



December 20, 2017

VIA ELECTRONIC MAIL

Dionne Hardy  
725 17th Street NW  
Suite 9204  
Washington, DC 20503

Re: Freedom of Information Act Records Request

Dear Ms. Hardy:

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 et seq., and the Office of Management and Budget (“OMB”) FOIA regulations at 5 C.F.R. Part 1303, Democracy Forward Foundation (“Democracy Forward” or “DF”) makes this request for records on behalf of itself and the following organizations individually and collectively: Center for Science in the Public Interest, The Leadership Conference on Civil and Human Rights, National Center for Lesbian Rights, National Center for Transgender Equity, National LGBTQ Task Force, National Partnership for Women & Families, National Women’s Law Center, and Union of Concerned Scientists (collectively “Requesters”).

The records sought in this request relate to highly concerning reports that President Trump’s Administration has “banned” the use of certain terms — “transgender,” “vulnerable,” “entitlement,” “diversity,” “fetus,” “evidence-based” and “science-based” — in the development of the upcoming 2019 federal budget. Such a censoring of terms has no place in our constitutional democracy, especially when those terms are commonly used in scientific discussions necessary for the continued progress of our nation.

The reported censoring of terms follows similar unlawful and troubling tactics by the Trump Administration to undermine science and discriminate against Americans, including attempts to exclude transgender persons from military service on the basis of their gender identity; attempts to censor the the use of scientific terms, such as “climate change” in federal reports and grant solicitations; and the Administration’s promulgation of rules that ignore scientific evidence and the best available data in order to allow employers to take birth control coverage away from women.

Accordingly, the Requesters, representing a broad cross section of the civil rights, women’s rights, LGBTQ rights, and scientific communities, urge your most immediate attention to this expedited request for public records.

## ***Background***

On July 7, August 1, and August 17, 2017, OMB issued Memorandum M-17-28, Circular A-11 (revised transmittal 91), and Memorandum M-17-30, which provide agencies with guidance for the development of the Fiscal Year 2019 Budget.<sup>1</sup> These documents provide direction to agencies regarding development of the President's Budget and budget-related materials. Among other things, Circular A-11 (revised transmittal 91) addresses the process to develop the President's Budget and budget-related materials. Specific to the President's Budget and budget-related materials, A-11 also provides an overview of the process. It explains that in November, OMB staff analyze agency budget proposals submitted by agencies and raises issues and presents options to the OMB Director and other OMB policy officials. OMB then briefs the President and senior advisors on proposed policies and subsequently provides passback to agencies on their budget requests. In December, Executive Branch agencies may then appeal budget decisions to OMB and the President. Following appeals, in January, materials are finalized in preparation for the transmittal of the President's Budget to Congress in February.<sup>2</sup> These guidance documents clearly demonstrate the significant role of OMB in the development of the President's Budget and budget-related materials.

It is in the context of the passback and appeals process that reports first surfaced on December 15, 2017 that the Trump Administration, through OMB, had provided guidance to departments within the United States Department of Health and Human Services ("HHS") to refrain from using certain terms, including those that identify categories of persons and/or are used in scientific discourse, as part of budget proposal requests.<sup>3</sup> Specifically, it was reported that officials at the Centers for Disease Control ("CDC"), an agency within HHS, were instructed not to use the terms "vulnerable," "entitlement," "diversity," "transgender," "fetus," "evidence-based," and "science-based." Reports further stated that the agency was instructed to describe its recommendations as being based on "science in consideration with community standards and wishes." Over the past few days, other reports have surfaced regarding the Administration's attempt to dictate word choices, for example, in other areas of the federal government, including at the State Department where employees were reportedly told to refer to sex education as "sexual risk avoidance," which primarily references abstinence-only education. And, most recently, it was revealed

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<sup>1</sup> Mick Mulvaney, Exec. Office of the President, *M-17-28 Memorandum for the Heads of Departments and Agencies: Fiscal Year (FY) 2019 Budget Guidance* (July 7, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-28.pdf>; Exec. Office of the President, *Circular No. A-11: Preparation, Submission, and Execution of the Budget* (Aug. 1, 2017) [https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/a11\\_current\\_year/a11\\_2017.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/a11_current_year/a11_2017.pdf) (revised transmittal memorandum no. 91); Mick Mulvaney, Exec. Office of the President, *M-17-30 Memorandum for the Heads of Departments and Agencies: FY 2019 Administration Research and Development Budget Priorities* (Aug. 17, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/m-17-30.pdf>.

