

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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BRENNAN CENTER FOR JUSTICE AT NEW YORK	
UNIVERSITY SCHOOL OF LAW,	:
Plaintiff,	:
-v.-	: <u>COMPLAINT</u>
UNITED STATES DEPARTMENT OF JUSTICE,	:
UNITED STATES DEPARTMENT OF HEALTH	:
AND HUMAN SERVICES and	:
U.S. AGENCY FOR INTERNATIONAL	:
DEVELOPMENT.	:
Defendants.	:
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1. The Brennan Center for Justice at New York University School of Law, Plaintiff in this action (“Brennan Center” or “Plaintiff”), submits this complaint under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”) against the three defendants named herein, the United States Department of Justice (“DOJ”); the United States Department of Health and Human Services (“HHS”); and the United States Agency for International Development (“USAID”) (collectively, the “Defendants”).

SUMMARY OF THE ACTION

2. The Brennan Center is suing three U.S. government agencies under FOIA to obtain documents that it has been seeking for almost four years and have been improperly withheld. The withheld documents relate to a matter of intense public concern, namely the Bush Administration’s changing views on the constitutionality of Congressional and Executive policies. The documents at issue also raise a high-profile policy issue, with important practical ramifications for people at risk of HIV/AIDS and the organizations serving them.

3. Defendants HHS and USAID distribute funds to organizations involved in fighting HIV/AIDS, as authorized by Congress. In 2003, Congress enacted the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (22 U.S.C. § 7631 et seq. (the “Leadership Act”) as part of a global strategy for combating the disease. That same year, Congress also enacted The Trafficking Victims Protection Reauthorization Act of 2003, 22 U.S.C. § 7110 et seq. (“TVPRA”), to combat human trafficking and provide assistance to its victims.

4. A provision was included in the Leadership Act that funds can be disbursed only to organizations that “have a policy explicitly opposing prostitution and sex trafficking.” 22 U.S.C. § 7631(f) (the “Pledge Requirement”). A similar provision was included in the TVPRA. 22 U.S.C. § 7110(g)(2) (the “Private Funds Restriction”).

5. It appears from the public record that Defendants HHS and USAID sought guidance from the DOJ’s Office of Legal Counsel (“OLC”) on how to enforce these problematic restrictions, and that, in February 2004, OLC conveyed its opinion to HHS and USAID that these provisions would be unconstitutional if they were applied to organizations based in the United States (the “OLC Opinion”).

6. The OLC Opinion, which has never been disclosed to the public, served for a period of time as the basis for an official U.S. policy to refrain from enforcing the Pledge Requirement and Private Funds Restriction against non-governmental organizations (“NGOs”) based in the United States (“U.S.-based NGOs”). That secret opinion is one of the documents that the Brennan Center seeks to obtain in this lawsuit.

7. At some point in 2004, the Bush Administration decided to enforce the Pledge Requirement and the Private Funds Restriction against both foreign and U.S.-based NGOs,

despite the OLC opinion that they could, under the Constitution, only be applied to foreign NGOs. In a letter dated September 20, 2004, OLC characterized the OLC Opinion as “tentative advice” and purported to withdraw the guidance in the OLC Opinion. (Letter to Alex M. Azar II, General Counsel, HHS, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel (Sept. 20, 2004)).

8. Over four years ago, the Brennan Center submitted a FOIA request to HHS seeking a copy of any and all documents containing “guidance provided by the OLC to any representative of HHS prior to September 20, 2004, relating the enforcement of the . . . provisions which require organizations that receive funds to carry out HIV/AIDS and anti-trafficking work to adopt positions against prostitution” (“OLC Guidance Documents”).

9. In response, HHS disclosed that it had identified at least 231 pages of responsive documents, but was withholding 46 pages on the basis of privilege. HHS referred Plaintiff to the OLC and USAID for a decision with respect to the remaining 185 pages of documents, which HHS declined to provide.

