



February 19, 2020

VIA EMAIL

Dionne Hardy
Office of Management and Budget
725 17th Street NW, Suite 9204
Washington, DC 20503
OMBFOIA@omb.eop.gov

Re: Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of your agency, American Oversight makes the following request for records.

On January 30, 2020, the Centers for Medicare & Medicaid Services (CMS), invited states to submit proposals to expand Medicaid coverage to previously uncovered populations under a “block grant” model, under which states would have authority to impose benefit cuts and out-of-pocket costs that are otherwise prohibited.¹ Converting Medicaid to a block-grant program has been a long-term goal of many conservative policymakers and lobbyists, but action on this front has generally been considered not to be viable in the absence of statutory changes.² The current proposal, which relies on a little known and rarely used statutory authority,³ came about after significant back and forth between CMS

¹ Rachana Pradhan & Phil Galewitz, *5 Things to Know about Trump’s Medicaid Block Grant Plan*, KAISER HEALTH NEWS, Jan. 31, 2020, <https://khn.org/news/5-things-to-know-about-trumps-medicaid-block-grant-plan/>; Dylan Scott, *Trump’s Audacious New Plan to Cut Medicaid, Explained*, VOX (Jan. 30, 2020, 9:30 AM), <https://www.vox.com/policy-and-politics/2020/1/30/21113436/trump-health-care-policy-medicaid-cuts>; Andy Schneider, *Medicaid Work Requirements and Beyond: CMS Administrator Tries a New Work-Around*, SAY AHHH!, Jan. 30, 2020, <https://ccf.georgetown.edu/2020/01/30/medicaid-work-requirements-and-beyond-cms-administrator-tries-a-new-work-around/>.

² See generally Rachel Sachs & Nicole Huberfeld, *The Problematic Law and Policy of Medicaid Block Grants*, HEALTH AFFAIRS BLOG, July 24, 2019, <https://www.healthaffairs.org/doi/10.1377/hblog20190722.62519/full/>.

³ Schneider, *supra* note 1.



and the Office of Management and Budget (OMB),⁴ and will likely be subject to legal challenge.⁵

American Oversight seeks records with the potential to shed light on the development of this major policy change.

Requested Records

American Oversight requests that your agency produce the following records within twenty business days:

All records reflecting OMB's review and CMS's subsequent withdrawal of the proposal entitled "State Medicaid Director Letter: Medicaid Value and Accountability Demonstration Opportunity" and labeled with the Regulation Identifier Number 0938-ZB55, which was received on June 4, 2019 and removed on November 15, 2019.

Examples of responsive records include any cost-benefit analysis, final determinations about the legality of the proposal, and decision memoranda regarding the withdrawal of the proposal.

American Oversight believes that your agency is in the best position to identify the custodians most likely to possess records responsive to this request. However, American Oversight requests that your agency search, at a minimum, the files of the following agency personnel:

1. Anyone serving as Director of the Office of Management and Budget, such as Mick Mulvaney and Russell Vought, including anyone in an acting capacity
2. Anyone serving as Deputy Director of the Office of Management and Budget, such as Russell Vought, including anyone in an acting capacity
3. Anyone serving as Chief of Staff in the Office of Management and Budget, such as Michelle Williams and Wesley Denton, including anyone in an acting capacity
4. Anyone serving as General Counsel of the Office of Management and Budget, such as Mark Paoletta, including anyone in an acting capacity
5. Anyone serving as Associate Director of Health Programs, such as Greg D'Angelo

⁴ Tony Pugh, *Guidance on State Caps on Federal Medicaid Funding Withdrawn*, BLOOMBERG (Nov. 18, 2019, 2:10 PM), <https://news.bloomberglaw.com/health-law-and-business/guidance-on-state-caps-on-federal-medicaid-funding-withdrawn>.

⁵ Shira Stein, *Medicaid Block Grant Proposal Could Face High Legal Hurdles*, BLOOMBERG (Jan. 28, 2020, 5:16 AM), <https://news.bloomberglaw.com/health-law-and-business/medicaid-block-grant-policy-could-face-high-legal-hurdles>.

6. Anyone serving as Deputy Associate Director of the Health Division within Health Programs, such as Tom Reilly, including anyone in an acting capacity
7. Anyone serving as Chief of the Public Health Branch within Health Programs, such as Marc Garufi, including anyone in an acting capacity
8. Anyone serving as Chief of the Medicaid Branch within the Health Division of Health Programs
9. Anyone serving as Administrator of the Office of Information and Regulatory Affairs, such as Paul Ray, including anyone in an acting capacity
10. Anyone serving as Deputy Administrator of the Office of Information and Regulatory Affairs, such as Dominic Mancini, including anyone in an acting capacity
11. Anyone serving as Counselor to the Administrator of the Office of Information and Regulatory Affairs, such as Rosario Palmieri, including anyone in an acting capacity

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency's regulations, 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. Moreover, the request is primarily and fundamentally for non-commercial purposes.

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 operations or activities of the government."⁶ The public has a significant interest in the funding, structure, and scope of Medicaid, which currently covers nearly 65 million individuals nationwide.⁷ Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including the process by which Medicaid policy decisions with national implications are reached, implemented, and managed. American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available, and the public's understanding of the government's activities would be enhanced through American Oversight's analysis and publication of these records.

⁶ 5 U.S.C. § 552(a)(4)(A)(iii).

⁷ *November 2019 Medicaid & CHIP Enrollment Data Highlights*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html>.

This request is primarily and fundamentally for non-commercial purposes.⁸ 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.⁹

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through numerous substantive analyses posted to its website.¹⁰ Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to an ethics waiver received by a senior Department of Justice attorney and an analysis of what those records demonstrated regarding the Department's process for issuing such waivers;¹¹ posting records received as part of American Oversight's "Audit the Wall" project to gather and analyze information related to the administration's proposed construction of a barrier along the U.S.-Mexico border, and analyses of what those records reveal;¹² posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;¹³ posting records and analysis relating to the

⁸ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁹ American Oversight currently has approximately 15,500 page likes on Facebook and 101,600 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Feb. 10, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Feb. 10, 2020).

¹⁰ News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

¹¹ DOJ Records Relating to Solicitor General Noel Francisco's Recusal, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *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>.

¹² See generally *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; see, e.g., *Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>.

¹³ *Documents Reveal Ben Carson Jr.'s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>.

federal government's efforts to sell nuclear technology to Saudi Arabia;¹⁴ and posting records and analysis regarding the Department of Justice's decision in response to demands from Congress to direct a U.S. Attorney to undertake a wide-ranging review and make recommendations regarding criminal investigations relating to the President's political opponents and allegations of misconduct by the Department of Justice itself and the Federal Bureau of Investigation.¹⁵

Accordingly, American Oversight qualifies for a fee waiver.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have 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 for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal

¹⁴ *Investigating the Trump Administration's Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>.

¹⁵ *Sessions' Letter Shows DOJ Acted on Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

Records Act and FOIA.¹⁶ 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, by intent or through negligence, failed to meet their obligations.¹⁷

- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to government-wide requirements to manage agency information electronically,¹⁸ and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency’s archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- 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 a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

¹⁶ 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).

¹⁷ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

¹⁸ 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>.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. 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 your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF 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.

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, please contact Christine Monahan at foia@americanoversight.org or 202.869.5244. 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 line extending to the left.

Austin R. Evers
Executive Director
American Oversight