<sup>2</sup> Exec. Office of the President, *Circular No. A-11*, *supra* note 1, at 4 § 10.

<sup>3</sup> Lena H. Sun & Juliet Eilperin, *CDC Gets List of Forbidden Words: Fetus, Transgender, Diversity*, Wash. Post (Dec. 15, 2017), [https://www.washingtonpost.com/national/health-science/cdc-gets-list-of-forbidden-words-fetus-transgender-diversity/2017/12/15/f503837a-e1cf-11e7-89e8-edec16379010\\_story.html?utm\\_term=.07e57ee691e7](https://www.washingtonpost.com/national/health-science/cdc-gets-list-of-forbidden-words-fetus-transgender-diversity/2017/12/15/f503837a-e1cf-11e7-89e8-edec16379010_story.html?utm_term=.07e57ee691e7).

that HHS has withheld publishing 10,000 public comments on a proposal that could affect access to abortion and care for transgender patients.<sup>4</sup>

These tactics raise a host of concerns regarding the President's budget as well as the integrity of the executive branch and its functions more generally. The reported censorship of language for the President's Budget or budget-related materials is contrary to the purported commitment contained in budget development guidance to "building evidence and better integrating evidence into policy, planning, budget, operational, and management decision-making."<sup>5</sup> The reported censorship is also troubling to the extent that the reported guidance may negatively impact funding for programs benefiting specific groups, potentially depriving categories of people from federal benefits on the basis of gender, race, and / or economic circumstance.

After news reports surfaced about the Trump Administration's guidance, a CDC spokesperson issued a statement that the "assertion that HHS has 'banned words' is a complete mischaracterization of discussions regarding the budget formulation process." Notably, the statement left unaddressed whether OMB had directed the agency to frame its budget requests so as to avoid these or other terms.<sup>6</sup>

In light of these actions, the Requesters seek records that will help to better understand, and explain to the public, the Administration's reported action.

### ***Records Requested***

- 1.) All records discussing, communicating, and / or otherwise consisting of any informal or formal guidance, instructions, suggestions, and / or directions regarding language to be used in the development of the President's Budget and budget-related materials provided by any employee or agent of OMB to any agency, including the agency's employees and / or agents.
- 2.) All records, including notes, talking points, and / or other materials used or generated by OMB in preparation for, or during, any conversations, meetings, or briefings to or with any agency concerning any informal or formal guidance, instructions, suggestions, and / or directions about language or concepts to be contained or not to be contained in the President's Budget and budget-related materials. This request includes, but is not limited to, any documents memorializing such communications.
- 3.) All OMB records that pertain to any aspect of informal or formal guidance, including the development and implementation of such guidance, which relate to the concepts and language

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<sup>4</sup> Dan Diamond, *HHS Defends Withholding Comments Critical of Abortion, Transgender Policy*, Politico (Dec. 18, 2017), <https://www.politico.com/story/2017/12/18/hhs-faith-based-rule-withholding-comments-236759>.

<sup>5</sup> Mulvaney, *M-17-28 Memorandum*, *supra* note 1.

<sup>6</sup> Eddie Scarry, *CDC Director Denies Reports That Staffers Are Banned from Using Certain Words*, Wash. Examiner (Dec. 17, 2017), <http://www.washingtonexaminer.com/cdc-director-denies-reports-that-staffers-are-banned-from-using-certain-words/article/2643773>.

that should or should not be included in materials for or associated with the President's Budget and / or budget-related materials.

- 4.) All records consisting of or referencing communications between OMB officials, CDC Director Brenda Fitzgerald, CDC spokesperson Matt Lloyd and / or their respective assistants regarding the development and issuance of Dr. Fitzgerald's public statements and internal communication to staff in response to news reports regarding the ban on particular terms in the 2019 budget. This request includes, but is not limited to, email communications and / or calendar appointments or invitations.

The time period for these requests is from July 3, 2017 until the date the search is conducted.

