

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION;

Plaintiff,

v.

INDIAN HEALTH SERVICES;

Defendant.

**COMPLAINT FOR  
INJUNCTIVE RELIEF**

Civil Action No.

**COMPLAINT FOR INJUNCTIVE RELIEF**

**Preliminary Statement**

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive and other appropriate relief, seeking, principally, the processing and release of agency records requested by Plaintiff American Civil Liberties Union (“ACLU”) from Defendant Indian Health Services. Plaintiff seeks documents related to Defendant’s failure to provide adequate obstetrical and other medical care to residents of the Cheyenne River Sioux Reservation (“Reservation”) in South Dakota.

2. Indian Health Services (“IHS”) is the federal agency charged with meeting the United States government’s treaty obligations to provide health care to American Indians and Alaska Natives. Despite this legal obligation, obstetrical care has been unavailable at any IHS facility on the Reservation since 2001 and plans for a new birthing unit have languished for years. As a result, most pregnant women who would otherwise be eligible for direct care in an IHS facility must travel approximately ninety miles to St. Mary’s

Healthcare Center (“St. Mary’s”), in Pierre, South Dakota, for labor and delivery.

Moreover, some of these women report that they are being told they must forgo natural labor and delivery, and instead take medication to induce labor – with little or no notice, explanation, or counseling, and at a time selected exclusively by their doctor (sometimes even before their due date).

3. Coercing women to take medication to induce labor necessarily violates their fundamental rights to privacy and bodily integrity. Such a practice raises serious concerns in this context given that this country has a long and unfortunate history of violating Indian women’s reproductive rights and autonomy. Abusive practices, such as forced and involuntary sterilizations, were endemic in government-sponsored Indian health services as recently as the 1970’s. These reports from the Cheyenne River Sioux – that, effectively left with no alternative source of medical care, women are being coerced into taking medication to induce labor – are jarringly reminiscent of such past abuses.

4. Accordingly, Plaintiff sent two FOIA requests to Defendant seeking information concerning the provision of reproductive health care on the Reservation: (1) regarding the construction of the proposed birthing unit and hospital that would create the promise of onsite medical care for residents of the Reservation; and (2) regarding the practice of inducing labor at St. Mary’s.

5. Plaintiff ACLU is entitled to the release of the documents sought and to a limitation and/or waiver of fees and has exhausted all administrative appeals. However, almost one year after they were filed, IHS continues to refuse to comply with Plaintiff’s requests, and has far exceeded the statutory, and regulatory, deadline for responding to FOIA requests.

### **Jurisdiction and Venue**

6. 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 501 U.S.C. §§ 701-706. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

### **Parties**

7. Plaintiff American Civil Liberties Union is a nationwide, non-profit, non-partisan organization with over 500,000 members dedicated to the constitutional principles of liberty and equality.

8. IHS is a Department of the Executive Branch of the United States Government. Defendant IHS is an agency within the meaning of 5 U.S.C. § 552(f)(1).

### **Obstetrical Care on the Cheyenne River Sioux Reservation**

9. The Cheyenne River Sioux Reservation is the fourth largest reservation in the United States, with a population of about 10,000 people, most of them tribal members.

10. Almost all of Ziebach County, S.D., one of the poorest counties in the United States, is located within the Reservation's borders.

11. Although there is a small medical facility on the Reservation in the town of Eagle Butte, for anything other than modest medical treatment, tribal members and residents must travel to Pierre (approximately 90 miles), Gettysburg (approximately 80 miles), Rapid City (approximately 180 miles), or Bismark, N.D. (approximately 180 miles).

12. In 2001, the only birthing unit on the entire reservation, which had been located at the Eagle Butte facility, closed. The nearest facilities that provide obstetrical services pursuant to an IHS contract are in Pierre. Because roads are poor, it can take over two hours to get to these hospitals.

13. On information and belief, the Cheyenne River Sioux Reservation is the only reservation in South Dakota that is not equipped to handle uncomplicated births.

14. Studies show that the availability of rural maternity units – even those that lack a surgical unit and can only handle uncomplicated births – results in better pregnancy outcomes than when rural women are forced to seek maternity care in distant urban areas.

15. In 2002, IHS approved plans for a new medical facility in Eagle Butte. In 2003, IHS announced that a birthing unit would be built as part of that new facility. By 2009, construction of the new facility in Eagle Butte had not progressed beyond the earliest stages. However, in 2009, Congress appropriated \$500 million in the American Recovery and Reinvestment Act of 2009 for improvements in Indian health, of which IHS allocated \$111 million to finishing the new facility in Eagle Butte.

16. According to an August 2009 IHS Project Status Update, the current expected completion date for the hospital is not until December 2012.

