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By Certified Mail,
Return Receipt Requested

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Dear Ms. Ingersoll:

This letter constitutes a request from the Native American Community Board ("NACB") and the American Civil Liberties Union ("ACLU"), for production of records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the implementing regulations of the Department of Health and Human Services, 45 C.F.R. pt. 5.

SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

This request seeks information concerning the Indian Health Services' ("IHS") policies governing access to emergency contraception at IHS facilities. The Food and Drug Administration ("FDA") has approved Plan B (sometimes referred to as "the morning after pill") and Next Choice for over-the-counter ("OTC") use as a form of emergency contraception by individuals 17 years of age or older and for women under 17 with a prescription. Emergency contraception ("EC") is an extremely safe, but nonetheless critical aspect of women's health care: if used within 120 hours, EC can safely prevent pregnancy after contraceptive failure or unprotected sex, and/or sexual assault. However, experts stress that EC is most effective the sooner it is taken, with effectiveness decreasing every 12 hours. It is therefore crucial that a woman who wants to avoid an unintended pregnancy be able to access EC in a timely manner.

Although the IHS clinical manual states that "all FDA-approved contraceptive devices should be available" to its patients, numerous reports indicate that EC is frequently unavailable or difficult to obtain at IHS facilities. In 2009, NACB released a report documenting their findings that only 10% of IHS unit pharmacies made Plan B available over-the-counter; that 37.5% of pharmacies only offered an alternative, non OTC emergency contraceptive; and that the remaining pharmacies – approximately 53% – had no form of EC available at all. *See e.g., NACB, Indigenous Women's Dialogue: Roundtable Report on the Accessibility of Plan B As An Over The*

Counter (OTC) Within Indian Health Service, (Feb. 2012) at 11, available at <http://www.nativeshop.org/images/stories/media/pdfs/Plan-B-Report.pdf>. More than four years later, the situation has not improved: An informal survey of 63 IHS facilities performed in September 2012, found that only 11% carried EC OTC, about half carried EC available only with a prescription and a doctor's visit, and about 43% of the pharmacies did not carry EC at all. See Sofia Resnik, *In face of inaction on emergency-contraception access, Native women turn to their own plan b*, *The American Independent*, Jan. 29, 2013, <http://americanindependent.com/218641/in-face-of-inaction-on-emergency-contraception-access-native-women-turn-to-their-own-plan-b>.

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For some Native American women, if EC is unavailable at their IHS facility the next closest commercial pharmacy may be hundreds of miles away and transportation costs may be insurmountable, making timely access to EC difficult, if not impossible for too many women. As demonstrated in the studies described above, even at those IHS facilities where emergency contraception is available, it is often unavailable OTC—despite FDA guidelines—creating further delay by forcing women to make and wait for an appointment with a health care provider in order to obtain EC. Moreover, the failure to adequately stock and offer EC is particularly concerning given that the government's own statistics show that Native American women experience sexual assault at a higher rate than all other women in the United States—more than 1 in 3 Native American women will be raped in their lifetime, which is more than double the rate reported by women of all other races. In the face of these devastating statistics, ensuring the availability of EC at IHS facilities should be a priority for the federal government. Accordingly, it is critical that the public know what steps their government is taking to ensure *all* Native women are able to access EC in a timely and appropriate manner.

Definitions

For purposes of this request, the term “materials” includes but is not limited to any and all objects, writings, drafts, 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. Any and all materials currently used, produced, or disseminated by IHS that relate to any procedures, policies, requirements, directives, practices, guidance or guidelines related to the availability and provision of OTC and/or prescription EC at IHS facilities.
2. Any and all materials dated from 2010 to the present related to any procedures, policies, requirements, directives, practices, guidance or guidelines related to standardizing, improving, and or otherwise ensuring that all IHS facilities adequately stock and/or provide OTC and/or prescription EC.
3. Any and all materials dated from 2010 to the present concerning IHS facilities, including IHS contractors, which have failed, refused, or are suspected of failing or refusing to adequately stock and/or provide OTC and/or prescription EC. This shall include, but is not limited to:
 - a) any and all communications with such facilities;
 - b) any complaints received or filed against those facilities; and/or
 - c) any disciplinary or remedial actions taken against those facilities.

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.

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* 45 C.F.R. § 5.33.

For the reasons discussed below, both NACB and ACLU (“the Requesters”) qualify as “representative[s] of the news media,” and should be charged only for duplication fees beyond the first 100 pages of duplication; the Requesters should not be charged fees for search and review associated with the request. *See* 45 C.F.R. § 5.41. The Requesters 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; namely, the obligation of the federal government to ensure timely and appropriate reproductive health care to Native American women.

