



1875 Eye Street NW, Suite 800, Washington, DC 20006

August 26, 2016

**VIA E-MAIL**

Department of Health and Human Services  
Attention: Michael Marquis, FOIA Officer  
Hubert H. Humphrey Building, Room 729H  
200 Independence Avenue, SW  
Washington, D.C. 20201  
FOIARequests@hhs.gov

**Re: Freedom of Information Act Request**

Dear Mr. Marquis:

I write on behalf of Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.<sup>1</sup> In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. To that end, we are examining the continued failures of the Affordable Care Act (“ACA”), specifically the decision by the Department of Health and Human Services (“HHS”) to shift money to pay off insurers before taxpayers.

It appears HHS has failed to return payments to taxpayers in violation of the law.<sup>2</sup> Section 1341 of the ACA created the transitional reinsurance program.<sup>3</sup> This program requires that HHS collect reinsurance contributions from health insurance providers and third party administrators on behalf of group health plans.<sup>4</sup> In order to comply with the law, HHS was supposed to use those contributions to make payments to health insurers who enroll high-risk individuals and deposit a portion of the contributions in the U.S. Treasury.<sup>5</sup> In total for 2014, 2015, and 2016, taxpayers were scheduled to receive \$5 billion.<sup>6</sup> Unfortunately for taxpayers, it appears when HHS collected less funds than required by the ACA, the agency decided to allocate

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<sup>1</sup> See CAUSE OF ACTION INSTITUTE, *About*, [www.causeofaction.org/about/](http://www.causeofaction.org/about/).

<sup>2</sup> See Paulette C. Morgan & Edward C. Liu, Congressional Research Service, Memorandum to the H. Comm. on Ways & Means and H. Comm. on Energy & Commerce, *Information on the ACA Transitional Reinsurance Program*, Feb. 23, 2016, available at <http://bit.ly/2bpFRIQ>.

<sup>3</sup> Centers for Medicare & Medicaid Services, *The Transitional Reinsurance Program -- The Transitional Reinsurance Program – Reinsurance Contributions*, available at <http://go.cms.gov/2biWa1o>.

<sup>4</sup> Morgan & Liu, *supra* note 2.

<sup>5</sup> 42 U.S.C. § 18061(b)(4).

<sup>6</sup> Morgan & Liu, *supra* note 2.

all transitional reinsurance program funding to health insurers, potentially depriving taxpayers of billions of dollars. According to the Congressional Research Service, providing the entire contribution from the transitional reinsurance program to health insurance providers is “in conflict with a plain reading of 1341(b)(4).”<sup>7</sup> HHS’s decision to engage in this activity while essentially bailing out insurance companies raises serious questions about which officials in the Obama Administration decided to thwart the intent of laws written by Congress to help special interests.

The continuing failures of Obamacare raise serious concerns about the long-term viability of the program.<sup>8</sup> In addition, the measures senior Obama Administration officials are willing to take in order to make the program appear successful is troubling. As such, there is significant interest in examining the decision-making process by Obama Administration officials related to bailing out insurance companies with taxpayer money.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), CoA Institute hereby requests access to the following records for the time period January 1, 2012 to the present:<sup>9</sup>

1. All records referring or relating the HHS decision to prioritize payments under the transitional reinsurance program to insurance companies over payments to the U.S. Treasury, including but not limited to communications between the HHS Office of the Secretary, Centers for Medicare and Medicaid Services Office of the Administrator, and the Executive Office of the President.
2. All records sent to the House Committee on Ways and Means in response to its February 9, 2016, letter regarding the transitional reinsurance program.<sup>10</sup>
3. All records sent to the House Committee on Energy and Commerce in response to its March 23, 2016, letter regarding the transitional reinsurance program.<sup>11</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> See Peter Sullivan, *Frustration Mounts Over Obamacare Co-op Failures*, THE HILL, Aug. 1, 2016, available at <http://bit.ly/2b4MDZkk>.

<sup>9</sup> For purposes of this request, the term “present” should be construed as the date on which the agency begins its search for responsive records. See *Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002). The term “record” means the entirety of the record any portion of which contains responsive information. See *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, No. 15-5201, 2016 WL 4056405, at \*7-9 (D.C. Cir. July 29, 2016) (admonishing agency for withholding information as “non-responsive” because “nothing in the statute suggests that the agency may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure”).

