



August 17, 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)

Hugh Gilmore  
Freedom of Information Officer  
Centers for Medicare & Medicaid Services  
North Building, Room N2-20-06  
7500 Security Boulevard  
Baltimore, MD 21244  
[Hugh.gilmore@cms.hhs.gov](mailto:Hugh.gilmore@cms.hhs.gov)

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

Dear Mr. Marquis and Mr. Gilmore:

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 attempting to repeal and replace 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.

Meanwhile, President Trump has suggested that in the absence of legislative reform, the best path forward might be to let the ACA “implode,” so that Democrats would be motivated to negotiate for a new health care deal.<sup>1</sup> Recent reports suggest that the Trump administration may be actively

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<sup>1</sup> Mike DeBonis et al., *GOP Health-Care Bill: House Republican Leaders Abruptly Pull Their Rewrite of the Nation’s Health-Care Law*, WASH. POST (Mar. 24, 2017, 4:24 PM), [https://www.washingtonpost.com/powerpost/house-leaders-prepare-to-vote-friday-on-health-care-reform/2017/03/24/736f1cd6-1081-11e7-9d5a-a83e627dc120\\_story.html?hpid=hp\\_rhp-banner-main\\_housevote715a-banner%3Ahomepage%2Fstory&utm\\_term=.a8fe3ca41561](https://www.washingtonpost.com/powerpost/house-leaders-prepare-to-vote-friday-on-health-care-reform/2017/03/24/736f1cd6-1081-11e7-9d5a-a83e627dc120_story.html?hpid=hp_rhp-banner-main_housevote715a-banner%3Ahomepage%2Fstory&utm_term=.a8fe3ca41561); Donald Trump (@realDonaldTrump), TWITTER (June 26, 2017, 6:14 AM), <https://twitter.com/realDonaldTrump/status/879326984794517507> (“Republican Senators are



involved in the “implosion” of the ACA; reports further suggest that HHS has been using taxpayer dollars meant to encourage participating in the ACA exchanges to wage a public relations battle against the ACA itself.<sup>2</sup> In particular, the Trump administration has reportedly used funds from the “Consumer Information and Outreach” budget—which were intended to promote the ACA—to produce a series of testimonial videos from individuals who claim to have been harmed by the ACA.<sup>3</sup>

American Oversight seeks records to shed light on how the Trump administration is approaching its obligations to implement the current health care laws.

### **Requested Records**

American Oversight requests that HHS (and its component the Centers for Medicare and Medicaid Services (CMS)) produce the following within twenty business days and seeks expedited review of this request for the reasons identified below:

1. Any of the following records relating to the decision to produce a series of testimonial videos reflecting individuals “burdened by Obamacare,” as seen at <https://www.youtube.com/user/USGOVHHS/>:
  - a. Any decision memoranda relating to the decision;
  - b. Planning documents or implementation plans for the videos;
  - c. Advice or analysis prepared in connection with the decision (including analysis of the legality of the use of appropriate funds to pay for the videos); or
  - d. Any other record documenting the decision, its approval, its legality, or its rationale.
2. Any communications with members of Congress or congressional staff regarding the series of testimonial videos reflecting individuals “burdened by Obamacare,” as seen at <https://www.youtube.com/user/USGOVHHS/>.
3. Any of the following records relating to the decision to advertise against the Affordable Care Act (“ACA,” or “Obamacare”) and/or promote legislative efforts to “repeal and replace” the ACA/Obamacare:
  - a. Decision memoranda relating to any such decision;

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working very hard to get there, with no help from the Democrats. Not easy! Perhaps just let OCare crash & burn!”); Donald Trump (@realDonaldTrump), TWITTER (July 27, 2017, 1:25 AM), <https://twitter.com/realdonaldtrump/status/890820505330212864> (“3 Republicans and 48 Democrats let the American people down. As I said from the beginning, let ObamaCare implode, then deal. Watch!”).

<sup>2</sup> Sam Stein, *Team Trump Used Obamacare Money to Run PR Effort Against It*, DAILY BEAST (July 20, 2017, 1:00 AM), <http://www.thedailybeast.com/team-trump-used-obamacare-money-to-run-ads-against-it>.

<sup>3</sup> See Stein, *supra* note 2; see also *U.S. Department of Health and Human Services - Families Burdened by Obamacare*, YOUTUBE, <https://www.youtube.com/playlist?list=PLr17E8KABz1EifD5BWCrauFUNqrMEKAQ0>.

