



ALEXA KOLBI MOLINAS
STAFF ATTORNEY
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November 24, 2009

By Certified Mail,
Return Receipt Requested

Department of Health and Human Services
Indian Health Service
801 Thompson Avenue, TMP 450
Rockville, MD 20852

Dear Sir or Madam:

This letter constitutes a request by the American Civil Liberties Union (“ACLU”) 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.

Since 2001, obstetrical services have been unavailable at any Indian Health Services (“IHS”) facility on the Cheyenne River Sioux Reservation. As a result, most pregnant women who would otherwise be eligible for direct care in an IHS facility must travel approximately 90 miles to St. Mary’s Healthcare Center (“St. Mary’s”), in Pierre, S.D., for labor and delivery. In 2003, Dr. Grim, then-Director of IHS, announced that a Birthing Unit would be built as part of a new state of the art hospital planned for the Cheyenne River Sioux in Eagle Butte. Although construction on the hospital has yet to be completed, in May 2009, IHS allocated an additional \$111 million of stimulus money for the new hospital in Eagle Butte.¹ This request seeks information related to plans to include a Birthing Unit at the new Eagle Butte facility.

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.

¹ Congress allocated a total of \$227 million in stimulus funds to allow the completion of two health facilities from the construction priority list. Of that money, IHS allocated \$111 million to the Eagle Butte facility.

Requests

Please provide the following materials dated from 2001 to the present:

1. Any and all materials related to the provision of labor and delivery services to women of and on the Cheyenne River Sioux Reservation.
2. Any and all materials related to the current status of plans to build a Birthing Unit, or other facility to provide labor and delivery services, as part of the new hospital at Eagle Butte and/or elsewhere on the Cheyenne River Sioux Reservation.

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

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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 the duplication fees associated with responding to this request exceed \$100, we request the fees be waived pursuant to 45 C.F.R. §§ 5.41, 5.45. For the reasons discussed below, the ACLU qualifies as a "representative of the news media," and should be charged only for duplication fees beyond the first 100 pages of duplication; the ACLU should not be charged fees for search and review associated with the request. *See* 45 C.F.R. § 5.41. We further request a waiver or reduction of any incurred duplication fees on the grounds that 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.'").

The applicable IHS FOIA 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 restoration of critical health care services to a rural and underserved population. Second, the information to be learned from the requested documents, which is not already public knowledge, is critical to ensuring public accountability for the use of stimulus money.

Third, because the ACLU qualifies as a “representative of the news media,” as defined by FOIA, IHS 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 a fee waiver in this instance is in the public interest: Disclosure will contribute to the public good in a significant way because the requested records are all materials related to the use of federal stimulus funds to improve health care facilities in an area IHS has already designated as a priority. See Indian Health Service 30-Day Report to Congress, General Plan for Expenditure of Recovery Act Funds at <http://www.hhs.gov/recovery/reports/ihsreport.html>. “[W]hat could be more important to the public’s understanding of [agency] operations” than

understanding how \$111 million taxpayer dollars is going to be used 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 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 both representatives of the news media and fee waivers, fees associated with responding to FOIA requests are regularly waived for the ACLU.

In the event that you decide not to waive fees for this request please provide me with prior notice so that we can discuss arrangements.

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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) 519-7845 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 Alexa Kolbi-Molinas, ACLU Foundation, 125 Broad Street, 18th Floor, New York, NY 10004.

Sincerely,



Alexa Kolbi-Molinas