The custodians for the search should include, but not be limited to: Mick Mulvaney, Russ Vought, Joe Grogan, Paul Winfree, Michael Kratsios, Alexandra Campau, and Katy Talento. The search should also include any records sent to or received from the Resource Management Office for health, the Resource Management Office for education, income maintenance, and labor, as well as records sent to or received from email domains containing the following suffixes: "hhs.gov," "state.gov," "hud.gov," "epa.gov," "dol.gov," "treas.gov," "va.gov," or "usda.gov." Search terms for this request should include, but not be limited to "vulnerable," "entitlement," "diversity," "transgender," "fetus," "evidence-based," "science-based," "sexual risk avoidance," "Obamacare," "exchanges," "marketplaces," "gender identity," and "ACA."

The term "agency" means the term as defined by 5 USC § 551(1) and includes the provision of materials or communications with to any agent or employee of the agency.

For speed of processing, a rolling release of records is requested.

Please search for records regardless of format, including paper records, electronic records, audiotapes, videotapes, photographs, data, and graphical materials. This request includes, without limitation, all correspondence, letters, emails, text messages, calendar entries, facsimiles, telephone messages, voice mail messages, and transcripts, notes, minutes, or audio or video recordings of any meetings, telephone conversations, or discussions.

FOIA requires agencies to disclose information, with only limited exceptions for information that would harm an interest protected by a specific exemption or where disclosure is prohibited by law. 5 U.S.C. § 552(a)(8)(A). In the event that any of the requested documents cannot be disclosed in their entirety, we request that you release any material that can be reasonably segregated. *See* 5 U.S.C. § 552(b). Should any documents or portions of documents be withheld, we further request that you state with specificity the description of the document to be withheld and the legal and factual grounds for withholding any documents or portions thereof in an index as required by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Should any document include both disclosable and non-disclosable material that cannot reasonably be segregated, we request that you describe what proportion of the information in a document is

non-disclosable and how that information is dispersed throughout the document. *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

If requested records are located in, or originated in, another agency, department, office, installation or bureau, please refer this request or any relevant portion of this request to the appropriate entity. To the extent that the records are readily reproducible in an electronic format, we would prefer to receive the records in that format. However, if certain records are not available in that format, we are willing to accept the best available copy of each such record.

Please respond to this request in writing within 20 working days as required under 5 U.S.C. § 552(a)(6)(A)(i). If all of the requested documents are not available within that time period, we request that you provide us with all requested documents or portions of documents that are available within that time period. If all relevant records are not produced within that time period, we are entitled to a waiver of fees for searching and duplicating records under 5 U.S.C. § 552(a)(4)(A)(viii)(I).

### ***Time for Response***

Requesters will be filing under separate cover a request for expedited processing, pursuant to 5 C.F.R. § 1303.10(d)(ii), on the ground that there is an urgency to inform the public about an actual or alleged federal government activity, and requesters are primarily engaged in disseminating information. The need to inform the public is urgent, as the request involves how the federal government plans to present and prioritize resource requests in the ongoing development of the federal budget. Requesters' core missions, as discussed in the section below, focus on critical public education efforts that contribute to public understanding of federal government activity.

### ***Fee Waiver Request***

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 5 C.F.R. § 1303.70, the Requesters request a waiver of all fees associated with processing records for this request. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of these operations by the public in a significant way. Moreover, the request is for non-commercial purposes.

Pursuant to 5 C.F.R. § 1303.70, disclosure of the requested records is "likely to contribute significantly to public understanding of the operations or activities of the government." The requested records will illuminate the budget process and the extent to which the President's Administration has banned certain terms for use in the 2019 budget, including the role that OMB and other Administration officials have played in any such decisions. These issues, thus, have a direct and clear connection to the operations and activity of the federal government. As described below, the Requesters intend to use social media accounts and their websites to ensure that the records disclosed in response to this request will contribute to the understanding of a reasonably broad audience of persons interested in the subject. This contribution will be "significant[]." *Id.* Given the ongoing and widespread media attention around the budget process

and whether certain words were banned from use in budget proposals, the records sought will contribute significantly to public understanding of an issue of profound public importance.

Moreover, the Requesters are nonprofit organizations and, accordingly, do not have a commercial interest in the records. The records obtained from this request will be made available to the public at no cost.

Requesters' core missions, as discussed immediately below, involve critical public education efforts that contribute to public understanding and operations of the federal government.

*Center for Science in the Public Interest:* Center for Science in the Public Interest ("CSPI") is a non-profit organization dedicated to obtaining a healthier food system. Since 1971, CSPI has worked to educate its members and the public about health, nutrition, and food safety; advocate for government policies that are consistent with scientific evidence; and counter industry's powerful influence on public opinion and public policies. CSPI publishes *Nutrition Action*, the world's largest-circulation nutrition newsletter, bringing independent, science-based food and nutrition information to more than half a million readers.

