



October 23, 2017

VIA ELECTRONIC MAIL

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Department of Health and Human Services
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Re: Freedom of Information Act Request

Dear FOIA Officers:

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

On October 6, 2017, the Washington Post reported that President Donald Trump had instructed HHS to deny a request by the State of Iowa for a Section 1332 Medicaid waiver under the Affordable Care Act (“ACA”).¹ Iowa was seeking a waiver, or Stopgap Measure, that would have allowed the state to change how it implements the ACA to ensure that its citizens retain health insurance coverage amid the state’s struggling insurance marketplace. The reports suggest that because then-HHS Secretary Tom Price was traveling at the time, Mr. Trump gave his instructions to Seema Verma, the head of the Centers for Medicare and Medicaid Services (CMS). Other reports have indicated that, notwithstanding any such direction from the president, the agency is

¹ See Juliet Eilperin, *As ACA Enrollment Nears, Administration Keeps Cutting Federal Support of the Law*, WASH. POST (Oct. 5, 2017, 6:12 PM), https://www.washingtonpost.com/politics/as-aca-enrollment-nears-administration-keeps-cutting-federal-support-of-the-law/2017/10/05/cc5995a2-a50e-11e7-b14f-f41773cd5a14_story.html?utm_term=.4b9da6160cf2; see also Jessica Chia, *Trump Directed HHS to Deny Iowa’s Proposal to Fix Health Care*, N.Y. DAILY NEWS (Oct. 5, 2017, 10:33 PM), <http://www.nydailynews.com/news/politics/trump-directed-hhs-deny-iowa-proposal-fix-healthcare-article-1.3544329>.



still considering Iowa's application.² American Oversight is seeking records to better understand the White House's involvement in HHS's review of Iowa's application.

Requested Records

American Oversight requests that HHS and CMS produce the following within twenty business days:

1. All communications between HHS and the White House (meaning the White House Office (WHO)) regarding any efforts by the state of Iowa to reform the state's health care system, including but not limited to its application for a Section 1332 Medicaid waiver or Stopgap Measure.

The search for responsive records should include all individuals and locations likely to contain responsive records, including but not limited to the Immediate Office of the Secretary (IOS) and CMS, including CMS Administrator Seema Verma.

2. Any guidance or direction from the White House or the Office of Management and Budget (OMB) to HHS or CMS mentioning Iowa.
3. All communications between any political appointee or SES staff in IOS or CMS and anyone acting on behalf of the state of Iowa.
4. All communications between HHS and OMB regarding any efforts by the state of Iowa to reform the state's health care system, including but not limited to its application for a Section 1332 Medicaid waiver or Stopgap Measure

Please provide all responsive records from July 1, 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.

² Kimberly Leonard, *Trump Administration Still Considering Iowa's Obamacare Waiver*, WASH. EXAM'R (Oct. 6, 2017, 11:34 AM), <http://www.washingtonexaminer.com/trump-administration-still-considering-iowas-obamacare-waiver/article/2636743>; Tony Leys, *Report of 'Stopgap' Insurance Proposal's Death Is Premature, Iowa Officials Say*, THE DES MOINES REGISTER (Oct. 5, 2017, 9:51 PM), <http://www.desmoinesregister.com/story/news/health/2017/10/05/stopgap-insurance-proposal-obamacare-death-premature-iowa-officials-say-washington-post/738369001/>.

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.³ 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.⁴**

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.⁵ 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

³ 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).

⁴ 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)).

⁵ 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>.

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.”⁶ 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.”⁷ 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.”⁸ 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.’”⁹

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.¹⁰ 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.

⁶ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁷ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁸ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

⁹ *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)).

¹⁰ *Mead Data Central*, 566 F.2d at 261.

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 relevant government procedures by the general public in a significant way.¹¹ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹²

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.¹³ President Trump has promised to “repeal and replace” the Affordable Care Act since his earliest days on the campaign trail. In light of Congress’s failure to pass a health care repeal bill,¹⁴ Mr. Trump has made clear his intention to let the ACA “implode” so that Democrats will be motivated to negotiate for a new health care deal.¹⁵ And indeed, the Trump administration appears to have taken several steps to do just that.¹⁶ The recent reports that President Trump stepped in to ensure that HHS (through CMS) would deny a

¹¹ 45 C.F.R. § 5.54(a).

¹² *Id.*

¹³ 45 C.F.R. §§ 5.54(a), (b)(1)-(2).

¹⁴ See, e.g., MJ Lee et al., *GOP Obamacare Repeal Bill Fails in Dramatic Late-Night Vote*, CNN POLITICS (July 28, 2017, 8:15 AM), <http://www.cnn.com/2017/07/27/politics/health-care-debate-thursday/index.html>.

¹⁵ Mike DeBonis et al., *GOP Health-Care Bill: House Republican Leaders Abruptly Pull Their Rewrite of the Nation’s Health-Care Law*, WASH. POST (Mar. 24, 2017, 4:24 PM), https://www.washingtonpost.com/powerpost/house-leaders-prepare-to-vote-friday-on-health-care-reform/2017/03/24/736f1cd6-1081-11e7-9d5a-a83e627dc120_story.html?hpid=hp_rhp-banner-main_housevote715a-banner%3Ahomepage%2Fstory&utm_term=.a8fe3ca41561; Donald Trump (@realDonaldTrump), TWITTER (June 26, 2017, 6:14 AM), <https://twitter.com/realDonaldTrump/status/879326984794517507> (“Republican Senators are working very hard to get there, with no help from the Democrats. Not easy! Perhaps just let OCare crash & burn!”); Donald Trump (@realDonaldTrump), TWITTER (July 27, 2017, 1:25 AM), <https://twitter.com/realdonaldtrump/status/890820505330212864> (“3 Republicans and 48 Democrats let the American people down. As I said from the beginning, let ObamaCare implode, then deal. Watch!”).

¹⁶ See, e.g., Audrey Carlsen & Haeyoun Park, *The Same Agency that Runs Obamacare Is Using Taxpayer Money to Undermine It*, N.Y. TIMES, Sept. 4, 2017, https://www.nytimes.com/interactive/2017/09/04/us/hhs-anti-obamacare-campaign.html?_r=0.

struggling state the ability to rework its ACA exchange—and attempt to improve the health care system for its citizens—represent another concerning example of these efforts to undermine the current law. It would significantly improve the public’s understanding of how the Trump administration is approaching its obligation to enforce the current law to understand whether and how the White House has been involved in HHS’s processing of Iowa’s waiver application.

This request is primarily and fundamentally not for 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 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 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

¹⁷ See 45 C.F.R. § 5.54(b)(3)(i)-(ii).

¹⁸ American Oversight currently has approximately 11,500 page likes on Facebook and 35,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Oct. 23, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Oct. 23, 2017).

¹⁹ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

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, www.auditthewall.org.

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". The signature is fluid and cursive, with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight