealed to request an appropriate search. To date, the ACLU has received no response to its appeal.

9. The ACLU is legally entitled to these documents, which were requested a year and a half ago. CMS has far exceeded the statutory and regulatory time limitations to respond to the ACLU's appeal.

10. Given the seriousness of the EMTALA and COP violations at issue, it is crucial that the requested documents are disclosed so that the public can ascertain whether hospitals receiving federal funds are violating federal laws designed to protect patient health and safety. Accordingly, this Court should order Defendants to provide the requested records to the ACLU immediately.

Jurisdiction and Venue

11. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. §

552(a)(4)(A)(vii). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701–706.

12. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) because Plaintiff's principal place of business is in New York.

Parties

13. Plaintiff American Civil Liberties Union ("ACLU") is a non-profit organization that educates the public about civil liberties and employs lawyers who provide legal representation free of charge in cases involving civil liberties. The ACLU has filed multiple FOIA requests pertaining to the government's policies. The ACLU is a nationwide, non-profit, non-partisan organization with more than 500,000 members dedicated to the constitutional principles of liberty and equality.

14. Defendant U.S. Department of Health & Human Services ("HHS") is a Department of the Executive Branch of the United States government. HHS is an agency within the meaning of 5 U.S.C. § 552(f)(1)

15. Defendant CMS, a subdivision of HHS, is an agency within the meaning of 5 U.S.C. § 552(f)(1).

CMS Complaints Against Catholic Hospitals for Failing to Provide Appropriate Care to Pregnant Women Suffering Miscarriages

16. Independent of the few tangentially relevant documents produced by CMS in response to the ACLU's FOIA request, the ACLU is aware of several complaints lodged with CMS that demonstrate the serious harms imposed on pregnant women when Catholic hospitals follow the Directives and violate federal law.

17. For example, on information and belief, CMS found in a 2012 investigation that St. John Hospital in Detroit, Michigan, violated EMTALA when it denied a woman appropriate treatment for her miscarriage because of its adherence to the Directives.

18. The woman, who had arrived at St. John Hospital via ambulance, presented with vaginal bleeding and an elevated heart rate. She was diagnosed with an “inevitable abortion” due to fetal prematurity. Crying and upset, the woman told hospital staff that she “wanted to have the abortion because she knew the baby would not make it,” but staff members refused to perform the procedure as long as there were fetal heart tones. After about six hours at the hospital, the woman was discharged with no real plan confirmed about where she would go for the emergency abortion or how she would arrive there safely. She was picked up by a family member and driven to another facility, where she received an emergency abortion and seven pints of blood.

19. During the investigation into the incident, a St. John Hospital staff member told CMS: “We are a Catholic institution and we do not perform abortions here if there are fetal heart tones.”

20. CMS found that St. John Hospital had violated an EMTALA regulation requiring hospitals that receive Medicare funds to stabilize and appropriately transfer patients with emergency medical conditions.

21. Moreover, Faith Groesbeck – a former county health official in Michigan – filed a CMS complaint alleging that Mercy Health Partners, a Catholic hospital, violated EMTALA by refusing to provide medically indicated treatment and information to five women undergoing dangerous miscarriages between August 2009 and December 2010. *See* Molly Redden, “Abortion Ban Linked to Dangerous Miscarriages at Catholic

Hospital, Report Claims,” *The Guardian* (Feb. 18, 2016), *available at* <http://www.theguardian.com/us-news/2016/feb/18/michigan-catholic-hospital-women-miscarriage-abortion-mercy-health-partners>.

22. On information and belief, the complaint and the women’s medical records indicated that all five women were experiencing pregnancy complications and showed signs of infection. None of their pregnancies were viable, and the women’s symptoms indicated that it would be safest for them to terminate their pregnancies immediately. But hospital staff at Mercy Health Partners neither informed them about the possibility of immediate termination nor provided the appropriate care. “As a result . . . several of the women suffered infection or emotional trauma, or had to undergo unnecessary surgery.” *Id.*

23. “One of the women described in the complaint was given Tylenol for a potentially deadly infection and sent home – twice – where she miscarried by herself on the toilet.” *Id.* Another woman was forced to wait over eighteen hours to complete a miscarriage without medical intervention, resulting in the retention of an infected placenta, which had to be removed through an additional surgical procedure.

