

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES; ADMINISTRATION FOR CHILDREN
AND FAMILIES,

Defendants.

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 the release of agency records related to the federal government and its contractors’ policies regarding vital reproductive health care, such as abortion and contraception, for the thousands of unaccompanied undocumented and refugee minors in the custody of the federal government and its contractors.

2. These young people are extremely vulnerable – many have come to the United States to flee abuse and torture; they have been separated from their families; and many have been sexually abused or assaulted either in their home countries or during their long journey to the United States. Some have also been trafficked for labor or prostitution in other countries or in the United States.

3. These young people are completely dependent on the government and its contractors for day-to-day care, such as clothing, food, medical care, and shelter. Moreover, the federal government and its contractors often restrict their mobility and closely monitor their activities.

4. Despite their vulnerability, dependence, and isolation, Plaintiff believes that the federal government and its contractors strictly limit these teens' access to, and referrals for, reproductive health care, such as contraceptives and abortion.

5. Refusing to provide access and referral to reproductive health care can further traumatize these teens, many of whom have already endured physical and psychological pain and suffering.

6. Denial of such services and referrals also violates their legal rights. For example, Defendants' contractors that provide care to unaccompanied, undocumented minors are legally obligated to provide or arrange for family planning services. Moreover, the government and its contractors cannot constitutionally obstruct or prevent access to contraception and abortion for the teens in their care and custody. Nor can the government allow its contractors to obstruct access to contraception and abortion based on their religious beliefs.

7. Plaintiff has therefore sought documents to uncover the details of the policies of the government and its contractors relating to the provision of reproductive health care to these teens. On August 19, 2008, Plaintiff American Civil Liberties Union Foundation requested documents under the FOIA from Defendant Administration for Children and Families ("ACF"), a subdivision of Defendant Department of Health and Human Services ("HHS"), but to date has not received any response to the request.

8. Plaintiff is legally entitled to these documents, which were requested approximately three months ago. Defendants have far exceeded the statutory and regulatory time limitations to respond, and have provided no documents or response.

9. Given the vulnerability of the population and the time-sensitive nature of the health care services at issue, it is crucial that the requested documents are disclosed immediately to determine whether these teens are receiving necessary health care. Accordingly, this Court should order Defendants to provide the requested records to Plaintiff immediately.

Jurisdiction and Venue

10. 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.

11. 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

12. Plaintiff American Civil Liberties Union Foundation ("ACLUF") is a 501(c)(3) organization that educates the public about civil liberties and employs lawyers who provide legal representation free of charge in cases involving civil liberties. The ACLUF has filed multiple FOIA requests pertaining to the government's policies. The ACLUF is the litigation and communications arm of the American Civil Liberties Union ("ACLU"). 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.

13. Defendant 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).

14. Defendant ACF, a subdivision of HHS, is a Department of the Executive Branch of the United States government. ACF is an agency within the meaning of 5 U.S.C. § 552(f)(1).

Unaccompanied Children Programs

15. Defendants run two programs through the Office of Refugee Resettlement (“ORR”), a subdivision of ACF. One program is for unaccompanied, undocumented children, which is called the Division of Unaccompanied Children’s Services (“DUCS”). The other program is for unaccompanied refugee children, which is called the Unaccompanied Refugee Minor (“URM”) Program.

16. ORR contracts with several private entities to provide care and placement for children in both the DUCS and the URM programs.

17. One major contractor is United States Conference of Catholic Bishops (“USCCB”). USCCB does not provide direct services; instead, upon information and belief, it subcontracts with various Catholic Charities who provide care to these children in several sites across the country, including, upon information and belief, Arizona, California, Florida, Michigan, Mississippi, New York, Texas, Virginia and Washington.

Unaccompanied, Undocumented Children in the DUCS Program

18. The federal government refers to unaccompanied, undocumented children as “unaccompanied alien children” or “UAC.”

19. By statutory definition, these young people are under 18 years old, have no legal immigration status, and have no parent or legal guardian in the United States. 6 U.S.C. § 279(g)(2).

20. They have come to the United States voluntarily, often fleeing violence or abuse, including sexual abuse. They also may have been trafficked for forced prostitution or labor in other countries, or may have endured sexual assault during their long journey to the United States.

21. Most speak little or no English.

22. After these young people are apprehended, they remain in federal custody in the DUCS program until they are deported to their home country; reunited with family in the United States; or obtain asylum or other legal status to remain in the United States.

