

VIA E-MAIL

October 24, 2018

Michael Marquis
FOIA Officer
Department of Health and Human Services
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue, SW
Washington, DC 20201
E-mail: FOIARequest@hhs.gov

Dear Mr. Marquis,

This letter constitutes an urgent request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the U.S. Department of Health and Human Services (“HHS”).

EPIC seeks records about the HHS’s efforts to establish or reinterpret the legal definition of sex and/or gender.

Documents Requested

- (1) All records—including but not limited to communications, memoranda, and policy guidance—about HHS efforts to establish or reinterpret the legal definition of “sex” or “gender” as described in the October 21, 2018 *New York Times* article.¹
- (2) All records—including but not limited to communications, memoranda, and policy guidance—about the potential use of genetic evidence by HHS or other federal agencies to purportedly determine that individuals are of a particular sex and/or gender.

Background

According to a memorandum obtained by the *New York Times*, the HHS is undertaking an effort to “establish a legal definition of sex under Title IX, the federal civil rights law that bans gender discrimination in education programs that receive government financial assistance.”² In the memorandum, which was drafted and circulated last spring, the HHS argues that certain government agencies should adopt an explicit and uniform definition of gender determined “on a

¹ Erica L. Green, Katie Benner, & Robert Pear, ‘Transgender’ Could Be Defined Out of Existence Under Trump Administration, *N.Y. Times* (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

² *Id.*

biological basis that is clear, grounded in science, objective and administrable.”³ The agencies identified in the memorandum are responsible for enforcing Title IX: HHS, the Department of Education (“DOE”), the Department of Justice (“DOJ”), and the Department of Labor (“DOL”).⁴

According to the *Times*, the memorandum proposes to legally redefine sex and/or gender as an immutable trait determined by genitalia at birth, either male or female, without an opportunity to change the classification. The memorandum states that “The sex listed one’s person’s birth certificate, as originally issued, shall constitute definitive proof of a person’s sex unless rebutted by reliable genetic evidence.”⁵

Trump administration officials told the *Times* that the HHS proposal could be formally presented to the DOJ by the end of the year to assess its legality.⁶ “If the Justice Department decides that the change is legal, the new definition can be approved and enforced in Title IX statutes, and across government agencies,” the *Times* reported.⁷

The HHS’s proposed definition would eliminate federal recognition of 1.4 million Americans who identify as transgender.⁸ Transgender persons need consistent identity documents to travel, work, enroll in school, and open bank accounts.⁹ Obtaining IDs and updating legal documents often impose intrusive and burdensome requirements on transgender persons.¹⁰ Traveling and going through airport body scanners as a transgender person can also be a particularly invasive process.¹¹ The proposed policy change in the legal definition of gender could therefore have profound impacts on the privacy of transgender persons.

On October 22, President Trump confirmed that “his administration is ‘seriously’ considering changing the way it treats transgender people under the law” but was not specific about the administration’s planned approach the issue.¹²

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Nat’l Center for Transgender Equality, *Identity Documents & Privacy* (2018), <https://transequality.org/issues/identity-documents-privacy>.

¹⁰ *Id.*

¹¹ Br. for Pet’r at 30–31, *EPIC v. DHS*, 688 F. App’x 20 (D.C. Cir. 2017) (“The agency has also chosen to use body scanner screening techniques despite the special burdens those techniques impose on passengers with certain medical conditions and passengers who are transgender and gender nonconforming persons.”).

¹² Laura Meckler, Samantha Schmidt, & Lena H. Sun, *Trump Administration Considering ‘Different Concepts’ Regarding Transgender Rights, With Some Pushing Back Internally*, Wash. Post (Oct. 22, 2018), https://www.washingtonpost.com/national/trump-administration-considering-different-concepts-regarding-transgender-rights-with-some-pushing-back-internally/2018/10/22/0668f4da-d624-11e8-83a2-d1c3da28d6b6_story.html.

Request for Expedition

EPIC is entitled to expedited processing of this request under the FOIA and HHS's FOIA regulations. 5 U.S.C § 552(a)(6)(E)(v)(II); 45 C.F.R. § 5.27(a). Specifically, this request is entitled to expedited processing because, first, there is "an urgent need to inform the public about an actual or alleged Federal Government activity," and second, because the request is "made by a person primarily engaged in disseminating information to the public." 45 C.F.R. § 5.27(b)(2).