The FOIA Request and CMS’s Response

24. On November 5, 2014, the ACLU filed a FOIA request with Defendant CMS seeking release of all records within the last five years: (1) relating to allegations of improper care, violations of EMTALA, and violations of CMS regulations related to pregnancy-related treatment – including treatment for miscarriage, abortion, and sterilization – at hospitals receiving federal funds; and (2) memorializing rules,

guidelines, policies, standards of care, etc. for treatment of pregnancy-related conditions at hospitals receiving federal funds. *See* Ex. A.

25. On September 10, 2015, the ACLU received CMS's response to the request. In total, CMS produced 150 pages of records concerning consent to sterilization, 139 pages of which were produced. *See* Ex. B.

26. Neither the results of CMS's investigation into St. John Hospital nor Ms. Groesbeck's CMS complaint were included in CMS's response. In fact, notwithstanding the ACLU's specific requests, CMS's response included no documents whatsoever related to complaints about treatment for miscarriage or abortion.

27. On October 8, 2015, the ACLU appealed CMS's response to its FOIA request. *See* Ex. C. In its administrative appeal, the ACLU expressly challenged the adequacy of CMS's search.

28. To date, the ACLU has received no response to its appeal.

29. CMS has failed to comply with the time limits imposed by the FOIA statute and the applicable HHS regulations.

30. On information and belief, CMS has not conducted an adequate search for records responsive to the ACLU's FOIA request.

31. Under the FOIA statute, an agency must determine an appeal within 20 days (excluding weekends and legal holidays) after receiving it. 5 U.S.C. § 522 (a)(6)(A)(ii).

32. Under HHS regulations, CMS must decide an appeal within 20 working days after the appeal reaches the appropriate review official. 45 C.F.R. § 5.35(b)(2).

33. If CMS fails to "meet the deadline[], [the requester] may proceed as if [it] had denied . . . [the] appeal." *Id.* § 5.35(a).

34. The ACLU therefore has instituted this action to ask the Court to order CMS to disclose the requested documents.

The ACLU's Entitlement to a Waiver of or Reduced Processing Fees

35. The ACLU also asked for a waiver or reduction of document search, review, and duplication fees because disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 45 C.F.R. § 5.45(a).

36. The records sought in the instant request will significantly contribute to the public understanding of the operations and activities of HHS, as well as the treatment of pregnancy-related conditions at hospitals receiving federal funds. In addition, disclosure is not in the ACLU's commercial interest. The ACLU will evaluate the disclosed documents and, depending on what is contained in the documents, may well disseminate the information to the public. If the ACLU publicly discloses information obtained through the FOIA, it will do so at no cost to the public.

37. The ACLU is also entitled to a waiver or reduction of fees because it qualifies as a “representative of the news media” and the records are not sought for commercial use. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II); 45 C.F.R. § 5.45(b)(3).

38. The ACLU is a representative of the news media for the purposes of FOIA because it is an entity that 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.

39. The ACLU does not seek the requested information for commercial reasons. The ACLU summarizes, explains, and disseminates the information it gathers through FOIA requests at no cost to the public.

Causes of Action

40. The ACLU repeats and realleges paragraphs 1-39.

41. Defendants' failure to timely respond to the ACLU's appeal violates the FOIA, 5 U.S.C. § 552(a)(6)(A)(ii), and HHS's corresponding regulation, 45 C.F.R. § 5.35(b)(2).

42. Defendants' failure to make a reasonable effort to search for records responsive to the ACLU's request violates the FOIA, 5 U.S.C. § 552(a)(3)(C), and HHS's corresponding regulation, 45 C.F.R. § 5.24.

43. Defendants' wrongful withholding of non-exempt responsive materials violates the FOIA, 5 U.S.C. § 552(a)(3)(A), and HHS's corresponding regulation, 45 C.F.R. § 5.2.

Requested Relief

WHEREFORE, Plaintiff prays that this Court:

1. Order Defendants to immediately process all requested records;
2. Order Defendants to conduct a thorough search for all responsive records;
3. Order Defendants to promptly disclose the requested records in their entirety and make copies available to Plaintiff;
4. Enjoin Defendants from charging Plaintiff fees for the processing of their request;
5. Award Plaintiff its costs and reasonable attorneys' fees incurred in this action under 5 U.S.C. § 552(a)(4)(E); and

6. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'Brian Hauss', is written over a horizontal line.

