



November 15, 2018

**VIA ELECTRONIC MAIL**

Michael Marquis  
Freedom of Information Officer  
Department of Health and Human Services  
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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  
[FOIA\\_Request@cms.hhs.gov](mailto:FOIA_Request@cms.hhs.gov)

**Re: Freedom of Information Act Request**

Dear Freedom of Information Act Officers:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations for the Department of Health and Human Services (HHS), 45 C.F.R. Part 5, American Oversight makes the following request for records from HHS and its component, the Centers for Medicare & Medicaid Services (CMS).

On November 7, 2018, CMS released a proposed rule on state-based health insurance exchanges that included a provision requiring insurers offering policies on these exchanges to issue a separate bill to consumers “for only the portion of their premium attributable to abortion coverage.”<sup>1</sup>

American Oversight seeks records to shed light on any outside influences behind this proposed rule, including whether the proposal was influenced by electoral politics or an effort to increase the burden of accessing abortion services.

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<sup>1</sup> CMS, *Fact Sheet for Exchange Program Integrity Proposed Rule*, Nov. 7, 2018, <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/fact-sheetprogramintegrityproposed-final.pdf>.



## Requested records

American Oversight requests that HHS and CMS produce within twenty business days:

All communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, WhatsApp, Signal, or Twitter Direct Messages), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) concerning the creation of any proposed rule to require certain insurers to send consumers a separate bill for abortion coverage, with any person not employed by the U.S. government, including any person using an email address ending in any of the following: .com, .net, .org, .edu, or .mail.

Please produce all responsive records from January 20, 2017, through November 15, 2018.

American Oversight requests that HHS search the following individuals for responsive records:

- a) All political appointees\* in the Immediate Office of the Secretary
- b) All political appointees in the Office of Intergovernmental and External Affairs
- c) All political appointees in the Office of Civil Rights
- d) All political appointees in the Office of Health Reform

American Oversight requests that CMS search the following individuals for responsive records:

- a) All political appointees\* in the Office of the Administrator
- b) All political appointees in the Center for Program Integrity
- c) All political appointees in the Center for Consumer Information & Insurance Oversight
- d) All political appointees in the Office of Legislation
- e) All political appointees in the Office of Equal Opportunity and Civil Rights

\*“Political appointee” should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a non-career SES, any Schedule C employees, or any persons hired under Temporary Non-Career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

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 you 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 are 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 Administration (NARA) Capstone program, or similar policies, now maintain emails in a

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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>.

**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>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

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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) (emphases 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.

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 government operations 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 the operations or activities of the government.”<sup>12</sup> The disclosure of the information sought under this request will document and reveal the activities of the federal government, including the process by which HHS and CMS policy decisions with national implications are reached and implemented. The American people deserve to know the extent to which nongovernmental organizations are influencing internal HHS and CMS policymaking, and whether policy decisions are being made and implemented pursuant to a sound process. The records requested relate directly to CMS’s Exchange Program Integrity Proposed Rule, a part of the administration’s apparent ongoing efforts to limit access to reproductive healthcare options, and external influences on those efforts, subjects of substantial public and media interest.<sup>13</sup> In this case, disclosure of the requested information would contribute to the understanding of a reasonably broad audience of persons interested in the

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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)(i)-(ii).

<sup>13</sup> See, e.g., Dan Diamond, *Trump’s Latest Move to Crack Down on Abortion*, POLITICO (Nov. 8, 2018, 10:00 AM), <https://www.politico.com/newsletters/politico-pulse/2018/11/08/trumps-latest-move-to-crack-down-on-abortion-405449>; Ricardo Alonso-Zaldivar & David Crary, *How the Trump Administration Is Remaking Federal Policy on Women’s Reproductive Health*, PBS (May 30, 2018, 3:08 PM), <https://www.pbs.org/newshour/politics/how-the-trump-administration-is-remaking-federal-policy-on-womens-reproductive-health>; Kimberly Leonard, *Democrats Slam Trump Administration for Conservative Group Input on Planned Parenthood Defunding*, WASH. EXAMINER (Feb. 13, 2018, 7:37 PM), <https://www.washingtonexaminer.com/democrats-slam-trump-administration-for-conservative-group-input-on-planned-parenthood-defunding/article/2649016>; see also, Max Bearak & Carol Morello, *How a Change in U.S. Abortion Policy Reverberated Around the Globe*, WASH. POST, Oct. 10, 2018, [https://www.washingtonpost.com/graphics/2018/world/how-a-change-in-us-abortion-policy-reverberated-around-the-globe/?utm\\_term=.47c5f4180da8](https://www.washingtonpost.com/graphics/2018/world/how-a-change-in-us-abortion-policy-reverberated-around-the-globe/?utm_term=.47c5f4180da8).

subject. And, as described in more detail below, American Oversight’s website and social media accounts demonstrate its ability and intention to effectively convey information to the public.

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 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>15</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>16</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>17</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>18</sup>

Accordingly, American Oversight qualifies for a fee waiver.

## **Conclusion**

We share a common mission to promote transparency in government. American Oversight looks forward to working with HHS 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 Katherine Anthony at foia@americanoversight.org or 202-897-3918. Also, if American Oversight’s

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<sup>14</sup> 45 C.F.R. § 5.54(b)(3)(i)-(ii).

<sup>15</sup> American Oversight currently has over 11,800 page likes on Facebook, and 45,800 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Nov. 14, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Nov. 14, 2018).

<sup>16</sup> *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

<sup>17</sup> *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

<sup>18</sup> *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

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