

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SIMON J. TORRES

**MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004,**

Plaintiff,

v.

**U.S. DEPARTMENT OF HEALTH AND HUMAN
SERVICES**

**200 Independence Avenue, S.W.
Washington, D.C. 20201,**

Defendant.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Plaintiff Simon J. Torres brings this action against Defendant U.S. Department of Health and Human Services (“HHS”) to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). As grounds therefore, Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff is an individual attorney with the law firm of Morgan, Lewis & Bockius, LLP, located at 1111 Pennsylvania Avenue, N.W., Washington, D.C. 20004. In the course of his representation of clients in various labor and employment matters, from time to time Plaintiff serves FOIA requests on federal, state and local government agencies, entities and offices.

4. Defendant HHS is an agency of the United States Government and is headquartered at 200 Independence Avenue, S.W., Washington, D.C. 20201. Defendant has possession, custody and control of records to which Plaintiff seeks access.

STATEMENT OF FACTS

5. On January 7, 2011, Plaintiff sent a FOIA request to the FOIA Office of HHS (attached hereto as Exhibit 1), seeking access to: “any and all memoranda, guidance, directives, instructions and other documents – whether electronic or written and whether distributed internally or externally – relating to the criteria to be applied by HHS in deciding whether to grant or deny applications for waiver of the annual limit requirements of the Public Health Services Act (the “PHS Act”) Section 2711”; and “any and all memoranda, notes, letters and other documents – whether electronic or written and whether distributed internally or externally – relating to the approval, denial or consideration of applications for waiver of the annual limit requirements of PHS Act Section 2711 by an applicant with 1,000 or more enrollees, including but not limited to any letters submitted to HHS in support of or against waiver, such as any letters submitted by members of the United States Congress, state officials or local officials.”

6. The request was sent by facsimile and was successfully transmitted.

7. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), HHS was required to respond to Plaintiff’s request within twenty (20) working days, or on or before February 7, 2011.

8. By letter dated January 12, 2011 (attached hereto as Exhibit 2), HHS acknowledged its receipt of the request on January 11, 2011 and assigned the request a case number. While HHS stated that the request would be processed “as expeditiously as possible”, it did not give a specific time by which it would respond or otherwise indicate any actual issues with Plaintiff’s request.

9. On February 2, 2011, Plaintiff spoke with HHS FOIA Officer Bob Eckert by telephone to inquire about the status of the request. Mr. Eckert said that he would look into Plaintiff's request and call Plaintiff back. On February 4, 2011, Plaintiff spoke by telephone with HHS's Garfield Daley, who explained that the request was being internally reassigned to another HHS component due to the transfer of HHS's Office of Consumer Information and Insurance Oversight to the Centers for Medicare & Medicaid Services (CMS), a component of HHS. Mr. Garfield indicated that Plaintiff would receive written notification of the transfer and that CMS would directly respond to Plaintiff's request. By February 9, 2011 letter (attached hereto as Exhibit 3), Mr. Eckert notified Plaintiff of the transfer of the request to CMS and of CMS's contact information, but did not provide any further information as to the request's status.

10. On February 28, 2011, Plaintiff called CMS at the telephone number listed on Mr. Eckert's February 9 letter to inquire about the status of his request. Plaintiff's call was transferred to a voicemail box that was full and would not permit Plaintiff to leave a message asking for further information and for someone to contact him about his request.

11. On March 1, 2011, Plaintiff again called CMS at the telephone number listed on Mr. Eckert's February 9 letter to inquire about the status of his request. Plaintiff's call was again transferred to a voicemail box that was full and would not permit Plaintiff to leave a message asking for further information and for someone to contact him about his request.

12. On two separate occasions on March 8, 2011, Plaintiff again called CMS at the telephone number listed on Mr. Eckert's February 9 letter to inquire about the status of his request. Each time, Plaintiff's call was again transferred to a voicemail box that was full and would not permit Plaintiff to leave a message asking for further information and for someone to contact him about his request.