Brigitte Amiri (BA-8497)

Brian Hauss*

American Civil Liberties Union Foundation

125 Broad Street, 18th Floor

New York, NY 10004

Phone: 212-549-2633

Fax: 212-549-2652

*Application for admission forthcoming

Exhibit A



November 5, 2014

By Certified Mail,
Return Receipt Requested

Hugh Gilmore
CMS FOIA Officer
Centers for Medicare & Medicaid Services
Mailstop N2-20-16
7500 Security Boulevard
Baltimore, MD 21244

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
WWW.ACLU.ORG

Dear Mr. Gilmore:

This is a request for production of records under the Freedom of Information Act, 5 U.S.C. § 552, and the implementing regulations of the Department of Health and Human Services ("HHS"), 45 C.F.R. Pt. 5, on behalf of the American Civil Liberties Union ("ACLU").

Definitions

For purposes of this request, the term "materials" includes but is not limited to any and all objects, writings, drawings, graphs, charts, tables, electronic or computerized data compilations, budgets, accountings, balance sheets or other financial statements, invoices, receipts, minutes, emails, electronic or computerized documents, photographs, audiotapes, videotapes, transcripts, drafts, correspondence, notes, notes of oral communications, and non-identical copies, including but not limited to copies with notations.

Requests

Please provide the following materials:

1. All materials, within the last five years, related to allegations of improper care, violations of the Emergency Medical Treatment and Active Labor Act ("EMTALA"), or violations of any Centers for Medicare & Medicaid Services ("CMS") regulation related to pregnancy-related treatment, including, but not limited to, treatment for miscarriage, abortion, or sterilization at hospitals receiving federal funds. Such materials may include, but are not limited to activity logs, incident reports, complaint forms, memoranda, correspondence, plans of correction, etc.

2. All materials that memorialize rules, guidelines, policies, practices, standards, instructions, reporting requirements, qualifications, and certifications concerning the proper treatment of, and/or standard of care for, pregnancy-related conditions or treatment at hospitals receiving federal funds that are in effect now or were in effect in the last five years.

We request that you produce responsive materials in their entirety, including all attachments, appendices, enclosures, and/or exhibits. However, to the extent that a response to this request would require CMS to provide multiple copies of identical material, the request is limited so that only one copy of the identical material is requested. Moreover, this request does not seek any personally identifying information of any hospital patient.

In the event you determine that materials contain information that falls within the statutory exemptions to mandatory disclosure, we request that such information be reviewed for possible discretionary disclosure. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979). We also request that, in accordance with 5 U.S.C. § 552(b), any and all reasonably segregable portions of otherwise exempt materials be produced. To the extent the request is denied, we expect to receive notice in writing, including a description of the information withheld, the reasons for denial, and any exemptions relied upon. *See* 5 C.F.R. § 5.33.

We request that the processing fee be waived or reduced pursuant to 45 C.F.R. § 5.45. Under § 5.45, fees should be waived or reduced if disclosure is (1) in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and (2) not primarily in the commercial interest of the requester. 45 C.F.R. § 5.45(a). Disclosure in this case meets both of these tests; and a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"). Moreover, to the extent fees are assessed at all, they should be "limited to reasonable standard charges for document duplication," because the ACLU qualifies as a "representative of the news media." 5 U.S.C. § 552(a)(4)(A)(ii)(II); 45 C.F.R. § 5.41(b).

The HHS regulations provide the following factors to consider in determining whether disclosure is in the public interest: (a) how the records pertain to the operations or activities of the federal government; (b) whether disclosure of the records reveals any meaningful information about government operations or activities; whether one can learn from these records anything that is not already public knowledge; (c) whether the disclosure advances the understanding of the general public as distinguished from a narrow segment of interested persons; and (d) whether the contribution to public understanding will

be significant and substantially greater as a result of disclosure. 45 C.F.R. § 5.45(b).

Disclosure pursuant to this request is in the public interest. First, the records pertain directly to the operations and activities of the federal government, as well as the treatment of pregnancy-related conditions at hospitals receiving federal funds. The treatment of pregnancy-related conditions at hospitals receiving federal funds is a matter of significant public interest. *See, e.g.,* Rob Stein, *Abortion Fight at Catholic Hospital Pushes ACLU to Seek Federal Help*, Wash. Post (Dec. 22, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122206219.html?sid=ST2010123003662>; Erik Eckholm, *Bishops Sued Over Anti-Abortion Policies at Catholic Hospitals*, N.Y. Times A12 (Dec. 3, 2013), available at <http://www.nytimes.com/2013/12/03/us/lawsuit-challenges-anti-abortion-policies-at-catholic-hospitals.html>; Complaint, *Means v. United States Conference of Catholic Bishops*, 2:13-cv-14916-DPH-PJK (E.D. Mich.), available at https://www.aclu.org/sites/default/files/assets/complaint_final_1.pdf.

