



April 19, 2021

VIA EMAIL

Hugh Gilmore
Freedom of Information Officer
Centers for Medicare & Medicaid Services
North Building, Room N2-20-06
7500 Security Boulevard
Baltimore, MD 21244
FOIA_Request@cms.hhs.gov

Re: Freedom of Information Act Request

Dear FOIA Officer Gilmore:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of your agency, 45 C.F.R Part 5, American Oversight makes the following request for records.

Requested Records

American Oversight requests that the Centers for Medicare & Medicaid Services (CMS) produce the following records within twenty business days:

All records concerning former CMS Administrator Seema Verma's loss of her government-issued mobile device in January 2021,¹ including, but not limited to, any communications or documentation identifying or discussing the date and context of the loss, when and how the loss was reported, and/or any efforts undertaken to recover the device or its contents.

Please provide all responsive records from January 1, 2021, through the date of the search.

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.

¹ American Oversight became aware of this event through counsel for CMS in litigation pertaining to a prior FOIA request from American Oversight. For more information, please see Exhibit A.



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.”² The public has a significant interest in federal officials’ compliance with their obligations to preserve federal records, including but not limited to those records subject to active litigation. Records with the potential to shed light on this issue would contribute significantly to public understanding of operations of the federal government, including whether and to what extent federal officials took all reasonable steps to preserve and recover the contents of former Administrator Verma’s government-issued device. 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.

This request is primarily and fundamentally for non-commercial purposes.³ 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.⁴

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through regular substantive analyses posted to its website.⁵ Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to the Trump Administration’s contacts with Ukraine and analyses of those contacts;⁶ posting records and editorial content about the federal government’s response to the Coronavirus pandemic;⁷ posting records received as part of American Oversight’s

² 5 U.S.C. § 552(a)(4)(A)(iii).

³ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁴ American Oversight currently has approximately 15,700 page likes on Facebook and 106,200 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited April 13, 2021); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited April 13, 2021).

⁵ See generally *News*, American Oversight, <https://www.americanoversight.org/blog>.

⁶ *Trump Administration’s Contacts with Ukraine*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-contacts-with-ukraine>.

⁷ See generally *The Trump Administration’s Response to Coronavirus*, American Oversight, <https://www.americanoversight.org/investigation/the-trump-administrations-response-to-coronavirus>; see, e.g., *CDC Calendars from 2018 and 2019: Pandemic-Related*

“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;⁸ 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;⁹ and posting records and analysis of federal officials’ use of taxpayer dollars to charter private aircraft or use government planes for unofficial business.¹⁰

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. For instance, if the request seeks “communications,” please search all locations likely to contain communications, including relevant hard-copy files, correspondence files, appropriate locations on hard drives and shared drives, emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voicemail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.
- 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

Briefings and Meetings, American Oversight, <https://www.americanoversight.org/cdc-calendars-from-2018-and-2019-pandemic-related-briefings-and-meetings>.

⁸ 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>.

⁹ *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>.

¹⁰ See generally *Swamp Airlines: Chartered Jets at Taxpayer Expense*, American Oversight, <https://www.americanoversight.org/investigation/swamp-airlines-private-jets-taxpayer-expense>; see, e.g., *New Information on Pompeo’s 2017 Trips to His Home State*, American Oversight, <https://www.americanoversight.org/new-information-on-pompeos-2017-trips-to-his-home-state>.

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 Records Act and FOIA.¹¹ 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.¹²
- 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,¹³ 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

¹¹ 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).

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

¹³ 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>.

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.

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 H. 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,

/s/ Christine H. Monahan
Christine H. Monahan
on behalf of
American Oversight

EXHIBIT 1



March 23, 2021

VIA U.S. MAIL / EMAIL

Xavier Becerra
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U.S. Department of Health & Human Services
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Washington, DC 20201

Elizabeth Richter
Acting Administrator
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elizabeth.richter@cms.hhs.gov

Hugh Gilmore
Freedom of Information Officer
Centers for Medicare & Medicaid Services
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7500 Security Boulevard
Baltimore, MD 21244
Hugh.Gilmore@cms.hhs.gov

Dear Secretary Becerra, Acting Administrator Richter, and Freedom of Information Officer Gilmore:

Through ongoing litigation brought pursuant to the Freedom of Information Act (FOIA), American Oversight has learned that former Centers for Medicare & Medicaid Services (CMS) Administrator Seema Verma purportedly lost her government-issued mobile phone in January 2021, prior to her departure from the agency. American Oversight hereby requests that you take immediate action to preserve or recover all federal records, including any text messages (or messages on similar applications, such as Signal or WhatsApp) regarding agency business, that were accessible from this device.