23. The federal government estimates that in Fiscal Year 2008 it will apprehend 10,350 unaccompanied, undocumented minors, who will be placed in HHS custody.

24. ORR is statutorily obligated to “ensur[e] that the interests of the [child] are considered in decisions and actions relating to the care and custody of an unaccompanied alien child.” *Id.* § 279(b)(1)(B).

25. The federal government reports that the average time such a child spends in federal custody is 55 days, although the length of time varies depending on the individual’s circumstances, and some children can remain in the federal government’s custody for years.

26. Upon information and belief, after these young people are initially apprehended, they are held in “holding tanks” or cells maintained by the Border Patrol. After several days, they are transferred to ORR, which places them in various settings.

27. These settings vary based on how long the young person will be in the government's custody, and other factors, including, for example, whether they are a flight risk.

28. Upon information and belief, once apprehended, these young people are wholly under the control of the federal government and its contractors. Young people who, for example, are flight risks are held in jail-like facilities with limited, if any, freedom.

29. Upon information and belief, even young people who are not held in jail-like facilities are often heavily monitored and their mobility is restricted. For example, some facilities use security cameras in hallways, gathering areas, and outside to monitor young people. Some facilities' exterior doors require security cards to enter or exit.

30. Upon information and belief, young people who are expected to be in the government's custody for an extended period or those who have special needs are transferred to group homes or a foster family.

31. Although the federal government contracts with private entities, including USCCB, to provide these young people with day-to-day physical care, at all times the federal government retains legal custody of them. *See* 6 U.S.C. § 279 (b)(1)(A).

32. Their medical care is paid for by the federal Public Health Services.

Unaccompanied Refugee Children

33. ORR also runs the URM Program. These children are generally identified by the Department of State abroad – in the child's home country – and are brought to the United States because they are orphans of war or other extreme circumstances.

34. These young people are also at high risk of exploitation and physical or sexual abuse.

35. Minors who have been trafficked into the United States for forced prostitution or labor are also placed in the URM Program.

36. Most of these young people speak little or no English.

37. ORR has about 600 refugee children in its care at any one time.

38. Refugee children are afforded the same rights as domestic foster care children. *See, e.g.*, 8 U.S.C. § 1522(d); 45 C.F.R. § 400.112.

39. Private entities that contract with the federal government to provide care for these young people often assume both physical and legal custody of them. For example, some contractors, including USCCB's subcontractors, routinely petition the courts for legal custody of the refugee children in their care.

40. Medical care for these children is paid for by Medicaid.

Restrictions on Access to Reproductive Health Care

41. In June 2008, the media reported that a 16-year-old in the DUCS program, and in the physical custody of Commonwealth Catholic Charities of Virginia ("CCC"), obtained contraception and later an abortion with the help of CCC employees. *See* Julia Duin, *Virginia Law Eyed in Girl's Abortion*, The Washington Times (June 18, 2008).

42. When CCC staff members learned of the teen's pregnancy and request for an abortion in January 2008, they consulted with USCCB and ORR to obtain guidance on how to proceed. *See* Juan Antonio Lizama, *Catholic Officials Knew of Abortion Plan*, Times-Dispatch (July 2, 2008).

43. In the context of that consultation, USCCB prohibited CCC staff from providing any “material support” for the abortion, including providing transportation to the doctor’s office. *Id.*

44. In Virginia, as in many states, a minor must obtain her parent or legal guardian’s consent before obtaining an abortion. If a minor cannot obtain or does not want to seek the consent of a parent, she can petition the court for an exemption of the requirement if she can show that she possesses sufficient maturity to make the decision on her own, or if terminating the pregnancy is in her best interest. *See* Va. Code Ann. § 16.1-241.

45. A CCC staff member signed the consent form for the abortion, believing that she had the legal authority to authorize the abortion as the teen’s custodian. *See* Juan Antonio Lizama, *Staffer’s Abortion Role Not Criminal*, Times-Dispatch (July 17, 2008).

46. No CCC or HHS funds were used to pay for the abortion. *Id.*

47. The media reported that after the teen obtained the abortion, four CCC employees were fired for helping the teen obtain the abortion and contraceptives. *Id.*; Juan Antonio Lizama, *Did Catholic Charity Staff Help Teen Get Abortion?*, Times-Dispatch (June 19, 2008).

48. CCC’s Executive Director said that it was necessary to discipline the CCC staff members involved because facilitating access to the abortion and to contraception is “contrary to basic teachings of the Catholic church.” *Id.* (quoting Joanne D. Natrass, executive director of CCC).

