



April 3, 2023

Via PAL

Arianne Perkins, Acting FOIA Officer
FOIA Officer/Director, Freedom of Information and Privacy Acts Division, Hubert
Department of Health and Human Services
H. Humphrey Building, Suite 729H
200 Independence Avenue, SW
Washington, DC 20201

Via FOIA.HRSA.gov

Brian May, FOIA Officer
HRSA Freedom of Information Act Office (FOIA)
Health Resources and Service Administration
5600 Fishers Lane, Room 13N82
Rockville, Maryland 20857
foia@hrsa.gov

Via FOIA.gov

Hugh Gilmore, FOIA Officer
Centers for Medicare & Medicaid Services
North Building, Room N2-20-06
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FOIA_Request@cms.hhs.gov

FOIA Request: Organ Donation Modernization Initiative

Dear FOIA Officers:

America First Legal Foundation is a national, nonprofit organization working to promote the rule of law in the United States, prevent executive overreach, and ensure due process and equal protection for all Americans, all to promote public knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. To that end, we file Freedom of Information Act (FOIA) requests on issues of pressing public concern, then disseminate the information we obtain, making documents broadly available to the public, scholars, and the media. Using our editorial skills to turn raw materials into distinct work, we distribute that work to a national audience through traditional and social media platforms. AFL's email list contains over 46,000 unique addresses, our

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Twitter page has 55,600 followers, the Twitter page of our Founder and President has over 409,000 followers, our Facebook page has 109,000 followers, and we have another approximately 31,600 followers on GETTR.

I. Background

On February 16, 2023, President Biden continued his radical, racist, and fundamentally anti-American overhaul of every federal function under the guise of “equity” by signing a new “Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.”¹ Among other things, agencies were ordered to “prevent and remedy discrimination, including by protecting the public from algorithmic discrimination,” which it defined as “instances when automated systems contribute to unjustified different treatments or impacts disfavoring people based on their actual or perceived race, color, ethnicity ... or any other classification protected by law.”² When read in context with the ongoing efforts of the Department of Health and Human Services (HHS) to racialize health policy, the new Executive Order signals that the Biden Administration intends to unlawfully alter the Health Resources and Service Administration (HRSA) Organ Procurement and Transplantation Network (OPTN) to make organs for transplant available based on the race of the recipient, not medical need.

A. Biden racializes health policy.

The National Organ Transplant Act of 1984 (the “Act”) created a national system for organ donation and instructed the HHS Secretary to establish and operate the OPTN to administer that system.³ The Act makes no allowance for consideration of race in allocating organs for donation. Rather, it requires the OPTN to maintain “a national list of individuals who need organs” and “establish ... *medical* criteria for allocating organs.”⁴ It further requires each organ donation organization operating under the OPTN allocate organs “according to established *medical* criteria.”⁵ Congress allowed racial factors to be considered *only* within the context of *temporary* “studies and demonstration projects for the purpose of improving procedures for organ donation *procurement and allocation*,” including but not limited to projects to “examine and attempt to increase transplantation among populations with special needs, including children and individuals who are members of racial or ethnic minority groups, and among populations with limited access to transportation.”⁶

¹ Press Release, WHITE HOUSE, *Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* (Feb. 16, 2023), <https://tinyurl.com/k4dc9fcx>.

² *Id.*

³ 42 U.S.C. § 274.

⁴ 42 U.S.C. § 274(b)(2)(A)(i) and (B) (emphasis added).

⁵ 42 U.S.C. § 273(b)(3)(E) (emphasis added).

⁶ 42 U.S.C. § 274(b)(2)(N).

