

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

PROTECT THE PUBLIC’S TRUST )  
712 H Street, N.E. )  
Suite 1682 )  
Washington, D.C. 20002, )

Plaintiff, )

v. )

Civil Case No. 1:25-cv-219

U.S. DEPARTMENT OF HEALTH AND )  
HUMAN SERVICES )  
200 Independence Ave., SW )  
Washington, D.C. 20201, )

Defendant. )

\_\_\_\_\_ )

**COMPLAINT**

1. Plaintiff Protect the Public’s Trust (“PPT”) brings this action against the U.S. Department of Health and Human Services (“HHS”) under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), seeking declaratory and injunctive relief to compel HHS’s compliance with the FOIA’s requirements.

**JURISDICTION AND VENUE**

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

**PARTIES**

4. Plaintiff PPT is a nonprofit corporation dedicated to restoring public trust in government by promoting the fair and equal application of the rules and standards of ethical conduct to all public servants. Consistent with Justice Brandeis’s aphorism that “Sunlight is said to

be the best of disinfectants, electric light the most efficient policemen,” PPT seeks to promote transparency and broadly disseminate information so that the American people can evaluate the integrity and ethical conduct of those who act in their name. Louis Brandeis, *OTHER PEOPLE’S MONEY AND HOW BANKERS USE IT*. (1914), <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v>.

5. Defendant HHS is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1). HHS has possession, custody, and control of records responsive to Plaintiff’s FOIA request.

### **STATEMENT OF FACTS**

#### *Overview of FOIA Requests*

6. On November 29, 2023, PPT submitted two FOIA requests to HHS regarding its regulation of marijuana.
7. For both requests, HHS took the same approach: after initially acknowledging the request and providing a status update that it was “In Process,” HHS failed to provide either a response to the request or further communications regarding it.
8. HHS has violated its FOIA obligations regarding each request.

#### *PPT’s First Request: 2024-00280-FOIA-PHS*

9. On November 29, 2023, PPT submitted its first request to HHS (attached as Exhibit A), seeking the following records:

From August 31, 2022, though the date this request is processed,

1. Records of communications between the list of officials and employees at the Department of Justice and/or employees at the Drug Enforcement Administration regarding the schedule classification of marijuana and the

recommendation to move marijuana from a Schedule I drug to a Schedule III drug.

Officials:

- I. Jeffery Nesbit, Assistant Secretary for Public Affairs
- II. Kamara Jones, Acting Assistant Secretary for the Public Affairs
- III. Samira Burns, Deputy Assistant Secretary for Public Affairs for Human Services
- IV. Lindsey “L.A” Ross, Acting Director Digital Communications Division
- V. Michael Wilker, Director, Broadcast Communications Division
- VI. May Malik, Deputy Assistant Secretary for Public Affairs for Public Education

10. Release of these records is in the public interest because it will contribute to the public’s understanding of HHS’s operations and activities and its regulation of marijuana.
11. On November 30, 2023, HHS sent PPT two emails regarding the request. The first stated that the request had been received and assigned tracking number 2024-00280-FOIA-PHS. The second was an acknowledgment email with an attached letter formally acknowledging the request. The letter stated that the request had been assigned to the complex processing track and that HHS required an extension to process it due to “unusual circumstances” that applied.
12. On January 20, 2024, HHS sent PPT an email stating that the status of the request had been updated to “In Process.”
13. Since its email from January 20, 2024, HHS has gone silent regarding the request.
14. To date, HHS has not sent PPT a response to the request, a timeline or estimate for when it will do so, or any other communication regarding the request.

*PPT’s Second Request: 2024-00334-FOIA-OS*

15. On November 29, 2023, PPT submitted its second FOIA request to HHS (attached as Exhibit B), seeking the following records:

From August 31, 2022, though the date this request is processed,

1. Records of communications between the list of officials regarding the schedule classification of marijuana and the recommendation to move marijuana from a Schedule I drug to a Schedule III drug.

2. Records of communications to and/or from the list of officials with other officials at the Department of Health and Human Services (hhs.gov) or Centers for Disease Control and Prevention (cdc.gov) regarding the schedule classification of marijuana and the recommendation to move marijuana from a Schedule I drug to a Schedule III drug.