10. The Brennan Center pursued these “referrals” to OLC and USAID, and thereafter received only one nine-page letter from OLC, which was already part of the public record. The Brennan Center also sought the documents directly from the OLC and USAID and received final agency decisions that documents, to the extent they had been identified, would not be provided.

11. The Defendants’ purported basis for withholding all non-public documents is the exemption in FOIA for inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. *See* 5 U.S.C. § 552(b)(5) (“Exemption 5”). This exemption is inapplicable, in part because the most

significant document withheld, the OLC Opinion, served as the basis for, and was incorporated into, official government policy and thus should be made public.

12. The Brennan Center has exhausted its administrative remedies, either actually or constructively, and brings this FOIA action for an injunction compelling the immediate processing and production of the agency records improperly withheld by DOJ, HHS, and USAID.

13. Plaintiff seeks relief on an expedited basis. A federal district court has already determined that Pledge Requirement violates the First Amendment rights of certain U.S.-based NGOs and issued a preliminary injunction barring USAID and HHS from enforcing it against most of the U.S.-based NGOs currently receiving Leadership Act funds. *Alliance for Open Society International v. United States Agency for International Development*, 570 F. Supp.2d 533 (S.D.N.Y., 2008); *Alliance for Open Society International v. United States Agency for International Development*, 430 F. Supp.2d 222 (S.D.N.Y. 2006). Defendants USAID and HHS maintain that the Pledge Requirement is constitutional as applied to these organizations and appealed the district court's preliminary injunction orders to the United States Court of Appeals for the Second Circuit. In stipulating to withdraw the appeal from active consideration (with leave to reactivate it by January 8, 2010), the government represented that USAID and HHS were reviewing their policies regarding the implementation of the Pledge Requirement and planned to act expeditiously in conducting rulemaking relating to its enforcement. The OLC Opinion, and the other requested documents, are highly relevant to that rulemaking proceeding and the issuance of new guidelines. Upon information and belief, the requested documents contain the government's acknowledgment that the Pledge Requirement is unconstitutional as applied to U.S.-based NGOs.

JURISDICTION AND VENUE

14. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § § 701 to 706.

15. Venue lies in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

16. Plaintiff Brennan Center is a nonprofit, nonpartisan public policy and law institute that focuses on the fundamental issues of democracy and justice. The Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector. The Brennan Center maintains its primary office in New York, New York and also has an office in Washington, DC.

17. Defendant Department of Justice or DOJ is a Department of the Executive Branch of the United States Government. OLC is a component of DOJ. DOJ is an agency within the meaning of 5 U.S.C. § 552(f)(1).

18. Defendant U.S. Department of Health and Human Services or HHS is a Department of the Executive Branch of the United States Government. Its primary office is located in the Hubert H. Humphrey Building, 200 Independence Avenue, SW, Washington, D.C. 20201. HHS uses funding provided by Congress to develop programs for health protection and to provide human services to Americans in need. HHS is an agency within the meaning of 5 U.S.C. § 552(f)(1).

19. Defendant United States Agency for International Development or USAID is an independent agency in the Executive Branch of the United States. Its primary office is located in the Ronald Reagan Building, 1300 Pennsylvania Avenue, NW, Washington, D.C. USAID is an

agency within the meaning of 5 U.S.C. § 552(f)(1). Defendant USAID uses funding provided by Congress for economic, development and humanitarian assistance around the world.

I. THE PLEDGE REQUIREMENT AND PRIVATE FUND RESTRICTION

20. The Pledge Requirement in the Leadership Act provides that no funds made available to carry out the Leadership Act may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking. It also bars those organizations from using even funds from sources other than the federal government to engage in activities viewed by the government as being sufficiently opposed to prostitution.

21. Similarly, the Private Funds Restriction in the TVPRA requires that each organization receiving funding under the statute to fight human trafficking must state “in either a grant application, or a grant agreement, or both, that it does not promote, support or advocate the legalization or practice of prostitution.” Similar to the Leadership Act, the TVPRA bars those organizations from using even their non-federal funds to engage in activities viewed by the government as promoting, supporting, or advocating the legalization or practice of prostitution.