Second, the information to be learned from the requested documents is not already public knowledge.

Third, because the ACLU qualifies as a “representative of the news media” as defined by FOIA, HHS should find that the information requested is “likely to [be] disseminated to the public.” *See* 45 C.F.R. § 5.45(b)(3). The ACLU meets the definition of a representative of the news media because it is “an entity that 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.” *National Sec. Archive v. Department of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). *See also* 45 C.F.R. § 5.5 (defining representative of the media as a “publisher[] of periodicals” that “distribute[s]” its “products to the general public” and an entity that “disseminate[s] news through other media (e.g., electronic dissemination of text)”). The ACLU regularly gathers information on issues of public significance; uses its editorial skills to turn that information into distinct publications such as reports, newsletters, right-to-know pamphlets, fact sheets, and other educational materials; and distributes those materials to the general public through various channels, such as its heavily subscribed Web site (www.aclu.org), and newsletter sent to its more than 400,000 members, as well as an electronic newsletter, which is distributed to subscribers by e-mail. And the ACLU has coauthored a report on the provision of reproductive health care at Catholic hospitals receiving federal Medicare and Medicaid funds. *See* MergerWatch & ACLU, *Miscarriage of Medicine: The Growth of Catholic Hospitals and the Threat to Reproductive Health Care* (Dec. 2013), available at

<https://www.aclu.org/files/assets/growth-of-catholic-hospitals-2013.pdf>. The ACLU is therefore a “news media entity.” Cf. *Electronic Privacy Information Ctr. v. Department of Defense*, 241 F.Supp.2d 5, 10–15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the media” for purposes of FOIA).

Fourth, allowing fee waivers is in the public interest: Disclosure will contribute to the public good in a significant way because the requested records, which are all materials related to CMS’s policies and how it monitors the treatment of pregnancy-related conditions at hospitals receiving federal funds. “[W]hat could be more important to the public’s understanding of [agency] operations” than understanding how the agency monitors the treatment of pregnant women at hospitals receiving federal funds? *Judicial Watch*, 326 F.3d at 1313.

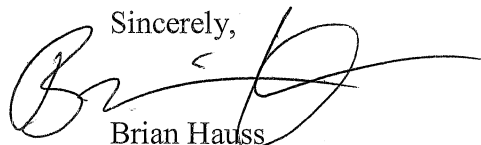
Finally, disclosure is not in the ACLU’s commercial interest, defined as “interests relating to business, trade and profit.” 45 C.F.R. 5.45(c)(1). The ACLU is a “non-profit, non-partisan, public interest organization.” See *Judicial Watch*, 326 F.3d at 1310. The ACLU has no intention of applying for any of the funding mentioned in this request. Additionally, the purpose of the request is to monitor and vindicate legal rights; it is unrelated to business, trade, or profit.

Because the ACLU meets the test for a fee waiver, fees associated with responding to FOIA requests are regularly waived for the ACLU.

Disclosure of the requested documents is in the public interest and not primarily in the commercial interest of the Requester, and the processing fees should therefore be waived. In the event that you decide not to waive the fees, please provide me with prior notice so that we can discuss arrangements.

We look forward to a determination on this request from you within 10 (ten) working days pursuant to 45 C.F.R. § 5.35. Thank you for your prompt attention to this request. Please call me at (212) 549-2604 if you have any questions or wish to obtain further information about the nature of the documents in which we are interested. The records should be sent to Brian Hauss, ACLU Foundation, 125 Broad Street, 18th Floor, New York, NY 10004.

