

CITY OF BALTIMORE

BERNARD "JACK" YOUNG
Mayor



DEPARTMENT OF LAW
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Dear Judge Russell:

Plaintiff the Mayor and City Council of Baltimore (the "City") has learned that the administrative record ("A.R.") that the Court ordered Defendants to provide by July 22, 2019 (Dkt. 26) is incomplete. Defendants agreed to complete the record one full month late, on August 19, 2019. In light of this delay, the City respectfully requests a one-week extension to file its opposition to and cross-motion for summary judgment, and its reply in support of preliminary injunction. This will delay completion of briefing by one week, to October 4, 2019. Defendants consent to the extension.

Defendants Did Not Timely Produce the Complete A.R.

The Court ordered Defendants to produce the A.R. on July 22, 2019. (Dkt. 26). On July 23, 2019, one of City's counsel received a drive containing over 500,000 pages of non-text-searchable documents, and a folder that could not be opened. It took over a week for counsel to convert the documents to text-searchable format to allow for effective review.

The City raised initial concerns with the A.R. during a July 31, 2019 status conference. The City stated that, while it was still reviewing the record, it did not believe it would be feasible to brief summary judgment motions on the original schedule because of the state of the A.R. (both length and format). The City requested that the Court place the City's Motion for Preliminary Injunction back on the calendar and allow for summary judgment briefing on a longer schedule, with the option for the Court, if necessary, to decide the preliminary injunction motion first. The Court granted the City's request to resume briefing on the motion for injunctive relief but did not extend the schedule for summary judgment. (Dkt. 26).

Since the July 31, 2019 status conference, Defendants confirmed that, in addition to being unwieldy, the A.R. is incomplete. Defendants' Certification of the A.R. stated that it had considered, *but had not included in the A.R.*, "publicly available materials otherwise referenced in the 2018 Proposed Rule, 83 Fed. Reg. 3,880 (Jan. 26, 2018) and in *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 84 Fed. Reg. 23,170, 45 C.F.R. Part 88 (May 21, 2019) ('2019 Final Rule')."

The City raised this with Defendants on August 7, 2019, and stated that the failure to provide publicly available material did not comply with the obligation to lodge the complete record, placed an unreasonable burden on the City and the Court to identify publicly available documents, and raised issues of authentication and admissibility.

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Defendants responded on August 12, 2019, that they would produce and bates stamp the publicly available documents cited in the “rulemaking documents in [administrative] record” other than “statutes, regulations, citations to case law, executive orders, citations to the congressional record, and citations to un-enacted legislation.” The City responded on August 13, 2019 to ask when it could expect these materials.

Defendants responded on August 16, 2019, after Plaintiffs in another case pending in the Southern District of New York (“SDNY”) (No. 19-CV-4676 (PAE)) filed a motion to complete the record, and the Court in SDNY ordered Defendants to complete the record by August 19, 2019. Defendants told the City they would provide the City with the same materials they are providing the SDNY plaintiffs on August 19, 2019. In addition to the publicly available materials, Defendants stated they would produce a small set of additional materials identified since providing Plaintiffs with the A.R. The City received the additional portions of the A.R. last night and is in the process of reviewing them.

Defendants’ Delay in Providing the Complete A.R. Warrants Relief

Administrative Procedure Act § 706 requires the reviewing court to review the “whole record or those parts of it cited by a party.” 5 U.S.C. § 706. The record is incomplete if it fails to provide a court with all of the documents, memoranda, and other evidence that was considered directly or indirectly by the agency. *Tafas v. Dudas*, 530 F. Supp. 2d 786, 795 (E.D. Va. 2008) (citing cases).

The City is conscious of the Court’s admonition that this the City’s lawsuit, and the City has been and will continue to diligently pursue its claim. But it is not the City’s administrative record---the A.R. is in Defendants’ exclusive control. Defendants have now confirmed they will provide parts of the A.R. one full month after the July 22, 2019 deadline. This makes an already onerous briefing schedule even more burdensome for the City.

In light of these developments, the City requests the following short extension of the briefing schedule as follows:

- **August 22, 2019** – Defendants file their opposition to preliminary injunction and motion for summary judgment
- **September 19, 2019 (previously September 12)** – Plaintiff files its reply in support of preliminary injunction, opposition to defendants’ summary judgment motion, and cross-motion
- **September 27, 2019 (previously September 20)** – Defendants file their reply and opposition to summary judgment
- **October 4, 2019 (previously September 27)** – Plaintiff files its reply in support of summary judgment

APPROVED THIS 21ST DAY OF Aug 20 19
George L. Russell III
GEORGE L. RUSSELL, III, U.S.D.J.