

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE LEGAL AID SOCIETY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
HOUSING AND URBAN
DEVELOPMENT,

Defendant.

Civil Action No. 1:20-cv-2283

COMPLAINT

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, seeking to compel the United States Department of Housing and Urban Development (“HUD”) to immediately respond to a request and disclose records under the Freedom of Information Act concerning HUD’s Proposed Rule, *Housing and Community Development Act of 1980; Verification of Eligible Status*, 84 Fed. Reg. 20,589 (May 10, 2019) (to be codified at 24 C.F.R. pt. 5), amending Section 214 of the Housing and Community Development Act of 1980, 42 U.S.C. § 1436a (the “Proposed Rule”). This information is subject to disclosure and critical to understanding the impact of (and intent behind) a proposed rule that poses an imminent threat to the integrity of the family unit.

2. Currently, families are eligible to receive federal rental assistance from HUD if at least one member of a household has eligible immigration status. When the eligibility of at least one family member is established, the household’s subsidy is prorated to account only for members eligible for rental assistance. Family members without an eligible immigration status (including, but not limited to, individuals who have a legal right to be present in the United

States, such as on a student visa or an employment visa) can live in a household, but do not receive a federal subsidy.

3. Accordingly, families with (i) eligible U.S. citizens or members with eligible immigration status and (ii) members without such status meet the eligibility requirements for receiving prorated financial assistance (hereinafter, a “mixed status family”). These eligibility requirements are set forth in a number of agency rules and statutory amendments, and have applied for more than thirty years. Through these statutes and regulations, Congress not only has affirmatively sanctioned prorating assistance to mixed status families, but has shown an express intent to protect the sanctity of the family unit.

4. Despite this, on May 10, 2019, HUD published the Proposed Rule, which would exclude mixed status households from receiving federal rental assistance. Under the Proposed Rule, any household whose leaseholder is not an eligible immigrant will not receive any financial rental assistance—regardless of the proration of rent or presence of eligible U.S. citizens or immigrants in the household. Further, the Proposed Rule would require families applying to or currently receiving financial rental assistance to verify the immigration status of each household member. Households containing family members without eligible status will be forced to either have non-eligible family members move out (thus threatening familial integrity) or face having their entire household’s assistance terminated (thus facing near certain homelessness).

5. HUD has claimed that the Proposed Rule is intended to “bring HUD’s regulations into greater alignment with the requirements of Section 214 [of the Housing and Community Development Act].”¹ The Proposed Rule, reverses decades of consistent Congressional and

¹ Regulatory Impact Analysis, *Housing and Community Development Act of 1980: Verification of Eligible Status*, Proposed Rule Docket No: FR-6124-P-01 (hereinafter “Regulatory Impact Analysis”), HUD, 1 (April 15, 2019).

agency practice without reasoned explanation, falls short of the text and purpose of the Housing and Community Development Act of 1980, falls short of the Secretary's statutory obligation to administer all HUD programs in a manner which affirmatively furthers fair housing, undermines Congressional prerogative to preserve families, and impairs the constitutional right of mixed-status households to family integrity. At the same time, HUD Secretary Benjamin Carson has testified that the actual motivation behind the Proposed Rule is to build pressure on Congress to pass comprehensive immigration reform. *Housing in America: Oversight of the U.S. Dep't. of Housing and Urb. Dev.*, 114th Cong. (2019) (statement of Hon. Dr. Benjamin Carson, Secretary, U.S. Dep't. of Housing and Urb. Dev.).

6. In order to learn the actual motivation for, impact of, and intent behind a proposed rule which appears to be contrary to the law and in stark opposition to certain constitutional protections, a request to HUD for records concerning the Proposed Rule on October 29, 2019 (the "FOIA Request") was submitted by Winston & Strawn LLP, which subsequently assigned its right to the FOIA Request to The Legal Aid Society ("Legal Aid").

7. Currently, the Proposed Rule is finalized to go into effect in May 2020.

8. Despite the imminent finalization of the Proposed Rule which threatens the integrity of the family unit (a fundamental due process right), Defendant HUD has failed to provide a determination within the statutory timeframe mandated by law. As a result, the purpose, intent, and impact of a proposed rule that would have a devastating, permanent, and unnecessary impact on families and society as a whole if allowed to go into effect remains opaque, to the detriment of the public.

9. Legal Aid files this action to compel Defendant HUD to respond to the FOIA Request and produce the requested information within thirty (30) days.

JURISDICTION AND VENUE

10. This Court has subject-matter jurisdiction pursuant to 5 U.S.C. §§ 552(a)(4)(B), (a)(6)(C)(i), (a)(6)(E)(iii) and 28 U.S.C. § 1331.