22. In or before February 2004, OLC wrote a memorandum containing an opinion on the constitutionality of applying the Pledge Requirement and the Private Funds Restriction to U.S.-based NGOs. Upon information and belief, the OLC Opinion stated that it would be unconstitutional to enforce these provisions against U.S.-based NGOs. Upon information and belief, the OLC Opinion was provided to HHS and USAID in or about February 2004.

23. From on or about February 26, 2004, through on or about June 9, 2005, Defendant USAID did not apply the Pledge Requirement to U.S.-based NGOs. On information and belief,

HHS also did not apply the Pledge Requirement to U.S.-based NGOs for a period of time between spring 2004 and spring 2005.

24. USAID announced that its policy at that time was in accordance with the official view of the U.S. government. On July 22, 2004, USAID gave this explanation as to why U.S.-based NGOs were exempt from compliance with the Pledge Requirement: “The US Government has determined that it is appropriate to apply the requirement set forth in section 301(f) only to foreign organizations” (Acquisition and Assistance Policy Directive 04-04 (revision 2)) Also on July 22, 2004, USAID stated this with respect to the Pledge Requirement: “The Office of Legal Counsel, U.S. Department of Justice, in a draft opinion determined that this provision only may be applied to foreign non-governmental organizations and public international organizations because of the constitutional implications of applying it to U.S. organizations.” (Guidance on the Definition & Use of the Child Survival and Health Programs Fund and the Global HIV/AIDS Initiative Account: FY 2004 Update).

25. On information and belief, USAID and HHS also relied on the OLC Opinion in refraining from enforcing the Private Funds Restriction in the TVPRA against U.S.-based NGOs. For example, on August 3, 2004, USAID stated: “[t]he US Government has determined that it is appropriate to apply the requirement set forth in subsection 113(g)(2) [codified at 22 U.S.C. § 7110(g)(2)] only to foreign organizations, including public international organizations” (AAPD 04-09, Anti-Trafficking Activities -- Limitation on the Use of Funds Restriction on Organizations Promoting, Supporting or Advocating Prostitution).

26. The U.S. Global AIDS Coordinator, who oversaw HIV/AIDS spending under the Leadership Act, told a Congressional sub-committee that the earlier OLC Opinion on the Pledge Requirement was determinative as to how it was enforced. He stated:

The 2003 Act, as you know, that set up this program contained language that said that no HIV/AIDS assistance funds could be provided to any group or organization not having a policy explicitly opposing prostitution and sex trafficking. The Office of Legal Counsel in the Department of Justice provided some tentative advice initially that those restrictions should be applied only to foreign organizations. Sometime mid- to late-, I think, in September of 2004, they withdrew that earlier tentative advice and advised that that provision was intended by the Congress to apply without that limitation to both domestic organizations as well as foreign organizations. And so I'm simply following the legislation and the advice to implement that.

(Transcript of Hearing on Fiscal Year 2006 Appropriations for Foreign HIV/AIDS Program, House Appropriations Committee, Foreign Operations, Export Financing and Related Programs Subcommittee, 2005 WL 504011 (F.D.C.H.) (March 2, 2005)).

27. An article in the *Wall Street Journal* underlined the public understanding that the OLC Opinion formed the basis of official government policy, stating that “the Bush administration had previously applied the requirement only to overseas groups because the Justice Department initially advised that it would be an unconstitutional violation of free speech to demand that American grant applicants support Mr. Bush’s policy.” See Michael M. Phillips, “Bush Ties Money for AIDS Work to a Policy Pledge,” *Wall Street Journal* (March 4, 2005).

