UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

NEW HAMPSHIRE RIGHT TO LIFE, Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendant.	)	Civil No. 11-585-PB

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I. Introduction and Request for Relief

Following a September 8, 2011 application for grant funds, the United States Department of Health and Human Services ("Defendant") issued a non-competitive grant of approximately one million dollars to Planned Parenthood's six New Hampshire locations on September 13, 2011. On October 7, 2011, Plaintiff New Hampshire Right to Life ("Plaintiff") requested documents relating to the September 13 grant, including financial information in Planned Parenthood's application, pursuant to the Freedom of Information Act ("FOIA"). Under FOIA, Defendant has twenty days to respond to Plaintiff's request, but Defendant failed to comply with its production obligations. This litigation resulted.

While Defendant was able to review and award a $1,000,000 grant to Planned Parenthood in just five days, Defendant has been unable to review and produce the same grant application in the more than 130 days since Plaintiff requested it.

Plaintiff requests a preliminary injunction ordering Defendant to comply with FOIA and produce the documents at issue within ten days of this Court's order on the instant Motion.

II. Facts

New Hampshire Right to Life seeks the documents at issue to analyze whether Defendant followed its own regulations in awarding a non-competitive grant to Planned Parenthood.[1] In addition, Plaintiff seeks the at-issue documents, in part, to lobby in support of HB 228, a bill currently pending in the New Hampshire legislature. Although FOIA requires Defendant to produce the requested documents within twenty days, Defendant failed to produce a single document within that time frame and, in fact, only started producing documents after Plaintiff initiated this litigation o December 22, 2011. On January 25, 2011, Defendant informed Plaintiff by letter that it would be withholding portions of Planned Parenthood's grant application, alleging that this information fell within an exemption to FOIA. On February 15, 2012, Defendant proposed a Discovery Plan in which it will withhold the requested documents that it admits are non-exempt until April 15, 2012, with a *Vaughn* index to follow on April 30, 2012.

III. Relevant Law

A. Freedom of Information Act

In passing FOIA, "Congress sought 'to open agency action to the light of public scrutiny.'" United States DOJ v. Tax Analysts, 492 U.S. 136, 142 (U.S. 1989)(quoting Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749, 772 (U.S. 1989)). "The purpose of providing information to the public [pursuant to FOIA] is 'to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold governors accountable to the governed.'" Electronic Privacy Information

[1] It is certainly noteworthy that Planned Parenthood received the at-issue grant from Defendant closely on the heels of a letter from Senator Jeanne Shaheen to Defendant, when Senator Shaheen, during the 2008 election cycle, received over $390,000 in political campaign contributions from the pro-abortion political action committees controlled by Planned Parenthood Federation of America, NARAL, and Emily's List.

Center v. Dep't of Justice, 416 F.Supp.2d 30 (D.D.C. 2006)(quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978)). Given FOIA's underlying policy of full disclosure, its exemptions are "given a narrow compass." Tax Analysts, 492 U.S. at 151.

FOIA "accords 'any person' a right to request any records held by a federal agency." Taylor v. Sturgell, 553 U.S. 880, 885 (U.S. 2008)(quoting 5 U.S.C. § 552(a)(3)(A)). "No reason need be given for a FOIA request, and unless the requested materials fall within one of the Act's enumerated exemptions…the agency must 'make the records ***promptly*** available' to the requester, § 552(a)(3)(A)." Id(emphasis supplied).

Congress has passed only nine exemptions to FOIA's disclosure requirements. See 5 U.S.C. § 552(b). One exemption is for "matters that are trade secrets and commercial or financial information obtained from a person and privileged or confidential." Id. at (b)(4). The agency, not the person requesting the documents, bears the burden of proving that a FOIA exemption applies. Tax Analysts, 492 U.S. at 142, n. 3. "'Placing the burden of proof upon the agency puts the task of justifying the withholding on the only party able to explain it.'" Id.(quoting S. Rep. No. 813, 89th Cong., 1st Sess., 8 (1965)). If an agency has claimed an exemption, the reviewing court reviews the applicability of that exemption *de novo*. Eg., Church of Scientology Int'l v. U.S. Dept't of Justice, 30 F.3d 224, 228 (1st Cir. 1994).

