



March 17, 2017

VIA ELECTRONIC MAIL

Michael Marquis
Freedom of Information Officer
Department of Health and Human Services
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue SW
Washington, DC 20201
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
hugh.gilmore@cms.hhs.gov

Re: Expedited Freedom of Information Act Request

Dear Mr. Marquis and 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.

On Monday, March 6, 2017, Republicans in the House of Representatives introduced the American Health Care Act (AHCA).¹ Since the release of the two bills that constitute the AHCA, numerous groups have raised concerns about the proposal, including members of Congress from both major parties, as well as major associations representing physicians, hospitals, and insurers.² This raises serious questions about whether adequate internal analysis of the bill was conducted prior to its introduction. More recently, the Congressional Budget Office (CBO) released its score

¹ Amy Goldstein et al., *House Republicans Release Long-Awaited Plan to Replace Obamacare*, WASH. POST (Mar. 6, 2017), https://www.washingtonpost.com/powerpost/new-details-emerge-on-gop-plans-to-repeal-and-replace-obamacare/2017/03/06/04751e3e-028f-11e7-ad5b-d22680e18d10_story.html?utm_term=.b934c16fb899.

² See Juliet Eilperin & Mike DeBonis, *Doctors, Hospitals, and Insurers Oppose Republican Health Plan*, WASH. POST, Mar. 8, 2017, https://www.washingtonpost.com/powerpost/doctors-hospitals-and-insurers-oppose-republican-health-plan/2017/03/08/d9f0f5c2-0426-11e7-ad5b-d22680e18d10_story.html?hpid=hp_hp-top-table-main_obamacareprint858pm:homepage/story&utm_term=.908e8e15b9dd.



for the bill and concluded that while the proposal would reduce the federal deficit over the next decade, it would also result in significantly lower rates of insurance coverage among the population.³ Additionally, it has been reported that the White House conducted internal analyses regarding the expected impact of the AHCA.⁴ American Oversight is requesting records related to the administration's understanding of the likely financial and coverage-related effects of its health care reform legislation.

Requested Records

American Oversight requests that HHS produce the following within twenty business days and seeks expedited review of this request for the reasons identified below:

1. All documents reflecting any analysis of the estimated costs or budgetary impact of the AHCA or other health care reform legislation considered since January 20, 2017, conducted by HHS, including by the Centers for Medicare and Medicaid Services (CMS) and/or its Office of the Actuary.
2. All directives or guidance to CMS regarding whether and how to conduct analysis of the estimated costs or budgetary impact of the AHCA or other health care reform legislation considered since January 20, 2017.
3. All documents reflecting any analysis by HHS, including by CMS and/or its Office of the Actuary, of the likely effect of the AHCA or other health care reform legislation considered since January 20, 2017, on either expected health care insurance premiums or rates of insurance coverage within the population.
4. All directives or guidance to CMS regarding whether and how to conduct analysis of the likely effect of the AHCA or other health care reform legislation considered since January 20, 2017, on either expected health care insurance premiums or rates of insurance coverage within the population.
5. All communications with the CBO relating to the scoring of the AHCA or other health care reform legislation by the CBO, both in advance of and after the CBO released its report.
6. All communications by any political appointees within HHS relating to the scoring of the AHCA or other health care reform legislation by the CBO, both in advance of and

³ Thomas Kaplan & Robert Pear, *Health Bill Would Add 24 Million Uninsured but Save \$337 Billion, Report Says*, N.Y. TIMES, Mar. 13, 2017, <https://www.nytimes.com/2017/03/13/us/politics/affordable-care-act-health-congressional-budget-office.html>.

⁴ Paul Demko, *White House Analysis of Obamacare Repeal Sees Even Deeper Insurance Losses than CBO*, POLITICO (Mar. 13, 2017, 9:38 PM), <http://www.politico.com/story/2017/03/obamacare-uninsured-white-house-236019>.

after the CBO released its report. For purposes of this request, please consider “political appointees” to include Secretary Price, CMS Administrator Seema Verma, former Acting CMS Administrator Patrick Conway, and any other employee in a PAS position, a presidentially-appointed position, a non-career SES position, or a Schedule C position.

Please provide all responsive records from January 20, 2017, to the date the search is conducted.

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 your agency 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 is 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

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-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

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.⁷ Furthermore, agencies that have adopted the National Archives and Records Agency (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 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.”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

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

⁷ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), *available at* <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), *available at* <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) (emphasis 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)).

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, 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 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 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 public understanding of those operations.¹³ Moreover, the request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii).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 government operations and “is not primarily in the commercial interest of the requester.”¹⁵ The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how officials conduct the public’s business.

As required by HHS’s regulations at 45 C.F.R. § 5.54(b)(1)-(2), the subject of the requested records clearly and directly “concern[s] identifiable operations or activities of the Federal Government,” and the disclosure of the requested information would meaningfully inform the understanding of a reasonably broad audience of persons regarding these aspects of the operation of the federal government. During his campaign and after taking office, President Trump

¹² *Mead Data Central*, 566 F.2d at 261.

