



May 12, 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](mailto:hugh.gilmore@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.

Last week, news media reported that the House Ways and Means Committee had sent an email to senior officials at the Centers for Medicare and Medicaid Services (CMS) attempting to designate all communications between those two entities as “congressional records” that are not subject to FOIA.<sup>1</sup> Earlier that same day, it had come to light that the House Financial Services Committee had sent a similar letter to various agencies within its jurisdiction.<sup>2</sup> American Oversight is seeking to understand the interaction between agencies of the Trump administration and Congress—including the House Ways and Means Committee—on policy matters within the jurisdiction of the Committee.

**Requested Records**

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

1. All communications between CMS and any member of the House Ways and Means Committee or any staff member working for either the House Ways and Means

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<sup>1</sup> Mary Ann Georgantopoulos, *Now Another House Committee Doesn't Want You to Read Its Emails with Government Officials*, BUZZFEED NEWS (May 5, 2017, 6:27 PM), [https://www.buzzfeed.com/maryanngeorgantopoulos/house-committee-foia-part-2?utm\\_term=.dkA0bz5g0#.yy6oOVDWo](https://www.buzzfeed.com/maryanngeorgantopoulos/house-committee-foia-part-2?utm_term=.dkA0bz5g0#.yy6oOVDWo).

<sup>2</sup> Max Greenwood, *GOP Chairman Tells Agencies to Exclude Info from FOIA Requests*, The Hill (May 5, 2017, 10:04 PM), <http://thehill.com/homenews/house/332183-gop-chairman-tells-agencies-to-exclude-info-from-foia-requests>.



Committee or one of its members concerning proposed legislation or administrative actions.

Please provide all responsive records from January 20, 2017, to the date the search is conducted. Also, American Oversight is aware of the email sent from committee staffer Nicholas Uehlecke informing CMS that the Committee will be including a signature block in all future email correspondence with CMS letter indicating that all such correspondence constitute “congressional records,” rather than “agency records,” and therefore not subject to FOIA.<sup>3</sup> We disagree with that position; communications between Congress and executive branch agencies constitute “agency records” and are therefore subject to disclosure under FOIA. Accordingly, if CMS withholds any records responsive to this request on the grounds that they are congressional records and not subject to disclosure under FOIA, please inform us that you have withheld the records on that basis, as we intend to litigate whether that is a proper basis for withholding records.

2) All communications relating to the opinion of the House Ways and Means Committee that communications between the Committee and federal agencies are not subject to disclosure under the Freedom of Information Act, including but not limited to instructions, directives, or guidance received on this issue from any member of the Committee or his or her staff, as well as internal agency correspondence on the issue. Please provide all responsive records from January 20, 2017, to the date the search is conducted.

3) Any memoranda, policies, rules, protocols, restrictions, directives, guidance, or other guidelines addressing how CMS responds to FOIA requests that implicate communications with Congress or records created at the request of Congress. Please do not limit the date of the search for records responsive to this portion of American Oversight’s FOIA request.

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 CMS 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.

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<sup>3</sup> See Mary Ann Georgantopoulos, *Now Another House Committee Doesn’t Want You to Read Its Emails with Government Officials*, BUZZFEED NEWS (May 5, 2017, 6:27 PM), [https://www.buzzfeed.com/maryanngeorgantopoulos/house-committee-foia-part-2?utm\\_term=.dkA0bz5g0#.yy6oOVDWo](https://www.buzzfeed.com/maryanngeorgantopoulos/house-committee-foia-part-2?utm_term=.dkA0bz5g0#.yy6oOVDWo).

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.<sup>4</sup> **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.**<sup>5</sup>

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.**<sup>6</sup> **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

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<sup>4</sup> 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).

<sup>5</sup> 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)).

<sup>6</sup> 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, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

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.”<sup>7</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>8</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>9</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>10</sup>

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>11</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, CMS 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

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<sup>7</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

<sup>8</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>9</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

<sup>10</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)).

<sup>11</sup> *Mead Data Central*, 566 F.2d at 261.

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 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>12</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<sup>13</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 the operations or activities of the government.”<sup>14</sup> 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.

The requested records will shed light on the role that Congress plays in shaping policy at CMS, as well as the inverse—what role does the executive branch play in shaping policy at the legislative level. More specifically, the requested records would allow the public to more fully evaluate any proposed legislative or administrative actions by either the House Ways and Means Committee or CMS by revealing the motivations and considerations behind any proposed actions that may be discussed in the requested records. Finally, it will be highly informative regarding governmental operations to see the extent to which CMS follows the Committee’s request to classify responsive records as congressional records outside the purview of FOIA, rather than the “agency records” that they clearly are. The public deserves to know whether CMS will be complying with its statutory obligations under FOIA, and whether the executive branch is collaborating with Congress to conceal relevant policy deliberations about which the public has a right to know.

This request is primarily and fundamentally not for commercial purposes.<sup>15</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 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

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<sup>12</sup> 45 C.F.R. § 5.54(a).

<sup>13</sup> 45 C.F.R. § 5.54(a).

<sup>14</sup> 45 C.F.R. § 5.54(b)(1), (2)(i)-(ii).

<sup>15</sup> 45 C.F.R. § 5.54(b)(3)(i)-(ii).

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.<sup>16</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>17</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>16</sup> American Oversight currently has over 10,800 page likes on Facebook, and over 32,300 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 12, 2017); American Oversight (@weareoversight), TWITTER (last visited May 12, 2017).

<sup>17</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org).