B. Preliminary Injunction Standard

As an exercise of its general equity powers, this Court may entertain Plaintiff's request for the preliminary injunction, as Defendant has received timely notice. Fed. R. Civ. P. 65(a)(1). "FOIA imposes no limits on courts' equitable powers in enforcing its terms." Payne Enterprises,

Inc. v. United States, 837 F.2d 486, 494 (D.C. Cir. 1988); see also 5 U.S.C. § 552(a)(4)(b). In considering Plaintiff's request for a preliminary injunction, this Court applies a four part test:

> (1)the likelihood of success on the merits; (2) the potential for irreparable harm [to the movant] if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest.

E.g., Esso Std. Oil Co. v. Monroig-Zayas, 445 F.3d 13, 18 (1st Cir. 2006)(citation omitted; alteration in original).

Federal courts regularly grant preliminary injunctions in FOIA cases when a requester has made the necessary legal showing. See, e.g., Electronic Privacy, 416 F.Supp.2d at 35("On numerous occasions, federal courts have entertained motions for a preliminary injunction in FOIA cases and, when appropriate, granted such motions."); ACLU v. Dept. of Defense, 339 F.Supp.2d 501, 503 (S.D.N.Y. 2004); S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv., 2008 U.S. Dist. LEXIS 107177 (E.D. Cal. June 20, 2008)("these factors weigh in favor of granting an injunction").

IV. This Court Should Grant Plaintiff's Request for a Preliminary Injunction

Because Plaintiff satisfies the relevant legal standard, *see Esso Std. Oil Co.*, 445 F.3d at 18, this Court should grant Plaintiff's request for a preliminary injunction.

A. Plaintiff has demonstrated a likelihood of success on the Merits

In the complaint, Plaintiff seeks relief on three grounds: a) that Defendant has not produced the requested documents within the twenty day period required by FOIA; b) that Defendant has illegally withheld documents and intends to continue to withhold documents for

which no valid FOIA exemption exists; and c) that Defendant unlawfully concluded that Plaintiff is not entitled to a fee waiver pursuant to 5 U.S.C. § 552(b).

1. Untimely Disclosure

Plaintiff submitted the FOIA request at issue on October 7, 2011. Defendant failed to timely respond, and failed to produce any documents until this litigation started, and still has not produced all responsive documents. Thus, Defendant failed to comply with FOIA's statutory disclosure requirements. Pursuant to 5 U.S.C. § 552(a)(6)(i), an agency must generally produce the requested documents within twenty days of the request. See also, e.g., Electronic Privacy Information Ctr. v. Dept. of Justice, 416 F.Supp.2d 30, 38 (D.D.C. 2006)(recognizing "twenty-day deadline that applies to standard FOIA requests."). An agency may extend the twenty-day deadline if "unusual circumstances" apply to the request at issue. 5 U.S.C. § 552(a)(6)(B). Nevertheless, even if these unusual circumstances existed, the statutory extensions would be for only ten days additional, resulting in a total of thirty days. To allow further delay runs counter to the policy underlying FOIA. See, e.g., Ettlinger v. FBI, 596 F. Supp. 867, 879 (D. Mass. 1984)("Given the legislative history of the FOIA and its clear language imposing specific administrative deadlines on agency responses to FOIA requests, a court supported extension of the time to respond to the plaintiff's request in this case would clearly undermine the intent of the FOIA.")

Defendant received a grant application for Planned Parenthood on September 8, 2011, and allegedly reviewed it and approved an approximately one million dollar grant by September 13, 2011. Yet, Defendant claims that it is unable to review and produce the very same grant application within the twenty days provided by the statute or the 130 days since Plaintiff

requested the documents. Defendant may not ignore the plain language of FOIA which requires it to produce the requested documents within twenty days. In light of the above, Plaintiff has demonstrated a likelihood of success on the merits with respect to its claim that Defendant has not timely produced the documents.

2. Failure to Disclose Non-Exempt Documents

In failing to disclose Plaintiff's requested documents, Defendant has relied principally on FOIA's "trade secret" exemption, Exemption Four. See Letter of January 25, 2012, attached as Ex. 1.[2] Plaintiff is likely to succeed on the merits of its claim that Exemption Four does not apply to the documents at issue.

1. Exemption Four

Pursuant to 5 U.S.C. § 552(b)(4), FOIA's disclosure requirements do "not apply to matters that are trade secrets and commercial or financial information obtained from a person and privileged or confidential." To successfully invoke this exemption, Courts have required an agency to prove that the information sought pursuant to the FOIA request is: 1) a "trade secret" or "commercial or financial"; 2) that the agency obtained the information from a person; 3) and that the information is "privileged or confidential." See, e.g., Inner City Press v. Board of Governors of the Fed. Reserve System, 463 F.3d 239, 245 (2d Cir. 2006).

