



September 7, 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, 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 May 4, 2017, American Oversight submitted a FOIA request to CMS seeking access to the following records:

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.

American Oversight sought all responsive records from January 20, 2017, to the date the search was conducted.



After that request was filed, the House of Representatives passed a bill to “repeal and replace” the Affordable Care Act (ACA),¹ and the Senate tried and failed to do the same.² Members of Congress now appear split on whether to push forward with the uphill battle of repeal, or reach a bipartisan compromise to fix problems with the current law.³

Because the health care debate rages on, American Oversight seeks access to communications related to health care reform that occurred subsequent to the date that its first FOIA request on this subject was submitted.

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.

¹ See Thomas Kaplan & Robert Pear, *House Passes Measure to Repeal and Replace the Affordable Care Act*, N.Y. TIMES, May 4, 2017,

https://www.nytimes.com/2017/05/04/us/politics/health-care-bill-vote.html?mcubz=0&_r=0.

² See 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>.

³ See Ed Kilgore, *The Song that Never Ends: House Conservatives Will Try to Force Another Vote on Obamacare Repeal*, N.Y. MAG., Aug. 11, 2017,

<http://nymag.com/daily/intelligencer/2017/08/house-could-vote-once-again-on-obamacare-repeal.html>;

Cathy Burke, *Sen. Cruz: ‘Frustrated’ But Obamacare Repeal ‘Closer’ than You Think*, NEWSMAX TV, (Aug. 24, 2017, 9:07 PM), <http://www.newsmax.com/Newsmax-Tv/repeal-and-replace-republicans-senate-2018/2017/08/24/id/809668/>; Russell Berman, *The Senate Tests a New Approach on Obamacare: Bipartisanship*, THE ATLANTIC, Aug. 28, 2017,

<https://www.theatlantic.com/politics/archive/2017/08/the-senate-tries-a-new-approach-on-obamacare-bipartisanship/538083/>;

Peter Sullivan, *Kasich, Hickenlooper Reach Deal on ObamaCare Markets*, THE HILL (Aug. 28, 2017, 2:33 PM),

<http://thehill.com/policy/healthcare/348287-kasich-hickenlooper-reach-deal-on-obamacare-plan>;

Carl Leubsdorf, *Senate GOP Leaders Make Another Attempt to Fix Obamacare*, DALLAS NEWS, Aug. 29, 2017, <https://www.dallasnews.com/opinion/commentary/2017/08/29/senate-gop-leaders-make-another-limp-attempt-repeal-replace-obamacare>.

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 the date that a search was initiated for the May 4 request to the date that the search is conducted on this request. In other words, American Oversight seeks to ensure that it receives all responsive records from January 20, 2017, to the date of this new search.

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.⁴ **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.**⁵

⁴ 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).

⁵ 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

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.**⁶ 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 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.”⁷ 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.”⁸ 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.”⁹ Further, “the withholding agency must supply ‘a relatively detailed

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)).

⁶ 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>.

⁷ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).

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

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

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.”¹⁰

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.¹¹ 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 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 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.¹² Moreover, the request is primarily and fundamentally for non-commercial purposes.¹³

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

¹⁰ *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)).

¹¹ *Mead Data Central*, 566 F.2d at 261.

¹² 45 C.F.R. § 5.54(a).

¹³ 45 C.F.R. § 5.54(a).

operations or activities of the government.”¹⁴ 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 records sought by American Oversight’s request could shed light on the inner workings of the legislative process that could shape the public’s view of the health care reform legislation. In particular, the requested records would reveal which outside stakeholders were represented during the drafting of and negotiating about the legislation, what outside groups thought about the proposed health care reform efforts, what promises were made to those groups about the impact of such health care reform efforts, if any, and whether all of those internal communications match external rhetoric by the Trump administration about the likely impact of legislation. Although the Senate’s effort to “repeal and replace” Obamacare failed,¹⁵ there are numerous reports of ongoing efforts to repeal the bill,¹⁶ as well as several bipartisan efforts to repair the current health care system instead.¹⁷ With so much activity on this issue, the public has a right to know what officials have said 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 the legislative effort of 2009 and 2010, significant, state-specific deals were cut to win the support of lawmakers.¹⁸

This request is primarily and fundamentally not for commercial purposes.¹⁹ 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.²⁰ 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,²¹ American Oversight promptly posted the records to its website and

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

¹⁵ See Lee et al., *supra* note 2.

¹⁶ See Kilgore, *supra* note 3; Burke, *supra* note 3; Leubsdorf, *supra* note 3.

¹⁷ See Berman, *supra* note 3; Sullivan, *supra* note 3.

¹⁸ 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>.

¹⁹ 45 C.F.R. § 5.54(b)(3)(i)-(ii).

²⁰ American Oversight currently has approximately 11,300 page likes on Facebook and 34,000 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Sept. 7, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Sept. 7, 2017).

²¹ See DOJ Civil Division Response Noel Francisco Compliance, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

published an analysis of what the records reflected about DOJ's process for ethics waivers.²² 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.²³

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. Even in the wake of the Senate's failure to pass any proposal to "repeal and replace" the ACA, Congress continues to discuss the best path forward on health care reform, including additional proposals to repeal the ACA,²⁴ as well as new efforts to reach a bipartisan compromise on how to stabilize the current health care system.²⁵ With new legislation likely to be considered or introduced shortly after the August recess, 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.

The records sought by American Oversight's request would shed light on the inner workings of the legislative process and could shape the public's view of the health care reform legislation. In particular, the requested records would reveal which outside stakeholders were represented during the drafting of and negotiating about the legislation, what outside groups thought about the proposed health care reform efforts, what promises were made to those groups about the impact of such health care reform efforts, if any, and whether all of those internal communications match external rhetoric by the Trump administration about the likely impact of the bill. There is an urgent need for the public to have access to any such communications before Congress passes any health care reform legislation. If such a bill were to be passed and signed into law before American Oversight and the American public receive the requested records, the usefulness of the records would be substantially diminished.

Indeed, in litigation on a related FOIA request to HHS addressing an analogous request for expedited processing, U.S. District Judge Emmet G. Sullivan agreed with American Oversight that expedition is likely appropriate when the FOIA request relates to a matter of such pressing

²² *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>.

²³ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

²⁴ See Kilgore, *supra* note 3; Burke, *supra* note 3; Leubsdorf, *supra* note 3.

²⁵ See Berman, *supra* note 3; Sullivan, *supra* note 3.

national concern as health care reform legislation. See Transcript of Proceedings, Status Conference, *American Oversight v. HHS et al.*, 17-827 (D.D.C. May 25, 2017), ECF No. 13. Judge Sullivan stated:

What else do they need to say? There's a raging health care debate in this country, there's a raging health care debate on Capitol Hill in the House of Representatives, it's now shifted to the senate, it's still raging, and it's going to continue to rage. I think any rational[] person would conclude it's going to continue to - to rage.

...

I don't know what else the plaintiff could have said about reasons for expediting the process other than what they said and what I said.

Id. at 24:13-19, 28:20-22. Expedition is equally appropriate on this request.

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,²⁶ 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."²⁷ American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, and 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.²⁸ 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, American Oversight promptly posted the records to its website²⁹ and published an analysis of what the records reflected about DOJ's process for ethics waivers.³⁰ Additionally, American Oversight is conducting a public project called "Audit the Wall," where the organization is gathering and

²⁶ 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).

²⁷ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

²⁸ American Oversight currently has approximately 11,300 page likes on Facebook and 34,000 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Sept. 7, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Sept. 7, 2017).

²⁹ See *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

³⁰ *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>.

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.³¹

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 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 that reads "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

³¹ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.