Background

On September 1, 2020, American Oversight submitted a FOIA request to CMS seeking all text messages or messages on similar applications sent or received by Administrator Verma, among other specified CMS officials, regarding the novel coronavirus outbreak or the government responses to the outbreak.¹ On November 12, 2020, American Oversight sent a letter to CMS

¹ A copy of this request is available online at <https://www.americanoversight.org/document/foia-to-cms-seeking-text-messages-of-leadership-related-to-coronavirus>.



asking that the agency take immediate action to preserve and recover any and all responsive records from these officials' electronic devices, including any personal devices, highlighting the fact that these officials had limited continued tenure at the agency.² American Oversight further notified the agency that it intended to pursue all legal avenues to enforce its right to access the requested records, including through litigation, and advised that the agency place a preservation hold on relevant records. On November 13, 2020, American Oversight filed suit to enforce this request and similar requests to other components of the U.S. Department of Health and Human Services (HHS). *See* Compl., *Am. Oversight v. U.S. Dep't of Health & Human Servs.*, Case No. 1:20-cv-03282, ECF No. 1 (D.D.C. Nov. 13, 2020).

On January 6, 2021, American Oversight contacted counsel for defendants in this matter to ask that the agencies provide assurances that all necessary steps were being taken to preserve any potentially responsive records in the possession of departing agency officials, including on both government-issued and personal devices. On January 13, 2021, counsel assured American Oversight that proper steps had been taken to direct the individuals identified in the relevant FOIA requests to preserve potentially responsive records prior to January 20, 2021. On January 19, 2021, counsel elaborated that the agencies planned to wait until the officials departed from their agency roles before gaining access to their government-issued devices. On February 26, 2021, counsel updated American Oversight that former Administrator Verma had lost her government-issued device in January 2021. Presumably this loss occurred sometime between January 13, 2021, and January 20, 2021, given the agency's prior representations to American Oversight through counsel.

American Oversight has since requested additional information regarding CMS's efforts to secure access to any potentially responsive records maintained on the lost device, including, specifically, what steps, if any, the agency has taken to recover these records. For example, American Oversight asked whether the agency has contacted the service provider for the device to gain access to its contents. CMS has not provided any information in response to American Oversight's questions.

Immediate Action is Needed to Preserve or Recover Federal Records

CMS's failure to confirm that it has secured access to the contents of former Administrator Verma's lost device raises serious concerns about whether records responsive to American Oversight's request, as well as other federal records, have been preserved in the manner required by the Federal Records Act. 44 U.S.C. § 3106.³ What's more, the agency's ongoing and continued failure to secure access to these records increases the risk, with each passing day,

² *See* Ex. A.

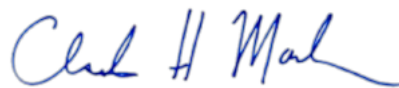
³ *See also* 44 U.S.C. § 3101 (requiring preservation of records documenting the "organization, functions, policies, decisions, procedures, and essential transactions of the agency"); 44 U.S.C. § 3301 (defining records as "all information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preservation by that agency . . ."); Nat'l Archives & Records Admin., Bulletin 2015-02, July 29, 2019, <https://www.archives.gov/records-mgmt/bulletins/2015/2015-02.html> (stating that text messages and similar records are federal records).

of the destruction of any federal records that were otherwise saved only on former Administrator Verma's lost device.

The Federal Records Act requires you to notify the Archivist of "any actual, impending, or threatened" unlawful removal, alteration, or destruction of federal records, and to initiate an action through the Attorney General to recover those records you have reason to believe were unlawfully removed. 44 U.S.C. § 3106(a). American Oversight urges you to take immediate action to preserve or recover all federal records on former Administrator Verma's lost device—including, if necessary, by seeking the records from the relevant service provider(s)—and, if there is any reason to believe that records have been unlawfully removed, to undertake an enforcement action through the Attorney General to ensure that all of the federal records on this device are properly preserved.

Please promptly alert American Oversight when you have taken action to preserve or recover the contents of former Administrator Verma's device. You may contact me at 202.869.5244 or christine.monahan@americanoversight.org.

Sincerely,



Christine H. Monahan
Counsel
American Oversight

CC:

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Avenue NW
Washington, DC 20408
david.ferriero@nara.gov

Cynthia Posey
Director, Division of Records and Information Systems
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EXHIBIT A



November 12, 2020

VIA EMAIL

Brandon Gaylord
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RE: Preservation of Records Responsive to Freedom of Information Act Request

Dear FOIA Officers:

On September 1, 2020, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(6)(A), and U.S. Department of Health and Human Services (HHS) regulations, 45 C.F.R. Part 5, American Oversight submitted FOIA requests to your offices seeking all text messages or messages on similar applications (such as Signal or WhatsApp) sent or received by specified agency officials regarding the novel coronavirus outbreak or the government responses to the outbreak.¹

¹ The tracking numbers for these requests are as follows: 2020-01746-FOIA-OS (HHS); 2020-6423 (Food and Drug Administration); and 090120207015 (PIN Z5UN) (Centers for Medicare & Medicaid Services).