Sincerely,



Brian Hauss

Exhibit B

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, N2-20-16
Baltimore, Maryland 21244-1850



Office of Strategic Operations and Regulatory Affairs/Freedom Information Group

Refer to: Control Number 110720147009 & PIN 97KS

September 10, 2015

Mr. Brain Hauss
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, New York 10004

Dear Mr. Hauss:

This letter is in response to your November 5, 2014 Freedom of Information Act (FOIA) (5 U.S.C. § 552) request for a copy of the following:

1. All materials, within the last five years, related to allegations of improper care, violations of the Emergency Medical Treatment and Active Labor Act (EMTALA), or violations of any Centers for Medicare & Medicaid Services (CMS) regulation related to pregnancy-related treatment, including, but not limited to, treatment for miscarriage, abortion, or sterilization at hospitals receiving federal funds. Such materials may include, but are not limited to activity logs, incident reports, complaint forms, memoranda, correspondence, plans of correction, etc.;
2. All materials that memorialize rules, guidelines, policies, practices, standards, instructions, reporting requirements, qualifications, and certifications concerning the proper treatment of, and/or standard of care for, pregnancy-related conditions or treatment at hospitals receiving federal funds that are in effect now or were in effect in the last five years.

After careful review of the 150 pages of records forwarded to my office, I have decided to release 139 pages of them to you. However, I am denying you access to 11 pages in full and portions of four pages pursuant to Exemptions 5 and 6 of the FOIA (5 U.S.C. § 552 (b)(5) & (b)(6)).

Exemption 5 protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” Among the privileges incorporated into Exemption 5 is the deliberative process privilege, which protects the “decision making processes of government agencies.”

Page Two -- Mr. Brain Hauss

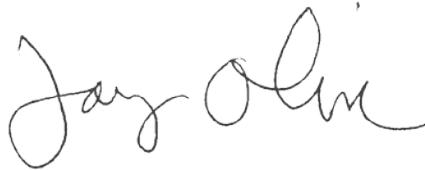
Also, I am denying portions of pages are Exemption 6 permits a federal agency to withhold information about individuals in “personnel and medical files and similar files” when disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.”

In making my determination, I have weighed the public interest in disclosure (which the Supreme Court has held is to be limited in this context to the public interest that would be served by shedding light on the agency’s performance of its statutory duties) against the harm to the privacy interests of the individuals identified in these records. In this case, I have concluded that the disclosure of this information would reveal little or nothing about the conduct of the agency itself and, therefore, that the privacy interests of the subject individuals in the redacted information far outweigh the public interest in disclosure.

There are no charges assessed for the processing of this request.

You have the right to appeal this decision. To do so, you must put your appeal in writing and send it within 30 days to: The Deputy Administrator and Chief Operating Officer, CMS, Room C5-16-03, 7500 Security Boulevard, Baltimore, Maryland 21244-1850. Please mark the envelope containing your letter of appeal “Freedom of Information Act Appeal” and enclose a copy of this letter with your appeal.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Jay Olin". The signature is fluid and cursive, with the first name "Jay" being more prominent than the last name "Olin".

Jay Olin
Director, Division of FOIA Analysis – C
Freedom of Information Group

Enclosure (139 pages)

Exhibit C



October 8, 2015

By Certified Mail,
Return Receipt Requested
The Deputy Administrator and Chief Operating Officer
CMS
Room C5-16-03
7500 Security Boulevard
Baltimore, MD 21244-1850

Re: Appeal of CMS FOIA Request Control Number 110720147009

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
WWW.ACLU.ORG

Dear Sir or Madam:

I write to appeal the Agency's erroneous denial of the above-referenced Freedom of Information Act request.

I. The Request

On November 5, 2014, the ACLU submitted a request to the Centers for Medicare & Medicaid Services (CMS) seeking: (1) materials, within the last five years related to violations of the Emergency Medical Treatment and Active Labor Act (EMTALA) or violations of CMS regulations if those violations relate to pregnancy-related treatment at hospitals receiving federal funds, including treatment for miscarriage, abortion, or sterilization; and (2) materials, within the last five years, memorializing the proper treatment of pregnancy-related conditions at hospitals receiving federal funds. ACLU FOIA Request (Nov. 5, 2014) (attached).

CMS responded on September 10, 2015. Letter from Jay Olin, at 1 (Sept. 10, 2015) (attached). In total, CMS's search produced 150 pages of records concerning consent to sterilization, 139 pages of which were produced in full. *Id.* at 2. CMS did not produce *any* materials concerning allegations of improper care in medical treatment for abortion or miscarriage. Such records clearly exist, as demonstrated by the attached documents.

