



April 7, 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  
[FOIA\\_Request@cms.hhs.gov](mailto: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 *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.

Shortly after President Trump took office, there were reports that the new administration was placing restrictions on how employees of certain federal agencies—including HHS—could communicate with the public.<sup>1</sup> More recently, it has been reported that federal agencies in the Trump administration have not been responding to congressional requests for information.<sup>2</sup> American Oversight seeks to promote transparency in government, which depends upon open and honest disclosure of information to the public. We therefore seek information about any recent guidance or directives regarding disclosure of information by federal agencies.

**Requested Records**

American Oversight requests that the Centers for Medicare and Medicaid Services (CMS) produce the following within twenty business days:

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<sup>1</sup> See, e.g., Juliet Eilperin & Brady Dennis, *Federal Agencies Ordered to Restrict Their Communications*, WASH. POST, Jan. 24, 2017, [https://www.washingtonpost.com/politics/federal-agencies-ordered-to-restrict-their-communications/2017/01/24/9daa6aa4-e26f-11e6-ba11-63c4b4fb5a63\\_story.html?utm\\_term=.7e542a9cb52a](https://www.washingtonpost.com/politics/federal-agencies-ordered-to-restrict-their-communications/2017/01/24/9daa6aa4-e26f-11e6-ba11-63c4b4fb5a63_story.html?utm_term=.7e542a9cb52a); Coral Davenport, *Federal Agencies Told to Halt External Communications*, N.Y. TIMES, Jan. 25, 2017, <https://www.nytimes.com/2017/01/25/us/politics/some-agencies-told-to-halt-communications-as-trump-administration-moves-in.html>.

<sup>2</sup> Justin Elliott, *How the Trump Administration Responds to Democrats' Demands for Information: It Doesn't*, PROPUBLICA (Mar. 30, 2017, 11:12 AM), [https://www.propublica.org/article/how-the-trump-administration-responds-to-democrats-demands-for-information?utm\\_source=pardot&utm\\_medium=email&utm\\_campaign=dailynewsletter](https://www.propublica.org/article/how-the-trump-administration-responds-to-democrats-demands-for-information?utm_source=pardot&utm_medium=email&utm_campaign=dailynewsletter).



1. Any memoranda, policies, rules, protocols, restrictions, directives, guidance, or other guidelines addressing the provision of information to representatives of the press or media by employees of CMS (including but not limited to responses to requests for information or other communication). This request includes any such directives or guidance issued internally by CMS or issued to CMS by the White House or any other office.
2. Any memoranda, policies, rules, protocols, restrictions, directives, guidance, or other guidelines addressing the provision of information to Congress, including members or staff, by employees of CMS (including but not limited to responses to requests for information or other communication). This request includes any such directives or guidance issued internally by CMS or issued to CMS by the White House or any other office.

Please provide all responsive records from January 20, 2017, through the date the search is conducted. This request includes any such directives or guidance issued by or to employees of the CMS Office of the Actuary, the Center for Medicaid and CHIP Services (CMCS), or any other office within CMS.

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.**

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>3</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>4</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>5</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>6</sup>

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<sup>3</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

<sup>4</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>5</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

<sup>6</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)).

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>7</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 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 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 relevant government procedures by the general public in a significant way.<sup>8</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<sup>9</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 government operations or activities.<sup>10</sup> Transparency in government is essential to a functioning democracy. Similarly, our democratic system of checks and balances depends on Congress being able to get information about the activities of the Executive branch of government. If federal agencies have issued any guidance or directives regarding whether and how they should disclose information to the press or in response to congressional inquiries—or if the White House has issued such guidance to the agencies—it is essential for the public to know so that it can utilize other tools (such as Freedom of Information Act requests) to solicit information from those agencies.

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<sup>7</sup> *Mead Data Central*, 566 F.2d at 261.

<sup>8</sup> 45 C.F.R. § 5.54(b).

<sup>9</sup> 45 C.F.R. § 5.54(b).

<sup>10</sup> 45 C.F.R. § 5.54(b)(1), (2)(i)-(ii).

Among other things, such directives could improperly chill whistleblowers from coming forward, which is of critical importance.

This request is primarily and fundamentally for non-commercial purposes.<sup>11</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 will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight will also make materials it gathers available on our public website and promote their availability on social media platforms, such as Facebook and Twitter.<sup>12</sup> One example of American Oversight's demonstrated public disclosure of documents and creation of editorial content is in its recently launched "Audit the Wall" effort, 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>13</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 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](mailto: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

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<sup>11</sup> 45 C.F.R. § 5.54(b)(3)(i)-(ii).

<sup>12</sup> American Oversight currently has over 10,400 page likes on Facebook, and over 11,000 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Apr. 7, 2017); American Oversight (@weareoversight), TWITTER (last visited Apr. 7, 2017).

<sup>13</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org).