On January 20, 2021, President Biden signed Executive Order 13985, “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.”⁷ Among other things, President Biden ordered the HHS Secretary to conduct an Equity Assessment on whether underserved communities and their members face systemic barriers and to produce an equity action plan for addressing those alleged barriers.⁸

On December 3, 2021, HHS’s Centers for Medicare & Medicaid Services (CMS) issued a Request for Information (the “RFI”) to “solicit[] public comments on potential changes to the requirements that transplant programs, organ procurement organizations, and end-stage renal disease facilities must meet in order to participate in the Medicare and Medicaid programs.”⁹ A significant portion of the RFI was focused on perceived inequities “amongst racial and ethnic minorities as compared to White Americans.”¹⁰ When the RFI was published, CMS Administrator Chiquita Brooks-LaSure issued an official statement emphasizing HHS’s “support[for] organ transplants for communities of color, individuals with disabilities and other historically underserved populations.”¹¹

On January 27, 2022, HRSA announced that it was changing how it would report data on organ transplantation to provide more detail about the racial and ethnic background of transplant recipients.¹² And on March 22, 2023, HRSA announced a “Modernization Initiative,” including “a plan to strengthen ... equity ... in the organ donation and transplantation system.”¹³ Since the passage of the Act, the only OPTN contracted with HHS to administer the nation’s organ transplantation network has been the non-profit United Network for Organ Sharing (“UNOS”).¹⁴ The Modernization Initiative specifically seeks to “break up [UNOS] ... as part of an effort to ... address racial inequities.”¹⁵

B. The clear and present danger of race-based audits

As ordered by President Biden, HHS is trying to push through an arbitrary and breathtakingly racist once-in-a-generation overhaul of the nation’s organ transplant

⁷ 86 Fed. Reg. 7,009 (Jan. 25, 2021).

⁸ *Id.* at 7,010.

⁹ 86 Fed. Reg. 68,594 (Dec., 3, 2021).

¹⁰ *Id.* at 68,597.

¹¹ CMS NEWSROOM, *HHS Seeks Public Comments to Advance Equity and Reduce Disparities in Organ Transplantation, Improve Life-Saving Donations, and Dialysis Facility Quality of Care*, (Dec. 1, 2023), <https://tinyurl.com/2ay3c96v>.

¹² HRSA, *Updated race and ethnicity labeling coming to OPTN data reports*, (Jan. 27, 2022), <https://tinyurl.com/yc68seczy>.

¹³ HRSA NEWS ROOM, *HRSA Announces Organ Procurement and Transplantation Network Modernization Initiative*, (Mar. 22, 2023), <https://tinyurl.com/bp7ybarp>.

¹⁴ UNOS, *About*, (retrieved Mar. 31, 2023), <https://tinyurl.com/f9z8zwdx>.

¹⁵ Sheryl Gay Stolberg, *U.S. Organ Transplant System, Troubled by Long Wait Times, Faces an Overhaul*, NEW YORK TIMES, (Mar. 22, 2023), <https://tinyurl.com/3dvhk9vf>.

system.¹⁶ Given the Biden Administration’s deep-seated obsession with dividing Americans based on their race, there is a clear and present danger that Biden’s HHS, HRSA, and CMS plan to allocate donated organs based on the race of the recipient rather than on medical criteria¹⁷ as Congress has required.

II. Requested Records

AFL requests the following records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a).

- A. For the custodians listed below, all records using any one of the following terms: “discrimination,” “discriminatory,” “race,” “racial,” “ethnicity,” “color,” “BIPOC,” “Asian,” “Indigenous,” “Black,” “Brown,” or “White” *and* any one of the following terms: “organ,” “transplant,” “transplantation,” “donor,” “donation,” “Organ Procurement and Transplantation Network,” “OPTN,” “United Network for Organ Sharing,” “UNOS,” “equity”, or “kidney”. The time period for this request is January 20, 2021 to the date this request is processed. Please exclude news articles, press clippings, listserv items, or forwards of the same without substantive commentary.
- B. For the custodians listed below, all records of, regarding, mentioning, or discussing updating race and ethnicity labeling in OPTN data reports.
- C. All records regarding the processing of this request.

III. Custodians

HHS:

- A. Xavier Becerra, Secretary
- B. Andrea Palm, Deputy Secretary
- C. Samuel Bagenstos, General Counsel
- D. Melanie Fontes Rainer, Director for Office for Civil Rights
- E. Rachel L. Levine, Assistant Secretary for Health
- F. Sean McCluskie, Chief of Staff

¹⁶ For example, HHS's racial labeling does not define the categories by reference to any fixed or scientifically discernable criteria. Does a person with three European grandparents and one African grandparent qualify as “Black” for organ allocation? Or must a person cross a DNA threshold of 50.1% to qualify for a transplant? Similarly, does a native-Spanish-speaking person who was born in Cuba or Spain qualify as an “Hispanic”, or will HHS steer organs only to Spanish-speaking people from Central and South America?