CMS also withheld 11 pages in full, and portions of four pages, pursuant to FOIA Exemptions 5 and 6 (5 U.S.C. § 552(b)(5) & (b)(6)). *Id.* at 3. With respect to its withholdings under Exemption 5, CMS broadly stated that "Exemption 5 protects 'inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency,'" and that the exemption encompasses "the



deliberative process privilege, which protects the ‘decision making processes of government agencies.’” CMS did not explain how these pages were responsive to the request, whether the pages were withheld solely because of the deliberative process privilege, to which deliberative process the withheld pages relate, or what harm may result from disclosure of the pages. It is also unclear whether CMS conducted the required segregability analysis. *See* 5 U.S.C. § 552(b). As a result, CMS has failed to meet its burden under FOIA and should produce documents responsive to the request and the eleven withheld pages without delay.

II. Argument

A. CMS’s Search Was Inadequate.

Although FOIA does not require the agency to conduct a “perfect search,” *Defenders of Wildlife v. U.S. Dep’t of Agric.*, 311 F. Supp. 2d 44, 54 (D.D.C. 2004), the agency must make “a good faith effort to conduct a search . . . using methods which can be reasonably expected to produce the information requested,” *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 67 (D.C. Cir. 1990). The adequacy of the agency’s search is evaluated based on the search’s reasonableness given the totality of the circumstances. *Wesiberg v. U.S. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

Here, the ACLU requested “[a]ll materials, within the last five years, related to allegations of improper care, violations of the Emergency Medical Treatment and Active Labor Act (“EMTALA”), or violations of any Centers for Medicare & Medicaid Services (“CMS”) regulation related to pregnancy-related treatment, including, but not limited to, treatment for miscarriage, abortion, or sterilization at hospitals receiving federal funds.” Although CMS produced a number of emails related to proper consent for sterilization treatment, it produced absolutely no records relating to allegations of improper care in medical care related to abortion or miscarriage. As demonstrated by the attached documents, such records clearly exist. *See* Tamesha Means, Complaint re: Denial of Reproductive Health Care at Religious Hospital (Dec. 17, 2013) (attached) (reporting violations of EMTALA, the Conditions of Participation of Medicare and Medicaid, and standard of care by Mercy Health Partners in Muskegon, Michigan for withholding information and treatment when complainant suffered from pregnancy complications); Plan of Correction for St. John Hospital and



Medical Center EMTALA Survey (March 1, 2013) (attached) (responding to a CMS determination that the facility “failed to comply with the requirements of 42 CFR 489.24 [special responsibilities of Medicare hospitals in emergency cases], because it failed to stabilize and transfer a woman in the midst of miscarriage); ACLU Letter to Acting CMS Administrator Marilyn Tavenner re: Denial of Reproductive Health Care at Religious Hospitals (July 1, 2010) (attached) (informing CMS about potential violations of EMTALA and the Conditions of Participation of Medicare and Medicaid by religious hospitals that refuse to provide emergency reproductive health care). Given that the ACLU is already aware of at least three responsive documents that were not provided, it is evident that a proper search was not conducted. The ACLU assumes that there are more responsive documents of which it is unaware.

B. CMS Has Not Satisfied Its Burden of Demonstrating That the Eleven Withheld Pages Are Exempt From Disclosure Under Exemption 5.

FOIA Exemption 5 exempts from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). The privileges that are incorporated into Exemption 5 include, among others, the deliberative process privilege, the attorney work-product privilege, and the attorney-client communications privilege. *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8–9 (2001).

Here, although CMS has not explicitly stated its basis for applying Exemption 5, it has suggested that eleven pages were withheld pursuant to the deliberative process privilege. To qualify for the deliberative process privilege, an agency must demonstrate that the withheld documents are both “pre-decisional” and “deliberative”; it does not suffice to simply declare that they are. *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). A document will be deemed pre-decisional if it was “generated before the adoption of an agency policy,” and will be deemed deliberative if it reflects the “give-and-take of the consultative process.” *Id.* (internal quotation marks omitted). The deliberative process privilege does not protect “an agency’s final opinions, statements of policy and interpretations definitively adopted by the agency, and any documents having ‘the force-and-effect of law.’” *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1122 (9th Cir.