13. On March 11, 2011, Plaintiff faxed a letter to CMS's FOIA office (attached hereto as Exhibit 4) in which he requested an immediate response to his FOIA request. In the letter, Plaintiff noted that more than two months had passed since his January 7, 2011 request and chronicled his unsuccessful attempts to reach CMS about the request.

14. In his March 11, 2011 letter, Plaintiff reiterated HHS's FOIA obligations and why his need for the requested information was crucial and time-sensitive: "As I explained in my January 7, 2011 request letter, the need for the requested information is immediate, especially now that the number of waivers approved by HHS has exceeded 1,000 (including more than 826 approved waivers in the past three months). Indeed, according to HHS's website, HHS appears to have posted 126 new approved waivers last Friday alone. And, just this week Secretary Kathleen Sebelius touted waivers as a commitment by the present Administration to promote flexibility with respect to the new healthcare laws. *See* Press Release, U.S. Department of Health and Human Services, Obama Administration Takes New Steps to Support Innovation, Empower States (Mar. 10, 2011). Secretary Sebelius's announcement was in conjunction with a proposed rule regarding a procedural framework for submission and review of initial applications for a Waiver for State Innovation. Interested parties will have 60 days from this upcoming Monday to comment. The information on PHS Section 2711 Act waivers may prove invaluable in helping interested parties to formulate comments on the proposed rule concerning State Innovation Waivers."

15. To date, no one from CMS has responded to Plaintiff's March 11, 2011 letter.

16. On March 15, 2011, Plaintiff again called CMS at the telephone number listed on Mr. Eckert's February 9 letter to inquire about the status of his request. Plaintiff's call was again transferred to a voicemail box that was full and would not permit Plaintiff to leave a message

asking for further information and for someone to contact him about his request.

17. On March 21, 2011, Plaintiff again called CMS at the telephone number listed on Mr. Eckert's February 9 letter to inquire about the status of his request. Plaintiff's call was again transferred to a voicemail box. This time, Plaintiff was able to leave a message asking about the status of his request and for someone to contact him as soon as possible.

18. To date, no one from CMS has responded to Plaintiff's March 21, 2011 message. Nor has anyone from CMS otherwise responded to his FOIA request.

19. As of the date of this Complaint, HHS has failed to produce any records responsive to the request, demonstrate that responsive records will be produced or inform Plaintiff that it will not produce responsive records.

20. Because HHS failed to comply with the time limit set forth in 5 U.S.C. § 552(a)(6)(A) or extend that time limit pursuant to 5 U.S.C. § 552(a)(6)(B), Plaintiff is deemed to have exhausted any and all administrative remedies with respect to his FOIA request, pursuant to 5 U.S.C. § 552(a)(6)(C).

COUNT I

(Violation of the Freedom of Information Act, 5 U.S.C. § 552)

21. Plaintiff realleges paragraphs 1-20 as fully stated herein.

22. Defendant has violated FOIA by failing to produce any and all non-exempt records responsive to Plaintiff's January 7, 2011 request within the twenty (20) day time period required by 5 U.S.C. § 552(a)(6)(A)(i) and by failing to demonstrate that any withheld records responsive to this same request are exempt from production.

23. Plaintiff is being irreparably harmed by reason of Defendant's violation of FOIA and will continue to be irreparably harmed unless Defendant is compelled to conform its conduct

to the requirements of the law.

WHEREFORE, Plaintiff respectfully requests that the Court: (1) declare Defendant's failure to comply with FOIA to be unlawful; (2) order Defendant to search for and produce any and all non-exempt records responsive to Plaintiff's January 7, 2011 request; (3) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to the request; (4) grant Plaintiff an award of attorney's fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and (5) grant Plaintiff such other relief as the Court deems just and proper.

Dated: March 23, 2011

Respectfully submitted,

Simon J. Torres, Bar No. 973898
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