



State of California
Office of the Attorney General

XAVIER BECERRA
ATTORNEY GENERAL

August 28, 2018

VIA ELECTRONIC DELIVERY AND CERTIFIED U.S. MAIL

Secretary Alex M. Azar II
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 716G
200 Independence Avenue SW
Washington, DC 20201
Email: FOIARequest@HHS.gov

RE: Freedom of Information Act Request Regarding Proposed Rule, "Compliance With Statutory Program Integrity," RIN 0937-ZA00

Dear Mr. Secretary:

I write to request documents pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, related to the harmful rule, RIN 0937-ZA00 (hereinafter "the Proposed Rule"), issued by the U.S. Department of Health and Human Services (HHS) which undermines the Title X family planning program and creates barriers to accessing life-saving reproductive healthcare for American women and their families. With any rule, but particularly one of this magnitude, there must be transparency in the justification for and the impact of the Rule, to allow affected parties to understand and assess its consequences. I write today seeking such transparency.

As the Attorney General of California, I have a constitutional duty to protect its more than 39 million Californians, including over 20 million Californian women, by safeguarding their health and safety, and defending the State's laws. Cal. Const., art. V, § 13. I have grave concerns about any and all efforts to restrict or burden California residents' rights to access all healthcare services, as the Proposed Rule would do. If implemented, the Proposed Rule will have significant negative impacts on our State; residents, including women and LGBTQ individuals; and numerous entities that receive federal funding to provide crucial benefits and services for California's residents.

The Proposed Rule would have an immediate and detrimental impact on Californians. California benefits from the largest Title X program in the nation, which funds providers throughout the State to support the delivery of quality preventive and



reproductive healthcare. California's Title X family planning program collectively serves more than one million patients annually—over 25% of all Title X patients nationwide—through 59 healthcare organizations, operating nearly 350 health centers in 37 of California's 58 counties.

Pursuant to FOIA, I hereby request disclosure of certain records regarding the Proposed Rule, "Compliance With Statutory Program Integrity" (RIN 0937-ZA00), HHS docket no. HHS-OS-2018-0008. This letter describes: (1) the records requested and (2) our request for a fee waiver for production of these records.

Request for Records

This request seeks all records, as described below, as that term has been defined by FOIA and interpreted by the courts (e.g., 5 U.S.C. § 552(f)(2)).

1. All records relating to the statement that "the new regulations would contribute to more clients being served, gaps in service being closed, and improved client care that better focuses on the family planning missions of the Title X program" (83 Fed. Reg. at 25505);
2. All records relating to HHS's statement that, "if implemented [the 2016 Regulation] would have entailed certain adverse consequences" (83 Fed. Reg. at 25504);
3. All records relating to HHS's statement that "[t]his bright-line rule would create a clearer, more transparent system of separation and accountability" (83 Fed. Reg. at 25507);
4. All records relating to HHS's statement that the phrase "medically approved," "may cause confusion about the type of family planning methods or services that a project may or should provide, and the type of approvals (if any) necessary before a Title X project can provide such method or service" (83 Fed. Reg. at 25515);
5. All records relating to HHS's statement that "[s]ome have interpreted the 'broad range' requirement of section 1001(a), as well as of 42 CFR 59.5(a)(1), to require that a project provide all forms of family planning approved or cleared by the Food and Drug Administration (FDA)" (83 Fed. Reg. at 25515);
6. All records relating to HHS's statement that the Rule "would also promote grantee diversity by expanding the number of qualified entities that would be willing and able to apply to provide Title X services, since potential grantees and sub-recipients that refuse to provide abortion referrals may have been

ineligible or discouraged from applying for Title X grants or seeking to provide family planning services under a Title X project by the requirements of the current regulations” (83 Fed. Reg. at 25518);