Officials:

- I. Jeffery Nesbit, Assistant Secretary for Public Affairs
- II. Kamara Jones, Acting Assistant Secretary for the Public Affairs
- III. Samira Burns, Deputy Assistant Secretary for Public Affairs for Human Services
- IV. Lindsey "L.A" Ross, Acting Director Digital Communications Division
- V. Michael Wilker, Director, Broadcast Communications Division
- VI. May Malik, Deputy Assistant Secretary for Public Affairs for Public Education

16. Release of these records is in the public interest because it will contribute to the public's understanding of HHS's operations and activities and its regulation of marijuana.

17. On December 15, 2023, HHS sent PPT four emails. The first stated that HHS had received the request and assigned it tracking number 2024-00334-FOIA-OS. The second stated that the status of the request had been updated to "Received." The third formally acknowledged receipt of the request and had an attached letter. The letter stated that HHS had assigned the request to the complex processing track and was in the process of reviewing the request and searching for responsive records but that "unusual circumstances" applied to the search and thus HHS required an extension to its time to respond. The fourth stated that the status of the request had been updated to "In Process."

18. Since its emails from December 15, 2023, HHS has gone silent regarding the request.

19. To date, HHS has not sent PPT a response to the request, a timeline or estimate for when it will do so, or any other communication regarding the request

*HHS has violated its FOIA obligations*

20. As Attorney General Garland has made clear, FOIA is “a vital tool for ensuring transparency, accessibility, and accountability in government” whose “‘basic purpose . . . is to ensure an informed citizenry,’ which is ‘vital to the functioning of a democratic society [and] needed to check against corruption and to hold the governors accountable to the governed.’” Merrick Garland, *Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines* 1 (Mar. 15, 2022), <https://www.justice.gov/ag/page/file/1483516/download> (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)) (“Garland Memo”).
21. The Garland Memo makes clear, “Timely disclosure of records is also essential to the core purpose of FOIA.” Garland Memo at 3.
22. Over 418 days have elapsed since HHS received PPT’s requests, yet HHS still has not made a determination with respect to them. *See Citizens for Responsibility and Ethics in Washington v. FEC*, 711 F.3d 180 (D.C. Cir. 2013). HHS has not produced responsive documents to PPT, has not communicated the scope of the documents it intends to produce or withhold—along with the reasons for any withholding—and has not informed PPT of its ability to appeal any adverse portion of its determination.
23. Given these facts, HHS has not met its statutory obligations to provide the requested records.
24. Through HHS’s failure to make determinations within the time period required by law, PPT has constructively exhausted its administrative remedies and seeks immediate judicial review.

**COUNT I – Request 2024-00280-FOIA-PHS**

**Violation of FOIA, 5 U.S.C. § 552**

**Wrongful Withholding of Non-Exempt Responsive Records**

- a. PPT repeats and incorporates by reference paragraphs 9-14 and 20-24 as if fully set forth herein.
- b. PPT's first request was a properly submitted request for records within the possession, custody, and control of HHS.
- c. HHS is an agency subject to FOIA, and therefore has an obligation to release any non-exempt records and provide a lawful reason for withholding any materials in response to a proper FOIA request.
- d. HHS is wrongfully withholding non-exempt agency records requested by PPT by failing to produce non-exempt records responsive to its request.
- e. HHS's failure to provide all non-exempt responsive records violates FOIA.
- f. Plaintiff PPT is therefore entitled to declaratory and injunctive relief requiring HHS to promptly produce all non-exempt records responsive to its FOIA request and provide an index justifying the withholding of any responsive records withheld under claim of exemption.

**COUNT II – Request 2024-003344-FOIA-OS**

**Violation of FOIA, 5 U.S.C. § 552  
Wrongful Withholding of Non-Exempt Responsive Records**

- a. PPT repeats and incorporates by reference paragraphs 15-24 as if fully set forth herein.
- b. PPT's second request was a properly submitted request for records within the possession, custody, and control of HHS.
- c. HHS is an agency subject to FOIA and, therefore, has an obligation to release any non-exempt records and provide a lawful reason for withholding any materials in response to a proper FOIA request.