1988) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975)). The privilege also does not protect material that is “purely factual.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

CMS’s blanket denial fails to demonstrate that the eleven withheld pages are protected under the deliberative process privilege. Although CMS need not point to a specific final agency decision in order to invoke Exemption 5, it must establish “what deliberative process is involved, and the role played by the documents in issue in the course of that process.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980). It has not done so. Instead, CMS’s denial simply states that the eleven withheld pages are exempt under Exemption 5, and notes that the Exemption includes the deliberative process privilege. It does not specify any deliberative process pursuant to which the documents are being withheld, or what role (if any) the documents played in that process. CMS’s denial also fails to specify the harm that will result from disclosure of the documents withheld pursuant to Exemption 5, even though an agency invoking the exemption is required to “show, by specific and detailed proof, that disclosure would defeat, rather than further, the purposes of FOIA.” *Mead Data Cent., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) (citations omitted). CMS has therefore failed to provide the “detailed justification” required under FOIA. *Id.* at 258.

C. CMS Is Required to Produce any Reasonably Segregable Portion of the Eleven Withheld Pages.

The fact that CMS withheld eleven responsive pages in their entirety strongly suggests that the agency failed to conduct the requisite segregability analysis. *See* 5 U.S.C. § 552(b) (“[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection”); *see also Ctr. for U.S. Env’t Law v. Office of the U.S. Trade Representative*, 505 F. Supp. 2d 150, 158 (D.D.C. 2007) (holding that, even if a FOIA exemption applies, a government agency “may not automatically withhold the full document as categorically exempt without disclosing any segregable portions”). Even if some portion of the eleven withheld pages contains material protected by the deliberative process privilege, CMS is required to produce any portion of those pages that is not both pre-decisional and deliberative. *See, e.g., Public Citizen, Inc. v. OMB*, 598 F.3d 865, 876 (D.C. Cir. 2010) (ordering OMB to



produce all portions of withheld documents that were not both pre-decisional and deliberative).

Here, given that the withheld documents seem to encompass communications involving CMS officials, it is likely that the documents include at least some purely factual information, such as the names of the sender(s) and recipient(s) of the communications, as well as the titles and dates of the communications. CMS is required to disclose any such “purely factual” information. *Id.* (“agencies must disclose portions of predecisional and deliberative documents that contain factual information that does not inevitably reveal the government’s deliberations” (internal quotation marks omitted)). Thus, to the extent that the eleven withheld pages contain information that is both pre-decisional and deliberative, that information should be redacted and the rest of the text produced.

D. Even If the Withheld Documents Are Exempt, CMS Should Release Them as a Matter of Discretion.

Should you remain unpersuaded that the withheld documents must be disclosed under FOIA, the ACLU nonetheless urges CMS to release them as a matter of discretion. As the Attorney General has made clear, “an agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.” Attorney Gen.’s Memorandum for Heads of Executive Dep’ts and Agencies Concerning the Freedom of Info. Act, at 1 (Mar. 19, 2009). Instead, the Attorney General has instructed agencies “to make discretionary disclosures of information.” *Id.*

Reports of EMTALA violations and violations of CMS regulations concerning pregnancy-related medical care reference matters of compelling public interest. See, e.g., Rob Stein, Abortion Fight at Catholic Hospital Pushes ACLU to Seek Federal Help, Wash. Post (Dec. 22, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122206219.html?sid=ST2010123003662>; Erik Eckholm, Bishops Sued Over Anti-Abortion Policies at Catholic Hospitals, N.Y. Times A12 (Dec. 3, 2013), available at <http://www.nytimes.com/2013/12/03/us/lawsuit-challenges-anti-abortion-policies-at-catholic-hospitals.html>; Complaint, Means v. United States Conference of Catholic Bishops, 2:13-cv-14916-DPH-PJK (E.D. Mich.), available at https://www.aclu.org/sites/default/files/assets/complaint_final_1.pdf. They make it possible for the public to



better understand whether CMS is effectively carrying out its statutory duties. “[W]hat could be more important to the public’s understanding of [agency] operations” than understanding how the agency monitors the treatment of pregnant women at hospitals receiving federal funds? *Judicial Watch*, 326 F.3d at 1313. Such matters are sufficiently serious to merit prompt and full disclosure, particularly when, as here, disclosure threatens no countervailing harm.

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For the reasons set forth above, the ACLU respectfully requests that CMS produce the documents responsive to the request forthwith and respond to this appeal within 20 days. *See* 5 U.S.C. § 552(a)(6)(A)(ii). If you have any questions or concerns regarding this appeal, please contact me directly at (212) 549-2604.

Sincerely,



Brian Hauss

Enclosures