

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,
1030 15th Street NW, B255
Washington, DC 20005

Plaintiff,

v.

Case No. 18-cv-549

U.S. DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
200 Independence Avenue SW
Washington, DC 20201

and

CENTERS FOR MEDICARE AND
MEDICAID SERVICES,
7500 Security Boulevard
Baltimore, MD 21244

Defendants.

COMPLAINT

1. Plaintiff American Oversight brings this action against the U.S. Department of Health and Human Services and the Centers for Medicare and Medicaid Services under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because Defendant the U.S. Department of Health and Human Services has failed to comply with the applicable time-limit provisions of FOIA, American Oversight is deemed to have constructively exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining the agency from continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff American Oversight is a nonpartisan, non-profit section 501(c)(3) organization committed to the promotion of transparency in government, the education of the public about government activities, and ensuring the accountability of government officials. Through research and FOIA requests, American Oversight uses the information it gathers, and its analysis of it, to educate the public about the activities and operations of the federal government through reports, published analyses, press releases, and other media. The organization is incorporated under the laws of the District of Columbia.

6. Defendant the U.S. Department of Health and Human Services (HHS) is a department of the executive branch of the U.S. government headquartered in Washington, DC, and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). HHS has possession, custody, and control of the records that American Oversight seeks.

7. Defendant the Centers for Medicare and Medicaid Services (CMS) is an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1) headquartered in Baltimore, MD. CMS has possession, custody, and control of the records that American Oversight seeks.

STATEMENT OF FACTS

8. On August 17, 2017, American Oversight submitted five FOIA requests to CMS regarding potential conflicts of interest by CMS Administrator Seema Verma.

9. On January 26, 2018, American Oversight submitted updated versions of four of those five FOIA requests to extend the date range of the records covered by each request.

Waivers and Recusals FOIAs

10. On August 17, 2017, American Oversight submitted a FOIA request to CMS seeking the following records:

- 1) Records reflecting any recusal determinations made or issued for Seema Verma, CMS Administrator.
- 2) Records reflecting any conflicts or ethics waivers or authorizations issued for Seema Verma, including authorizations pursuant to 5 C.F.R. § 2635.502.

11. On October 24, 2017, CMS notified American Oversight that it had assigned the first Waivers and Recusals FOIA tracking number 091920177083.

12. On January 26, 2018, American Oversight submitted a second request for identical records in order to capture records created after the date of the search for records responsive to the first request.

13. On January 29, 2018, CMS notified American Oversight that it had assigned the second Waivers and Recusals FOIA tracking number 012620187041.

14. American Oversight has not received any further communication from CMS regarding either of the Waivers and Recusals FOIAs.

Dennis Smith FOIA

15. On August 17, 2017, American Oversight submitted a FOIA request to CMS seeking the following records:

All records reflecting communications (including emails, telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, or other materials) between CMS Administrator Seema Verma (or anyone acting on her behalf) and Dennis Smith of the Arkansas Department of Human Services (or anyone acting on his behalf).

16. On September 29, 2017, CMS notified American Oversight that it had assigned the Dennis Smith FOIA tracking number 091920177081.

17. American Oversight has not received any further communication from CMS regarding the Dennis Smith FOIA.

Medicaid Waiver Applications FOIAs

18. On August 17, 2017, American Oversight submitted a FOIA request to CMS seeking the following records:

All records reflecting any involvement by Seema Verma in the pending Medicaid waiver applications by Kentucky, Indiana, and Iowa.

19. On October 18, 2017, CMS notified American Oversight that it had assigned the first Medicaid Waiver Applications FOIA tracking number 091920177096.

20. On October 24, 2017, CMS informed American Oversight that it had initiated a search for records responsive to the first Medicaid Waiver Applications FOIA.

21. On January 26, 2018, American Oversight submitted an updated version of the Medicaid Waiver Applications FOIA in order to capture records created after the date of the search for records responsive to the first request and to add the state of Arkansas.

22. On February 1, 2018, American Oversight received an email from CMS acknowledging receipt of the second Medicaid Waiver Applications FOIA, but the email did not contain a tracking number for the request.

23. American Oversight has not received any further communication from CMS regarding either of the Medicaid Waiver Application FOIAs.

State Communications FOIAs

24. On August 17, 2017, American Oversight submitted a FOIA request to CMS seeking the following records:

All emails between CMS Administrator Seema Verma (or anyone acting on her behalf) and anyone acting on behalf of the states of Arkansas, Indiana, Iowa, Kentucky, Ohio, South Carolina, or Virginia.