- d. HHS is wrongfully withholding non-exempt agency records requested by PPT by failing to produce non-exempt records responsive to its request.
- e. HHS's failure to provide all non-exempt responsive records violates FOIA.
- f. Plaintiff PPT is therefore entitled to declaratory and injunctive relief requiring HHS to promptly produce all non-exempt records responsive to its FOIA request and provide an index justifying the withholding of any responsive records withheld under claim of exemption.

**REQUESTED RELIEF**

Plaintiff PPT respectfully requests this Court:

- (1) Assume jurisdiction in this matter and maintain jurisdiction until Defendant HHS complies with the requirements of FOIA and any and all orders of this Court.
- (2) Order HHS to produce, within ten days of the Court's order, or by other such date as the Court deems appropriate, any and all non-exempt records responsive to PPT's request and an index justifying withholding all or part of any responsive records that are withheld under claim of exemption.
- (3) Award PPT the costs of this proceeding, including reasonable attorney's fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E).
- (4) Grant PPT other such relief as the Court deems just and proper.

Dated: January 8, 2025

Respectfully submitted,

PROTECT THE PUBLIC'S TRUST

By Counsel:  
/s/ Jacob William Roth  
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*Counsel for the Plaintiff*





# PROTECT the PUBLIC'S TRUST

Freedom of Information Act

November 29, 2023

FOIA Officer/Director,  
Freedom of Information and Privacy Acts Division  
Hubert H. Humphrey Bldg, Suite 729H  
200 Independence Avenue, SW  
Washington, DC 20201  
[FOIARequest@hhs.gov](mailto:FOIARequest@hhs.gov)

## **Re: Reclassification of Marijuana**

Dear FOIA Officer,

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (FOIA), from the Protect the Public's Trust (PPT), a nonpartisan organization dedicated to promoting ethics in government and restoring the public's trust in government officials.

In late August of this year, the Department of Health and Human Services (HHS) urged the Drug Enforcement Agency to consider loosening its restrictions on marijuana. The drug's classification is currently at a '1', but HHS officials are looking to the DEA to move the drug down to a class '3'. This push comes as more and more states consider the legalization of marijuana. Currently, medical marijuana is legal in 39 states while 23 have legalized recreational use of the drug.<sup>1</sup> Accordingly, PPT seeks the following records related to HHS's push to reschedule the classification of marijuana.

## **Records Requested**

From August 31, 2022, through the date this request is processed,

1. Records of communications between the list of officials and employees at the Department of Justice and/or employees at the Drug Enforcement Administration regarding the schedule classification of marijuana and the recommendation to move marijuana from a Schedule I drug to a Schedule III drug.

Officials:

- I. Jeffery Nesbit, Assistant Secretary for Public Affairs
- II. Kamara Jones, Acting Assistant Secretary for the Public Affairs
- III. Samira Burns, Deputy Assistant Secretary for Public Affairs for Human Services
- IV. Lindsey "L.A." Ross, Acting Director Digital Communications Division
- V. Michael Wilker, Director, Broadcast Communications Division
- VI. May Malik, Deputy Assistant Secretary for Public Affairs for Public Education

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<sup>1</sup> <https://www.cnn.com/2023/08/31/hhs-wants-to-reclassify-marijuana-what-it-means.html>



The term “records” includes emails (with attachments) but also refers to other documents and items, such as text messages; invitations, communications, and chats from meeting applications such as Zoom and Microsoft Teams; encrypted apps such as Signal, WhatsApp, Wikr Me, and others; phone records; as well as communications on collaboration platforms such as Slack.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under the FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

PPT is willing to receive records on a rolling basis.

To facilitate this request, we request that the FOIA office use the Agency’s enterprise records management system to search and process this request.

