

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

New Hampshire Right to Life *
PO Box 421 *
Merrimack, NH 03054 *

Plaintiff *

v. *

United States Department of *
Health & Human Services *
200 Independence Avenue, S.W. *
Washington, D.C. 20221-0004 *

Defendant *

Civil Action No. _____

COMPLAINT

INTRODUCTION

On or about September 13, 2011, the United States Department of Health and Human Services provided an approximately \$1 million grant to fund Title X family planning and birth control services at Planned Parenthood’s six New Hampshire abortion clinics. In an October 7, 2011 Freedom of Information Act request, New Hampshire Right to Life sought documents and communications between Planned Parenthood and the government regarding this grant award and why this grant was not put out for competitive bidding to allow one of the hospitals or community health clinics in the cities where these abortion clinics are located to apply for this grant. HHS has failed to comply with the FOIA statute. New Hampshire Right to Life seeks an Order from this Court compelling HHS to produce the requested documents as required by the FOIA statute.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to the Freedom of Information Act (hereinafter “FOIA”), 5 U.S.C. §552(a)(4)(B) and 28 U.S.C. §1331.
2. Venue is proper in this Court under 5 U.S.C. §552(a)(4)(B) as the plaintiff resides in New Hampshire and the documents requested by the plaintiff concern a grant to provide Title X services within the State of New Hampshire.
3. On or about October 7, 2011, New Hampshire Right to Life made a FOIA request to the Department of Health & Human Services for communications and other documents relating to the provision of a \$1 million grant to Planned Parenthood.
4. Pursuant to the FOIA statute, Health & Human Services had 20 working days to produce the requested records.
5. Health & Human Services has failed to comply with the time limit set forth in the statute.
6. Both the FOIA statute, as well as HHS regulations explicitly provide that failure to comply with time limits should be construed as a denial and does not require the exhaustion of any other administrative remedies. See 5 U.S.C. §552(a)(6)(C)(I) and 45 CFR §5.35(b).
7. The FOIA claims made in this Complaint are ripe for judicial review and New Hampshire Right to Life’s harms can be remedied by an Order of this Court.

PARTIES

8. The plaintiff, New Hampshire Right to Life (hereinafter “NHRTL”), is a New Hampshire non profit organization incorporated and having its principal place of business in the State

of New Hampshire.

9. NHRTL is the oldest and largest Right to Life organization in the State of New Hampshire.
10. NHRTL is dedicated to promoting the sanctity of life from the moment of conception until natural death.
11. As part of its mission, NHRTL educates the public on policy issues regarding the protection of the sanctity of life.
12. Defendant, Health & Human Services (“HHS”), is a federal agency with offices in all 50 states but its principal place of business is at 200 Independence Avenue Southwest, Washington, D.C. 20201-0004.
13. According to HHS’ website “HHS represents almost a quarter of all federal outlays and it administers more grant dollars than all other federal agencies combined.”
14. Among the grant programs HHS administers, it administers the Title X Family Planning Program.
15. The Title X program provides funding to provide for free or reduced costs birth control, contraception, and other services.
16. Pursuant to the Title X statute, no Title X funds shall not “be used in programs where abortion is a method of family planning.” 42 U.S.C. §300a-6.

FACTS

17. For many decades, the State of New Hampshire has been a grantee of the federal HHS in order to administer the Title X program in New Hampshire.

18. After obtaining a grant from the federal government, the State awards sub grants to multiple entities that can cover various areas in the State.
19. Under the New Hampshire Constitution, any grants over \$10,000.00 must be approved by the Executive Council.
20. In June 2011, the Executive Counsel voted to award Title X sub grants to community health clinics and other providers in the rural parts of the State but decided not to provide approximately \$1.8 million to Planned Parenthood's 6 clinics in Manchester, Derry, Keene, Exeter, Lebanon and Claremont.
21. In each of the aforementioned cities and towns, there is a full service hospital such as the Elliot Hospital, Parkland Medical Center, Cheshire Medical Center, Exeter Hospital, Mary Hitchcock Hospital (Dartmouth-Hitchcock) and Valley Regional Hospital.
22. In addition, the Executive Council expressed its concern that Planned Parenthood was not able to provide sufficient guarantees that the Title X funds would not be used to subsidize abortions.
23. Planned Parenthood's proposal sets forth various employees who Planned Parenthood claims will devote a certain percentage of their time to Title X services while the remaining percentage is devoted to providing abortions or other non-Title X services.
24. In denying the award of Title X funds to Planned Parenthood, the Executive Council specifically requested that hospitals or community health facilities be found who would be willing to provide the Title X services.
25. On or about August 4, 2011, the State of New Hampshire Department of Health & Human Services was informed by federal HHS that the federal HHS would put the 2012

Title X funds out for a competitive bid sometime in August or September of 2011 that would be awarded effective January 1, 2012. See E-mail from Commissioner Toumpas to Governor Lynch, et al attached as Exhibit A.