<sup>10</sup> Letter from H. Comm. on Ways & Means, et al., to Sylvia Matthews Burwell, Sec’y, U.S. Dept. of Health & Human Serv., Feb. 9, 2016 available at <http://bit.ly/2bCDDME>.

<sup>11</sup> See Letter from H. Comm. on Energy & Commerce, et al., to Sylvia Matthews Burwell, Sec’y, U.S. Dept. of Health & Human Serv. Mar. 23, 2016, available at <http://bit.ly/1svOKOX>.

4. All records sent to the Senate Committee on Homeland Security and Governmental Affairs in response to its July 28, 2016, letter regarding the transitional reinsurance program.<sup>12</sup>

### **Request for a Public Interest Fee Waiver**

CoA Institute requests a waiver of any and all applicable fees. FOIA and applicable regulations provide that the agency shall furnish requested records without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”<sup>13</sup> In this case, the requested records unquestionably shed light on the “operations or activities of the government,” namely learning about the decision by officials in the Obama Administration to divert taxpayer money to insurance companies in possible violation of the law. These records are not available to the public and will provide insight into the Obama Administration’s decision making process.

CoA Institute has both the intent and ability to make the results of this request available to a reasonably broad public audience through various media. Its staff has significant experience and expertise in government oversight, investigative reporting, and federal public interest litigation. These professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public, whether through the Institute’s regularly published online newsletter, memoranda, reports, or press releases.<sup>14</sup> In addition, as CoA Institute is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code, it has no commercial interest in making this request.

### **Request To Be Classified as a Representative of the News Media**

For fee status purposes, CoA Institute also qualifies as a “representative of the news media” under FOIA.<sup>15</sup> As the D.C. Circuit recently held, the “representative of the news media” test is properly focused on the requestor, not the specific FOIA request at issue.<sup>16</sup> CoA Institute satisfies this test because it gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.<sup>17</sup> Although it is not required by the statute, CoA Institute gathers the news it regularly

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<sup>12</sup> Letter from S. Comm. on Homeland Security & Governmental Affairs, Permanent Subcomm. on Investigations to Sylvia Matthews Burwell, Sec’y, U.S. Dept. of Health & Human Serv., July 28, 2016, *available at* <http://bit.ly/2bnw4bO>.

<sup>13</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 45 C.F.R. § 5.45 (1997); *see also Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1115-19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

<sup>14</sup> *See also Cause of Action*, 799 F.3d at 1125-26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

<sup>15</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 45 C.F.R. § 5.5 (1997).

<sup>16</sup> *See Cause of Action*, 799 F.3d at 1121.

<sup>17</sup> CoA Institute notes that the agency’s definition of “representative of the news media” 45 C.F.R. § 5.5 (1997) is in conflict with the statutory definition and controlling case law. The agency has improperly retained the outdated “organized and operated” standard that Congress abrogated when it provided a statutory definition in the OPEN Government Act of 2007. *See Cause of Action*, 799 F.3d at 1125 (“Congress . . . omitted the ‘organized and operated’ language when it enacted the statutory definition in 2007. . . . [Therefore,] there is no basis for adding an

publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. It does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.<sup>18</sup> These distinct works are distributed to the public through various media, including the Institute’s website, Twitter, and Facebook. CoA Institute also provides news updates to subscribers via e-mail.

The statutory definition of a “representative of the news media” contemplates that organizations such as CoA Institute, which electronically disseminate information and publications via “alternative media[,] shall be considered to be news-media entities.”<sup>19</sup> In light of the foregoing, numerous federal agencies—including the HHS—have appropriately recognized the Institute’s news media status in connection with its FOIA requests.<sup>20</sup>

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‘organized and operated’ requirement to the statutory definition.”). Under either definition, however, CoA Institute qualifies as a representative of the news media.

<sup>18</sup> See, e.g., *Cause of Action Testifies Before Congress on Questionable White House Detail Program* (May 19, 2015), available at <http://coainst.org/2aJ8UAA>; COA INSTITUTE, 2015 GRADING THE GOVERNMENT REPORT CARD (Mar. 16, 2015), available at <http://coainst.org/2as088a>; *Cause of Action Launches Online Resource: Executive Branch Earmarks.com* (Sept. 8, 2014), available at <http://coainst.org/2aJ8sm5>; COA INSTITUTE, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://coainst.org/2aFWxUZ>; COA INSTITUTE, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://coainst.org/2apTwqP>; COA INSTITUTE, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://coainst.org/2aJh901>.