¹³ 45 C.F.R. § 5.54(b)(1)-(2).

¹⁴ 45 C.F.R. § 5.54(b)(3); see, e.g., *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

¹⁵ 5 U.S.C. § 552(a)(4)(A)(iii); 45 C.F.R. § 5.54(a).

repeatedly promised to “repeal and replace” the Affordable Care Act.¹⁶ He also made numerous promises about the form that health care reform would take, including who would be covered and the cost of coverage. On Monday, March 6, 2017, Republicans in the House of Representatives introduced a proposal that purported to fulfill those promises.¹⁷ News media reported that there was significant interaction between the White House, congressional leadership, and agency staff regarding the AHCA before its release.¹⁸ Since then, however, there has been significant debate about the substance of the proposal, especially over the extent to which it would achieve its stated purpose.¹⁹ With so much disagreement on this issue, the public has a right to know what officials are saying in private—what analysis has the administration done regarding the costs and likely implications for who would be covered under the new proposal.

As required by HHS’s regulations at 45 C.F.R. § 5.54(b)(3)(i)-(ii), this request is primarily and fundamentally not for commercial purposes, but rather the primary interest is in public disclosure of responsive records. 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 commercial 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.

Accordingly, American Oversight qualifies for a fee waiver.

¹⁶ See, e.g., Nolan McCaskill, *Trump Wants ‘Special Session’ To Repeal Obamacare*, POLITICO (Nov. 1, 2016, 1:05 PM), <http://www.politico.com/story/2016/11/trump-obamacare-special-session-230588>; MJ Lee, *Trump Gives a Boost to Obamacare Repeal, but Doesn’t Solve GOP Problems*, CNN (Mar. 1, 2017, 6:04 AM), <http://www.cnn.com/2017/03/01/politics/obamacare-donald-trump-address/>.

¹⁷ Amy Goldstein et al., *House Republicans Release Long-Awaited Plan to Replace Obamacare*, WASH. POST (Mar. 6, 2017), https://www.washingtonpost.com/powerpost/new-details-emerge-on-gop-plans-to-repeal-and-replace-obamacare/2017/03/06/04751e3e-028f-11e7-ad5b-d22680e18d10_story.html?utm_term=.b934c16fb899.

¹⁸ See Lauren Fox & Deirdre Walsh, *Republicans Unveil Bill to Repeal and Replace Obamacare*, CNN (Mar. 7, 2017, 9:32 AM), <http://www.cnn.com/2017/03/06/politics/republicans-public-obamacare-plan/index.html?sr=fbCNN030617republicans-public-obamacare-plan1235PMVODtopLink&linkId=35156015>.

¹⁹ See Mike DeBonis et al., *House GOP Proposal to Replace Obamacare Sparks Broad Backlash*, WASH. POST (Mar. 7, 2017), https://www.washingtonpost.com/powerpost/house-leaders-brace-for-the-task-ahead-selling-obamacare-lite/2017/03/07/ab2f721e-02e5-11e7-ad5b-d22680e18d10_story.html?utm_term=.d7f7da524f26; Russell Berman, *The Conservative Uprising Against the Republican Health-Care Bill*, THE ATLANTIC (Mar. 7, 2017, 12:22 PM), <https://www.theatlantic.com/politics/archive/2017/03/conservatives-revolt-against-gop-obamacare-repeal-replacement/518775/>.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(i) and 45 C.F.R. § 5.27(b), American Oversight requests that HHS expedite the processing of this request.

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 activity that is the subject of this request. The legislative process for the AHCA is well underway, and Republican leadership in the House and Senate have indicated that it will be brought up for votes as quickly as possible.²⁰ This aggressive timeline for consideration of the bill creates an urgency for outside groups to provide the public with the information necessary to evaluate such significant legislation. The information sought in this request will meaningfully further public understanding on this issue of pressing national concern.

Additionally, 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,²¹ 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.”²² American Oversight will use the information gathered, and its analysis of it, to educate the public through reports, press releases, and other media. American Oversight will also make materials it gathers available on our public website.

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

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 or 202-869-5246. Also, if American

²⁰ Mike Lillis, *DNC Chairman: 'Reckless' Repeal Plan Shows GOP Clueless on Health Policy*, THE HILL BLOG (Mar. 8, 2017, 12:25PM), <http://thehill.com/policy/healthcare/322961-dnc-chair-reckless-repeal-plan-shows-gop-clueless-on-health-policy>; Jordain Carney, *Schumer: 'Reckless' to Vote on ObamaCare Repeal without Budget Score*, THE HILL BLOG (Mar. 8, 2017, 10:54PM), <https://origin-ny1.thehill.com/blogs/floor-action/senate/322921-schumer-reckless-to-vote-on-obamacare-repeal-without-budget-score>; Max Greenwood, *Graham: No 'Need for Speed' on ObamaCare Repeal*, THE HILL BLOG (Mar. 7, 2017, 12:05 PM), <http://thehill.com/policy/healthcare/322707-lindsey-graham-i-dont-feel-a-need-for-speed-on-obamacare-repeal>.

²¹ 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).

²² *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

Oversight's 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