In light of the results of the 2020 presidential election,² the relevant custodians, including, but not limited to, Secretary Alex Azar, Food and Drug Administration (FDA) Commissioner Stephen Hahn, and Centers for Medicare & Medicaid Services (CMS) Administrator Seema Verma, likely have limited continued tenure at the agency as they are political appointees of the current administration. The spate of post-election dismissals of top agency officials and media speculation that other senior officials may lose their jobs in the near future³ suggests that some of these officials' tenures may extend only a matter of days or weeks.⁴

Your agencies are legally obligated to preserve high-ranking employees' text messages⁵ regarding official business—including the federal government's response to the coronavirus—as federal records under the Federal Records Act (FRA).⁶ Text messages of agency officials are also subject to FOIA. To constitute an “agency record” for purposes of FOIA, an agency, first, must “either create or obtain” a requested record, and, second, “must be in control of the requested materials at the time the FOIA request is made.”⁷ There can be no doubt that text messages sent by an agency official are

² Stephen Collinson & Maeve Reston, *Biden Defeats Trump in an Election He Made About Character of the Nation and the President*, CNN (Nov. 7, 2020, 9:44 PM), <https://www.cnn.com/2020/11/07/politics/joe-biden-wins-us-presidential-election/index.html>.

³ See, e.g., Jemima McEvoy, *Trump's 'Post-Election' Purge: At Least 9 Senior Officials Fired, Quit or Reassigned*, Forbes (Nov. 10, 2020, 2:12 PM), <https://www.forbes.com/sites/jemimamcevoy/2020/11/10/trumps-post-election-purge-at-least-7-senior-officials-fired-quit-or-reassigned/?sh=39b7537a7f67>; Brett Samuels et al., *Esper Firing Hints at Broader Post-Election Shake-Up*, The Hill (Nov. 9, 2020, 5:40 PM), <https://thehill.com/homenews/administration/525202-esper-firing-hints-at-broader-post-election-shakeup>.

⁴ See Laurie McGinley et al., *Trump Rails Against 'Medical Deep State' After Pfizer Vaccine News Comes After Election Day*, Wash. Post (Nov. 11, 2020, 7:08 PM), <https://www.washingtonpost.com/politics/2020/11/11/trump-angry-about-pfizer-vaccine/>; Alicia Ault, *Trump Could Clean House at Health Agencies*, Medscape, Nov. 10, 2020, <https://www.medscape.com/viewarticle/940736>.

⁵ For purposes of this letter, references to “text messages” include messages on other, similar messaging platforms or applications, such as Signal or WhatsApp.

⁶ See 44 U.S.C. § 3301 (defining covered records as “all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them”); Bulletin 2015-02, Nat'l Archives (July 29, 2015), <https://www.archives.gov/records-mgmt/bulletins/2015/2015-02.html> (“agencies must capture and manage [text and other electronic messages] in compliance with Federal records management laws, regulations, and policies,” and must “ensure electronic messages are . . . available for release or production when needed”).

⁷ *DOJ v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

“created” by the agency (and the obvious corollary, that text messages received by that official are “obtained” by the agency). And so long as those text messages relate to agency business, they plainly came into the agency’s possession “in the legitimate conduct of its official duties,” as required to demonstrate that the agency is in control of the material.⁸

As stated in its FOIA requests for top officials’ text messages regarding the coronavirus and response thereto, American Oversight intends to pursue all legal avenues to enforce its rights to access the records it has requested, including through litigation. Your agencies remain on notice that litigation is reasonably foreseeable and should take prompt action to place a preservation hold on relevant records. In light of the special risks presented by the likely imminent departure of officials identified in American Oversight’s requests, your agencies should take immediate action to preserve and recover any and all responsive records from these officials’ electronic devices (including any personal devices⁹) before their departure.¹⁰

Please promptly alert American Oversight when you have taken action to preserve or recover responsive records. You may contact Christine H. Monahan at 202.869.5244 or christine.monahan@americanoversight.org.

Sincerely,



Austin R. Evers
Executive Director
American Oversight

Cc:

Jacqlyn Smith-Simpson, Acting
U.S. Department of Health and Human Services
Room 348F.24
200 Independence Ave. SW

⁸ *Id.*

⁹ Records of official business conducted using unofficial systems or stored outside of official files are subject to the FRA and FOIA. *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).

¹⁰ To the extent officials are currently no longer employed by the federal government and their records were not preserved, the FRA requires the head of your agency to notify the Archivist of “any actual, impending, or threatened” unlawful removal, alteration, or destruction of federal records, and to initiate an action through the Attorney General to recover those records you have reason to believe were unlawfully removed. 44 U.S.C. § 3106(a).

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