

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE



1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Public: (916) 445-9555
Facsimile: (916) 324-5567

April 25, 2018

VIA ELECTRONIC DELIVERY AND CERTIFIED U.S. MAIL

FOIA Officer: Michael Marquis
U.S. Department of Health and Human Services
Freedom of Information Officer
Hubert F. Humphrey Building, Room 729H
200 Independence Avenue, SW
Washington, DC 20201
Email: FOIARequest@HHS.gov

RE: Freedom of Information Act Request Regarding Proposed Rule, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority" (RIN 0945-ZA03)

Dear Mr. Marquis:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (the "Act"), I hereby request disclosure of certain records regarding the Proposed Rule, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority" (RIN 0945-ZA03), HHS docket no. HHS-OCR-2018-0002 (hereinafter "Proposed Rule"). This letter describes: (1) the records requested and (2) our request for a fee waiver for production of these records.

The Attorney General of California has a constitutional duty to protect all 39 million Californians, by safeguarding their health and safety, and defending the State's laws. Cal. Const., art. V, § 13. Attorney General Becerra has deep concerns about any efforts, including the Proposed Rule by the U.S. Department of Health and Human Services (HHS), to restrict or burden California residents' access to all health care services. If implemented, it will have significant negative impacts on our State; residents, including women, LGBTQ individuals, and other people; and numerous State entities that receive federal funding to provide important benefits and services for California's residents. In Attorney General Becerra's comment letter to HHS on the Proposed Rule, he made clear that the Proposed Rule "fails to account for its potential impact on States and their citizens." As such, we believe it is critical that there be transparency in the justification for and impact of such a broad, sweeping rule, to allow affected parties to understand and assess the Proposed Rule's impacts and consequences.

//

//

Request for Records

As a result, on behalf of Attorney General Becerra, I respectfully request that HHS produce a copy of all of the records enumerated below (in electronic format, or print versions if electronic versions are not available) relating to the justification for the Proposed Rule and the economic impact of the Proposed Rule. Our request seeks all records, as described below, as that term has been defined by the Act and interpreted by the courts (e.g., 5 U.S.C. § 552(f)(2)).

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.

The Attorney General of California respectfully requests the following records relating to the Proposed Rule:

1. All records relating to the statement that “this proposed rule probably will have minimal to no impact on family well-being” (83 Fed. Reg. at 3919);
2. All records relating to HHS’s conclusions regarding impact of the Proposed Rule on patients;
3. All records relating to the alleged forty-four complaints that the Office for Civil Rights (OCR) has received since 2008, including the thirty-four complaints filed since the November 2016 election (83 Fed. Reg. at 3886);
4. All records relating to the statement that “[s]ince November 2016, there has been a significant increase in complaints filed with OCR alleging violations of these conscience and associated anti-discrimination laws” (83 Fed. Reg. at 3887);
5. All records relating to HHS’s statement that “[m]embers of Congress raised concerns following OCR’s closure of three additional complaints” (83 Fed. Reg. at 3886);

6. All records relating to the decision that the prior “sub-regulatory guidance issued by OCR with respect to interpretation of the Weldon Amendment no longer reflects the current position of HHS, OCR, or the HHS Office of the General Counsel” (83 Fed. Reg. at 3890);
7. All records relating to HHS’s conclusion that the universe of new persons and entities subject to the Proposed Rule “is small and, possibly, non-existent” (83 Fed. Reg. at 3909);
8. All records relating to HHS’s statement that “all persons and entities subject to the proposed rule would spend approximately one hour on average familiarizing themselves with the content of the proposed rule and its requirements” (83 Fed. Reg. at 3912);
9. All records relating to HHS’s statement that it would take “3.5 hours on average to review the applicability of the additional laws that this rule proposes to enforce” (83 Fed. Reg. at 3913);
10. All records relating to HHS’s estimate that it expects “OCR’s staff costs would increase by \$904,500 annually [sic] in years one through five” (83 Fed. Reg. at 3915);
11. All records relating to HHS’s statements regarding “Estimated Benefits” of the Proposed Rule (83 Fed. Reg. at 3916);
12. All records relating to HHS’s statement that the Department “carefully considered alternatives to this proposed rule” (83 Fed. Reg. at 3917);
13. All records relating to HHS’s statement that “OCR estimates that there are 30 recipients on average per year that OCR may investigate” (83 Fed. Reg. at 3915);
14. All records relating to HHS’s decision to require both an assurance and certification (83 Fed. Reg. at 3928-3929);
15. All records relating to HHS’s decision as to what language to include in the Proposed Rule’s “Notice concerning Federal Health Care Conscience and Associated Anti-Discrimination Protections” (83 Fed. Reg. at 3931);
16. All records relating to how the Notice requirement is related to Congress’s intent in promulgating the “Federal health care conscience and associated anti-discrimination laws”;
17. All records, including but not limited to, studies, data, evidence, or other materials that HHS considered in relation to the decision to include the Notice requirement in the Proposed Rule;