11. This Court has jurisdiction to grant declaratory and further proper relief pursuant to 28 U.S.C §§ 2201-2202 and the Federal Rules of Civil Procedure 57 and 65.

12. Venue lies in this District under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because Legal Aid has its principal place of business within the Southern District of New York.

PARTIES

13. Plaintiff Legal Aid is a nonprofit organization incorporated under section 501(c)(3) of the Internal Revenue Code, headquartered at 199 Water Street, New York, NY 10038. Legal Aid is New York City's oldest and largest provider of legal aid to the indigent, providing services for both criminal cases and civil cases.

14. On March 4, 2020, Winston & Strawn assigned all of the rights, benefits, and interests from the FOIA Request to Legal Aid.

15. By letter dated March 4, 2020, Winston & Strawn and Legal Aid notified Deborah R. Snowden, a Deputy Chief FOIA Officer, that Winston & Strawn assigned all of the rights, benefits and interests from the FOIA Request to Legal Aid, and that all further responses and communications should be directed to Legal Aid (the "Assignment"). A copy of the Assignment is attached as Exhibit A.

16. On March 4, 2020, Winston & Strawn provided copy of the Assignment to Ethan Bodell, a Government Information Specialist at HUD, via email.

17. Legal Aid thus retains all of the rights, benefits, and interests of the FOIA Request submitted on October 29, 2019.

18. Defendant HUD is an agency of the United States government and an agency within the meaning of 5 U.S.C. § 552(f). HUD is the Federal agency responsible for national policy and programs that address America's housing needs, that improve and develop the nation's communities, and enforce fair housing laws. HUD is responsible for helping create a decent home and suitable living environment for all Americans, and giving a strong national voice to America's communities at the Cabinet level.

19. Defendant has custody and control over the records that Plaintiff seeks to make publicly available under 5 U.S.C § 552(a)(3)(A).

FACTUAL ALLEGATIONS

I. Background

a. History of Section 214 of the Housing and Community Development Act

20. In the 1980s, Congress, for the first time, limited assistance under federal housing programs to certain categories of eligible immigrants in Section 214 of the Housing and Community Development Act (the "Act"). However, Congress (and the courts) ultimately voided efforts to deem mixed-status families ineligible for housing assistance.²

21. In 1994, HUD proposed a rule to finally implement Section 214. *See* Restrictions on Assistance to Noncitizens, 59 Fed. Reg. 43,900, 43,901 (Aug. 25, 1994). This rule was finalized in March 1995 and expressly mandated prorated assistance to mixed-status families.

² *See, e.g.*, Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, 97 Stat. 1153 (1983); Restriction on Use of Assisted Housing, 51 Fed. Reg. 26,876 (July 28, 1986) (delaying the effective date of the rule for two months in response to a request by several Members of Congress in view of the possible enactment of pending legislation, containing amendments to section 214, during the 1986 Congressional session); Restriction on Use of Assisted Housing; Delay of Effective Date and Related Technical Amendments, 51 Fed. Reg. 34,570 (Sept. 29, 1986) (delaying the effective date an additional three months in response to a second congressional request); Restriction on Use of Assisted Housing, 51 Fed. Reg. 42,088 (Nov. 21, 1986) (delaying the effective date of the rule until at least October 31, 1987); Memorandum and Order, *Yolano-Donnelly Tenant Ass'n v. Pierce*, No. S-86-0846 MLS (E.D. Cal., July 15, 1986) (finding, *inter alia*, that plaintiffs raised serious questions on the merits of their claim that the rule violated their Fifth Amendment right to due process because it denied the right to cohabit with their families).

Restrictions on Assistance to Noncitizens, 60 Fed. Reg. 14,816, 14,817 (Mar. 20, 1995). As HUD explained, “[p]roration of assistance is consistent with the preservation of Families [sic] provisions of Section 214.” *Id.* at 14,822.

22. Thereafter, in 1996, Congress added language to Section 214 that made clear that where “the eligibility for financial assistance of at least one member of a family has been affirmatively established under the program of financial assistance, and under this section, any financial assistance made available to that family... shall be prorated.” 42 U.S.C. § 1436a(b)(2).