7. All records relating to HHS’s statements regarding “Estimated Benefits” of the Proposed Rule (83 Fed. Reg. at 25525);
8. All records relating to HHS’s conclusions regarding the impact of the Proposed Rule.
9. All records relating to HHS’s statement that the Department “carefully considered the alternatives to this proposed rule . . .” (83 Fed. Reg. at 25526);
10. All records from HHS’s audits of Title X providers for the last five (5) years;
11. All records relating to Title X program reviews;
12. All records relating to Title X site visits;
13. All records concerning internal HHS meetings related to the Proposed Rule which were held with HHS employees only;
 - a. Request 13 includes but is not limited to any communications, including emails, phone logs, text messages, meeting requests or invitations to persons or groups as well as meeting notes or lists of those attending meetings or calls;
 - b. Request 13 includes but is not limited to records involving:
 - i. HHS Secretary Alex M. Azar, former HHS Secretary Thomas Price, Valerie Huber, and Assistant Secretary ADM Brett P. Giroir, M.D.;
 - ii. Office of Population Affairs (OPA) employees, including but not limited to Deputy Assistant Secretary Diane Foley, M.D., FAAP and Deputy Director Susan B. Moskosky, M.S., WHNP-BC;
 - iii. Office for Civil Rights employees, including but not limited to Director Roger Severino;
 - iv. Assistant Secretary of Health and Human Services for Planning and Evaluation employees;
 - v. Centers for Medicare and Medicaid Services employees;
 - vi. the Food and Drug Administration employees;
 - vii. the Health Resources and Services Administration employees;
 - viii. the Centers for Disease Control and Prevention employees; and,
 - ix. Office of Minority Health employees;

14. All records, from January 20, 2017 to the present, concerning HHS meetings or calls related to the Proposed Rule which were held with HHS employees and individuals outside HHS;
 - a. Request 14 includes but is not limited to records involving any communications, including emails, phone logs, text messages, meeting requests or invitations to persons or groups as well as meeting notes or lists of those attending meetings or calls;
 - b. Request 14 includes but is not limited to:
 - i. any group including outside entities and other governmental agencies;
 - ii. the Office of Management and Budget;
 - iii. any member of Congress or representative of a member of Congress;
 - iv. any employee of the White House, including but not limited to Katy Talento;
 - v. Any employee of a not-for-profit entity, advocacy group, or member thereof;

15. All records from Executive Order 12866 meetings on the Proposed Rule from May 24, 2018 to May 29, 2018 when the regulation was posted publicly on the Office of Information and Regulatory Affairs, Office of Management and Budget Reginfo.gov dashboard, and from May 24, 2018 to June 1, 2018 when the regulation was posted in the Federal Register:
 - a. Request 15 includes but is not limited to records involving any communications, including emails, phone logs, text messages, meeting requests or invitations to persons or groups as well as meeting notes or lists of those attending meetings or calls;
 - b. Request 15 includes but is not limited to:
 - i. any group, including outside entities and other governmental agencies;
 - ii. the Office of Management and Budget;
 - iii. any employee of the White House, including but not limited to Katy Talento;
 - iv. any employee of the Department of Health and Human Services;
 - v. Any employee of a not-for-profit entity, advocacy group, or member thereof;

16. All records, from January 20, 2017 to the present, including but not limited to, memorandum(s), including, but not limited to a final decision memorandum presented to the Secretary, emails, meeting notices, summaries, or notes of any meeting or call, related to internal communications between HHS employees, including but not limited to former Secretary Thomas Price, Secretary Alex M. Azar and Assistant Secretary ADM Brett P. Giroir, M.D.,

Deputy Assistant Secretary Diane Foley, M.D., FAAP, Valerie Huber, OPA employees, and the Centers for Medicare and Medicaid Services employees, related to the Proposed Rule;

17. The names and professional affiliation of all medical providers, including nurses and doctors, consulted in developing the Proposed Rule;
18. All records related to communications between employees of HHS with any other person or group not already identified in this request from January 20, 2017 to the date of the response to this request, relating to the Proposed Rule;
19. Organization chart(s) for HHS, from January 20, 2017 to the date of the response to this request, including all employees who participated in the development and/or drafting of the Proposed Rule;
20. All communications, including but not limited to, e-mails, text message, phone logs, messages, meeting invitations, and calendar notices, discussing the process for tallying, grouping, and tracking comments to the Proposed Rule;
21. All communications, including but not limited to, e-mails, text message, phone logs, messages, meeting invitations, and calendar notices, relating to which comments would be available publicly on Regulations.gov and/or when comments would be available publicly on Regulations.gov.