II. FOIA REQUESTS AND DEFENDANTS’ RESPONSES

28. The Brennan Center made FOIA requests to Defendants DOJ, USAID, and HHS for OLC Guidance Documentation in July 2005, after information concerning the secret documents became known among U.S.-based NGOs, whose funding was uncertain because of the flip-flop in the government’s interpretation of the statutes. To date, Plaintiff has not received *a single page* of responsive documents (except for a nine-page letter that was already public). The Brennan Center hoped that the Defendants might change their position after President Obama instructed that FOIA “should be administered with a clear presumption: In the face of

doubt, openness prevails.” (74 Fed. Reg. 483 (Jan. 26, 2009)). A letter to the OLC renewing its request, in March 2009, received no response.

A. FOIA Request to HHS:

29. The Brennan Center submitted a proper FOIA request for OLC Guidance Documents to the FOIA Officer of HHS in July 2005 (“HHS Request”). (July 14, 2005, Letter, Exhibit 1.) The HHS Request reasonably described the records sought.

30. HHS did not respond until almost two years later, when its FOIA Director stated that he had located 231 pages of responsive records. (March 7, 2007, Letter, Exhibit 2.) The FOIA officer stated that he had determined to withhold 46 pages of the documents, in their entirety, based on Exemption 5 and the deliberative process and attorney-client privilege therein. Rather than provide any of the remaining responsive documents, the FOIA officer stated that HHS regulations (45 C.F.R. § 5.23) permitted him to “refer” the HHS Request to the “appropriate agency for review and determination of release to you.”

31. HHS “referred” 177 pages of documents to DOJ, with a notation that these were “generated in your department.” HHS “referred” eight pages of documents to USAID with the notation that these were “generated in your department.” (See attachments to Exhibit 2.)

32. Defendant HHS’s response did not identify the documents being withheld, release segregable non-exempt material or explain why HHS believed that the deliberative-process and attorney-client privilege encompassed all of the withheld records.

33. The Brennan Center timely appealed HHS’s failure to disclose documents within its control. (April 3, 2007, Letter, Exhibit 3.)

34. In a final agency decision, which advised Plaintiff of the right to an appeal to a federal district court, the Deputy Assistant Secretary for Public Affairs at HHS stated that she

had conducted a *de novo* review and that HHS had decided to continue withholding 46 pages of documents based on Exemption 5. (May 21, 2007, Letter, Exhibit 4.)

35. This final determination by HHS concedes that the withheld material includes communications between HHS and DOJ attorneys concerning “a draft opinion on Sex Trafficking, AIDS Act grant restrictions” and a draft letter from HHS to DOJ “concerning implementation of the [Leadership] Act and the TVPRA.” The letter contends that some of these communications are “confidential attorney-client communications.”

B. Responses to HHS’s Referrals to OLC and USAID

36. In June 2007, a lawyer for the OLC acted on HHS’s referral of the HHS Request. OLC turned over a single nine-page letter, *which was already in the public record*, and withheld the remaining 168 pages of documents, on the basis of Exemption 5. (June 21, 2007, Letter, Exhibit 5.)

37. Defendant OLC’s response to the referred HHS Request did not identify the documents being withheld, release segregable non-exempt material, or explain why OLC believed that the deliberative-process and attorney-client privilege encompassed all of the withheld records.

38. The Brennan Center appealed OLC’s action administratively on a timely basis. (August 7, 2007, Letter, Exhibit 6.) An Associate Director in the U.S. Department of Justice affirmed the OLC’s action. (September 25, 2007, Letter, Exhibit 7.)

39. USAID never responded to the HHS Request that was referred to USAID by HHS on March 7, 2007.

B. FOIA Request to DOJ (OLC)

40. Plaintiff also made a FOIA request directly to OLC for the production of OLC Guidance Documentation (“OLC Request”). (July 14, 2005, Letter, Exhibit 8.) The OLC Request reasonably described the records sought.

41. OLC responded on September 9, 2005, stating that it had searched its files and found *one responsive document*. OLC did not say what this document was, or how voluminous it was, and withheld it on the basis of Exemption 5. (September 9, 2005, Letter, Exhibit 9.) The response did not explain why OLC believed that the deliberative-process and attorney-client privilege protected the document.

