November 27, 2017

By U.S. Mail and Email

FOIA Officer (FOIAREQUEST@HHS.gov)
Department of Health and Human Services
Freedom of Information Officer
Hubert H. Humphrey Building, Room 729H 200
Independence Avenue, SW Washington, DC 20201

Re: Request for Public Records

To Whom It May Concern:


Background

Religious freedom is a fundamental American value protected by our laws and Constitution. It gives everyone the right to believe, or not; but it does not give anyone the right to use taxpayer dollars to impose one’s faith on other people or to use religion as a justification for discrimination.

On October 25, 2017, the U.S. Department of Health and Human Services issued a formal request for information entitled “Removing Barriers for Religious and Faith-Based Organizations to Participate in HHS Programs and Receive Public Funding.” The request solicited comments to guide HHS in repealing regulations and enacting new regulations to “affirmatively accommodate” faith-based organizations.

While faith-based organizations have historically played an important role in addressing our nation’s most pressing social needs, their collaboration with the government does not require exemptions from critical protections against discrimination. Taxpayer-funded social-service providers should not be allowed to use a religious litmus test to determine whom they will serve or employ, or to refuse to perform functions for which they are receiving public funds. To permit them to do so would not only undermine
HHS’s mission but also violate the protections for religious freedom and equal protection guaranteed by the Constitution.

Americans United requests public records related to HHS’s Request for Information, so that we may inform the public about the potential expansion of religious exemptions that would involve the federal government in funding, authorizing, and endorsing discrimination against religious minorities, women, LGBTQ individuals, and others who receive services from federally funded programs.

Definitions

1. **HHS**: The U.S. Department of Health and Human Services or any department, agency, sub-agency, office, board, program, group, bureau, administration, subdivision, employee, or contractor of the U.S. Department of Health and Human Services.

2. **Materials**: Including but 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, e-mails, electronic or computerized documents, photographs, audiotapes, videotapes, transcripts, drafts, correspondence, notes, notes of oral communications, and non-identical copies, such as copies with notations, including but not limited to materials sent to or received from other any individual or group of individuals working for other federal agencies or working for nongovernmental organizations.

3. **Responses**: All written comments received electronically, by e-mail, by regular mail, and by express or overnight mail.

Requested Records

1. Any and all materials from January 1, 2017, through the present, relating to the issuance of the Request for Information entitled “Removing Barriers for Religious and Faith-Based Organizations to Participate in HHS Programs and Receive Public Funding.”

2. All responses to the Center for Faith-Based and Neighborhood Partnerships, the Office of Intergovernmental and External Affairs, or the U.S. Department of Health and Human Services’ Request for Information entitled “Removing Barriers for Religious and Faith-Based Organizations to Participate in HHS Programs and Receive Public Funding.”

3. Any and all materials from January 1, 2017, through the present, relating to plans to take action on responses to the Request for Information entitled “Removing Barriers for Religious and Faith-Based Organizations to Participate in HHS Programs and Receive Public Funding,” including but not limited to memoranda on
changes to existing regulations, guidance documents, or policies, or to the promulgation of new regulations, guidance documents, or policies.

Instructions

1. Please respond to this request within ten working days, as required by 45 C.F.R. § 5.35.

2. If materials are available electronically, please provide them by e-mail to tanner@au.org. For documents that are too large to send by e-mail or that are available only in hard copy, please send them to the following address:

Alison Tanner
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005

3. In the event that you determine that the requested materials contain information that falls within the statutory exemptions from mandatory disclosure, we request that such information be reviewed for possible discretionary disclosure. See Chrysler Corp. v. Brown, 441 US. 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 that portions of the request are 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.

4. If the fee exceeds $200.00, we request that the fee be waived under 45 C.F.R. § 5.45. Disclosure of the records (1) is in the public interest and will likely contribute greatly to public understanding of the operations or activities of the government and (2) is not in Americans United’s commercial interest. Further, as the publisher of the magazine Church & State and two online blogs, Wall of Separation and Protect Thy Neighbor, Americans United qualifies as a “representative of the news media as defined by FOIA. Cf. Electronic Privacy Information Ctr. v. Department of Defense, 241 F. Supp. 2d 5, 10–15 (D.D.C. 2003) (finding nonprofit public-interest organization that disseminated e-mail newsletter and published books was a “representative of the media” for purposes of FOIA). Therefore, the fee waiver would fulfill Congress’s legislative intent. 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.’”). Because we do not wish to slow the agency’s response, we do not ask for a fee waiver if the fee under 5 U.S.C. § 552(a)(4)(A) and 45 C.F.R. § 5.43 will be less than $200.00. Fees should be “limited to reasonable standard charges for document duplication.” 5 U.S.C. § 522(a)(4)(A)(ii)(II); 45 C.F.R. § 5.41(b).

If the fee exceeds $200.00 and you determine not to grant the requested waiver, please provide me with prior notice so that we can discuss arrangements and approve the anticipated fees.
Thank you for your prompt attention to this request. If you have any questions, please contact Alison Tanner at (202) 898-2134 or tanner@au.org.

Sincerely,

Alison Tanner, Steven Gey Fellow*  
* 2017 law-school graduate. Bar application pending.