Finally, FOIA’s “frequently requested record” provision was enacted as part of the 1996 Electronic Freedom of Information Act Amendments and requires all federal agencies to give “reading room” treatment to any FOIA-processed records that, “because of the nature of their subject matter, the agency determines have become the subject of subsequent requests for substantially the same records.” 5 U.S.C. § 552(a)(2)(D)(ii)(I). Also, enacted as part of the 2016 FOIA Improvement Act, FOIA’s Rule of 3 requires all federal agencies to proactively “make available for public inspection in an electronic format” “copies of records, regardless of form or format ... that have been released to any



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person ... and ... that have been requested 3 or more times.” 5 U.S.C. § 552(a)(2)(D)(ii)(I). Therefore, we respectfully request that you make available online any records that the agency determines will become the subject of subsequent requests for substantially the same records, and records that have been requested three or more times.

## Format of Requested Records

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested. See, e.g., 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”). “Readily accessible” means text-searchable and OCR-formatted. See 5 U.S.C. § 552(a)(3)(B). We ask that you please provide all records in an electronic format. Additionally, please provide the records either in (1) load-ready format with a CSV file index or Excel spreadsheet, or; (2) for files that are in .PDF format, without any “portfolios” or “embedded files.” Portfolios and embedded files within files are not readily accessible. Please do not provide the records in a single, or “batched,” .PDF file. We appreciate the inclusion of an index.

If you should seek to withhold or redact any responsive records, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption. 5 U.S.C. § 552(b). Please correlate any redactions with specific exemptions under FOIA.

## Fee Waiver Request

FOIA was designed to provide citizens a broad right to access government records. FOIA’s basic purpose is to “open agency action to the light of public scrutiny,” with a focus on the public’s “right to be informed about what their government is up to.” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA’s fee waiver provision requires that “[d]ocuments shall be furnished without any charge or at a [reduced] charge,” if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA’s fee waiver requirement is “liberally construed.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide organizations access to government records without the payment of fees. Indeed, FOIA’s fee waiver provision was intended “to prevent government agencies from using high fees to discourage certain types of requesters and requests,” which are “consistently associated with requests from journalists, scholars, and non-profit public interest groups.” *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated,



“[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information ....” 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

#### I. PPT Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). The HHS FOIA regulations at 45 CFR § 5.54(b) establish the same standard.

Thus, HHS must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns “the operations or activities of the Federal government,” (2) whether the disclosure is “likely to contribute” to an understanding of government operations or activities, (3) whether the disclosure “will contribute to public understanding” of a reasonably broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. 45 CFR § 5.54(b) As shown below, PPT meets each of these factors.

##### A. The Subject of This Request Concerns “The Operations and Activities of the Government.”

The subject matter of this request concerns the operations and activities of HHS. This request asks for: records of communications between the list of officials and employees at the Department of Justice and/or employees at the Drug Enforcement Administration.

##### B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public. Disclosure of the requested records will allow PPT to convey to the public information about HHS’s push to reschedule the classification of marijuana.

After disclosing the requested records, PPT will inform the public about their findings in order to ensure decisions are being made consistent with the law. Once the information is made available, PPT will analyze it and present it to its followers and the general public in a manner that will meaningfully enhance the public’s understanding of this topic.

Thus, the requested records are likely to contribute to an understanding of HHS operations and activities.



C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding of Operations at the HHS.

The requested records will contribute to the public understanding of operations at HHS. As explained above, the records will contribute to public understanding of this topic.

Access to information articulating the rescheduling of the classification of marijuana of interest to a broad segment of the public. As noted previously, 39 states have legalized the medical use of marijuana, while almost half of states (23) have legalized it recreationally. Disclosure of the requested records will enhance the public's understanding of any communication between HHS officials and employees at DOJ and/or DEA. *See W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.”).

Through PPT's synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), cert. denied, 513 U.S. 823 (1994) (applying “public” to require a sufficient “breadth of benefit” beyond the requester's own interests); *Cnty. Legal Servs. v. Dep't of Hous. & Urban Dev.*, 405 F.Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester's “work by its nature is unlikely to reach a very general audience,” “there is a segment of the public that is interested in its work”).

Indeed, the public does not currently have an ability to easily evaluate the requested records, which concern the reclassification of marijuana. We are also unaware of any previous release to the public of these or similar records. *See Cnty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records “clarify important facts” about agency policy, “the CLS request would likely shed light on information that is new to the interested public.”). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations....”