Second, the information to be learned from the requested documents is not already public knowledge. Indeed, it is the very *lack* of government transparency on this issue that has been the subject of ongoing press reports, demonstrating widespread interest and concern. See e.g., Sofia Resnik, *In face of inaction on emergency-contraception access, Native women turn to their own plan b*, *The American Independent*, Jan. 29, 2013, <http://americanindependent.com/218641/in-face-of-inaction-on-emergency-contraception-access-native-women-turn-to-their-own-plan-b>; Eisa Ulen, *Despite High Incidence of Rape, Native Women Denied Right to EC*, *Indian Country Today*, Mar. 29, 2012, <http://indiancountrytodaymedianetwork.com/2012/03/09/despite-high-incidence-of-rape-native-women-denied-right-to-plan-b-101640>; Akiba Solomon, *Why Native American Women Are Batting for Plan B*, *Colorlines*, Mar. 22, 2012, http://colorlines.com/archives/2012/03/on_july_29_2010_lisa.html; Kate Sheppard, *Report: Plan B Access Limited in Native Communities*, *Mother Jones*, Mar. 13, 2012, <http://www.motherjones.com/mojo/2012/03/report-plan-b-access-limited-native-communities>. In fact, an online petition demanding that the federal government ensure Native women have access to emergency contraception has received over 100,000 signatures in support.

See IHS: Stop Blocking Native Women's Access to Contraception!, <http://www.change.org/petitions/ihs-stop-blocking-native-women-s-access-to-emergency-contraception>.

Third, because both NACB and ACLU qualify as “representative[s] 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 Requesters meet the definition of a representative of the news media because each 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.” *Nat'l Sec. Archive v. Dep't 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”).

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

NACB provides direct services to Native women and families in South Dakota and advocates for Native women at the community, national, and international levels to protect reproductive health and rights. NACB's activities include community education to preserve Native culture, campaigns to end violence against Indigenous women, coalition building to fight for reproductive justice, and environmental justice. Dissemination of information to the public is a critical and substantial component of NACB's mission and work. For example, NACB's numerous reports have been used by Congress, the U.N., the World Health Organization, Amnesty International, universities, and policy institutes to raise awareness of the environmental and reproductive justice issues facing Indigenous women.¹ NACB has also produced a wide array of educational materials on subjects such as teen dating violence prevention, Indigenous women's health, and the medical rights of victims of sexual assault, which are widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students, and faculty, for no cost or for a nominal fee via their website.² And NACB publishes a bi-weekly newsletter, distributed via email, on health topics relevant to Native communities and women's reproductive health.

Of particular relevance here, NACB has devoted and continues to devote (i.e. through this FOIA request) significant effort to educating the public about IHS treatment of rape/incest victims and documenting IHS' violations of Native American women's right to health care and to pregnancy

¹ *See e.g.*, NACB, Reports, <http://www.nativeshop.org/resources/reports.html>.

² *See e.g.*, NACB, Educational Materials, <http://www.nativeshop.org/resources/health-book.html>.

prevention/choice.³ See generally *Elec. Privacy Info. Ctr. v. Dep't of Defense*, 241 F. Supp. 2d 5, 11 (D. D. C. 2003) (finding the Electronic Privacy Information Center to be a news-media requester because of its publication and distribution of seven books on privacy, technology, and civil liberties).

ACLU is a national organization dedicated to the defense of civil rights and civil liberties. Like NACB, dissemination of information to the public is a critical and substantial component of ACLU's mission and work. Specifically, ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly disseminated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students, and faculty, for no cost or for a nominal fee through its public education department and web site. The web site addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which ACLU is focused. The web site specifically includes features on information obtained through FOIA. For example, ACLU's "Accountability for Torture FOIA" webpage, <http://www.aclu.org/torturefoia>, contains commentary about ACLU's FOIA request for documents related to the treatment of detainees, press releases, analysis of the FOIA documents disclosed, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA. See *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch to be a news-media requester because it posted documents obtained through FOIA on its website).