¹⁷ 42 U.S.C. § 273(b)(3)(E) and 274(B).

Health Resources and Services Administration (HRSA):

- G. Carole Johnson, Administrator,
- H. Diana Espinosa, Principal Deputy Administrator
- I. Jordan Grossman, Deputy Administrator
- J. Garrett Devenney, Chief of Staff
- K. Nisha Patel, Senior Advisor
- L. Michelle Allender, Director, Office of Health Equity
- M. Christine Ramey, Deputy Director, Office of Health Equity
- N. Gopal K. Singh, Senior Health Equity Advisor, Office of Health Equity

Centers for Medicare & Medicaid Services (CMS)

- O. Chiquita Brooks-LaSure, Administrator
- P. Jonathan Blum, Principal Deputy Administrator & Chief Operating Officer
- Q. Erin Richardson, Chief of Staff
- R. John Czajkowski, Deputy Chief Operating Officer
- S. Anita Pinder, Director, Office of Equal Opportunity & Civil Rights
- T. Alaina Jenkins, Deputy Director, Office of Equal Opportunity & Civil Rights
- U. LaShawn McIver, Director, Office of Minority Health
- V. Wanda Finch, Deputy Director, Office of Minority Health

Additional Custodians

- W. All other political appointees assigned to the Office of the Secretary, the Office of the Deputy Secretary, the Health Resources and Services Administration (HRSA), and the Centers for Medicare & Medicaid Services (CMS).
- X. All employees at or equivalent to grade GS-14 and above at the Office of the Secretary, the Office of the Deputy Secretary, the Health Resources and Services Administration (HRSA), and the Centers for Medicare & Medicaid Services (CMS).

IV. Processing

Processing should strictly comply with the processing guidance in the Attorney General's Memorandum on Freedom of Information Act Guidelines.¹⁸ If you have any questions or believe further discussions regarding search and processing will facilitate more efficient production of records of interest to AFL, please do not hesitate to contact me at FOIA@aflegal.org.

¹⁸ U.S. DEP'T JUST. (Mar. 15, 2022), <https://tinyurl.com/4sup7e7f>.

V. Fee Waiver Request

Per 5 U.S.C. § 552(a)(4)(A)(iii), 31 C.F.R. § 1.7(k), and 26 C.F.R. § 601.702(f)(2), AFL requests a waiver of all search and duplication fees associated with this request. The requested information specifically concerns identifiable operations and activities of the Federal Government, including how the Department of Health and Human Services and the HRSA are implementing President Biden's executive orders on racial equity, and whether those efforts would implicate the integrity of the country's organ donation system. Because it has not been made public how racial equity would be applied to the allocation of donated organs, disclosure of the requested information would contribute significantly to public understanding. Furthermore, AFL has a demonstrated ability and intention to effectively convey the information broadly to the public; AFL's status as a representative of the news media has been recognized by other agencies for granting fee waivers, including this Department in prior requests, as well as the Departments of Defense, Education, Energy, Justice, Interior, and Homeland Security. Finally, as a non-profit organization, AFL has no identifiable commercial interest, and the request is made entirely to serve the public interest. We are, of course, available to provide additional information in writing or offline in support of this request. If AFL's request for a fee waiver is not granted in full, please contact us immediately upon making that determination.

VI. Production

To accelerate the release of responsive records, AFL welcomes production on an agreed rolling basis. If possible, please provide responsive records in an electronic format by email. Alternatively, please provide responsive records in native format or in PDF format on a USB drive to America First Legal Foundation, 611 Pennsylvania Ave SE #231, Washington, DC 20003.

Thank you in advance for your cooperation.

Sincerely,
/s/ James Rogers
James Rogers
America First Legal Foundation