AMERICAN OVERSIGHT

February 8, 2019

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
FOIA_Request@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, 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.

On January 18, 2019, the Administrator of the Centers for Medicare and Medicaid Services (CMS) approved the state of Arizona's waiver for a Medicaid work requirement.[1] Since CMS issued new policy guidance allowing states to implement work requirements in January 2018, Arizona became the eighth state to receive such an approval.[2] Previously, on August 23, 2018, Representatives Elijah Cummings and Raja Krishnamoorthi wrote to HHS Secretary Alex Azar and CMS Administrator Seema Verma seeking information concerning the impact of the then-proposed work requirements.[3] Receiving no documents or information in response to their

[1] Ltr. from Seema Verma, Administrator, CMS, to Jami Snyder, Director, Arizona Health Care Cost Containment System, Jan. 18, 2019, https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/az/az-hccc-ca.pdf.

[2] Press Release, *CMS Announces New Policy Guidance for States to Test Community Engagement for Able-bodied Adults*, CENTERS FOR MEDICARE & MEDICAID SERVICES, Jan. 11, 2018, https://www.cms.gov/newsroom/press-releases/cms-announces-new-policy-guidance-states-test-community-engagement-able-bodied-adults; *Work Requirement Waivers: Approved and Pending*, KAISER FAMILY FOUNDATION, Jan. 23, 2019, https://www.kff.org/medicaid/issue-brief/medicaid-waiver-tracker-approved-and-pending-section-1115-waivers-by-state/.

[3] Ltr. from Ranking Member Elijah E. Cummings, House Comm. on Oversight & Gov't Reform, & Ranking Member Raja Krishnamoorthi, Subcomm. on Health Care, Benefits, & Admin. Rules, to Sec. Alex M. Azar, Dep't of Health & Human Servs., & Administrator Seema Verma, Centers

request, on September 20, 2018, they wrote to Representative Trey Gowdy, Chairman of the House Committee on Oversight and Government Reform, asking him to issue a subpoena for the records.[4]

American Oversight seeks records with the potential to shed light on whether and to what extent stakeholders outside the federal government influenced CMS's policy guidance concerning Medicaid work requirements.

Requested Records

American Oversight requests that CMS produce the following 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, or WhatsApp), calendar invitations, letters, or memoranda) related to any current, pending, or contemplated Section 1115 demonstration waivers and/or the Medicaid work requirement exchanged between any person listed in Column A and person representing the state governments listed in Column B:

Column A: CMS Officials	Column B: Officials representing the following states
• Seema Verma, Administrator • Paul Mango, Chief Principal Deputy Administrator and Chief of Staff • Brady Brookes, Deputy Administrator and Deputy Chief of Staff • Demetrios Kouzoukas, Principal Deputy Administrator for Medicare and Director, Center for Medicare • Jennifer Main, Chief Operating Officer • Chris Traylor, Acting Deputy Administrator and Director, Center for Medicaid and CHIP Services	a) Arkansas b) Indiana c) Kentucky d) Maine e) Michigan f) New Hampshire g) Wisconsin h) Alabama i) Arizona j) Mississippi k) Ohio l) Oklahoma

for Medicare and Medicaid Services, Aug. 23, 2018, https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2018-08-23.EEC%20Krishnamoorthi%20to%20Azar-HHS,%20Verma-CMS%20re%20Medicaid%20Work%20Requirements.pdf.

[4] Ltr. from Ranking Member Elijah E. Cummings, House Comm. on Oversight & Gov't Reform, & Ranking Member Raja Krishnamoorthi, Subcomm. on Health Care, Benefits, & Admin. Rules, to Chairman Trey Gowdy, House Comm. on Oversight & Gov't Reform, Sept. 20, 2018, https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2018-09-20.EEC%20Krishnamoorthi%20to%20Gowdy-OGR%20re%20Medicaid%20Subpoena%20Request.pdf.

	m) South Dakota n) Tennessee o) Utah p) Virginia

Please provide all responsive records from January 1, 2018, through the date of the search.

