



June 29, 2018

VIA ELECTRONIC MAIL

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

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

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

Requested Records

American Oversight and the Sunlight Foundation request that HHS produce the following within twenty business days:

All communications (including email messages, text messages, instant messages, letters, memoranda or any other records) regarding any considered or actual changes to the medicare.gov website, the medicaid.gov website, the cms.gov website, or the insurekidsnow.gov website, between January 1, 2017, and the date your search is conducted.

We believe that a reasonable search would include at least the following terms, but HHS should also use any other additional search terms or methods that it believes are likely to produce responsive records: “web,” “website,” “medicare.gov,” “medicaid.gov,” “cms.gov,” and “insurekidsnow.gov.”

The search for responsive records should include all locations and individuals likely to contain responsive records, including at least (a) past and current individuals working within the Digital Communications Division; and (b) past and current individuals holding the following jobs, as well as any deputies or advisors who have reported or currently report to them: the Assistant Secretary for Public Affairs, the HHS Secretary, the Deputy Assistant Secretary for Public Affairs for Human Services, and the Assistant Secretary for Administration.



In addition to the records requested above, we also request 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 HHS 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 and the Sunlight Foundation seek 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.¹ **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; we have 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.**²

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.**³ Furthermore, agencies that have adopted the National Archives and

¹ 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).

² 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)).

³ 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,

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, we insist 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. We are 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.”⁴ If it is your position that any portion of the requested records is exempt from disclosure, we request 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.”⁵ 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.”⁶ 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.’”⁷

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.⁸ 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. We intend 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.

“Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

⁴ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁵ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁶ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

⁷ *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)).

⁸ *Mead Data Central*, 566 F.2d at 261.

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, we welcome 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, we 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, 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 40 C.F.R. § 2.107(l), American Oversight and the Sunlight Foundation request 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.⁹ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁰

American Oversight and the Sunlight Foundation request 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 activities.¹¹ There has been significant public and media attention regarding efforts by the Trump administration to remove content from federal websites.¹² In particular, records including agency communications about those website removals

⁹ 40 C.F.R. § 2.107(l)(1).

¹⁰ *Id.*

¹¹ *Id.*; see also 40 C.F.R. § 2.107(l)(2)(i)-(iv).

¹² See, e.g., Juliet Eilperin, *The EPA Just Buried Its Climate Change Website for Kids*, WASH. POST (May. 6, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/05/06/epa-buries-climate-change-site-for-kids/?utm_term=.ef22f7f64a2a; Lisa Friedman, *EPA Scrubs a Climate Website of ‘Climate Change’*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/climate/epa-climate-change.html>; Andrew Freedman, *Post-Hurricane Puerto Rico Water, Electricity Statistics Omitted from FEMA Website*, MASHABLE (Oct. 6, 2017), https://mashable.com/2017/10/06/fema-website-puerto-rico-data-removed/#_VKlQB.AQqq0; Timothy Cama, *Group Details ‘Systemic’ Removal of Climate Content from Federal Websites*, THE HILL (Jan. 10, 2018, 9:49 AM), <http://thehill.com/policy/energy-environment/368270-group-documents-systematic-reduction-in-climate-content-on-trump>; Hilary Brueck, *The Trump Administration Has Been Quietly Removing Content from Federal Websites - Here’s the Before and After*, BUS. INSIDER (Jan. 11, 2018, 10:54 AM), <http://www.businessinsider.com/trump-administration-climate-change-references-scrubbed-from-websites-2018-1>; Dan Diamond, *HHS Strips, Lesbian, Bisexual Health Content from Women’s Health Website*, POLITICO (Mar. 21, 2018, 8:57 AM), <https://www.politico.com/story/2018/03/21/hhs-strips-lesbian-bisexual-health-content-from-womens-health-website-430123>.

have also been the topic of significant public and media attention.¹³ Much of that reporting has been based on the efforts of the Sunlight Foundation’s Web Integrity Project (WIP) and the work that WIP’s co-founders have helped lead at the Environmental Data and Governance Initiative.¹⁴ WIP has already observed significant changes to HHS’s websites, in particular to the website for the Office on Women’s Health.¹⁵ This FOIA request would inform the public about the reasons for these types of changes, which would shed significant light on how HHS views its mission under the Trump administration. The public deserves to have access to the work reflected in those documents.

