



May 4, 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
Hugh.gilmore@cms.hhs.gov

Re: Expedited 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.

On Monday, March 6, 2017, Republicans in the House of Representatives introduced their proposal to repeal and replace the Affordable Care Act, a set of bills collectively known as the American Health Care Act (AHCA).¹ However, on March 24, 2017, House Republican leaders pulled the AHCA after failing to gather enough support to pass the proposal.² It has been widely reported that Republicans planned to pass their health care reform plan before they could move on to their next legislative priority, tax reform.³ Since the decision to cancel the March 24, 2017

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 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, 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.

³ Brittany De Lea, *Health Care Domino: Why Trump's Tax Cuts Depend on the ObamaCare Repeal*, FOX BUSINESS, Mar. 22, 2017, <http://www.foxbusiness.com/politics/2017/03/22/health-care-domino-why-trumps-tax-cuts-depend-on-obamacare-repeal.html>; Damian Paletta & Mike DeBonis, *Trump Shifts Course Again, Says Health Care Repeal Must Precede Tax Overhaul*, CHICAGO TRIBUNE, Apr. 12, 2017, <http://www.chicagotribune.com/news/nationworld/politics/ct-trump-health-care-repeal-20170412-story.html>; David Sherfinski, *Donald Trump: Health Care Has to Come Before Tax Reform*, WASH. TIMES, Apr. 12, 2017,



vote on the AHCA, there have been numerous reports that Republicans are continuing to discuss legislative approaches to health care reform,⁴ and new proposed health care reform legislation could be introduced and acted upon at any time. In light of the significant role played by the Centers for Medicare and Medicaid Services (CMS) in implementing the Affordable Care Act and related health care provisions, it is likely that CMS is involved in policy deliberations and negotiations regarding potential health care reform legislation. The public should have access to communications related to the shaping of this legislation on an issue of such national concern.

Requested Records

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

1. All communications, meeting notices, meeting agendas, informational materials, draft legislation, talking points, or other materials received by CMS or exchanged between CMS and any non-governmental entities related to health care reform. Such non-governmental entities include, but are not limited to: insurance companies; health care policy or advocacy groups; health care providers; health care professional organizations; pharmaceutical companies; medical device companies; health care, medical, pharmaceutical, or medical device trade associations; political advocacy groups or think tanks; and political organizations or parties.
2. All communications, meeting notices, meeting agendas, informational materials, draft legislation, talking points, or other materials received by CMS or exchanged between CMS and any state government or state government agency related to health care reform. Such state government or state government agency includes, but is not limited to, elected, appointed, or career officials or anyone lobbying or acting as an agent on behalf of a state government or state government agency.

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

<http://www.washingtontimes.com/news/2017/apr/12/donald-trump-health-care-has-come-tax-reform/>.

⁴ Philip Wegmann, *Could Cutting Recess Short Kickstart Healthcare Reform and Reboot Trump's Agenda? Maybe.*, WASH. EXAMINER (Apr. 11, 2017, 5:00 PM),

<http://www.washingtonexaminer.com/could-cutting-recess-short-kickstart-healthcare-reform-and-reboot-trumps-agenda-maybe./article/2620020>; Lauren Fox, *In Health Care Reform Back on the Table? Talks Resume*, CBS46.COM (Apr. 12, 2017, 10:07 PM),

<http://www.cbs46.com/story/35138560/is-health-care-reform-back-on-the-table-talks-resume;>

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

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 CMS’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

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)).

⁷ 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 CMS's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that CMS 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 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, CMS 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>.

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)).

¹² *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, 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 CMS 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 a better understanding of relevant government procedures by the general public in a significant way.¹³ Moreover, the request is primarily and fundamentally for non-commercial purposes.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 the operations or activities of the government.”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.

During his campaign and after taking office, President Trump 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 reports indicate that there was significant interaction between the White House, congressional leadership, and agency staff regarding the AHCA before

¹³ 45 C.F.R. § 5.54(a).

¹⁴ 45 C.F.R. § 5.54(a).

¹⁵ 45 C.F.R. § 5.54(b)(1), (2)(i)-(ii).

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 Goldstein et al., *supra* note 1.

its release.¹⁸ After that time, however, there was significant debate about the substance of the proposal, especially over the extent to which it would achieve its stated purpose.¹⁹ Now that the vote on the proposed health care reform proposal has been cancelled, there are reports of additional negotiations going on behind closed doors to try and revive the reform efforts and hopefully increase the likelihood of successful tax reform in the process.²⁰ With so much disagreement on this issue, the public has a right to know what officials are saying in private—what deals are being cut, what industries are being courted, and what promises are being made, particularly in light of the fact that in 2009 and 2010, significant, state-specific deals were cut to win the support of lawmakers.²¹

This request is primarily and fundamentally not for commercial purposes.²² 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 its website and promote their availability on social media platforms, such as Facebook and Twitter.²³ 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.²⁴

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/>.

²⁰ See, e.g., Wegmann, *supra* note 4; Fox, *supra* note 4.

²¹ See, e.g., Chris Frates, *Payoffs for States Get Reid to 60*, POLITICO (Dec. 19, 2009), <http://www.politico.com/story/2009/12/payoffs-for-states-get-reid-to-60-030815>.

²² 45 C.F.R. § 5.54(b)(3)(i)-(ii).

²³ American Oversight currently has over 10,800 page likes on Facebook, and over 32,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 1, 2017); American Oversight (@weareoversight), TWITTER (last visited May 1, 2017).

²⁴ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

Accordingly, American Oversight qualifies for a fee waiver.

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 CMS 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. It has been widely reported that Republicans need to pass their health care reform plan before they can move on to their next legislative priority—tax reform.²⁵ Unsurprisingly, therefore, since the death of the AHCA, there have been numerous reports that Republicans are continuing to discuss legislative alternatives.²⁶ House Republicans could introduce and act on a new iteration of the AHCA at any time. There is an urgent need for the public to have access to communications related to the shaping of this legislation on an issue of such 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,²⁷ 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.”²⁸ 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 its website and promote their availability on social media platforms, such as Facebook and Twitter.²⁹ 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.³⁰

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

²⁵ De Lea, *supra* note 3; Paletta & DeBonis, *supra* note 3; Sherfinski, *supra* note 3.

²⁶ Wegmann, *supra* note 4; Fox, *supra* note 4.

²⁷ 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).

²⁸ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

²⁹ American Oversight currently has over 10,800 page likes on Facebook, and over 32,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 1, 2017); American Oversight (@weareoversight), TWITTER (last visited May 1, 2017).

³⁰ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

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 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