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 CMS 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 are subject to the Federal Records Act and FOIA.[5] **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.**[6]

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[5] *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).

[6] *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

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.**[7] **Furthermore, agencies that have adopted the National Archives and Records Administration (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."[8] 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."[9] 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."[10] 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.'"[11]

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related email in the [personal] account was duplicated in [the official's] work email account." (citations omitted)).

[7] 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.

[8] FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).

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

[10] *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223—24 (D.C. Cir. 1987) (emphases in original).

[11] *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)).

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.[12] 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 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.[13] Moreover, the request is primarily and fundamentally for non-commercial purposes.[14]

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."[15] The disclosure of the information sought under this request will document and reveal the activities of the federal government, including the process by which CMS policy decisions with national implications are reached, implemented, and managed. Moreover, there has been significant public interest related to healthcare reform, including concerns regarding the potential impact of Medicaid work requirements on healthcare access for

[12] *Mead Data Central*, 566 F.2d at 261.
[13] 45 C.F.R. § 5.54(a).
[14] *Id.*
[15] 45 C.F.R. § 5.54(b)(1), (2)(i)-(ii).

vulnerable Americans.[16] This request goes directly to federal government operations and activities related to such concerns, and the requested records will significantly increase the general public's understanding of the process by which CMS issued its policy guidance, as well as the potential impact of Medicaid work requirements.

This request is primarily and fundamentally for non-commercial purposes.[17] 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.[18] 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,[19] American Oversight promptly posted the records to its website and

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[16] *See, e.g.*, Noam N. Levey, *In Rush to Revamp Medicaid, Trump Officials Bend Rules that Protect Patients*, L.A. TIMES (Feb. 6, 2019, 11:10 AM), https://www.latimes.com/politics/la-na-pol-trump-medicaid-reforms-20180206-story.html; Megan Banta & Carol Thompson, *Report: Work Requirements Could Cause up to 183,000 Healthy Michigan Recipients to Lose Coverage*, LANSING STATE J. (Feb. 6, 2019, 12:39 PM), https://www.lansingstatejournal.com/story/news/local/2019/02/06/medicaid-healthy-michigan-plan/2788952002/; Pamela Herd & Donald Moynihan, *The Crux of Republican Policy: Make Public Services Harder to Use*, WASH. POST, Jan. 28, 2019, https://www.washingtonpost.com/opinions/the-crux-of-republican-policy-make-public-services-harder-to-use/2019/01/28/9e9d4b94-1f66-11e9-8e21-59a09ff1e2a1_story.html?utm_term=.80b4655ef062; Dylan Scott, *16,932 People Have Lost Medicaid Coverage Under Arkansas's Work Requirements*, VOX (Dec. 18, 2018, 10:50 AM), https://www.vox.com/policy-and-politics/2018/12/18/18146261/arkansas-medicaid-work-requirements-enrollment; Rachel Garfield *et al.*, *Implications of Work Requirements in Medicaid: What Does the Data Say?*, KAISER FAMILY FOUNDATION, June 12, 2018, https://www.kff.org/medicaid/issue-brief/implications-of-work-requirements-in-medicaid-what-does-the-data-say/.

[17] 45 C.F.R. § 5.54(b)(3)(i)-(ii).

[18] American Oversight currently has approximately 12,100 page likes on Facebook, and 49,800 followers on Twitter. American Oversight, FACEBOOK, https://www.facebook.com/weareoversight/ (last visited Feb. 8, 2019); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited Feb. 8, 2019).

[19] *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance.

published an analysis of what the records reflected about DOJ's process for ethics waivers.[20] 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.[21]

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 CMS 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 202.873.3918. 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

[20] *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.
[21] *Audit the Wall*, AMERICAN OVERSIGHT, https://www.americanoversight.org/investigation/audit-the-wall.