23. Further, Congress expressly sought to avoid disrupting the family unit by excepting mixed-status families from the category of households that could lose their eligibility of financial assistance if it was determined that an individual within that household allowed an ineligible individual to reside with them: “The applicable Secretary shall terminate the eligibility for financial assistance of an individual and the members of the household of the individual . . . upon determining that such individual has knowingly permitted another individual who is not eligible for such assistance to reside in the public or assisted housing unit of the individual. **This provision shall not apply to a family if the ineligibility of the individual at issue was considered in calculating any proration of assistance provided for the family.**” 42 U.S.C. § 1436a(d)(6) (emphasis added).

24. This language remains in Section 214(b) to this day.

25. An interim rule published in November 1996 continued the practice of prorated assistance, “requir[ing] that continued financial assistance be provided to an eligible mixed family after November 29, 1996 be prorated based on the percentage of family members that are eligible for assistance. An eligible mixed family is a family containing members with eligible immigration status, as well as members without such status, and that meets the criteria for

eligibility for continued assistance as described in Section 214.” Revised Restrictions on Assistance to Noncitizens, 61 Fed. Reg. 60,535, 60,536 (Nov. 29, 1996).

26. Despite having opportunities to change its mandate to HUD that mixed-status families are entitled to assistance, Congress has repeatedly chosen not to do so.

b. The Proposed Rule

27. On May 10, 2019, HUD published the Proposed Rule. A copy of the Proposed Rule is attached as Exhibit B.

28. The Proposed Rule aims to make two changes to Section 214. First, it would “require the verification of the eligible immigration status of all recipients of [housing] assistance.” Second, it would require “that individuals who are not in eligible immigration status may not serve as a leaseholder, even as part of a mixed family whose assistance is prorated based on the percentage of members with eligible status.” Ex. B at 1.

29. As a result of these two changes, the Proposed Rule will make “prorated assistance a temporary condition pending verification of eligible status, as opposed to under the current regulation where it could continue indefinitely.” *Id.* Consequently, households that do not consist exclusively of eligible members (*i.e.*, mixed-status families) will no longer be eligible to receive housing assistance.

30. Consequently, the Proposed Rule cruelly forces mixed-status families to choose between staying together as a familial unit and losing critical housing assistance (risking homelessness) or separating in order to allow eligible family member to maintain their housing assistance.

31. The stated animating factor for the Proposed Rule is Executive Order 13828, titled “*Reducing Poverty in America by Promoting Opportunity and Economic Mobility*” (the

“Executive Order”), which was issued by President Donald J. Trump on April 10, 2018. *Id.* at 2. The Executive Order states, among other provisions, that agencies should “adopt policies to ensure that only eligible persons receive benefits and enforce all relevant laws provided that aliens who are not otherwise qualified and eligible may not receive benefits.” *Id.*

32. The Proposed Rule is currently scheduled to be finalized in May 2020.³

c. Impact of the Proposed Rule

33. According to HUD’s own admission, the Proposed Rule will impact approximately 108,000 individuals residing in mixed-status family households.⁴ This includes approximately 55,000 U.S. citizen children who would otherwise be entitled to housing assistance.

34. Of these 108,000 individuals living in mixed-status families projected to be impacted, HUD acknowledges that approximately 70% are eligible to receive rental assistance, the vast majority of which are children.⁵ Therefore, most families who will be impacted face the prospect of one or both parents being forced to leave the family home.

35. Within New York City alone, the Proposed Rule threatens to render 11,400 individuals, including approximately 5,000 children, homeless.⁶

36. Further, the Proposed Rule disproportionately threatens the housing assistance of people of color, and especially individuals who are Latinx. Of the 108,000 individuals that will

³ OFFICE OF INFORMATION AND REGULATORY AFFAIRS, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=2501-AD89> (last visited February 7, 2020).

⁴ See Federal Data Summary School Years 2014-2015 to 2016-2017, NAT’L CENTER FOR HOMELESS EDUC. (February 2019) <https://nche.ed.gov/wp-content/uploads/2019/02/Federal-Data-Summary-SY-14.15-to-16.17-Final-Published-2.12.19.pdf>; HUD, Regulatory Impact Analysis, *Amendments to Further Implement Provisions of the Housing and Community Development Act of 1980*, Docket No. FR-6124-P-01, at 7 (Apr. 15, 2019).

⁵ HUD, Regulatory Impact Analysis, *Amendments to Further Implement Provisions of the Housing and Community Development Act of 1980*, Docket No. FR-6124-P-01, at 8 (Apr. 15, 2019).