26. On or about September 12, 2011, New Hampshire Right to Life requested of Kathy Desilets, Regional Program Consultant for Family Planning Services at HHS' Boston Office (i.e., the official in charge of New Hampshire Title X funds), a copy of any outstanding requests for proposals for Title X services in New Hampshire or information regarding if a request for a proposal will be issued in the future.
27. On or about September 14, 2011, Ms. Desilets responded that there were no outstanding requests for proposals for Title X services in New Hampshire. See attached as Exhibit B.
28. On or about September 13, 2011, Planned Parenthood of Northern New England and Senator Jeanne Shaheen announced that Planned Parenthood had been awarded approximately a \$1 million grant to provide Title X services through the end of 2012.
29. Senator Shaheen indicated that she had instructed HHS to provide the funds to Planned Parenthood in a September 6, 2011 letter.
30. NHRTL has attempted to work in good faith with HHS to obtain copies of the documents and/or communications of Planned Parenthood that resulted in the single source grant of September 13, 2011. In a telephone conversation on or about September 19, 2011, NHRTL was informed that NHRTL had erroneously termed its request for a "request for proposals" as the term is used only in the state context and in the federal context the proper terminology is "notice of solicitation."
31. NHRTL, therefore, made a request on or about September 20, 2011 for documents

relating to the notice of solicitation.

32. NHRTL was then informed by HHS that notices of solicitation are only for contracted goods and that in the context of grants for services, the proper terminology is “request for funding application.”
33. In order to make crystal clear that NHRTL was seeking the documents and communications that resulted in the awarding of the grant to Planned Parenthood, NHRTL submitted a new FOIA request, dated October 7, 2011, specifically requesting all documents and communications with Planned Parenthood and others relating to the award of the Title X grant in New Hampshire to Planned Parenthood. See attached as Exhibit C.
34. HHS acknowledged receipt of the October 7, 2011 FOIA request in a letter dated October 31, 2011 and assigned it FOIA Case # 12-0063. See attached as Exhibit D.
35. In its October 31, 2011 letter, HHS stated that it would “be unable to comply with the 20 working day time limit in this case, as well as the 10 additional days provided by statute.” Nevertheless, HHS did not provide any date by which it would be able to produce the communications it has had with Planned Parenthood or other requested documents.

COUNT I:

HHS HAS FAILED TO TIMELY PRODUCE THE REQUESTED DOCUMENTS WITHIN TWENTY (20) WORKING DAYS OF THE OCTOBER 7, 2011 FOIA REQUEST AS REQUIRED BY THE FOIA STATUTE.

36. NHRTL repeats and incorporates by reference all of the preceding paragraphs.
37. Pursuant to 5 U.S.C. §552(a)(6)(A), HHS was required to either produce the requested

documents or inform NHRTL of the statutory exemptions which preclude their production within the shorter of either twenty (20) working days of when the request is received by HHS or within ten (10) days of when the request is received by the HHS FOIA officer.

38. The October 7, 2011 FOIA request was sent to both the appropriate agency official, Kathy Desilets, in HHS' Boston office, as well as the designated FOIA officer, Angela Fox, at HHS' Bethesda, Maryland office.
39. Carol Maloney, Director of FOIA Services for HHS, stated in her October 31, 2011 letter that the HHS FOIA office received the request on October 17, 2011. See attached as Exhibit D.
40. It is more than twenty (20) days since HHS' receipt of NHRTL's October 7, 2011 FOIA request.
41. Pursuant to 5 U.S.C. §552(a)(6)(B), the time period for responding to a request may be extended by "unusual circumstances" as defined by the statute, but not for a period longer than thirty (30) days.
42. It has been longer than thirty (30) days since HHS' receipt of NHRTL's October 7, 2011 FOIA request.
43. No unusual circumstances exist justifying additional time.
44. Pursuant to 45 CFR 5.35, a failure to produce documents within twenty (20) days constitutes a denial of the request for production.

COUNT II:

**HHS HAS ILLEGALLY WITHHELD DOCUMENTS
FOR WHICH NO STATUTORY EXEMPTION EXISTS
IN VIOLATION OF FOIA**

45. NHRTL repeats and incorporates by reference the previous allegations.
46. HHS continues to violate FOIA by illegally withholding the communications it has had with Planned Parenthood, as well as other requested documents, which are not subject to any FOIA withholding provisions. 5 U.S.C. §552(b).