³ See e.g. NACB, *Indigenous Women's Dialogue – Roundtable Report on the Accessibility of Plan B as an Overt the Counter (OTC) Within Indian Health Services* (Feb. 2011), available at <http://www.nativeshop.org/images/stories/media/pdfs/Plan-B-Report.pdf>; NACB, *Roundtable Report on the Availability of Plan B and Emergency Contraceptives within Indian Health Service* (Jan. 2009), available at http://www.nativeshop.org/images/stories/media/pdfs/RoundtableofEC_PlanBintheIHSER2009.pdf; NACB, *A Survey of the Availability of Plan B and Emergency Contraceptives within Indian Health Service* (Jan. 2008), available at http://www.nativeshop.org/images/stories/media/pdfs/SurveyofEC_PlanBintheIHSER2008.pdf; NACB, *Roundtable Report on Sexual Assault Policies and Protocols within Indian Health Services Emergency Rooms* (2005), available at <http://www.nativeshop.org/images/stories/media/pdfs/RoundtableSexualAssaultPoliciesProtocolsWithinIHSERRooms2005.pdf>; NACB, *A Survey of Sexual Assault Policies and Protocols within Indian Health Service Emergency Rooms* (Dec. 2004), available at <http://www.nativeshop.org/images/stories/media/pdfs/SurveyofSexualAssaultPoliciesRepoWithinIHS2004.pdf>; NACB, *Indigenous Women's Reproductive Rights: Roundtable Report on Access to Abortion Services through the Indian Health Service Under the Hyde Amendment* (Apr. 2003); NACB, *Indigenous Women's Reproductive Rights: The Indian Health Service and Its Inconsistent Application of the Hyde Amendment* (Oct. 2002).

Further, ACLU publishes a newsletter at least twice a year that reports on and analyzes civil-liberties-related current events. The newsletter is distributed to approximately 450,000 people. ACLU also publishes a bi-weekly electronic newsletter, which is distributed to approximately 300,000 subscribers (both ACLU members and non-members) by e-mail. Both of these newsletters often include descriptions and analyses of information obtained from the government through FOIA, as well as information about cases, governmental policies, pending legislation, abuses of constitutional rights, and polling data. *Cf. Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 13–14 (finding the Electronic Privacy Information Center to be a representative of the news media under Department of Defense regulations because it published a “bi-weekly electronic newsletter that is distributed to over 15,000 readers” about “court cases and legal challenges, government policies, legislation, civil rights, surveys and polls, legislation, privacy abuses, international issues, and trends and technological advancements”).

ACLU also regularly publishes books,⁴ “know your rights” publications,⁵ fact sheets,⁶ and educational brochures and pamphlets designed to educate the public about civil liberties issues and governmental policies that implicate civil rights and liberties. These materials are specifically designed to be educational and widely disseminated to the public. *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11.

Depending on the results of this request, the Requesters plan to “disseminate the information” they receive “among the public” through these kinds of publications in these kinds of channels. For these and the reasons set forth above, the Requesters therefore constitute a news media entity for purposes of FOIA.

⁴ Some of the recent books published by the ACLU include: SUSAN N. HERMAN, *TAKING LIBERTIES: THE WAR ON TERROR AND THE EROSION OF AMERICAN DEMOCRACY* (2011); LENORA M. LAPIDUS, EMILY J. MARTIN & NAMITA LUTHRA, *THE RIGHTS OF WOMEN: THE AUTHORITATIVE ACLU GUIDE TO WOMEN’S RIGHTS* (4th ed. 2009); JAMEEL JAFFER & AMRIT SINGH, *ADMINISTRATION OF TORTURE: A DOCUMENTARY RECORD FROM WASHINGTON TO ABU GHRAIB AND BEYOND* (2007) (a book based on documents obtained through FOIA).

⁵ Some of the more recent “know your rights” publications include: ACLU, *Know Your Rights: Demonstrations and Protests* (Nov. 2011), available at http://www.aclu.org/files/assets/kyr_protests.pdf; ACLU, *Gender-Based Violence & Harassment: Your School, Your Rights* (May 2011), available at http://www.aclu.org/files/assets/genderbasedviolence_factsheet_0.pdf; ACLU, *Know Your Rights: What to Do If You’re Stopped by Police, Immigration Agents or the FBI* (June 2010), available at http://www.aclu.org/files/assets/bustcard_eng_20100630.pdf.

⁶ *See, e.g.*, ACLU, *Military Abortion Ban in Cases of Rape and Incest (Factsheet)* (2011), available at <http://www.aclu.org/reproductive-freedom/military-abortion-ban-cases-rape-and-incest-factsheet>; ACLU, *The Facts About “The No Taxpayer Funding For Abortion Act”* (2011), available at http://www.aclu.org/files/assets/Chris_Smith_bill-ACLU_Fact_Sheet_UPDATED-4-30-11.pdf.

Fourth, allowing fee waivers 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 provision of critical health care services to already underserved Indian communities. *See Judicial Watch*, 326 F.3d at 1313.

Finally, disclosure is not in NACB's or ACLU's commercial interest, defined as "interests relating to business, trade and profit." 45 C.F.R. § 5.45(c)(1). Both organizations are "non-profit, non-partisan, public interest organization[s]." *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.

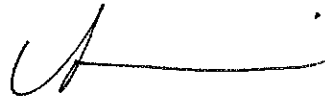
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Because ACLU meets the test for both representatives of the news media and fee waivers, fees associated with responding to FOIA requests are regularly waived for the ACLU.

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.

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

Charon Asetoyer, CEO
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Board
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