⁶ Impact Numbers for NYCHA/HPD cited by NYCHA to counsel on 5/16/2019, does not include State HCR-administered vouchers.

be affected by the Proposed Rule, approximately 95% are people of color, including 85% of who are Latinx.⁷

37. The Proposed Rule threatens households beyond mixed-status families. Because of the Proposed Rule's verification requirement, the housing security of over 9 million assisted U.S. citizens, who may not have the documents needed to verify citizenship and are unable to retrieve them within the time required, is threatened.⁸ As just one example, according to a 2006 study, 12% of U.S. citizens with incomes below \$25,000 lack proof of citizenship.⁹

38. Likewise, the Proposed Rule threatens the housing of all individuals that have obtained a U-Visa. Recipients of a U-Visa are victims of qualifying criminal activity that are helpful to law enforcement to bring the perpetrator of the crime to justice. These individuals are ineligible for federal benefits, and would be unable to live in federally subsidized housing.¹⁰

39. Further, the Proposed Rule disproportionately threatens the housing of U.S. citizens who are people of color or women. According to a NYU Brennan Center for Justice study, 25% of African American citizens lack government issued photo identification and 50% of female citizens lack a birth certificate with their current legal name.¹¹

⁷ See Alicia Mazzara, *Demographic Data Highlight Potential Harm of New Trump Proposal to Restrict Housing Assistance*, CENTER ON BUDGET AND POLICY PRIORITIES (July 1, 2019), <https://www.cbpp.org/research/housing/demographic-data-highlight-potential-harm-of-new-trump-proposal-to-restrict-housing>.

⁸ See *ACLU Comment*; Douglas Rice, *Trump Proposal Would Jeopardize Rental Aid for Many U.S. Citizens*, Center for Budget and Policy Priorities, (June 18, 2019), available at <https://www.cbpp.org/blog/trump-proposal-would-jeopardize-rental-aid-for-many-us-citizens>.

⁹ *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, BRENNAN CTR. FOR JUST. (Nov. 2006), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf.

¹⁰ See *New York State Office for the Prevention of Domestic Violence Comment*; Gwen Wright, *Comments in Response to Department of Housing and Urban Development's Notice of Proposed Rulemaking*, (July 9, 2019), available at <https://www.regulations.gov/document?D=HUD-2019-0044-9329>.

¹¹ *Id.*

40. HUD's own projections reveal that the Proposed Rule will likely reduce the quality and quantity of assisted housing in response to higher costs from the "replacement households" for mixed-status family households.¹²

II. The FOIA Request

41. On October 29, 2019, Winston & Strawn submitted its FOIA Request by U.S. certified mail to the Freedom of Information Act Office of the United States Department of Housing and Development. A copy of the Request is attached as Exhibit C.

42. The FOIA Request seeks records reflecting HUD's communications regarding the Proposed Rule, including but not limited to those within HUD, with third parties, or with the White House. Additionally, the Request seeks, amongst other things, drafts, comments, assessments, analyses, and data used in the creation of the Proposed Rule. *See generally* Ex. C.

43. The FOIA Request also seeks records, from July 1, 2008 to the date the search is conducted, reflecting HUD's communications concerning the Systematic Alien Verification for Entitlements Program ("SAVE"), and management of the SAVE Program. *Id.*

44. Winston & Strawn requested expedited processing pursuant to 24 C.F.R. § 15.105(b) because "[t]he imminent ratification of the Proposed Rule threatens the integrity of the family unit—long recognized as a fundamental due process right, *see Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)—as mixed-status families will face the possibility of asking an ineligible member to leave an assisted household." Ex. C at 3. Accordingly, the "failure to obtain the requested records on an expedited basis could reasonably be expected to pose... a threatened loss of a substantial due process right." *Id.*

¹² *See* Regulatory Impact Analysis, *Housing and Community Development Act of 1980: Verification of Eligible Status*, Proposed Rule Docket No: FR-6124-P-01, HUD, 3 (Apr. 15, 2019).

45. In a letter dated November 12, 2019, HUD acknowledged that it had received the FOIA Request, determined that unusual circumstances existed, purported to “extend the time limit to respond beyond the ten additional days provided by the statute,” and assigned the FOIA Request to HUD’s “complex track.” HUD granted Winston & Strawn’s request for expedited processing, determining that the FOIA request was in response to a “compelling need.” A copy of the letter is attached as Exhibit D.

46. By email dated November 12, 2019, HUD requested additional information for three identified items within the FOIA request.

47. By email dated November 22, 2019, Winston & Strawn promptly provided the necessary additional information requested by HUD.

48. Nearly two months later, by an email dated January 13, 2020, Winston & Strawn requested an updated timeline on the status of the FOIA Request. In response, HUD informed Winston & Strawn that the FOIA Request was scheduled for collection between November 5, 2020 and November 13, 2020.