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of HHS's process in determining marijuana should be rescheduled from a class ‘1’ drug to a class ‘3’ drug. The public is always well served



when it knows how the government conducts its activities. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public.

D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

PPT is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public's understanding of the potential rescheduling of marijuana. Indeed, public understanding will be significantly increased as a result of disclosure.

The records are also certain to shed light on HHS's compliance with its own mission and responsibilities. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, PPT meets this factor as well.

II. PPT Has the Ability to Disseminate the Requested Information Broadly.

PPT is a nonpartisan organization that informs, educates, and counsels the public about the importance of government officials acting consistently with their ethics obligations. A key component of being able to fulfill this mission and educate the public about these duties is access to information that articulates the requested records. PPT intends to publish information from requested records on its website, distribute the records and expert analysis to its followers through social media channels including Twitter, Facebook, and other similar platforms. PPT also has a robust network of reporters, bloggers, and media publications interested in its content and that have durable relationships with the organization. PPT intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Through these means, PPT will ensure: (1) that the information requested contributes significantly to the public's understanding of the government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that PPT possesses the expertise to explain the requested information to the public; (4) that PPT possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes PPT as a reliable source in the field of government ethics and conduct.

Public oversight and enhanced understanding of HHS's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). PPT need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for PPT to show how it distributes information to the public generally. *Id.*



### III. Obtaining the Requested Records is of No Commercial Interest to PPT.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to PPT's role of educating the general public. PPT is a nonpartisan organization with supporters and members of the public who seek a transparent, ethical and impartial government that makes decisions in the best interests of all Americans, not former employers and special interests. PPT has no commercial interest and will realize no commercial benefit from the release of the requested records.

### IV. PPT Qualifies as a Representative of the News Media

PPT qualifies as a representative of the news media for the purposes of FOIA. Under FOIA, the term "representative of the news media" includes any person or entity that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." See 5 U.S.C. § 552(a)(4)(A)(ii); see also Cause of Action v. Federal Trade Commission, 799 F.3d 1108, 1120 (D.C. Cir. 2015). PPT is an entity that gathers information, including through FOIA requests such as this one, that is of interest to at least a segment of the population, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. For example, PPT has issued more than 150 press releases, the vast majority of which involved taking raw materials received from FOIA requests and turning that material into distinct works, which were then distributed to a diverse audience.

### V. Conclusion

For all of the foregoing reasons, PPT qualifies for a full fee waiver. We hope that HHS will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

If you have any questions, please contact me at [foia@protectpublictrust.org](mailto:foia@protectpublictrust.org). All records and any related correspondence should be sent to my attention at the address below.

Sincerely,  
Morgan Yardis  
Research and Publication Associate  
[foia@protectpublictrust.org](mailto:foia@protectpublictrust.org)



# PROTECT the PUBLIC'S TRUST

Freedom of Information Act

November 29, 2023

FDA Division of Freedom of Information,  
Office of the Executive Secretariat, OC  
5630 Fishers Lane, Room 1035  
Rockville, MD 20857

## **Re: Reclassification of Marijuana**

Dear FOIA Officer,

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (FOIA), from the Protect the Public's Trust (PPT), a nonpartisan organization dedicated to promoting ethics in government and restoring the public's trust in government officials.

In late August of this year, the Department of Health and Human Services (HHS) urged the Drug Enforcement Agency to consider loosening its restrictions on marijuana. The drug's classification is currently at a 'I', but HHS officials are looking to the DEA to move the drug down to a class 'III'. This push comes as more and more states consider the legalization of marijuana. Currently, medical marijuana is legal in 39 states while 23 have legalized recreational use of the drug.<sup>1</sup> Accordingly, PPT seeks the following records related to HHS's push to reschedule the classification of marijuana.