The information Plaintiff seeks is not exempt from FOIA disclosure under Exemption 4 because the information at issue is not "commercial" or a "trade secret." See 45 C.F.R. § 5.65(a)(defining trade secret); 45 C.F.R. § 5.65(b)(1)(defining "commercial/financial"); see also Washington Research Project, Inc. v. Dept. of Health, Education, and Welfare, 504 F.2d 238,

244 (DC Cir. 1974)("It is clear enough that a non-commercial scientist's research design is not literally a trade secret or item of commercial information for it defies common sense to pretend that the scientist is engaged in trade or commerce."). Planned Parenthood, a non-profit entity, has neither commercial interests nor trade secrets. Indeed, the medical services performed at Planned Parenthood are performed elsewhere so it is difficult to contemplate how such information would qualify as a trade secret: "There must be a direct relationship between the trade secret and the productive process." 45 C.F.R. § 5.65(a). It is not as if Planned Parenthood is a think-tank, or a for-profit research-facility, and Plaintiff is likely to prevail on the merits of its argument that the information sought is not a "trade secret." Similarly, the information sought is not "commercial." According to the "Who We Are" section on its website, Planned Parenthood's mission is "[t]o provide, promote, and protect access to reproductive health care and sexuality education so that all people can make voluntary choices about their reproductive and sexual health." Therefore, the information is not commercial, either.[3] See Washington Research Project, 504 F.2d at 244.

Even if the Court concludes that the information sought is commercial or a trade secret, Plaintiff is still entitled to a preliminary injunction because the information sought is neither "confidential" nor "privileged" and thus not entitled to protection under Exemption Four. Planned Parenthood is a non-profit, tax exempt 501(c)(3) organization. Plaintiff seeks information relating to Planned Parenthood's attempt to get a federal grant, one of the criteria of

[2] It is troubling that in determining what "trade secrets" Planned Parenthood might have in how it operates its abortion clinics Defendant asked Planned Parenthood to determine what documents Defendant should and should not produce to the public at large.

[3] In deciding to award a Title X grant to Planned Parenthood, Defendant must first determine that Planned Parenthood is not a commercial entity but rather a non-profit organization. See 42 C.F.R. § 59.3. Having made the determination that Planned Parenthood was non-commercial for Title X purposes, it cannot then determine that it is a commercial entity for FOIA purposes.

which is financial need. See 42 C.F.R. § 59.7(a)(3). In light of relevant case law and the plain meaning of Exemption Four, the information Plaintiff seeks is not "confidential" or "privileged."

To be confidential information for the purposes of Exemption 4, the Court must determine that the disclosure of such information would impair the Government's ability to obtain necessary information in the future, or cause substantial harm to the competitive position of the person from whom the information was obtained. E.g., Physicians for Responsible Medicine v. National Inst. Of Health, 326 F.Supp.2d 19, 26 (D.D.C. 2004). "The important point for competitive harm in the FOIA context is that it be limited to harm flowing from the affirmative use of proprietary information by competitors." Id. As stated, Planned Parenthood claims to be a non-profit, charitable organization that provides health care services to women. Accordingly, it cannot be said that its "competitors" will gain access to "proprietary information" if Plaintiff's FOIA request is granted, especially in a situation such as this, where Planned Parenthood received a non-competitive grant. See id. Similarly, it is inconceivable that granting Plaintiff's request would impact the government's ability to obtain similar information in the future. Unlike the commercial context, Planned Parenthood is not a business entity that creates proprietary technology to compete against other, similar businesses. The idea that granting Plaintiff's request would impair the government's ability to get information in the future lacks merit. Similarly, Plaintiff has not sought information that should qualify as "privileged," because Plaintiff did not intend, and does not desire, information subject to recognized privileges. See 45 C.F.R. § 5.65(b)(3)("privileged" holds same meaning as it does in context of civil discovery).

3. Fee Waiver

Plaintiff will likely prevail as to the merits of its claim that Defendant has unlawfully failed to determine that Plaintiff is entitled to a fee waiver. Pursuant to 5 U.S.C. § 552(a)(4)(iii), documents sought via a FOIA request "shall be furnished without any charge…if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." Defendant's regulations mirror the two-part statutory test, i.e., contribution to the public interest and lack of a commercial motive. See 45 C.F.R. § 5.45(a)(1-2).

a. Public Interest

In considering whether the party requesting a fee waiver is making a FOIA request that will further the public interest, the Court should consider four factors: 1) whether the requested documents relate to the operation of the government; 2) whether disclosure will reveal meaningful information about the government or its activities; 3) whether the information will advance the understanding of the public at large or a narrow segment of individuals; and 4) whether the contribution to the public's understanding will be significant. Id. at (b)(1-4).

