



June 28, 2017

VIA ELECTRONIC MAIL

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

Re: Freedom of Information Act Request

Dear 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 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.¹

Meanwhile, President Trump has suggested that in the absence of legislative reform, the best path forward might be to let the ACA “explode,” so that Democrats would be motivated to negotiate for a new health care deal.² Simultaneously, there have been numerous reports about plans by the Trump administration to take administrative actions that would affect the operation of the ACA.³

¹ 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-mccconnell-senate-health-care-bill.html?_r=0.

² 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; Donald Trump (@realDonaldTrump), TWITTER (June 26, 2017, 6:14 AM), <https://twitter.com/realDonaldTrump/status/879326984794517507> (“Republican Senators are working very hard to get there, with no help from the Democrats. Not easy! Perhaps just let OCare crash & burn!”).

³ See, e.g., Stephanie Armour, *With GOP Plan Dead, Trump Weighs Other Ways to Reshape Health Care*, WALL ST. J. (Mar. 25, 2017, 1:33 PM), <https://www.wsj.com/articles/with-gop-plan->



As one particularly concerning example, the Trump administration has refused to guarantee that it will continue to pay “cost-sharing reduction payments” to insurance companies to help control costs, despite the government’s legal obligation to do so.⁴ Some insurance companies have cited the uncertainty caused by the administration’s refusal to commit to continuing those payments as the reason for their increasing health insurance premiums or even leaving the ACA insurance exchanges altogether.⁵ And indeed, uncertainty about those payments has been heightened ever since a federal district court judge ruled that the use of a particular permanent appropriation to make those payments was lawful in May 2016.⁶ The Obama administration appealed that ruling, but the Trump administration has sought several stays in the litigation, leaving the fate of future payments up in the air.⁷

[dead-trump-eyes-other-ways-to-reshape-health-care-1490434201](#); Dan Diamond & Josh Dawsey, *Trump Dangles Obamacare Payments to Force Dems to the Table*, POLITICO (Apr. 12, 2017, 8:18 PM), <http://www.politico.com/story/2017/04/donald-trump-obamacare-subsidies-negotiate-237174>; Benjamin Siegel, *Trump Threatens to Undermine Obamacare to Get Democrats to Negotiate*, ABC NEWS (Apr. 12, 2017, 10:03 PM), <http://abcnews.go.com/Politics/trump-threatens-undermine-obamacare-democrats-negotiate/story?id=46764709>.

⁴ See, e.g., Robert King, *Price Dodges On Committing to Obamacare Insurer Payments*, WASH. EXAMINER (June 8, 2017, 10:57 AM), <http://www.washingtonexaminer.com/price-dodges-on-committing-to-obamacare-insurer-payments/article/26253333>; Rachel Roubein, *No Certainty On Cost-Sharing Payments to Insurers*, THE HILL (June 8, 2017, 1:34 PM), <http://thehill.com/policy/healthcare/336974-no-certainty-on-cost-sharing-payments-to-insurers>; Eric Levitz, *Trump’s Attempts to Sabotage Obamacare Are Working*, N.Y. MAG. (June 13, 2017, 10:13 AM), <http://nymag.com/daily/intelligencer/2017/06/trumps-sabotage-of-obamacare-is-working.html>; Russell Berman, *Top Republicans Tell Trump: Make Obamacare Work, For Now*, THE ATLANTIC, June 15, 2017, <https://www.theatlantic.com/politics/archive/2017/06/top-republicans-tell-trump-make-obamacare-work-for-now/530538/>.

⁵ See, e.g., *supra* note 3; Michael Hiltzik, *Trump’s Sabotage of Obamacare Has Just Claimed 10,000 New Victims*, L.A. TIMES, June 6, 2017, <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-anthem-pullout-20170606-story.html>; Sean Colarossi, *Here’s How Trump and the GOP Are Deviously Undercutting Obamacare In Swing States*, POLITICUSUSA (June 19, 2017, 7:39 PM), <http://www.politicususa.com/2017/06/19/trump-gop-deviously-undercutting-obamacare-swing-states.html>.

⁶ Timothy Jost, *Judge Rules Against Administration In Cost-Sharing Reduction Payment Case*, HEALTH AFFAIRS BLOG, May 12, 2016, <http://healthaffairs.org/blog/2016/05/12/judge-blocks-reimbursement-of-insurers-for-aca-cost-sharing-reduction-payments/>;

⁷ See Harris Meyer, *House Republicans Win Delay In Case to End ACA Cost-Sharing Subsidies*, MODERN HEALTHCARE, Dec. 5, 2016, <http://www.modernhealthcare.com/article/20161205/NEWS/161209963>; Timothy Jost, *Parties Ask Court to Keep Cost-Sharing Reduction Payment Litigation On Hold*, HEALTH AFFAIRS BLOG, Feb. 21, 2017, <http://healthaffairs.org/blog/2017/02/21/parties-ask-court-to-keep-cost-sharing-reduction-payment-litigation-on-hold/>; Mara Lee, *Trump Administration Seeks Another Delay in CSR Lawsuit*, MODERN HEALTHCARE, May 22, 2017, <http://www.modernhealthcare.com/article/20170522/NEWS/170529987>;

American Oversight seeks to resolve some of this uncertainty by shedding light on how the Trump administration is approaching its obligations to implement the current health care laws.

Requested Records

American Oversight requests that CMS produce the following within twenty business days:

Any communications or analysis regarding the impact on the health insurance marketplace of the uncertainty introduced by the prospect of potential legislation or regulatory changes to the implementation of the Affordable Care Act (“ACA” or “Obamacare”).

Please provide all responsive records from November 8, 2016, to the date the search is conducted.

The search for responsive records should include all locations and individuals likely to contain responsive records, including at least the CMS Office of the Actuary, the CMS Center for Medicaid and CHIP Services (CMCS), and the CMS Center for Consumer Information and Insurance Oversight (CCIIO).

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.⁸ 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**

⁸ 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).

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.⁹

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 CMS’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.**¹⁰ 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 CMS’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that CMS 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.”¹¹ 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

⁹ 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)).

¹⁰ 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>.

¹¹ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

actually exempt under FOIA.”¹² 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.”¹³ 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.’”¹⁴

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.¹⁵ 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, CMS 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 CMS 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 15th Street, NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on 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

¹² *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹³ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹⁴ *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)).

¹⁵ *Mead Data Central*, 566 F.2d at 261.

better understanding of relevant government procedures by the general public in a significant way.¹⁶ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁷

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 federal government.¹⁸ This request seeks to understand whether HHS—through its component CMS—has conducted any analysis or had discussions about the impact of legislative and regulatory uncertainty on the functioning of the health insurance marketplace. Because government operations may be having an effect on the health care marketplace, the American people deserve to know whether the government has conducted or discussed such analysis and, if so, what the result of that analysis was.

This request is primarily and fundamentally for non-commercial purposes.¹⁹ 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.²⁰ 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,²¹ 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.²² As another example, American Oversight’s 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.²³

Accordingly, American Oversight qualifies for a fee waiver.

¹⁶ 45 C.F.R. § 5.54(a).

¹⁷ 45 C.F.R. § 5.54(a).

¹⁸ 45 C.F.R. § 5.54(b)(1)-(2).

¹⁹ 40 C.F.R. § 2.107(l)(1), (3)(i)-(ii).

²⁰ American Oversight currently has over 10,900 page likes on Facebook, and over 32,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited June 28, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited June 28, 2017).

²¹ *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco>.

²² *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents>.

²³ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

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 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