49. Upon information and belief, the teen's access to reproductive health care prompted both ORR and USCCB to issue written policies regarding the provision of reproductive health care to these teens.

50. On March 21, 2008, David Siegel, Acting Director of ORR, sent a memorandum to all DUCS staff, DUCS funded shelters, and DUCS service providers informing them of a change in DUCS' medical policy.

51. The new policy (a) mandates heightened ORR involvement in surgical and medical procedures, particularly abortion, for unaccompanied, undocumented teens; (b) prohibits grantees from taking action in such cases without "direction and approval from ORR"; (c) prohibits ORR staff and ORR grantees from providing consent for an abortion; and (d) prohibits federal funds to be expended for an abortion, except in cases where the pregnancy is the result of rape or incest, or if the teen's life is in jeopardy.

52. Upon information and belief, the policy also prohibits federal funds from being used to "facilitate" an abortion. Juan Antonio Lizama, *Did Catholic Charity Staff Help Teen Get Abortion?*, Times-Dispatch (June 19, 2008) (quoting Kenneth J. Wolfe, a spokesperson for HHS).

53. Therefore, every teen living in federal custody in a state where parental involvement is mandated must obtain judicial authorization for an abortion.

54. Upon information and belief, no provision is made under the policy, however, to ensure that teens in federal custody are made aware of the availability of a judicial bypass, let alone access to the judicial system to seek such a bypass. Without such provision and other protections, these teens' ability to access reproductive health care services is effectively foreclosed.

55. In addition to announcing a new policy to DUCS staff and DUCS contractors, Mr. Siegel also sent a letter to USCCB's Migration and Refugee Services' executive director.

56. In that letter, dated April 23, 2008, ORR asked USCCB to take corrective actions. ORR expressed concern that, *inter alia*, "USCCB knew that the [teen in Virginia] was pregnant and considering an abortion, but, nonetheless, allowed CCC to facilitate an abortion for the [teen]."

57. Also in that letter, ORR explained to USCCB that a Treatment Authorization Request form should have been submitted to ORR for approval for the abortion. But, the letter notes, even if such a form had been submitted, it would have been denied.

58. In response, USCCB reiterated its policies related to access to reproductive health care following the Virginia teen's abortion and access to contraceptives.

59. USCCB sent a letter to Catholic Charities nationwide instructing them that, as Catholic organizations, they are prohibited from providing or referring for abortion services or contraceptive materials for the young people in the care of USCCB and Catholic Charities.

60. Moreover, statements of the Bishop of Richmond, Virginia, Francis X. DiLorenzo and the Executive Director of Catholic Charities, Joanne D. Nattrass, indicate that Catholic officials may affirmatively try to block teens' access to abortion in the future. Both DiLorenzo and Nattrass indicated that they were misled to believe that they could not stop the teen's abortion. *See* Juan Antonio Lizama, *Catholic Officials Knew of Abortion Plan*, Times-Dispatch (July 2, 2008); Dionne Walker, *Virginia Catholic Bishop Sorry After Abortion Mixup*, Associated Press (July 1, 2008).

61. More recently, a nurse employed by Catholic Charities in Texas was fired after she refused to deny her patients information about condoms, as part of a federally-funded HIV prevention program. Prior to the dissemination of USCCB's policy, she had routinely provided information to her patients about the use of condoms to prevent the transmission of HIV. After the policy was disseminated, however, she was told that she could not do so. See Max B. Baker, *Charity Sued by Worker Fired Over Stance on Condoms*, Star Telegram (July 25, 2008).

62. As these examples show, the federal government and USCCB's policies will have a profound effect on the young people in their care.

63. ORR and USCCB are restricting access to necessary reproductive health care and critical information about disease prevention. For example, since many girls are sexually assaulted during their journey to the United States, some will inevitably need and want access to emergency contraception, and possibly abortion. They will also need medically accurate information about HIV prevention, including information about condoms.

64. In any setting where a teen cannot leave on her own accord, she will be unable to obtain an abortion or contraceptives without the government or its contractors' assistance.

65. Even for those teens with more mobility and access to outside services, it is unlikely that they will be able to obtain an abortion or contraceptives without the government or its contractors' assistance.

66. Indeed, all of these children in the DUCS and URM programs face barriers to obtaining services if they are not provided by the government and its contractors. For

example, even if a teen can leave the shelter, she still may not be able to obtain access to abortion or contraceptives without assistance because she likely speaks little or no English; she may have no support system, other than that provided by her program; she may have no means of transportation to the doctor's office; and she may have little or no financial resources.

