



July 25, 2017

**VIA ELECTRONIC MAIL**

Michael Marquis  
Freedom of Information Officer  
Department of Health and Human Services  
Hubert H. Humphrey Building, Room 729H  
200 Independence Avenue SW  
Washington, DC 20201  
[FOIARequest@hhs.gov](mailto:FOIARequest@hhs.gov)

**Re: Expedited Freedom of Information Act Request**

Dear Mr. Marquis:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and Department of Health and Human Services (HHS) implementing regulations, 45 C.F.R. Part 5, American Oversight makes the following request for records.

Since the start of this term, Congressional Republicans have devoted significant energy and resources to repealing and replacing the Affordable Care Act (ACA). However, the fate of those reform efforts remains up in the air, with significant questions about whether the Senate will manage to pass its own version of a reform bill.<sup>1</sup>

It has recently come to light that on June 20, 2017, HHS Secretary Tom Price participated in a closed-door meeting with Senate Republicans to address the health care reform legislative efforts. However, to date, no information about the meeting has been made public. The American public deserves to know what negotiations are taking place between the Trump administration and Congress regarding legislation with the potential to reform one-sixth of the national economy.

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<sup>1</sup> See, e.g., Robert Pear & Thomas Kaplan, *Senate Leaders Try to Appease Members as Support for Health Bill Slips*, N.Y. TIMES, June 25, 2017, [https://www.nytimes.com/2017/06/25/us/politics/mitch-mcconnell-senate-health-care-bill.html?\\_r=0](https://www.nytimes.com/2017/06/25/us/politics/mitch-mcconnell-senate-health-care-bill.html?_r=0); Leigh Ann Caldwell, *Confusion Grips Senate GOP Ahead of Expected Health Care Vote*, NBC NEWS (July 21, 2017, 8:12 AM), <http://www.nbcnews.com/politics/congress/confusion-grips-senate-gop-ahead-expected-health-care-vote-n785066>; Thomas Kaplan & Julie Hirschfeld Davis, *Senate Braces for Health Showdown with McCain on Hand but a Plan Unclear*, N.Y. TIMES, July 24, 2017, <https://www.nytimes.com/2017/07/24/us/politics/senate-health-bill-obamacare-repeal-and-replace-trump-mcconnell.html>.



## Requested Records

American Oversight requests that HHS produce the following within twenty business days and seeks expedited review of this request for the reasons identified below:

1. All records provided, shared, or exchanged between HHS and Congress at or in connection with the meeting that occurred on or about June 20, 2017, between HHS Secretary Tom Price and Republican senators, including any meeting notices, meeting agendas, meeting notes, informational materials, talking points, or other materials shared, exchanged, discussed, made available for review, or provided at that meeting.
2. All communications between HHS and Congress relating to health care legislation in connection with the meeting that occurred on or about June 20, 2017, between HHS Secretary Tom Price and Republican senators. Please provide all responsive records from June 10, 2017 to June 30, 2017. American Oversight does not seek purely administrative emails with only scheduling or other logistical details. Rather, American Oversight seeks communications reflecting substantive discussions about health care reform legislation leading up to or following up on the June 20, 2017 meeting.

This request includes records between anyone at HHS (including not only Secretary Tom Price but also any other HHS employee involved in preparing for or participating in the June 20 meeting, as well as anyone acting on Mr. Price's behalf) and anyone at Congress (including not only the members of Congress at the meeting itself but also congressional staff members involved in preparing for or participating in the meeting).

The search for responsive records should include all individuals and locations where records are likely to exist, including but not limited to the Immediate Office of the Secretary and the Office of the Assistant Secretary for Legislation.

In addition to the records requested above, American Oversight also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

American Oversight seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms "record," "document," and "information" in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.<sup>2</sup> **It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.**<sup>3</sup>

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered HHS’s prior FOIA practices unreasonable. **In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.**<sup>4</sup> Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but HHS’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that HHS use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. American Oversight is available to work with you to craft appropriate search terms. **However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.**

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<sup>2</sup> See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

<sup>3</sup> See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

<sup>4</sup> Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”<sup>5</sup> If it is your position that any portion of the requested records is exempt from disclosure, American Oversight requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”<sup>6</sup> Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”<sup>7</sup> Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”<sup>8</sup>

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.<sup>9</sup> Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

**You should institute a preservation hold on information responsive to this request.** American Oversight intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, HHS is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and HHS can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15<sup>th</sup> Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

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<sup>5</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

<sup>6</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>7</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

<sup>8</sup> *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

<sup>9</sup> *Mead Data Central*, 566 F.2d at 261.

## Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 45 C.F.R. § 5.54, American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way.<sup>10</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<sup>11</sup>

American Oversight requests a waiver of fees because disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding” of government.<sup>12</sup> The records sought by American Oversight’s request could shed light on the inner workings of the legislative process that could shape the public’s view of the health care reform legislation. In particular, the requested records would reveal which members of Congress were engaged on this issue by the Trump administration, what negotiations took place between members of Congress and the Trump administration, whether any promises were made in order to secure votes for the legislation, and whether internal discussions matched the public rhetoric about the bill. Moreover, the importance of this issue is evident from the fact that several Senate Democrats have asked HHS to provide the requested information, to no avail.<sup>13</sup>

This request is primarily and fundamentally for non-commercial purposes.<sup>14</sup> As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight’s financial interest. American Oversight’s mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight will also make materials it gathers available on our public website and promote their availability on social media platforms, such as Facebook and Twitter.<sup>15</sup> One example of American Oversight’s demonstrated public disclosure of documents and creation of editorial content is in its recently launched “Audit the Wall” effort, where the organization is

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<sup>10</sup> 45 C.F.R. § 5.54(a).

<sup>11</sup> 45 C.F.R. § 5.54(a).

<sup>12</sup> 45 C.F.R. § 5.54(b)(1)-(2).

<sup>13</sup> Press Release, *Casey, Wyden, Murray Call on HHS Secretary, Tom Price, to Reveal Details of Backroom Deals Being Made with Republican Senators*, BOB CASEY, U.S. SENATOR FOR PENNSYLVANIA (June 30, 2017), <https://www.casey.senate.gov/newsroom/releases/casey-wyden-murray-call-on-hhs-secretary-tom-price-to-reveal-details-of-backroom-deals-being-made-with-republican-senators>.

<sup>14</sup> 45 C.F.R. § 5.54(b)(3).

<sup>15</sup> American Oversight currently has over 11,100 page likes on Facebook, and over 33,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited July 25, 2017); American Oversight (@weareoversight), TWITTER (last visited July 25, 2017).

gathering and analyzing information and commenting on public releases of information related to the administrations proposed construction of a barrier along the U.S.-Mexico border.

Accordingly, American Oversight qualifies for a fee waiver.

### **Application for Expedited Processing**

Pursuant to 5 U.S.C. § 552(a)(6)(E)(i) and 45 C.F.R. § 5.27(b), American Oversight requests that HHS expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief, that there is an urgent need to inform the public about the federal government activity that is the subject of this request. On May 4, 2017, House Republicans successfully passed their proposal to “repeal and replace” the Affordable Care Act (ACA).<sup>16</sup> The Senate is currently working on passing its own version of the bill. Senate leadership has indicated that they intend to move quickly, pushing for a vote before the August recess,<sup>17</sup> potentially even as early as today.<sup>18</sup> Moreover, the legislative process is proceeding in relative obscurity, with no committee hearings and without even a draft of the bill being made public.<sup>19</sup>

The records sought by American Oversight’s request could shed light on the inner workings of the legislative process that could shape the public’s view of the health care reform legislation. In particular, the requested records would reveal which members of Congress were engaged on this

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<sup>16</sup> See, e.g., MJ Lee, *House Republicans Pass Bill to Replace and Repeal Obamacare*, CNN POLITICS (May 4, 2017, 5:53 PM), <http://www.cnn.com/2017/05/04/politics/health-care-vote/>.

<sup>17</sup> Kelsey Snell et al., *McConnell Delays August Recess to Complete Work on Health-Care Bill, Other Issues*, WASH. POST, July 11, 2017, [https://www.washingtonpost.com/powerpost/mcconnell-delays-august-recess-to-complete-work-on-health-care-bill-other-issues/2017/07/11/1d90e3d2-6647-11e7-9928-22d00a47778f\\_story.html?utm\\_term=.0bc034d98b5d](https://www.washingtonpost.com/powerpost/mcconnell-delays-august-recess-to-complete-work-on-health-care-bill-other-issues/2017/07/11/1d90e3d2-6647-11e7-9928-22d00a47778f_story.html?utm_term=.0bc034d98b5d); Michelle Fox, *The ‘Clock Is Ticking’ on Republican Health-Care Legislation: Analyst*, CNBC, July 24, 2017, <http://www.cnbc.com/2017/07/24/the-clock-is-ticking-on-republican-health-care-legislation-analyst.html>.