Please provide these records in a timely manner, on a rolling basis, and in a readily-accessible, electronic format, either in “.pdf,” or native form for excel spreadsheets. *See* 5 U.S.C. § 552(a)(3)(B). If HHS has destroyed or otherwise deems any requested record or portion of a record exempt from disclosure pursuant to one or more 5 U.S.C. § 552(b) exemptions, then please provide an explanation for the destruction or the basis for withholding the record or portion of a record, including (i) basic factual information about each destroyed or withheld record (author(s), recipient(s), date, length, subject matter, and location), (ii) the justification for the destruction or claimed exemption(s), and (iii) the interest protected by the exemption(s) that disclosure would harm. 5 U.S.C. § 552(a)(8)(A).

This request includes any records in the custody, control, or possession of HHS, inclusive of all sub-agencies and all respective subdivisions of each agency. Nothing in these requests should be interpreted to be seeking personally identifiable information such as names or addresses. Any record responsive to a request that contains personally identifiable information should be redacted accordingly.

I believe that the documents sought are of great public interest and not exempt from required disclosure under FOIA. Please forward this request to all HHS agencies

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and any other federal agencies that may be in possession of the requested documents. In addition, given that disclosure of these records would be in the public interest, even if you determine that certain of the documents sought are exempt under FOIA, I request that you disclose these documents as a matter of agency discretion.

Please send all requested materials to my attention, at the address provided above, within 20 business days as required by FOIA. Should you have any questions or concerns about this request, please contact Deputy Attorney General Karli Eisenberg at 916-210-7913 or Karli.Eisenberg@doj.ca.gov. In addition, our request for a fee waiver is available in appendix A.

Sincerely,

A handwritten signature in blue ink, appearing to read "Xavier Becerra", with a large, stylized flourish at the end.

XAVIER BECERRA
California Attorney General

Appendix A

California requests a waiver of searching and copying fees associated with these requests. Under FOIA, agencies must waive such fees where disclosure is likely to contribute significantly to public understanding of the operations and activities of the government and disclosure is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii). HHS has incorporated this requirement in its regulations for responding to FOIA requests. 45 C.F.R. § 5.54. Under the criteria set forth in the HHS regulations, such a waiver is appropriate here, as explained below.

“Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.” 45 C.F.R. § 5.54(b)(1).

These requests explicitly concern only the operation or activities of the federal government. Specifically, they concern the decision of HHS to include new conditions on the disbursement of federal funds. These are direct and clear actions by the federal government that have a direct impact on state and local governments.

“Disclosure of the requested information would be likely to contribute significantly to public understanding of those operations or activities.” 45 C.F.R. § 5.54(b)(2).

This disclosure would be likely to contribute significantly to the public understanding of the federal government’s decision to issue the Proposed Rule, including these new conditions on the disbursement of federal funds appropriated by Congress. Some parts of the Proposed Rule include no explanation of the new conditions and/or the reasoning behind their imposition and/or the evidence that HHS relied on in making its decision. Thus, this information is not already in the public domain. *See* 45 C.F.R. § 5.54(b)(2)(i).

Moreover, the disclosure will contribute to the understanding of a broad audience of persons interested in the subject. *See* 45 C.F.R. § 5.54(b)(2)(iii). There is no question that the distribution of federal funds itself is a matter of significant public interest, and impacts all residents of California (and the other 49 states), whose state and local entities rely on this funding. I am the chief law officer for the State of California and its more than 39 million residents, and I have a role in determining whether state and local policies are in compliance with these new substantive conditions. At a minimum, we intend to share the disclosed records with other state entities and sub-recipients, something that will be of “great benefit to the public at large.” In addition, our office engages regularly with the public and serves as a source of information to promote the public’s understanding through speaking engagements, press releases, and other social media. Those public outreach actions, coupled with our expertise in both administrative and civil

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justice law, make our office well suited to disseminate more broadly, which I also plan to do, any notable records disclosed as part of this request.

“The disclosure must not be primarily in the commercial interest of the requester.” 45 C.F.R. § 5.54(b)(3).

I am a public officer acting on behalf of the State and the public pursuant to the California Constitution, statutory authority, and common law. *See* Cal. Const. art. V, § 13; Cal. Gov’t Code § 12511; *D’Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974). The information sought in this FOIA request will assist me in representing the 39 million people of California. Disclosure of the documents sought “is likely to contribute significantly to public understanding of the operations or activities of the Government,” and the materials requested are not sought for any commercial purpose.