Plaintiff satisfies the first two facets of the test. Plaintiff seeks documents relating to Defendant's decision to award an approximately one million dollar grant to Planned Parenthood, after the request of Senator Shaheen, and without any competitive bidding as required by Defendant's own regulations; the awarding of a grant is a function of the government, and documents relating to that process qualify as meaningful information. Kurzon v. Department of Health & Human Services, 649 F.2d 65, 69 (1st Cir. 1981)("federal grant applicants cannot reasonably expect that their efforts to secure government funds, especially in a field so much in

the public eye as cancer research, will remain purely private matters. There is an obvious public element to the process and the results.")

With respect to the third question contained in Defendant's regulations, disclosure of the documents at-issue will benefit the public at large, not just a narrow segment of interested persons. Taxpayer funding of Planned Parenthood, HB 228 and related questions of public policy arouse great passion and colorful language from parties on both sides of the debate. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 980 (U.S. 1992)(Scalia, J., concurring part and dissenting in part). In fact, the *Union Leader*, the state's largest newspaper, ran a front page article on February 15, 2012 on the grant at issue in this case, and that newspaper has asked that Plaintiff provide it with the documents requested in this FOIA request when they are finally produced. The American democratic tradition calls for "the uninhibited, robust, and wide-open debate about matters of public importance." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (U.S. 1964). Accordingly, with respect to issues such as taxpayer funding of the nation's largest provider of abortions that have occupied a significant part of the republic's political debate for several decades, the public at large, not a "narrow segment of interested persons" will benefit. See, e.g., Consumers' Checkbook v. United States, 502 F.Supp.2d 79, 88 (D.D.C. 2007)(finding third question satisfied and discussing ways information would be disseminated to general public)

Finally, with respect to the fourth question, 45 C.F.R. § 5.45(b)(4), the "contribution to public understanding [will] be a significant one." The documents Plaintiff sought via its FOIA request will ensure that the debate over taxpayer funding of Planned Parenthood in general, and HB 228 in particular, is robust and based upon all available facts; the public receives a

significant benefit when its legislators are permitted to deliberate upon all information relevant to a bill, not just selective portions. See Ctr. for Medicare Advocacy v. United State States, 577 F.Supp.2d 221, 241(D.D.C. 2008)(finding that disclosure to Medicare advocacy group constituted "significant" contribution because of various services it provided to the public). As the regulation asks, the salient question is whether "the public's understanding will be substantially greater as a result of the disclosure." 45 C.F.R. § 5.45(b)(4). In this case, the question is a simple one; the public currently knows very little of how Defendant awarded Planned Parenthood received the money in the fall of 2011 without any competitive bidding. It is therefore clear that the public's understanding will be substantially greater with disclosure than without it.

b. Commercial Interest

Because Plaintiff has demonstrated a likelihood of success on the merits with respect to the public interest requirement of 45 C.F.R. § 5.45(b), the Court must next determine whether the requested disclosure will further Plaintiff's commercial interests and, if so, whether that advancement outweighs the benefit to the public interest. See 45 C.F.R. § 5.45(c)(1-2). In this case, Plaintiff has no commercial interests and thus the requested disclosure cannot further one. Plaintiff is a non-profit public advocacy group, with a mailing list of over ten thousand members which strives to educate tax payers and citizens of New Hampshire, and ensure that the issues surrounding the taxpayer funding of Planned Parenthood are fully understood and HB 228 is fully and fairly debated. In short, Plaintiff gains no commercial benefit from the disclosure sought. See, e.g., Consumers Checkbook, 502 F.Supp.2d at 89("'Congress did not intend for scholars (or journalists and public interest groups) to forego compensation when acting within

the scope of their professional roles.'")(quoting Campbell v. United States, 164 F.3d 20, 35-36 (D.C. Cir. 1998))(emphasis deleted).

B. Irreparable Harm

"As the Supreme Court has made clear, public awareness of the government's actions is 'a structural necessity in a real democracy.'" Electronic Privacy, 416 F.Supp.2d at 40(quoting Nat'l Archives & Records Admin v. Favish, 541 U.S. 157, 172 (U.S. 2004)); see also, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 270 (U.S. 1964)("[it is] the uninhibited, robust, and wide-open debate about matters of public importance that secures an informed citizenry."). Although the ability to gain access to information is, in and of itself, important, equally important is the ability to timely access information to ensure that a FOIA requester is able to intelligently participate in ongoing matters of public debate.