First, there is "an urgent need to inform the public about an actual or alleged Federal Government activity." 45 C.F.R. § 5.27(b)(2). The "actual . . . Federal Government activity" is the HHS's efforts to define "sex" and/or "gender" on purportedly biological terms. The *Times* reports that the HHS has drafted a memorandum with a proposed definition of sex and/or gender.

There is an urgent need to inform the public about this activity given the public pressure for more information. There is substantial interest in this subject matter, and major news outlets have followed the *Times*' reporting of the story.¹³ Protests have erupted in major cities in response to the leaked HHS report.¹⁴ Many individuals have also expressed concern over the agency's actions through social media with the hashtag #WontBeErased.¹⁵ A delayed response would compromise a significant recognized interest in the requested records. Details about the HHS's decision to establish a legal definition of sex and/or gender is vital to the current and

¹³ See e.g., Mark Joseph Stern, *How the Trump Administration's Radical New Definition of "Sex" Would Legalize Anti-LGBTQ Discrimination*, Slate (Oct. 22, 2018), <https://slate.com/news-and-politics/2018/10/trump-sex-definition-lgbtq-trans-discrimination.html>; William Cummings, *Trump Administration May End Legal Recognition of Transgender Americans*, *NYT Reports*, USA Today (Oct. 21, 2018), <https://www.usatoday.com/story/news/politics/2018/10/21/trump-administration-gender-definiton/1721621002/>; Sarah Berger, *Trump Admin Said to Refine Legal Definition of Gender, Putting Transgender Gains at Risk: NY Times*, CNBC (Oct. 21, 2018), <https://www.cnn.com/2018/10/21/trump-admin-reportedly-aims-to-refine-legal-definition-of-gender.html>; Amelia McDonell-Parry, *Trump's Department of Health and Human Services Seeks to Erase Transgender Protections*, Rolling Stone (Oct. 22, 2018), <https://www.rollingstone.com/culture/culture-news/trump-hhs-health-human-services-transgender-rights-745572/>.

¹⁴ See e.g., Emily Birnbaum, *LGBTQ Groups to Rally in Response to NYT Report on Trump's Gender Policy Proposal*, The Hill (Oct. 21, 2018), <https://thehill.com/homenews/administration/412455-lgbtq-groups-announce-rallies-in-response-to-nyt-report-on-trumps>; Ryan Grenoble, *Trump's Reported Proposal To Redefine Gender, Eliminate Trans Rights Prompts Mass Protests*, Huffington Post (Oct. 22, 2018), https://www.huffingtonpost.com/entry/trump-redefine-gender-protests_us_5bcddf9be4b0a8f17eed5f2; Caitlin Emma, *Trump Administration Proposal on Transgender Protections Spurs Protest*, Politico (Oct. 22, 2018), <https://www.politico.com/story/2018/10/22/trump-transgender-protections-protests-873153>.

¹⁵ See e.g., Sarah Mervosh & Christine Hauser, *At Rallies and Online, Transgender People Say They #WontbeErased*, N.Y. Times (Oct. 22, 2018), <https://www.nytimes.com/2018/10/22/us/transgender-reaction-rally.html>; Rachel Leah & Shira Tarlo, *#WontBeErased: Twitter Erupts in Protest After Trump Administration Unveils Anti-Trans Proposal*, Salon (Oct. 22, 2018), <https://www.salon.com/2018/10/22/wontbeerased-twitter-erupts-in-protest-after-trump-administration-unveils-anti-trans-proposal/>; Laura Wamsley, *Trans People Say They #WontBeErased As Trump Administration Mulls Defining 'Sex'*, Nat'l Pub. Radio (Oct. 22, 2018), <https://www.npr.org/2018/10/22/659553583/trans-people-say-they-wontbeerased-as-trump-administration-mulls-defining-sex>.

ongoing public debate about transgender rights and sex-based discrimination. Sources from the *Times* state that the HHS could present its proposal to the DOJ at the end of the year.

Second, EPIC is an organization “primarily engaged in disseminating information to the public.” 45 C.F.R. § 5.27(b)(2). As the Court explained in *EPIC v. DOD*, “EPIC satisfies the definition of ‘representative of the news media’” entitling it to preferred fee status under the FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003). EPIC’s primary purpose is to focus public attention on emerging privacy and civil liberties issues and frequently disseminates information obtained through the FOIA on its website, EPIC.org.