<sup>18</sup> MJ Lee et al., *Republican Senators Poised to Vote Today on Health Care. What You Need to Know*, CNN POLITICS, July 25, 2017, <http://www.cnn.com/2017/07/25/politics/senate-poised-to-vote-today-on-health-care/index.html>; Rebecca Shabad, *McCain Returning to Senate for Key Health Care Vote*, CBS NEWS (July 24, 2017, 11:05 PM), <http://www.cbsnews.com/news/john-mccain-to-return-senate-health-care-vote-tuesday/>.

<sup>19</sup> See, e.g., Leigh Ann Caldwell, *Confusion Grips Senate GOP Ahead of Expected Health Care Vote*, NBC NEWS (July 21, 2017, 8:12 AM), <http://www.nbcnews.com/politics/congress/confusion-grips-senate-gop-ahead-expected-health-care-vote-n785066>; Thomas Kaplan & Julie Hirschfeld Davis, *Senate Braces for Health Showdown with McCain on Hand but a Plan Unclear*, N.Y. TIMES, July 24, 2017, <https://www.nytimes.com/2017/07/24/us/politics/senate-health-bill-obamacare-repeal-and-replace-trump-mcconnell.html>; Associated Press, *GOP Health Bill Still a Mystery Before Vote*, DENVER POST, July 24, 2017, <http://www.denverpost.com/2017/07/24/gop-health-bill-mystery/>.

issue by the Trump administration, what negotiations took place between members of Congress and the Trump administration, whether any promises were made in order to secure votes for the legislation, and whether internal discussions matched the public rhetoric about the bill. There is an urgent need for the public to have access to any such communications before the Senate votes on its version of the bill, while there is still time for the public to weigh in on the legislative process. If the bill passed and signed into law before American Oversight and the American public receive the requested records, the usefulness of the records will be substantially diminished, if not destroyed altogether.

Indeed, in litigation on a related FOIA request addressing an analogous request for expedited processing, U.S. District Judge Emmet G. Sullivan agreed with American Oversight that expedition is likely appropriate when the FOIA request relates to a matter of such pressing national concern as health care reform legislation.<sup>20</sup> Judge Sullivan stated:

What else do they need to say? There's a raging health care debate in this country, there's a raging health care debate on Capitol Hill in the House of Representatives, it's now shifted to the [S]enate, it's still raging, and it's going to continue to rage. I think any rational[] person would conclude it's going to continue to - to rage.

...

I don't know what else the plaintiff could have said about reasons for expediting the process other than what they said and what I said.

*Id.* There is a similar urgency to inform the public about the subject matter of this request.

I further certify that American Oversight is primarily engaged in disseminating information to the public. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,<sup>21</sup> American Oversight "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience."<sup>22</sup> American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, and other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.<sup>23</sup> American Oversight has demonstrated its

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<sup>20</sup> See Transcript, Status Conference, *American Oversight v. HHS et al.*, 17-827 (D.D.C. May 25, 2017), ECF No. 13.

<sup>21</sup> See *ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 30–31 (D.D.C. 2004); *EPIC v. Dep't of Defense*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

<sup>22</sup> *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

<sup>23</sup> American Oversight currently has over 11,100 page likes on Facebook, and over 33,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight>

commitment to the public disclosure of documents and creation of editorial content. For example, after receiving records regarding an ethics waiver received by a senior DOJ attorney,<sup>24</sup> American Oversight promptly posted the records to its website and published an analysis of what the records reflected about DOJ's process for ethics waivers.<sup>25</sup> As another example, American Oversight has a project called "Audit the Wall," where the organization is gathering and analyzing information and commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.<sup>26</sup>

Accordingly, American Oversight's request satisfies the criteria for expedition.

### Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Sara Creighton at [foia@americanoversight.org](mailto:foia@americanoversight.org) or (202) 869-5246. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,



Austin R. Evers  
Executive Director  
American Oversight

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(last visited July 25, 2017); American Oversight (@weareoversight), TWITTER (last visited July 25, 2017).

<sup>24</sup> *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco>.

<sup>25</sup> *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents>.

<sup>26</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org).