



April 2, 2020

VIA EMAIL

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: Expedited Freedom of Information Act Request**

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of your agency, 45 C.F.R Part 5, American Oversight makes the following request for records.

The outbreak of the novel coronavirus, SARS-CoV-2, and the disease it causes, COVID-19, has been declared a public health emergency at both the national and international levels.<sup>1</sup> Since late 2019, the virus has spread to dozens of countries, sickened hundreds of thousands of people, and resulted in tens of thousands of deaths.<sup>2</sup> This is a rapidly evolving situation that is demanding coordinated attention and action across the federal government. After recently stating that they were considering opening enrollment for healthcare coverage during the coronavirus outbreak, the Trump administration this week stated that the federal enrollment site HealthCare.gov would not be reopened.<sup>3</sup>

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<sup>1</sup> *Coronavirus Disease 2019 (COVID-19) Situation Summary*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/summary.html>.

<sup>2</sup> *Coronavirus Map: Tracking the Global Outbreak*, N.Y. TIMES (Apr. 1, 2020, 8:14 AM) <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html>.

<sup>3</sup> Susannah Luthi, *Trump Rejects Obamacare Special Enrollment Period Amid Pandemic*, POLITICO (Mar. 31, 2020, 5:19 PM) <https://www.politico.com/news/2020/03/31/trump-obamacare-coronavirus-157788>.



Meanwhile, millions of Americans are about to lose workplace healthcare coverage<sup>4</sup> and hundreds of thousands of Americans are expected to die during the coronavirus outbreak.<sup>5</sup>

American Oversight seeks to shed light on the administration's decision to not launch healthcare enrollment during a national public health emergency.

### **Requested Records**

American Oversight seeks expedited review of this request for the reasons identified below and requests that your agency produce the following records as soon as practicable, and at least within twenty business days:

The directive/s or guidance from the White House (including coronavirus task force, led by Vice President Pence, or any other senior White House officials) to not reopen HealthCare.gov for a special enrollment period, as reported by *Politico*.<sup>6</sup>

Please search for responsive records from March 1, 2020, through the date of the search.

Given that this request seeks a specific, recent, readily-identifiable record, American Oversight expects that this request can be processed on the Simple processing track in a prompt manner, in addition to warranting expedited processing.

### **Fee Waiver Request**

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency's regulations, 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. Moreover, the request is primarily and fundamentally for non-commercial purposes.

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

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<sup>4</sup> Wendell Potter, *Millions of Americans Are About to Lose Their Health Insurance in a Pandemic*, THE GUARDIAN (Mar. 27, 2020, 6:26 PM), <https://www.theguardian.com/commentisfree/2020/mar/27/coronavirus-pandemic-americans-health-insurance>.

<sup>5</sup> *Coronavirus Live Updates: White House Projects Grim Toll from Coronavirus*, N.Y. TIMES, Mar. 31, 2020, <https://www.nytimes.com/2020/03/31/world/coronavirus-live-news-updates.html>.

<sup>6</sup> Luthi, *supra* note 3.

public understanding of operations or activities of the government.”<sup>7</sup> The public has a significant interest in the federal government’s response to the coronavirus. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including the role of federal agencies in taking action to mitigate the spread of the disease and to assist states in responding to it.<sup>8</sup> American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available, and the public’s understanding of the government’s activities would be enhanced through American Oversight’s analysis and publication of these records.

This request is primarily and fundamentally for non-commercial purposes.<sup>9</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>10</sup>

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through numerous substantive analyses posted to its website.<sup>11</sup> Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to an ethics waiver received by a senior Department of Justice attorney and an analysis of what those records demonstrated regarding the Department’s process for issuing such waivers;<sup>12</sup> posting records received as part of American Oversight’s “Audit the Wall” project to gather and analyze information related to the administration’s proposed construction of a barrier along the U.S.-Mexico border, and analyses of what those records

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<sup>7</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>8</sup> Potter, *supra* note 4.

<sup>9</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>10</sup> American Oversight currently has approximately 15,500 page likes on Facebook and 102,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Apr. 1, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Apr. 1, 2020).