In submitting this request for expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief. 5 U.S.C. 552(a)(6)(E)(vi); 45 C.F.R. § 5.27(a).

Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes. *EPIC v. DOD*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the request records with only duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

Further, any duplication fees should also be waived because disclosure because (1) “disclosure of the requested 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 (2) “disclosure is not primarily in the commercial interest” of EPIC, the requester. 5 U.S.C. § 552(a)(4)(A)(iii); 45 C.F.R. § 5.54(a). EPIC’s request satisfies this standard based on the HHS’s considerations for granting a fee waiver. 45 C.F.R. § 5.54(b)(1)–(3).

(1) Disclosure of the requested information would shed light on the operations or activities of the government.

First, disclosure of the requested documents concern “identifiable operations or activities of the Federal Government.” 45 C.F.R. § 5.54(b)(1). The change in legal definition of sex and/or gender in federal programs is an identifiable activity of the Trump administration. As the *Times* reports, the HHS is spearheading these efforts and has drafted a memorandum proposing a definition and identified select agencies that should adopt this uniform definition.

(2) Disclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government.

Second, disclosure of the requested documents would be “likely to contribute significantly to public understanding of [government] operations or activities.” 45 C.F.R. § 5.54(b)(2). HHS evaluates two factors to determine whether this requirement is met: (i) disclosure “must be meaningfully informative about government operations or activities;” and (ii) “disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject.” *Id.*

On the first factor, disclosure is “meaningfully informative about government operations or activities” because the release of the requested information will contribute to public debate on whether such a government policy may be implemented and whether imposing such definition is even possible.¹⁶ 45 C.F.R. § 5.54(b)(2)(i). If the definition is deemed legal, the definition could be approved and enforced across all government agencies and Title IX statutes and could affect almost 1.4 million Americans that identify as transgender.¹⁷ Transgender persons are uniquely burdened by ID requirements and full body scanners at airports, and a change in the legal definition of sex and/or gender could have enormous impacts on a vulnerable population.¹⁸

On the second factor, disclosure “contribute[s] to the understanding of a reasonably broad audience of persons interested in the subject.” 45 C.F.R. § 5.54(b)(2)(ii). As provided in HHS FOIA regulations, HHS shall “presume that a representative of the news media will satisfy this consideration.” *Id.*

(3) Disclosure of the information is not primarily in the commercial interest of the requester.

Third, disclosure is not “primarily in the commercial interest of” EPIC, the requester. 45 C.F.R. § 5.54(b)(3). EPIC has no commercial interest in the records. EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.¹⁹ EPIC consistently publishes critical documents obtained through the FOIA and through litigation on its robust website, EPIC.org, and its online newsletter, *EPIC Alert*.²⁰ Under HHS FOIA regulations, the agency “will presume that when a news media requester has satisfied factors (b)(1) and (2) of [the fee waiver section], the request is not primarily in the commercial interest of the requester.” 45 C.F.R. § 5.54(b)(3)(ii). Again, EPIC is a news media requester and, as set out above, this request satisfies the public interest factors (b)(1) and (2).

For these reasons, a full fee waiver should be granted for EPIC’s request.

¹⁶ See James Hamblin, *Against a Federal Registry of Genitals*, The Atlantic (Oct. 21, 2018), <https://www.theatlantic.com/health/archive/2018/10/trump-defines-gender-hhs/573544/>.

¹⁷ Green et al., *supra* note 1.

¹⁸ See Br. for Pet’r at 30–31, *EPIC*, 688 F. App’x 20.

¹⁹ EPIC, *About EPIC*, <https://www.epic.org/epic/about.html>.

²⁰ See EPIC.org, <https://www.epic.org/>; EPIC, *EPIC Alert*, <https://www.epic.org/alert/>.

Conclusion

Thank you for your consideration of this request. I anticipate your determination on our request within ten calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I); 45 C.F.R. § 5.27(c). For any queries regarding this request, I can be contacted at 202-483-1140 x104 or FOIA@epic.org, cc zhou@epic.org.

Respectfully submitted,

/s Enid Zhou

Enid Zhou

EPIC Open Government Counsel