18. All records identifying or explaining the statutory authority that HHS relied on to include the Notice requirement in the Proposed Rule;
19. All records, including but not limited to, studies, data, evidence, or other materials that HHS considered in relation to the decision to include the Compliance requirements;
20. All records, including but not limited to, studies, data, evidence, or other materials that HHS considered in relation to the decision to require recipients to validate compliance;
21. All records that HHS considered in relation to its estimate that the Proposed Rule “generates \$112 million in annualized costs at a 7% discount rate, discounted relative to year 2016, over a perpetual time horizon” (83 Fed. Reg. at 3918);
22. All records relating to the “Delegations of Authority” authorized in the Proposed Rule, including but not limited to, records relating to the necessity for the “Delegations of Authority” (83 Fed. Reg. at 3902);
23. All records, including but not limited to, studies, data, evidence, or other materials that HHS considered in relation to the decision to establish a Conscience and Religious Freedom Division;
24. All records concerning internal HHS and/or Centers for Medicare and Medicaid Services (CMS) meetings related to the Proposed Rule which were held with HHS and/or CMS employees only,
 - a. Request 24 includes but is not limited to any communications, meeting requests or invitations to persons or groups as well as meeting notes or lists of those attending meetings or calls,
 - b. Request 24 includes but is not limited to records involving:
 - i. HHS Secretary Alex M. Azar and Sarah Bayko Albrecht;
 - ii. OCR employees, including but not limited to Director Roger Severino;
 - iii. CMS employees;
 - iv. the Food and Drug Administration;
 - v. the Health Resources and Services Administration; and,
 - vi. the Centers for Disease Control and Prevention;
25. All records concerning HHS and/or CMS meetings or calls related to the Proposed Rule which were held with HHS and/or CMS employees and individuals outside HHS and/or CMS;
 - a. Request 25 includes but is not limited to records involving any communications, meeting requests or invitations to persons or groups as well as meeting notes or lists of those attending meetings or calls;

- b. Request 25 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;
26. All records, 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 Secretary Alex M. Azar and Sarah Bayko Albrecht, OCR employees, including but not limited to Director Roger Severino, and the Centers for Medicare and Medicaid Services employees, related to the Proposed Rule;
27. All records related to communications between employees of HHS with any other person or group from January 20, 2017 to the date of the response to this request, relating to the reorganization of the Office of Civil Rights; and,
28. Organization chart(s) for HHS and OCR, 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.

The Attorney General believes 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 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, the Attorney General requests that you disclose these documents as a matter of agency discretion.

Request for a Fee Waiver

The California Attorney General's Office is a noncommercial organization not subject to review fees. In addition, I request 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 to states and localities, and to require recipients of federal funding to validate compliance. 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. The California Attorney General, who is the chief law officer for the State of California and its more than 39 million residents, has 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 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).

The California Attorney General is 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

April 25, 2018

Page 7

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.

Please send all requested materials to my attention, at the address provided above, within 20 business days as required by FOIA. Please call me at 916-210-7913 if you have any questions about this request.

Sincerely,

Karli Eisenberg

KARLI EISENBERG
Deputy Attorney General

For XAVIER BECERRA
Attorney General