<sup>19</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>20</sup> See, e.g., FOIA Request 1355038-000, Fed. Bureau of Investigation, Dep’t of Justice (Aug. 2, 2016); FOIA Request CFPB-2016-222-F, Consumer Fin. Prot. Bureau (Apr. 20, 2016); FOIA Request CFPB-2016-207-F, Consumer Fin. Prot. Bureau (Apr. 14, 2016); FOIA Request 796939, Dep’t of Labor (Mar. 7, 2016); FOIA Request 2015-HQFO-00691, Dep’t of Homeland Sec. (Sept. 22, 2015); FOIA Request F-2015-12930, Dept. of State (Sept. 2, 2015); FOIA Request 14-401-F, Dep’t of Educ. (Aug. 13, 2015); FOIA Request HQ-2015-01689-F, Dep’t of Energy (Aug. 7, 2015); FOIA Request 2015-OSEC-04996-F, Dep’t of Agric. (Aug. 6, 2015); FOIA Request OS-2015-00419, Dep’t of Interior (Aug. 3, 2015); FOIA Request 780831, Dep’t of Labor (Jul 23, 2015); FOIA Request 15-05002, Sec. & Exch. Comm’n (July 23, 2015); FOIA Request 145-FOI-13785, Dep’t of Justice (Jun. 16, 2015); FOIA Request 15-00326-F, Dep’t of Educ. (Apr. 08, 2015); FOIA Request 2015-26, Fed. Energy Regulatory Comm’n (Feb. 13, 2015); FOIA Request HQ-2015-00248, Dep’t of Energy (Nat’l Headquarters) (Dec. 15, 2014); FOIA Request F-2015-106, Fed. Commc’n Comm’n (Dec. 12, 2014); FOIA Request HQ-2015-00245-F, Dep’t of Energy (Dec. 4, 2014); FOIA Request F-2014-21360, Dep’t of State, (Dec. 3, 2014); FOIA Request LR-2015-0115, Nat’l Labor Relations Bd. (Dec. 1, 2014); FOIA Request 201500009F, Exp.-Imp. Bank (Nov. 21, 2014); FOIA Request 2015-OSEC-00771-F, Dep’t of Agric. (OCIO) (Nov. 21, 2014); FOIA Request OS-2015-00068, Dep’t of Interior (Office of Sec’y) (Nov. 20, 2014); FOIA Request CFPB-2015-049-F, Consumer Fin. Prot. Bureau (Nov. 19, 2014); FOIA Request GO-14-307, Dep’t of Energy (Nat’l Renewable Energy Lab.) (Aug. 28, 2014); FOIA Request HQ-2014-01580-F, Dep’t of Energy (Nat’l Headquarters) (Aug. 14, 2014); FOIA Request LR-20140441, Nat’l Labor Relations Bd. (June 4, 2014); FOIA Request 14-01095, Sec. & Exch. Comm’n (May 7, 2014); FOIA Request 2014-4QFO-00236, Dep’t of Homeland Sec. (Jan. 8, 2014); FOIA Request DOC-OS-2014-000304, Dep’t of Commerce (Dec. 30, 2013); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013); FOIA Request 2013-073, Dep’t of Homeland Sec. (Apr. 5, 2013); FOIA Request 2012-RMA-02563F, Dep’t of Agric. (May 3, 2012); FOIA Request 2012-00270, Dep’t of Interior (Feb. 17, 2012); FOIA Request 12-00455-F, Dep’t of Educ. (Jan. 20, 2012).

## **Record Preservation Requirement**

CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and any administrative remedies for appeal have been exhausted. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request.<sup>21</sup>

## **Record Production and Contact Information**

In an effort to facilitate document review, please provide the responsive documents in electronic form in lieu of a paper production. If a certain portion of responsive records can be produced more readily, CoA Institute requests that those records be produced first and the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact me by telephone at (202) 499-4232 or by e-mail at [lamar.echols@causeofaction.org](mailto:lamar.echols@causeofaction.org). Thank you for your attention to this matter.



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Lamar Echols  
Counsel

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<sup>21</sup> See 36 C.F.R. § 1230.3(b) (“Unlawful or accidental destruction (also called unauthorized destruction) means . . . disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records.”); *Chambers v. Dep’t of the Interior*, 568 F.3d 998, 1004-05 (D.C. Cir. 2009) (“[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act.”); *Judicial Watch, Inc. v. Dep’t of Commerce*, 34 F. Supp. 2d 28, 41-44 (D.D.C. 1998).