*The Leadership Conference on Civil and Human Rights:* The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is the nation's oldest, largest, and most diverse coalition of more than 200 national organizations committed to the protection of civil and human rights in the United States. Through advocacy, outreach, and education, The Leadership Conference works to build a more open, inclusive and just society — an America as good as its ideals. The Leadership Conference plays a significant role in the education of the public regarding civil and human rights, including educating the public when actions by the federal government present risks to such rights.

*The National Center for Lesbian Rights:* The National Center for Lesbian Rights ("NCLR") is a non-profit legal organization committed to securing equality and inclusion for lesbian, gay, bisexual, and transgender people and their families. Since 1977, NCLR has represented LGBT students, employees, elders, parents, athletes, health care consumers, and asylum seekers in litigation, advocated for fair treatment of LGBT people in public policy and legislation, and educated policy makers and the public about issues affecting the health, safety, and equality of LGBT people. NCLR disseminates information to the public concerning the activities and operations of the federal government.

*National Center for Transgender Equality:* Founded in 2003, the National Center for Transgender Equality ("NCTE") works to advance fairness, opportunity, and well-being for transgender people and their loved ones through research, advocacy, and education. NCTE works with Congress, federal agencies, and state and local governments to improve the lives of transgender people. In 2015, NCTE conducted the largest survey to date of transgender people, the US Transgender Survey, with over 27,000 respondents.

*National LGBTQ Task Force:* The National LGBTQ Task Force builds power, takes action and creates change to achieve freedom and justice for lesbian, gay, bisexual, transgender, and queer ("LGBTQ") people and their families. As a progressive social justice organization, the Task Force works to create a society that values and respects the diversity of human expression and identity and achieves equity for all.

The Task Force educates the public on issues affecting LGBTQ rights, including disseminating information to the public concerning the way in which the federal government's policies affect those rights to the general public.

*National Partnership for Women & Families:* The National Partnership for Women & Families is dedicated to expanding opportunities for women and improving the well-being and economic security of our nation's families. For more than 45 years, we have promoted access to quality, affordable health care, reproductive health and rights, policies that help women and men meet the dual demands of work and family, and fairness in the workplace. The National Partnership works to educate the public about issues, policies and programs affecting women's health and rights.

*National Women's Law Center:* The National Women's Law Center is a non-partisan, non-profit organization that has been working for 45 years to expand, protect, and promote opportunity and advancement for women and girls at every stage of their lives. The National Women's Law Center works in particular on behalf of low-income women and those who face multiple and intersecting forms of discrimination. A key component of the National Women's Law Center's work is educating the public about laws, policies, and important federal programs and benefits that help women and families.

*Union of Concerned Scientists:* The Union of Concerned Scientists (UCS) is a non-profit, non-partisan, public interest organization chartered under IRS Code § 501(c)(3) as a non-profit, educational and charitable organization. We seek to serve the public by working for a healthy environment and a safer world. We do this by combining independent scientific research and citizen action to develop innovative, practical solutions and to secure responsible changes in government policy, corporate practices, and consumer choices.

*Democracy Forward Foundation:* A core mission of Democracy Forward Foundation is to educate the public about improper govern activity. Democracy Forward Foundation intends to use the materials gathered to educate the public through its website, press releases, and social media outlets.

Accordingly, the Requesters qualify for a fee waiver. If the request for a waiver is denied, we are willing to pay all reasonable fees incurred for searching and duplicating records in responding to this request, up to \$100. If the costs of responding to this request should exceed that amount, please contact us before incurring costs exceeding that amount.

If you need clarification as to the scope of the request, have any questions, or foresee any obstacles to releasing fully the requested records within the 20 day period, please contact Skye Perryman as soon as possible at foia@democracyforward.org or 202-448-9090.

We appreciate your assistance and look forward to your prompt response.

Sincerely,

/s/ Skye L. Perryman

Skye L. Perryman  
Senior Counsel  
Democracy Forward Foundation

Counsel to Center for Science in the Public Interest, The Leadership Conference on Civil and Human Rights, National Center for Lesbian Rights, National Center for Transgender Equity, National LGBTQ Task Force, National Partnership for Women & Families, National Women's Law Center, Union of Concerned Scientists, and Democracy Forward Foundation.