#### **Obstetrical Care at St. Mary's Hospital**

17. Because the IHS facility at Eagle Butte is not equipped to handle labor and delivery, IHS has contracted with a single obstetrician at St. Mary's Hospital in Pierre, S.D. (approximately ninety miles away) to provide obstetrical care to tribal members. The next closest IHS physician is twice as far away, in Rapid City, S.D. (approximately

180 miles away). For this reason, virtually all the women on the Reservation go to St. Mary's for labor and delivery.

18. However, some women report that they are coerced into scheduling an induction and forgoing spontaneous labor and delivery at St. Mary's. These women fear that if they refuse to be induced, IHS, which they rely upon for health care, will refuse to subsidize the cost of labor and delivery.

19. These women also report that they do not receive any counseling regarding the risks and benefits of inducing labor and delivery and forgoing spontaneous labor and delivery.

20. Induction carries some risks to the pregnant woman and her infant, including higher cesarean section rates, and are contraindicated for some women (e.g., where there is a transverse fetal position, umbilical cord prolapse, active genital herpes infection, placenta previa, and women who have had fibroids removed).

21. While labor is sometimes induced for logistical reasons, such as a woman's distance from the hospital, there is no medical group or organization that recommends mandatory inductions for all rural women, regardless of their preference or circumstances.

22. For example, the American College of Obstetricians and Gynecologists' ("ACOG") August 2009 clinical guidelines regarding inductions state that a patient should always be counseled regarding the indications for induction and the possible need for repeat induction or cesarean delivery as a result.

23. ACOG also suggests allowing at least 12-18 hours of latent labor before elective induction, in order to reduce the risk of cesarean delivery.

24. The need for induction also depends on whether it is a woman's first pregnancy, as labor typically takes longer for these women and it is therefore less likely that they will deliver before reaching a hospital.

25. The policy or practice of coercing inductions has a devastating effect on women and their families. For example, not only do women of the Cheyenne River Sioux have to travel far outside their community in order to give birth, but some women are also induced and forced to deliver before their families are able to join them at the hospital – even when there are no medical reasons to do so.

26. Moreover, because they are beholden to IHS for medical care, these women feel powerless to refuse to be induced on their physician's terms, and thus their fundamental rights to privacy and bodily integrity are violated. That the women of the Cheyenne River Sioux live in a rural area and must rely on IHS for health care does not give the federal government the right to deprive Native women of the ability to make an informed and autonomous decision about their medical care.

#### **Plaintiff's FOIA Requests**

27. On November 24, 2009, Plaintiff filed a FOIA request ("Birthing Unit Request") with IHS Headquarters via certified mail seeking records related to the plans to build a birthing unit at the new medical facility in Eagle Butte. Ex. A ("Birthing Unit Request"). This request was received by IHS Headquarters on November 27, 2009.

28. In the request, Plaintiff also sought a limitation of fees as a news media requester pursuant to 45 C.F.R. § 5.41(b) and a further waiver or reduction of fees pursuant to 45 C.F.R. § 5.45 because disclosure of the information requested is likely to contribute significantly to public understanding of the operations or activities of the

federal government and is not sought for Plaintiff's commercial use. Ex. A ("Birthing Unit Request").

29. On November 24, 2009, Plaintiff also filed a FOIA request ("St. Mary's Request") with the IHS Regional FOIA Office in Aberdeen, S.D., via certified mail seeking, *inter alia*, records related to IHS policies regarding induction of labor at St. Mary's. Ex. B ("St. Mary's Request"). This request was received by the IHS Regional FOIA office on November 30, 2009.

30. In the request, Plaintiff also sought a limitation of fees as a news media requester pursuant to 45 C.F.R. § 5.41(b) and a further waiver or reduction of fees pursuant to 45 C.F.R. § 5.45 because disclosure of the information requested is likely to contribute significantly to public understanding of the operations or activities of the federal government and is not sought for Plaintiff's commercial use. *Id.*

31. In a letter dated December 17, 2009, the IHS Regional FOIA office informed Plaintiff that it was forwarding the St. Mary's Request to IHS headquarters. Ex. C (Dec. 17, 2009 Letter from IHS to ACLU).

### **Defendant Agency's Responses**

32. Plaintiff received no response from Defendant to its requests until nearly three months after the requests were filed.