- b. Planning documents or implementation plans for any such actions;
- c. Advice or analysis prepared in connection with any such decisions (including analysis of the legality of the use of appropriated funds to pay for those efforts)
- d. Any other record documenting any such decision, its approval, its legality, or its rationale.

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>4</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>5</sup>

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<sup>4</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>5</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)).

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>6</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.**

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>7</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>8</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>9</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>10</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

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<sup>6</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>.

<sup>7</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).

<sup>8</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>9</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

<sup>10</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)).

portion of the document is non-exempt, and how the material is dispersed throughout the document.<sup>11</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.

### **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>12</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<sup>13</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 the operations or activities of the government.<sup>14</sup> The Executive Branch of the federal government is tasked with upholding and implementing federal law. More specifically, HHS and CMS are responsible for implementing the nation's current health care laws. Additionally, executive agencies are neither supposed to nor required to use taxpayer funds to lobby in favor of pending legislation. Yet news reports suggest HHS and CMS may have used funds intended to implement current law in order to promote a particular legislative agenda, violating both of those principles. The American people deserve to know how the Trump administration is approaching its obligation to implement the nation's health care laws, and whether the administration is complying with relevant

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<sup>11</sup> *Mead Data Central*, 566 F.2d at 261.

<sup>12</sup> 45 C.F.R. § 5.54(a).

<sup>13</sup> *Id.*

<sup>14</sup> 45 C.F.R. § 5.54(a), (b)(1)-(2).

ethics rules. The importance of this issue is underscored from the fact that several Senate Democrats also recently asked HHS to provide information on this same topic.<sup>15</sup>

This request is primarily and fundamentally for non-commercial purposes.<sup>16</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 uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or 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>17</sup> American Oversight has demonstrated its 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>18</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>19</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>20</sup>

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.

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<sup>15</sup> Sam Stein, *Senate Democrats Demand Info from HHS About Its Anti-Ocare PR Campaign*, DAILY BEAST (July 22, 2017, 12:37 PM), <http://www.thedailybeast.com/senator-democrats-demand-info-from-hhs-about-its-anti-ocare-pr-campaign>.

<sup>16</sup> 45 C.F.R. § 5.54(b)(3).

<sup>17</sup> American Oversight currently has over 11,200 page likes on Facebook, and over 33,600 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Aug. 16, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Aug. 16, 2017).

<sup>18</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>19</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>20</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org).

On July 30, 2017, Senate Republicans failed to garner enough votes to pass their proposal to repeal and replace the ACA.<sup>21</sup> Accordingly, the ACA remains the law of the land for the foreseeable future. However, President Trump has made clear his intention to let Obamacare “implode” so that Democrats will have no choice but to cooperate on a new health care plan.<sup>22</sup> The records sought by American Oversight’s request would shed light on how HHS and CMS view their obligation to implement the current health care system, including by revealing whether and how the Trump administration is taking steps to actively undermining the current health care system. The information American Oversight seeks thus concerns “a matter of a current exigency to the American public.”<sup>23</sup>

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>24</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>25</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>26</sup> American Oversight has demonstrated its 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>27</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>28</sup> As another example, American Oversight has a project called “Audit the Wall,” where the organization is gathering and analyzing information and

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<sup>21</sup> See MJ Lee, *GOP Obamacare Repeal Bill Fails in Dramatic Late-Night Vote*, CNN POLITICS (July 28, 2017, 8:15 AM), <http://www.cnn.com/2017/07/27/politics/health-care-debate-thursday/index.html>.

<sup>22</sup> See *supra* note 1.

<sup>23</sup> *Al-Fayed v. Cent. Intelligence Agency*, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting H.R. Rep. No. 104-795, at 26 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3469).

<sup>24</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>25</sup> *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

<sup>26</sup> American Oversight currently has over 11,200 page likes on Facebook, and over 33,600 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited Aug. 14, 2017); American Oversight (@weareoversight), TWITTER (last visited Aug. 14, 2017).

<sup>27</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>28</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>.

commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.<sup>29</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,

A handwritten signature in blue ink, appearing to read "Austin R. Evers", with a long horizontal flourish extending to the left.

Austin R. Evers  
Executive Director  
American Oversight

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<sup>29</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org).