42. The Brennan Center appealed OLC’s action administratively, as provided for in FOIA. (November 3, 2005, Letter, Exhibit 10.) Many months later, the Office of Information and Privacy for the DOJ affirmed OLC’s action on the request in a very brief letter containing no additional information or reasoning. The letter states that the Brennan Center “may seek judicial review” if it is dissatisfied with the decision. (September 18, 2006, Letter, Exhibit 11.)

43. Following President Obama’s mandate on FOIA that “openness prevails,” the Brennan Center sent a letter to the OLC that summarized the OLC’s handling of the direct request to OLC and the request referred to OLC by HHS. (March 12, 2009 Letter, Exhibit 12.) The letter stated the hope that “in accordance with the spirit of that injunction, your agency will reconsider its previous refusal to release the requested documents.” OLC has not responded.

C. FOIA Request to USAID

44. Plaintiff made a FOIA request to USAID in July 2005 seeking OLC Guidance Documents (“USAID Request”). (July 14, 2005, Letter, Exhibit 13.) The USAID Request reasonably described the records sought.

45. USAID acknowledged receipt of the request, but then did not respond substantively to the request for almost two years, despite the time limitations in FOIA. Defendant USAID stated that it “regret[ted] the delay,” and that all of “the documents identified as responsive to your request are attorney-client privileged and cannot be released.” Without any description or itemization of the number or volume of responsive documents, USAID stated that the documents were protected by Exemption 5. (February 28, 2007 letter, Exhibit 14.)

46. The Brennan Center timely appealed USAID’s action administratively, as provided for in FOIA. (March 28, 2007 Letter, Exhibit 15.) In a final agency decision, USAID affirmed the decision to withhold all records, adding the “deliberative process” privilege as an additional basis for withholding all responsive documents. (June 5, 2007 Letter, Exhibit 16.)

D. Exhaustion of Administrative Remedies

47. Plaintiff has exhausted the available administrative remedies.

48. An agency must respond to a FOIA request within 20 working days. 5 U.S.C. § 552(a)(6)(A). Defendant USAID has failed for more than 20 days to respond to the HHS Request that was referred to USAID by HHS. Likewise, Defendant DOJ failed for more than 20 days to respond to Plaintiff’s renewal of a previously denied request. Accordingly, Plaintiff is deemed to have exhausted its administrative remedies with respect to these requests.

* * *

FIRST CAUSE OF ACTION

Violation of FOIA by HHS

49. Plaintiff repeats and re-alleges paragraphs 1 through 48 as if repeated herein.

50. Defendant HHS's failure to properly identify responsive documents, failure to release a reasonably segregable portion of the withheld responsive documents, and failure to disclose the records requested by Plaintiff violates 5 U.S.C. § 552(a)(3)(A).

SECOND CAUSE OF ACTION

Violation of FOIA by DOJ

51. Plaintiff repeats and re-alleges paragraphs 1 through 48 as if repeated herein.

52. Defendant DOJ's failure to properly identify responsive documents, failure to release a reasonably segregable portion of the withheld responsive documents, failure to respond to the March 12, 2009 letter, and failure to produce the records requested by Plaintiff violates 5 U.S.C. § 552(a)(3)(A).

THIRD CAUSE OF ACTION

Violation of FOIA by USAID

53. Plaintiff repeats and re-alleges paragraphs 1 through 48 as if repeated herein.

54. Defendant USAID's failure to properly identify responsive documents, failure to release a reasonably segregable portion of the withheld responsive documents, failure to respond to the HHS referral in March 2007, and failure to produce the records requested by Plaintiff violates 5 U.S.C. § 552(a)(3)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- (1) Declare that Defendants improperly refused to disclose the records requested by Plaintiff;
- (2) Order Defendants to make the requested records available to the Plaintiff immediately;
- (3) Award Plaintiff its costs and reasonable attorneys' fees in this action as provided by 5 U.S.C. § 552(a)(4)(E);
- (4) Accord expedited treatment to this action; and
- (5) Grant such other and further relief as this Court may deem just and proper.

Dated: October 15, 2009

Respectfully submitted,

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