As another Circuit previously acknowledged, "stale information is of little value." Payne Enters., Inc. v. United States, 837 F.2d 486, 494 (D.C. Cir. 1988). In a situation such as Plaintiff's, "ongoing debate about [the proper functioning of our government] cannot be restarted or wound back." Gerstein v. CIA, 2006 U.S. Dist. LEXIS 89883 (N.D. Cal. Nov. 29, 2006). Indeed, the New Hampshire Senate is expected to hold a hearing on HB 228 in late March 2012.[4] If Plaintiff does not timely receive the documents it seeks, it will be robbed of the ability to intelligently participate in the "uninhibited, robust, and wide-open debate about matters of public importance" essential for the proper functioning of a democracy. New York Times, 376 U.S. at

[4] The New Hampshire House held a hearing on HCR 41 on February 14, 2012. This bill condemned the grant from Defendant to Planned Parenthood at issue in this FOIA litigation. Unfortunately, even though Plaintiff's FOIA request was sent on October 7, 2011, Defendant still has not produced all of the documents such as the grant

270. Plaintiff will be irreparably harmed if it cannot adequately attend and advocate for its position at those debates. Plaintiff has thus satisfied this prong of the preliminary injunction standard.

C. The Balance of Potential Harms Favors Plaintiff

If this Court grants Plaintiff's Motion and the preliminary injunction issues, the only burden placed on Defendant will be to produce documents that the law mandated it had to produce last October. Defendant "cannot be said to 'be burdened by a requirement that it comply with the law.'" Electronic Privacy, 416 F.Supp. at 41. Indeed, if the sole imposition Defendant can claim is that the preliminary injunction will force it to more expeditiously comply with the law than it otherwise would, Defendant should seek a legislative remedy, not a judicial one:

> Though FOIA doubtless poses practical difficulties for federal agencies, federal agencies can educate Congress on the practical problems they have, and attempt to persuade Congress to change the law or provide additional funds to achieve compliance. So long as the Freedom of Information Act is the law, we cannot repeal it by a construction that vitiates any practical utility it may have.

Fiduccia v. United States DOJ, 185 F.3d 1035, 1041 (9th Cir. 1999). Accordingly, "the balance of relative impositions" favors Plaintiff. Esso Std. Oil Co., 445 F.3d at 18. Plaintiff meets this prong of the preliminary injunction standard.

D. The Public Interest Favors the Request Relief

FOIA evidences the Congress's commitment "to the principle that a democracy cannot function unless the people are permitted to know what their government is up to." EPA v. Mink,

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application upon which Defendant decided to award over one million dollars to Planned Parenthood and therefore

410 U.S. 73, 105 (U.S. 1973)(Douglas, J., dissenting). "This basic policy of full agency disclosure unless information is exempted under clearly delineated statutory language indeed focuses on the citizens' right to be informed." Dep't of Justice v. Reporters Committee for Freedom of the Press, et al, 489 U.S. 749,773 (U.S.1989)(internal citations and quotation marks omitted). The Court should thus construe FOIA in light of the policy underlying it, and construe its exemptions narrowly; "[t]he public has a significant, enduring interest in remaining informed about actions taken by public officials in the course of their duties." New England Apple Council, et al v. Donovan, 725 F.2d 139, 144 (1st Cir. 1984); see also, e.g., Jacksonvill Port. Auth. v. Adams, 556 F.2d 52, 59 (D.C. Cir. 1977). On facts such as the instant case, the public interest favors disclosure.

WHEREFORE, Plaintiff respectfully requests that this Court order Defendant:

A) To produce all documents responsive to Plaintiff's requests within ten days of the Court's order on Plaintiff's Motion for Preliminary Injunction;

B) Produce a *Vaughn* index of the requested documents within twenty days of the Court's order on Plaintiff's Motion for Preliminary Injunction; and

C) Grant such further relief as is reasonable and just.

Plaintiff was unable to provide these documents to the legislators as they considered HCR 41.

Respectfully submitted,

NEW HAMPSHIRE RIGHT TO LIFE

Dated: February 16, 2012

By: /s/ Michael J. Tierney
Michael J. Tierney
NH Bar No. 17173
Joseph G. Mattson
NH Bar No. 19287
Wadleigh, Starr & Peters, PLLC
95 Market Street
Manchester, NH 03101
603-669-4140
mtierney@wadleighlaw.com

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