Legal Implications of ORR and USCCB's Policies

67. Plaintiff has requested various documents relating to ORR and USCCB's policies because of the impact on these vulnerable young people and their legal rights.

68. First, Defendants are legally obligated to ensure that programs that provide care to unaccompanied, undocumented children comply with the minimum requirements detailed in the settlement agreement reached in *Flores v. Meese*, No. CV85-4544-RJK (C.D. Cal. 1996) (hereinafter "the *Flores* agreement").

69. Under the *Flores* agreement, all programs must "provide or arrange for" appropriate medical care and "family planning services." There are no exceptions to this requirement.

70. Upon information and belief, Defendants have failed to ensure that USCCB and its subgrantees comply with this provision.

71. Second, if the government – or its contractors – are obstructing or preventing access to contraception and abortion for the teens in their care and custody, the teens' Fifth Amendment right to privacy is implicated.

72. Third, if the government permits contractors, including USCCB, to obstruct access to contraception and abortion based on their religious beliefs, and contrary to the Constitution and the *Flores* agreement, the Establishment Clause is implicated.

The FOIA Request and the Agency's Response

73. On August 19, 2008, Plaintiff filed a FOIA request with Defendants seeking, *inter alia*, release of all policies related to reproductive health care for unaccompanied, undocumented and refugee minors; all documents related to the teen's abortion in Virginia; and contracts, agreements, and correspondence between ORR and USCCB, and USCCB and Catholic Charities, related to the care of these young people. *See* Ex. A.

74. Plaintiff sent the FOIA request by certified mail, and tracked the request through the U.S. Postal Service, which confirmed that Defendants received the FOIA request on August 25, 2008.

75. Plaintiff called to check on the status of the request on October 8, 2008, and spoke with someone named Jeanne in the ACF FOIA office. She said that she would check on the status of the request and call Plaintiff back.

76. On October 9, 2008, Plaintiff received a call from Jeanne saying that it would take "awhile" for ACF to respond to the request, and she was unable to give a date certain by which Plaintiff would receive a response.

77. To date, Plaintiff has received no response and no documents whatsoever, including any explanation of Defendants' withholding of the records. Indeed, Plaintiff has received no indication that a search is even underway. For example, Plaintiff has not even received notice from Defendants that it has assigned a case number to the request.

78. Defendants have failed to comply with the time limits imposed by the FOIA statute and Defendants' regulations.

79. Under the FOIA statute, an agency must determine whether to comply with the request within 20 days (excluding weekends and legal holidays) after receiving it. 5

U.S.C. § 522 (a)(6)(A)(i). That time limit can be shortened to 10 days, if the requestor demonstrates a compelling need for the documents. *Id.* § 522 (a)(6)(E).

80. Under HHS regulations, HHS is to decide whether to release records within 10 working days, and must provide the records as soon as possible after that decision. 45 C.F.R. § 5.35(b)(1).

81. Given that HHS voluntarily shortens the deadline for responding to requests to match the statutory framework for expedited requests, Plaintiff did not ask for expedited processing here.

82. If HHS fails to “meet the deadline[], [the requestor] may proceed as if [it] had denied [the] request.” *Id.* § 5.35(a).

83. Plaintiff therefore has instituted this action to ask the Court to order Defendants to disclose the requested documents.

Plaintiff’s Entitlement to a Waiver of or Reduced Processing Fees

84. Plaintiff also asked for a waiver or reduction of document search, review, and duplication fees because disclosure is “likely to contribute significantly to the public understanding of the activities or operations 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.

85. As alleged above, numerous news accounts reflect the public interest in the records Plaintiff seek. The records sought in the instant request will significantly contribute to the public understanding of the operations and activities of HHS and its contractors. In addition, disclosure is not in the ACLUF’s commercial interest. The ACLUF will evaluate the disclosed documents and, depending on what is contained in the documents, may well disseminate the information to the public. If the ACLUF

publicly discloses information obtained through the FOIA, it will do so at no cost to the public.

86. The ACLUF is also entitled to a waiver or reduction of fees because the ACLUF 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).

87. The ACLUF 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.

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

Causes of Action

89. Plaintiff repeats and realleges paragraphs 1-88.

90. Defendants’ failure to timely make available the records sought by Plaintiff’s request violates the FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and Defendants’ corresponding regulation, 45 C.F.R. § 5.35(b)(1).

91. Defendants’ 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 Defendants’ corresponding regulation, 45 C.F.R. § 5.24.