33. In a letter to Plaintiff dated February 17, 2010, IHS stated it was "acknowledging" Plaintiff's "request." Ex. D (Feb. 17, 2010 Letter from IHS to ACLU). The letter also appeared to deny Plaintiff's requests for a limitation of fees as a news media requester pursuant to 45 C.F.R. § 5.41(b), although it did not do so explicitly, by placing Plaintiff in the "other" requester category. *Id.*

34. The letter failed to specify whether it was “acknowledging” receipt of both of the requests or simply one of them (and, if so, which one). The letter also failed to specify the status of either of Plaintiff’s requests; to specify the reasons why Plaintiff’s requests for news media requester status were implicitly denied; or to specify how Plaintiff might appeal the implicit denial of its requests for news media requester status. Finally, the letter failed to say anything at all about Plaintiff’s requests for a further waiver and reduction of fees pursuant to 45 C.F.R. § 5.45. *Id.*

### **Plaintiff’s Administrative Appeal**

35. When an agency fails to *decide* a FOIA request within the statutory deadline (twenty-calendar days), the request is deemed constructively denied. *See* 45 C.F.R. § 5.35(a). At this time, a requester is also deemed to have constructively exhausted the administrative appeals process and is entitled to seek immediate judicial review of the agency’s non-response. *See* 5 U.S.C. § 552(a)(6)(C).

36. Because Defendant failed to decide Plaintiff’s requests within the statutory deadline – or, indeed, to give any indication as to an estimated timeline for deciding the requests – Plaintiff was entitled to immediate judicial review. However, in an effort to avoid litigation, Plaintiff filed an administrative appeal of Defendant’s constructive denial of its requests on March 3, 2010. Ex. E (Administrative Appeal). Plaintiff’s administrative appeal was received by the agency on March 5, 2010. Ex. F (Mar. 5, 2010 Letter from IHS to ACLU).

37. To date, Plaintiff has received no further communication from Defendant in regards to either the original requests or the administrative appeal. Nearly a year has passed since Plaintiff initially filed its requests, yet Defendant has not disclosed any

record in response to Plaintiff's requests nor stated which records, if any, it intends to disclose.

38. Judicial review is proper in light of Defendant's effective denial both of Plaintiff's original requests and Plaintiff's administrative appeal. *See, e.g.*, 5 U.S.C. § 552(a)(6)(C); 45 C.F.R. § 5.35(a).

39. Defendant is improperly withholding the records sought by Plaintiff's requests.

**Plaintiff's Entitlement to a Waiver or Limitation of Processing Fees**

40. Plaintiff ACLU is entitled to a waiver of document search and review fees pursuant to 45 C.F.R. § 5.41 because it qualifies as a "representative of the news media."

41. Plaintiff 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. *See* 45 C.F.R. § 5.5; *see also* Exs. A ("Birthing Unit Request"), B ("St. Mary's Request"), E (Administrative Appeal).

42. Plaintiff is also entitled to a waiver or limitation of duplication fees because disclosure of the requested information 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. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 45 C.F.R. § 5.45(b); *see also* Exs. A ("Birthing Unit Request"), B ("St. Mary's Request"), E (Administrative Appeal).

43. Plaintiff is also entitled to a waiver of search and/or duplication fees because Defendant IHS failed to comply with the statutory time limits for deciding Plaintiff's requests. *See* 5 U.S.C § 552(a)(4)(A)(viii).

44. As alleged above, the Cheyenne River Sioux Reservation, which spans over 4,000 square miles, has lacked any medical facility that can handle even uncomplicated births for almost a decade. This is so even though plans were announced for a new birthing unit in Eagle Butte in 2003. Moreover, as set forth above, women from the Reservation report that, at the nearest hospital that does handle births – St. Mary's, which is ninety miles away – pregnant Indian women are coerced into scheduling an induction date, and forgoing natural birth; if they refuse, they fear IHS, their only source of affordable health care, will not cover the cost of labor and delivery.

45. Thus, the records sought in the instant requests pertain directly to the operations and activities of the federal government. For example, Plaintiff seeks information relating to the restoration of critical health care services and to the provision of medically appropriate obstetrical care to a rural and underserved population. Moreover, the information to be learned from the requested documents is not already public knowledge.

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

### **Causes of Action**

47. Defendant's failure to timely respond to Plaintiff's requests violates the FOIA, 5 U.S.C. § 552(a)(6)(A), and Defendant's corresponding regulations.

48. Defendant's failure to make a reasonable effort to search for records responsive to the Plaintiff's requests violates the FOIA, 5 U.S.C. § 552(a)(3)(C), and Defendant's corresponding regulations.

49. Defendant's failure to grant Plaintiff's Requests for a waiver of fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and Defendant's corresponding regulations.

50. Defendant's failure to grant Plaintiff's requests for a limitation of fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A)(ii)(II), and Defendant's corresponding regulations.

### **Requested Relief**

WHEREFORE, Plaintiffs pray that this Court:

1. Order Defendant immediately to process all requested records;
2. Order Defendant to conduct a thorough search for all responsive records;
3. Order Defendant to promptly disclose the requested records in their entirety, and make copies available to Plaintiff;
4. Enjoin Defendant from charging Plaintiff fees for the processing of their requests;
5. Award Plaintiff 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.

DATED: September 27, 2010

Respectfully submitted,

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