

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
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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.

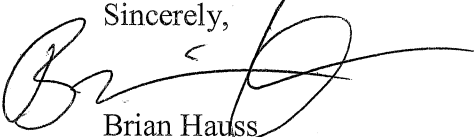
Finally, disclosure is not in the ACLU’s commercial interest, defined as “interests relating to business, trade and profit.” 45 C.F.R. 5.45(c)(1). The ACLU is a “non-profit, non-partisan, public interest organization.” *See Judicial Watch*, 326 F.3d at 1310. The ACLU has no intention of applying for 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