<sup>11</sup> News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

<sup>12</sup> DOJ Records Relating to Solicitor General Noel Francisco’s Recusal, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; 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>.

reveal;<sup>13</sup> posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;<sup>14</sup> posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;<sup>15</sup> posting records and analysis regarding the Department of Justice's decision in response to demands from Congress to direct a U.S. Attorney to undertake a wide-ranging review and make recommendations regarding criminal investigations relating to the President's political opponents and allegations of misconduct by the Department of Justice itself and the Federal Bureau of Investigation.<sup>16</sup>

Accordingly, American Oversight qualifies for a fee waiver.

### **Application for Expedited Processing**

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1), American Oversight requests that your agency expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief that the information requested is urgently needed in order to inform the public concerning actual or alleged government activity, and American Oversight is primarily engaged in disseminating the information it receives from public records requests to the public.

Recent reporting demonstrates that there is clearly an urgent need to inform the public regarding the matters that are the subject of American Oversight's FOIA request. First, American Oversight has requested records with the potential to shed light on the steps the administration has undertaken to manage a public health emergency at both national and international levels. Because the virus has spread rapidly and has already killed thousands of people in the United States,<sup>17</sup> there is plainly an urgent need to inform the public about the actions that the government has taken to mitigate the spread and assist in treating the ongoing cases. The exceptionally widespread news reporting on this virus demonstrates

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<sup>13</sup> See generally *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; see, e.g., *Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>.

<sup>14</sup> *Documents Reveal Ben Carson Jr.'s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>.

<sup>15</sup> *Investigating the Trump Administration's Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>.

<sup>16</sup> *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

<sup>17</sup> *Coronavirus Live Updates*, *supra* note 2.

that the public urgently needs information concerning the subject matter of this request.<sup>18</sup> In particular, this request will shed light on the decision to not open enrollment in healthcare coverage to millions of Americans who are about to lose workplace coverage and the uninsured who now face the outbreak of a pandemic that the White House projects will claim hundreds of thousands of American lives.

Moreover, 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's response to the coronavirus outbreak. American Oversight's request seeks information that can shed light on the role that top government officials have played in the crisis—including the extent to which they have decided to take or forgo steps critical to ensuring Americans receive healthcare coverage. The public urgently needs the information to understand the extent of the federal government's efforts to address this health crisis and how the federal government is responding to healthcare gaps nationwide in the midst of a public health emergency.

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>19</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>20</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>21</sup> As discussed previously, American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content.<sup>22</sup>

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<sup>18</sup> *Id.*; Adam Taylor et al., *Live Updates: U.S. coronavirus death toll rises; cruise held off Calif. coast after passengers show symptoms*, WASH. POST (Apr. 2, 2020, 2:38 PM), <https://www.washingtonpost.com/world/2020/03/04/coronavirus-live-updates/>; *Coronavirus live updates: Democratic Convention Postponed to August; California Cases Reach 10,000, More Than 200 Deaths*, L.A. TIMES (Apr. 2, 2020, 9:23 AM), <https://www.latimes.com/california/liveblog/coronavirus-live-updates-thursday-april-2>; Ben Westcott, et al., *Live Updates: Coronavirus pandemic alters life as we know it*, CNN (Apr. 2, 2020, 2:20 PM) <https://www.cnn.com/world/live-news/coronavirus-pandemic-04-02-20-intl/index.html>.

<sup>19</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>20</sup> *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

<sup>21</sup> See *supra* note 10.

<sup>22</sup> See generally *News*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>; see, e.g., *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT,

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

### **Guidance Regarding the Search & Processing of Requested Records**

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have 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.
- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal

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<https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *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>; *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; *Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>; *Documents Reveal Ben Carson Jr.'s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>; *Investigating the Trump Administration's Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>; *Sessions' Letter Shows DOJ Acted On Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

Records Act and FOIA.<sup>23</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, by intent or through negligence, failed to meet their obligations.<sup>24</sup>

- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to government-wide requirements to manage agency information electronically,<sup>25</sup> and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency’s archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- 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 a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

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<sup>23</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>24</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).

<sup>25</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>.

## Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. 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 your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF 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.

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, please contact Christine Monahan at [foia@americanoversight.org](mailto:foia@americanoversight.org) or 202.869.5244. Also, if American Oversight's request for expedition is not granted or its 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