92. Defendants’ failure to grant Plaintiff’s request for a waiver of fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and Defendants’ corresponding regulation, 45 C.F.R. § 5.45.

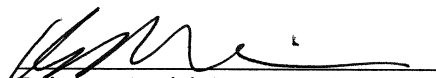
93. Defendants' failure to grant Plaintiff's requests for a reduction of fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A)(ii)(II), and Defendants' corresponding regulation, 45 C.F.R. § 5.45(b)(3).

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, except for the disclosure of the names or identifying information of teens who have sought reproductive health care, 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,



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* motion for *pro hac vice* to be filed

Exhibit A



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STAFF ATTORNEY
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August 19, 2008

By Certified Mail,
Return Receipt Requested

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Lead FOIA Specialist
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Dear Ms. Semper:

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, 45 C.F.R. Pt. 5.

OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

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.

For purposes of this request, the term "HHS entity" means any individual or group of individuals working for the Department of Health and Human Services ("HHS") and any sub-department, office, board, program, group, agency, bureau, administration, and/or other subdivision within HHS.

Requests

Please provide the following materials:

1. Any and all materials related to the abortion obtained by the unaccompanied alien minor in the care of Commonwealth Catholic Charities of Virginia ("CCC") who is referenced in ORR's letter to United States Conference of Catholic Bishops ("USCCB") dated April 23, 2008, including but not limited to:

a. the timeline provided to the Office of Refugee Resettlement (“ORR”) on January 28, 2008, from Julianne Duncan, USCCB’s Associate Director for Children’s Services;

b. USCCB’s response(s) to ORR’s letter dated April 23, 2008, including USCCB’s corrective plan;

c. any correspondence, electronic mail, notes of telephone calls from communications between or among ORR, USCCB, CCC about the minor who obtained the abortion, both before and after the abortion took place;

d. complaint(s) submitted to the Inspector General.

2. The cooperative agreement, #90ZU0032, between ORR and USCCB.

3. The notice of award, request for proposal, USCCB’s application for the award, and the contract between USCCB and ORR related to USCCB’s care of unaccompanied alien children (“UAC”) and unaccompanied refugee children.

4. Subcontract/subgrantee agreements between USCCB and any subcontractor/subgrantee related to the care of unaccompanied alien children and unaccompanied refugee children.

5. A transportation authorization request form – in its current format and in the format that existed when the minor in Virginia obtained the abortion, and any intervening drafts.

6. The medical authorization form ORR gives to USCCB and other contractors/grantees and their subcontractors/subgrantees to provide medical treatment to unaccompanied alien minors – in its current form and in the form that existed when the minor in Virginia obtained the abortion, and any intervening drafts.

7. Any and all materials related to any HHS entity’s policy related to reproductive health care, including access to, referrals for and payment for abortion, contraceptives, and family planning services, for UAC and unaccompanied refugee children.

8. Any and all materials related to any HHS entity’s handling of abortion requests by UAC and unaccompanied refugee children from HHS

grantees/contractors or any other source, including any communications made pursuant to the March 21, 2008 ORR memorandum to DUCS staff, shelters, and service providers regarding “Medical Services Requiring Heightened ORR Involvement.”

9. Significant Incident Documentation and Reporting Manual for UAC.

10. Medical Services Manual for UAC.

11. List of all entities that ACF or ORR contracts with to provide day-to-day care for UAC and unaccompanied refugee children, including short-term shelters and long-term foster care.

12. HHS grantees/contractors and subgrantee/subcontractors’ policies related to reproductive health care, including access to abortion, contraception, and family planning services for UAC and unaccompanied refugee children.

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 HHS to provide multiple copies of identical material, the request is limited so that only one copy of the identical material is requested.

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.

If, however, the fee associated with responding to this request exceeds \$200.00, we request that the fee be waived 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. 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.”). Fees should thus be “limited to reasonable standard charges for document duplication.” 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 and the vulnerable population of unaccompanied alien and refugee children. 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. 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 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 HHS' policies and the award and terms of contracts for funding of nongovernmental entities. "[W]hat could be more important to the public's understanding of [agency] operations" than understanding how particular contracts are awarded by that agency. *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 fees should therefore be waived. In the event that you decide not to waive the fees if over \$200.00, 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) 519-7897 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 Brigitte Amiri, ACLU Foundation, 125 Broad Street, 18th Floor, New York, NY, 10004.

Sincerely,

A handwritten signature in black ink, appearing to read 'Brigitte Amiri', with a long horizontal flourish extending to the right.

Brigitte Amiri