This request is primarily and fundamentally for non-commercial purposes.¹⁶ 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.¹⁷ 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,¹⁸ 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.¹⁹ 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.²⁰

¹³ Michael Biesecker, *Emails: Pruitt Monitored Changes to EPA Webpages on Climate*, ASSOC. PRESS (Feb. 2, 2018), <https://www.apnews.com/85e69300761040a2995f5b457f2ac9f4>.

¹⁴ See, e.g., Eilperin, *supra* note 12; Friedman, *supra* note 12; Freedman, *supra* note 12; Cama, *supra* note 12; Brueck, *supra* note 12; Diamond, *supra* note 12.

¹⁵ Diamond, *supra* note 12.

¹⁶ 40 C.F.R. § 2.107(l)(1); 40 C.F.R. § 2.107(l)(3)(i)-(ii).

¹⁷ American Oversight currently has approximately 11,800 page likes on Facebook and 43,900 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited June 28, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited June 28, 2018).

¹⁸ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

¹⁹ *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>.

²⁰ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

The Sunlight Foundation's interest in the disclosure of the requested records is purely non-commercial, and the release of the information requested is not in the Sunlight Foundation's financial interest. The Sunlight Foundation is a 501(c)(3) non-profit public interest organization dedicated to using the power of information to promote government transparency. The Sunlight Foundation's Web Integrity Project (WIP) will use the information gathered in furtherance of this mission. WIP is primarily concerned with monitoring changes to federal websites. As part of this work, WIP publishes reports and creates public-facing resources to educate the public on changes to federal Web resources, and to advocate for clear and consistent Web management policies on federal government websites. For example, WIP has published reports detailing removals and other alterations to federal government websites, and has communicated such changes to the public through a variety of media.²¹ Like American Oversight, the Sunlight Foundation plans to use the information gathered, and its analysis of that information, to educate the public through various channels, including reports, blogs, and press releases. The Sunlight Foundation and WIP also make materials they gather available on their public websites and promote their availability on social media platforms, such as Facebook and Twitter.²²

Accordingly, this request qualifies for a fee waiver.

Conclusion

We share a common mission to promote transparency in government. We look forward to working with HHS 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 202.869.5245. Also, if our 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

²¹ See, e.g., Rachel Bergman, *Federal Women's Health Office Obscures Lesbian and Bisexual Fact Sheet Online*, SUNLIGHT FOUNDATION (Mar. 21, 2018, 10:45 AM), <https://sunlightfoundation.com/2018/03/21/federal-womens-health-office-obscures-lesbian-and-bisexual-fact-sheet-online/>; Rachel Bergman & Toly Rinberg, *In Website Reshuffle, Federal Committee Makes Reports on Collecting Sexual Orientation and Gender Identity Data Inaccessible*, SUNLIGHT FOUNDATION (Mar. 2, 2018, 5:00 AM), <https://sunlightfoundation.com/2018/03/02/federal-committee-makes-reports-on-collecting-sexual-orientation-and-gender-identity-data-inaccessible/>.

²² The Sunlight Foundation currently has approximately 33,600 page likes on Facebook and 74,700 followers on Twitter. Sunlight Foundation, FACEBOOK, <https://www.facebook.com/sunlightfoundation/> (last visited June 14, 2018); American Oversight (@SunFoundation), TWITTER, <https://twitter.com/SunFoundation> (last visited June 14, 2018).



Toly Rinberg
Director, Web Integrity Project
Sunlight Foundation