### **Records Requested**

From August 31, 2022, though the date this request is processed,

1. Records of communications between Officials in the FDA's Office of Communications regarding the schedule classification of marijuana and the recommendation to move marijuana from a Schedule I drug to a Schedule III drug.
2. Records of communications to and/or from officials in the FDA's Office of Communications with other officials at the Department of Health and Human Services (hhs.gov) or Centers for Disease Control and Prevention (cdc.gov) regarding the schedule classification of marijuana and the recommendation to move marijuana from a Schedule I drug to a Schedule III drug.

The term "records" includes emails (with attachments) but also refers to other documents and items, such as text messages; invitations, communications, and chats from meeting applications such as Zoom and Microsoft Teams; encrypted apps such as Signal,

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<sup>1</sup> <https://www.cnn.com/2023/08/31/hhs-wants-to-reclassify-marijuana-what-it-means.html>





# PROTECT the PUBLIC'S TRUST

WhatsApp, Wikr Me, and others; phone records; as well as communications on collaboration platforms such as Slack.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under the FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

PPT is willing to receive records on a rolling basis.

To facilitate this request, we request that the FOIA office use the Agency's enterprise records management system to search and process this request.

Finally, FOIA's "frequently requested record" provision was enacted as part of the 1996 Electronic Freedom of Information Act Amendments and requires all federal agencies to give "reading room" treatment to any FOIA-processed records that, "because of the nature of their subject matter, the agency determines have become the subject of subsequent requests for substantially the same records." 5 U.S.C. § 552(a)(2)(D)(ii)(I). Also, enacted as part of the 2016 FOIA Improvement Act, FOIA's Rule of 3 requires all federal agencies to proactively "make available for public inspection in an electronic format" "copies of records, regardless of form or format ... that have been released to any person ... and ... that have been requested 3 or more times." 5 U.S.C. § 552(a)(2)(D)(ii)(I). Therefore, we respectfully request that you make available online any records that the agency determines will become the subject of subsequent requests for substantially the same records, and records that have been requested three or more times.



# PROTECT the PUBLIC'S TRUST

## Format of Requested Records

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested. See, e.g., 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”). “Readily accessible” means text-searchable and OCR-formatted. See 5 U.S.C. § 552(a)(3)(B). We ask that you please provide all records in an electronic format. Additionally, please provide the records either in (1) load-ready format with a CSV file index or Excel spreadsheet, or; (2) for files that are in .PDF format, without any “portfolios” or “embedded files.” Portfolios and embedded files within files are not readily accessible. Please do not provide the records in a single, or “batched,” .PDF file. We appreciate the inclusion of an index.

If you should seek to withhold or redact any responsive records, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption. 5 U.S.C. § 552(b). Please correlate any redactions with specific exemptions under FOIA.

## Fee Waiver Request

FOIA was designed to provide citizens a broad right to access government records. FOIA’s basic purpose is to “open agency action to the light of public scrutiny,” with a focus on the public’s “right to be informed about what their government is up to.” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA’s fee waiver provision requires that “[d]ocuments shall be furnished without any charge or at a [reduced] charge,” if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA’s fee waiver requirement is “liberally construed.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide organizations access to government records without the payment of fees. Indeed, FOIA’s fee waiver provision was intended “to prevent government agencies from using high fees to discourage certain types of requesters and requests,” which are “consistently associated with requests from journalists, scholars, and non-profit public interest groups.” *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, “[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information ....” 132 Cong. Rec. S. 14298 (statement of Senator Leahy).



### I. PPT Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). The FDA FOIA regulations at 45 CFR § 5.54(b) establish the same standard.

Thus, FDA must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns “the operations or activities of the Federal government,” (2) whether the disclosure is “likely to contribute” to an understanding of government operations or activities, (3) whether the disclosure “will contribute to public understanding” of a reasonably broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. 45 CFR § 5.54(b) As shown below, PPT meets each of these factors.

#### A. The Subject of This Request Concerns “The Operations and Activities of the Government.”

The subject matter of this request concerns the operations and activities of FDA. This request asks for: records of communications between officials in the Office of Communications regarding the recommendation to move marijuana from a Schedule I drug to a Schedule III drug.

#### B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public. Disclosure of the requested records will allow PPT to convey to the public information about FDA’s push to reschedule the classification of marijuana.

After disclosing the requested records, PPT will inform the public about their findings in order to ensure decisions are being made consistent with the law. Once the information is made available, PPT will analyze it and present it to its followers and the general public in a manner that will meaningfully enhance the public’s understanding of this topic.

Thus, the requested records are likely to contribute to an understanding of FDA operations and activities.



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## C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding of Operations at the FDA.

The requested records will contribute to the public understanding of operations at FDA. As explained above, the records will contribute to public understanding of this topic.

Access to information articulating the rescheduling of the classification of marijuana of interest to a broad segment of the public. As noted previously, 39 states have legalized the medical use of marijuana, while almost half of states (23) have legalized it recreationally. Disclosure of the requested records will enhance the public's understanding of any communication between FDA officials regarding this reclassification. See *W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.”).

Through PPT's synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), cert. denied, 513 U.S. 823 (1994) (applying “public” to require a sufficient “breadth of benefit” beyond the requester's own interests); *Cnty. Legal Servs. v. Dep't of Hous. & Urban Dev.*, 405 F.Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester's “work by its nature is unlikely to reach a very general audience,” “there is a segment of the public that is interested in its work”).

Indeed, the public does not currently have an ability to easily evaluate the requested records, which concern the reclassification of marijuana. We are also unaware of any previous release to the public of these or similar records. See *Cnty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records “clarify important facts” about agency policy, “the CLS request would likely shed light on information that is new to the interested public.”). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations....”

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of FDA's process in determining marijuana should be rescheduled from a class ‘1’ drug to a class ‘3’ drug. The public is always well served



when it knows how the government conducts its activities. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public.

#### D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

PPT is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public's understanding of the potential rescheduling of marijuana. Indeed, public understanding will be significantly increased as a result of disclosure.

The records are also certain to shed light on FDA's compliance with its own mission and responsibilities. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, PPT meets this factor as well.

#### II. PPT Has the Ability to Disseminate the Requested Information Broadly.

PPT is a nonpartisan organization that informs, educates, and counsels the public about the importance of government officials acting consistently with their ethics obligations. A key component of being able to fulfill this mission and educate the public about these duties is access to information that articulates the requested records. PPT intends to publish information from requested records on its website, distribute the records and expert analysis to its followers through social media channels including Twitter, Facebook, and other similar platforms. PPT also has a robust network of reporters, bloggers, and media publications interested in its content and that have durable relationships with the organization. PPT intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Through these means, PPT will ensure: (1) that the information requested contributes significantly to the public's understanding of the government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that PPT possesses the expertise to explain the requested information to the public; (4) that PPT possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes PPT as a reliable source in the field of government ethics and conduct.

Public oversight and enhanced understanding of FDA's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). PPT need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for PPT to show how it distributes information to the public generally. *Id.*



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### III. Obtaining the Requested Records is of No Commercial Interest to PPT.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to PPT's role of educating the general public. PPT is a nonpartisan organization with supporters and members of the public who seek a transparent, ethical and impartial government that makes decisions in the best interests of all Americans, not former employers and special interests. PPT has no commercial interest and will realize no commercial benefit from the release of the requested records.

### IV. PPT Qualifies as a Representative of the News Media

PPT qualifies as a representative of the news media for the purposes of FOIA. Under FOIA, the term "representative of the news media" includes any person or entity that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." See 5 U.S.C. § 552(a)(4)(A)(ii); see also Cause of Action v. Federal Trade Commission, 799 F.3d 1108, 1120 (D.C. Cir. 2015). PPT is an entity that gathers information, including through FOIA requests such as this one, that is of interest to at least a segment of the population, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. For example, PPT has issued more than 150 press releases, the vast majority of which involved taking raw materials received from FOIA requests and turning that material into distinct works, which were then distributed to a diverse audience.

### V. Conclusion

For all of the foregoing reasons, PPT qualifies for a full fee waiver. We hope that FDA will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

If you have any questions, please contact me at [foia@protectpublictrust.org](mailto:foia@protectpublictrust.org). All records and any related correspondence should be sent to my attention at the address below.

Sincerely,  
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