49. By email dated January 15, 2020, Winston & Strawn offered to refine the scope of its request to ensure a speedy resolution. HUD failed to respond to this request.

50. By email dated January 28, 2020, Winston & Strawn repeated its desire to reach a mutually agreed upon set of documents to ensure the request’s speedy resolution. In response, HUD did not provide Winston & Strawn an option to refine its request.

51. The projected collection date of November 5, 2020, is 256 business days after Winston & Strawn submitted the FOIA Request. It is 247 business days after HUD acknowledged receipt of the FOIA Request. A copy of these emails is attached hereto as Exhibit E.

52. In a letter dated February 11, 2020, HUD provided an interim response (the “Interim Response”), which did not include an appealable final determination.

53. The Interim Response only provided a partial response to items 2, 3, 5, 6, and 7 of the FOIA Request, indicating that “additional searches are ongoing, including an electronic search for email records responsive to your request.”

54. The Interim Response failed to include a list of documents that were withheld, or a statement of reasons justifying their withholding.

55. Implausibly, the Interim Response provided only 18 pages for release, consisting entirely of a publicly available document that Plaintiff is already in possession of, and based a portion of the FOIA Request on.

56. To date, HUD has failed to conduct an adequate search and have unlawfully withheld responsive records to items 2, 3, 5, 6, and 7 of the FOIA Request.

57. To date, HUD has failed to provide a final determination to the FOIA Request.

58. HUD has violated the applicable statutory time limit for processing of FOIA requests. Under 5 U.S.C. § 552(a)(6)(A) and (B), HUD was required to make a determination on the FOIA Request within thirty business days. The request was tolled for 7 business days, pursuant to HUD’s request for additional information. Therefore, HUD’s response to the FOIA Request was due by December 23, 2019.

59. Because Defendant has failed to provide a final determination to the FOIA Request within the applicable statutory period, any administrative remedies are deemed exhausted. 5 U.S.C. § 552(a)(6)(C)(i).

CLAIM FOR RELIEF

FIRST CAUSE OF ACTION

**Violation of the Freedom of Information Act, 5 U.S.C. § 552:
Failure to Disclose Responsive Records**

60. Plaintiff realleges paragraphs 1 through 59 as if fully set forth herein.

61. Defendant is obligated under 5 U.S.C. § 552(a)(3) to promptly produce all records responsive to Plaintiffs' FOIA Request.

62. Plaintiff has a legal right to obtain such records, and no legal basis exists for Defendant's failure to disclose them.

63. Defendant's failure to disclose all responsive records within the statutory timeframe violates 5 U.S.C. § 552 (a)(3)(A) and 5 U.S.C. § 552(a)(6)(A)(i).

64. Because of these failures to comply with FOIA's response deadlines, and because exceptional circumstances do not exist, HUD may not assess any search fees. 5 U.S.C. § 552(a)(6)(C)(i).

SECOND CAUSE OF ACTION

**Violation of the Freedom of Information Act, 5 U.S.C. § 552:
Failure to Adequately Search for Responsive Records**

65. Plaintiff realleges paragraphs 1 through 59 as if fully set forth herein.

66. Defendant are obligated under 5 U.S.C. § 552(a)(3) to conduct a reasonable search for records responsive to the FOIA Request.

67. Plaintiff has a legal right to obtain such records, and no legal basis exists for failure to search for them.

68. Defendant's failure to conduct a reasonable search for records responsive to the FOIA Request violates 5 U.S.C. § 552(a)(3).

PRAYER FOR RELIEF

For the foregoing reasons, Legal Aid respectfully requests that judgment be entered in their favor against Defendant, and that the Court:

69. Order Defendant and any of its departments, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendant to conduct a reasonable search for all records responsive to the FOIA Request and produce the requested information within thirty (30) days;

70. Enjoin and order the Defendant and any of its departments, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendant from improperly withholding records or portions of records responsive to the FOIA Request and order them to promptly produce the same;

71. Enjoin Defendant from charging Legal Aid fees for the processing of the FOIA Request;

72. Award Legal Aid reasonable attorney's fees and costs; and

73. Grant such other relief as the Court may deem just and proper.

March 13, 2020

Respectfully Submitted,

By: /s/ Jeffrey L. Kessler

Jeffrey L. Kessler
Jeffrey J. Amato
Kerry C. Donovan
WINSTON & STRAWN, LLP

200 Park Avenue
New York, New York 10166
Tel: (212) 294-6700
Fax: (212) 294-4700
jkessler@winston.com
jamato@winston.com
kcdonovan@winston.com

Counsel for Plaintiff