The search for responsive records should include at least all emails containing the official state government domains:

- Arkansas: arkansas.gov
- Indiana: in.gov, isdh.in.gov
- Iowa: iowa.gov;
- Kentucky: kentucky.gov, chfs.ky.gov, ky.gov
- Ohio: ohio.gov, odh.ohio.gov, medicaid.ohio.gov
- South Carolina: sc.gov, scdhhs.gov
- Virginia: virginia.gov, vdh.virginia.gov, dmas.virginia.gov

Additionally, if CMS is aware of any other entities acting on behalf of the states listed above (e.g., consultants), the search should include communications with those entities as well.

25. On September 29, 2017, CMS notified American Oversight that it had assigned the first State Communications FOIA tracking number 091920177095.

26. On January 26, 2018, American Oversight submitted a second request for identical records in order to capture records created after the date of the search for records responsive to the first request.

27. On January 29, 2018, CMS notified American Oversight that it had assigned the second State Communications FOIA tracking number 012620187046.

28. American Oversight has not received any further communication from CMS regarding either of the State Communications FOIAs.

SVC/HMA Communications FOIAs

29. On August 17, 2017, American Oversight submitted a FOIA request to CMS seeking the following records:

All records reflecting any communications between Seema Verma (or anyone acting on her behalf) and any of the following entities:

- SVC Inc. (@svcinc.org)
- HMA Medicaid Market Solutions (HMA MMS) (@hmamedicaidmarketsolutions.com)
- Health Management Associates (HMA) (@healthmanagement.com)

30. On January 26, 2018, American Oversight submitted a second request for identical records in order to capture records created after the date of the search for records responsive to the first request.

31. On January 31, 2018, CMS notified American Oversight that it had assigned the first SVC/HMA Communications FOIA tracking number 012320187043.

32. American Oversight has received no further communication from CMS regarding either of the SVC/HMA Communications FOIAs.

Exhaustion of Administrative Remedies

33. As of the date of this Complaint, CMS has failed to (a) notify American Oversight of a final determination regarding any of the FOIA requests, including the scope of any responsive records CMS intends to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

34. Through Defendants' failure to respond to American Oversight's FOIA requests within the time period required by law, American Oversight has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I

Violation of FOIA, 5 U.S.C. § 552

Failure to Conduct Adequate Searches for Responsive Records

35. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

36. American Oversight properly requested records within the possession, custody, and control of Defendants.

37. HHS is an agency subject to FOIA, and its component CMS must therefore make reasonable efforts to search for requested records.

38. CMS has failed to promptly review agency records for the purpose of locating those records that are responsive to American Oversight's FOIA requests.

39. CMS's failure to conduct adequate searches for responsive records violates FOIA.

40. Plaintiff American Oversight is therefore entitled to declaratory and injunctive relief requiring CMS to promptly make reasonable efforts to search for records responsive to American Oversight's FOIA requests.

COUNT II

Violation of FOIA, 5 U.S.C. § 552

Wrongful Withholding of Non-Exempt Records

41. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

42. American Oversight properly requested records within the possession, custody, and control of Defendants.

43. HHS is an agency subject to FOIA, and its component CMS must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

44. CMS is wrongfully withholding non-exempt agency records requested by American Oversight by failing to produce records responsive to its FOIA requests.

45. CMS is wrongfully withholding non-exempt agency records requested by American Oversight by failing to segregate exempt information in otherwise non-exempt records responsive to American Oversight's FOIA requests.

46. CMS's failure to provide all non-exempt responsive records violates FOIA.

47. Plaintiff American Oversight is therefore entitled to declaratory and injunctive relief requiring CMS to promptly produce all non-exempt records responsive to its FOIA requests and provide an index justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, American Oversight respectfully requests the Court to:

- (1) Order Defendants to conduct a search or searches reasonably calculated to uncover all records responsive to American Oversight's FOIA requests;
- (2) Order Defendants to produce, by such date as the Court deems appropriate, any and all non-exempt records responsive to American Oversight's FOIA requests and an index justifying the withholding of any responsive records withheld under claim of exemption;
- (3) Enjoin Defendants from continuing to withhold any and all non-exempt records responsive to American Oversight's FOIA requests;
- (4) Award American Oversight attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (5) Grant American Oversight such other relief as the Court deems just and proper.

Dated: March 9, 2018

Respectfully submitted,

/s/ Sara Kaiser Creighton

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/s/ Austin R. Evers

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