COUNT III:

**HHS HAS UNLAWFULLY FAILED TO DETERMINE
THAT NHRTL IS ENTITLED TO A FEE WAIVER**

47. NHRTL repeats and incorporates by reference the previous allegations.
48. Pursuant to 5 U.S.C. §552(a)(4)(A)(III), HHS cannot charge for the search and duplication of records “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.”
49. NHRTL is the State’s oldest and largest pro life advocacy organization.
50. NHRTL wishes to advance the public interest by analyzing and disseminating the communications that resulted in the award of an approximately \$1 million contract to Planned Parenthood without any competitive bidding.
51. NHRTL has an interest in analyzing these communications and other documents to insure that HHS did not inappropriately or unlawfully award a grant to Planned Parenthood that should or could have been competitively bid and/or granted to some of the hospitals or

community health centers that serve the cities where Planned Parenthood's abortion clinics are located.

52. New Hampshire Right to Life has over 10,000 members and operates a website and e alert system, as well as periodic newsletters. In addition, NHRTL coordinates dissemination and information with other organizations and groups, both in New Hampshire and nationally.
53. All of the major newspapers in New Hampshire, including, but not limited to, the Manchester Union Leader, the Concord Monitor, the Keene Sentinel, the Valley News and the Nashua Telegraph have run stories on HHS' decision to award \$1 million in Title X funds to Planned Parenthood without any competitive bidding process.
54. The public is particularly interested in how it came to be that Planned Parenthood was unilaterally given this grant as the only communications made public are a press release from Senator Jeanne Shaheen and the Senator's September 6, 2011 letter to HHS Secretary Kathleen Sebelius instructing HHS to give Planned Parenthood the grant.
55. In the 2008 election cycle, Senator Shaheen's campaign received over \$390,000.00 in political campaign contributions from the pro abortion political action committees controlled by Planned Parenthood Federation of America, NARAL and Emily's List.
56. New Hampshire Right to Life is interested in seeing if any of the communications between Planned Parenthood and HHS discussed alternative providers such as Manchester Community Health Clinic who would be more likely to use the \$1 million taxpayer grant to actually provide health care services and not increase its profits as

Planned Parenthood appears to be doing.

57. At the time the grant was awarded to Planned Parenthood, Manchester Community Health Clinic had requested information from the State on how to bid for a Title X grant but never received a response.
58. Rather than use the taxpayer funds to provide health care services, Planned Parenthood of Northern New England, a Vermont corporation, together with its affiliate, the Planned Parenthood Federation of America, Inc., have filed 990 Forms indicating that these entities posted surpluses (i.e., profits) of \$21,773,569.00 in 2009 and \$5,626,756.00 in 2010.
59. In addition, New Hampshire Right to Life believes that with the recent cuts in subsidies to hospitals, the full service hospitals located in each of the communities where Planned Parenthood operates an abortion clinic would be better able to provide a variety of health care services to people in need.
60. Disclosure of the communications between Planned Parenthood and HHS is in the public interest as the public has an interest and a right to know how the HHS bureaucracy would grant \$1 million to the State's largest abortion provider, which is currently maintaining a substantial surplus, while at the same time cutting over thirty-five million to the State's hospitals who are currently struggling to provide necessary services and needing to engage in substantial layoffs.
61. NHRTL, a non profit organization, has no commercial interest in this grant, other than representing the interests of thousands of New Hampshire taxpayers.

PRAYERS FOR RELIEF

WHEREFORE, the New Hampshire Right to Life respectfully requests this Honorable

Court:

- a. Issue an injunction enjoining the Department of Health & Human Services from illegally withholding documents that are not subject to a lawful FOIA exemption as set forth in 5 U.S.C. §552(b);
- b. Declare that HHS has violated FOIA by failing to produce the requested documents responsive to NHRTL's October 7, 2011 request in accordance with the statutory deadline;
- c. Declare that HHS continues to violate FOIA by not producing the requested documents;
- d. Order HHS to immediately provide NHRTL with all records responsive to the October 7, 2011 request;
- e. Order HHS to produce a *Vaughn* index of any document it claims is exempt under FOIA;
- f. Grant NHRTL its costs of litigation, including reasonable attorney's fees as provided by 5 U.S.C. §552(a)(4)(E); and
- g. Such other and further relief as may be just and equitable.

Respectfully submitted,

NEW HAMPSHIRE RIGHT TO LIFE
By its attorneys,
WADLEIGH, STARR & PETERS, PLLC

Dated: December 22, 2011

By /S/ Michael J. Tierney

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