



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

September 22, 2016

**VIA E-MAIL**

Centers for Medicare and Medicaid Services  
Attention: Hugh Gilmore, Director  
Division of Freedom of Information, Office of Strategic Operations & Regulatory Affairs  
7500 Security Boulevard  
Baltimore, MD 21244  
FOIA\_Request@cms.hhs.gov

**Re: Freedom of Information Act Request**

Dear Mr. Gilmore:

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 Obama Administration’s apparent attempt to bailout insurers through judicial settlements in order to compensate for short falls in the risk corridors program.

Under the ACA, the risk corridors program was supposed to collect payments from insurers with lower than expected losses and redirect the money to subsidize insurers with higher than expected losses.<sup>2</sup> Because of the monetary shortfalls in the risk corridors program, payouts have been limited.<sup>3</sup> On September 9, 2016, the Centers for Medicare and Medicaid Services (“CMS”) released a document entitled “Risk Corridors Payments for 2015.”<sup>4</sup> The CMS document states that “no funds will be available at this time for 2015 benefit year risk corridors payments.”<sup>5</sup> More concerning, the CMS document essentially invites judicial settlements with insurance companies:

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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> Philip Klein, *How Obama Could Try to Bail Out Obamacare Insurers*, WASH EXAMINER, Sept. 12, 2016, available at <http://washex.am/2cWWNjm>.

<sup>3</sup> Peter Sullivan, *Official Hints at Settlement Talks with Obamacare Insurers*, The Hill, Sept. 14, 2016, available at <http://bit.ly/2depzcN>.

<sup>4</sup> Centers for Medicare & Medicaid Services, *Risk Corridors Payments for 2015*, Sept. 9, 2016, available at <http://go.cms.gov/2cPXLzl>.

<sup>5</sup> *Id.*

We know that a number of issuers have sued in federal court seeking to obtain the risk corridors amounts that have not been paid to date. As in any lawsuit, the Department of Justice is vigorously defending those claims on behalf of the United States. However, as in all cases where there is litigation risk, we are open to discussing resolution of those claims. We are willing to begin such discussions at any time.<sup>6</sup>

The CMS document raises serious questions about the intentions of the Administration to fund the risk corridors program. In fact, the document creates the appearance that the Administration is now inviting lawsuit settlements in order to work around a provision enacted by Congress.<sup>7</sup> In 2014, Congress enacted a provision preventing the Administration from shifting funds into the risk corridors program.<sup>8</sup> Moreover, the U.S. Department of Justice (“DOJ”) Office of Legal Counsel has determined that these “backdoor bailouts” are improper.<sup>9</sup>

The Judgment Fund does not become available simply because an agency may have insufficient funds at a particular time to pay a judgment. If the agency lacks sufficient funds to pay a judgment, but possesses statutory authority to make the payment, its recourse is to seek funds from Congress. Thus, if another appropriation or fund is legally available to pay a judgment or settlement, payment is “otherwise provided for” and the Judgment Fund is not available.<sup>10</sup>

The continuing failures of ObamaCare raise serious concerns about the long-term viability of the program.<sup>11</sup> In this case, the Administration appears to be attempting to circumvent laws and rules created by both Congress and DOJ. Additionally, the measures 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 Administration officials related to the apparent decision to bail out insurance companies with taxpayer money through settlements with insurers.

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, 2015 to the present.<sup>12</sup>

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

<sup>7</sup> Sullivan, *supra* note 3.

<sup>8</sup> *Id.*

<sup>9</sup> Chris Jacobs, *Another Illegal Obamacare Bailout Appears to Be on the Way*, NAT’L REVIEW, Sept. 12, 2016, available at <http://bit.ly/2derpdP>.

<sup>10</sup> *Id.*; see also Dept. of Justice, Office of Legal Counsel, *Appropriate Source for Payment of Judgments and Settlements in U.S. v. Winstar Corp.*, July 22, 1998, available at <http://bit.ly/2d5Ymsi>.

<sup>11</sup> See Peter Sullivan, *Frustration Mounts Over Obamacare Co-op Failures*, THE HILL, Aug. 1, 2016, available at <http://bit.ly/2b4MDZkk>.

<sup>12</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*

1. All records referring or relating to a lack of funds for risk corridors payments to insurance companies, including but not limited to communications between and among the Health and Human Services Office of the Secretary, Centers for Medicare and Medicaid Services Office of the Administrator, insurance companies, the Executive Office of the President, and the Department of Justice.
2. All records referring or relating to the September 9, 2016, CMS document entitled “Risk Corridors Payments for 2015.”<sup>13</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>14</sup> In this case, the requested records unquestionably shed light on the “operations or activities of the government,” namely learning whether the Obama Administration plans to fund ACA risk corridors payments through judicial settlements with insurance companies instead of seeking funding from Congress. 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>15</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>16</sup> As the D.C. Circuit recently held, the “representative of the news media”

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*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>13</sup> CMS, *supra* 4.

<sup>14</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 45 C.F.R. § 5.45; *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>15</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>16</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 45 C.F.R. § 5.5.

test is properly focused on the requestor, not the specific FOIA request at issue.<sup>17</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>18</sup> Although it is not required by the statute, CoA Institute gathers the news it regularly 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>19</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>20</sup> In light of the foregoing, numerous federal agencies—including the Department—have appropriately recognized the Institute’s news media status in connection with its FOIA requests.<sup>21</sup>

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<sup>17</sup> See *Cause of Action*, 799 F.3d at 1121.

<sup>18</sup> CoA Institute notes that the agency’s definition of “representative of the news media” (45 C.F.R. § 5.5) 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 ‘organized and operated’ requirement to the statutory definition.”). Under either definition, however, CoA Institute qualifies as a representative of the news media.

<sup>19</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: ExecutiveBranchEarmarks.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 PROFITTEERING: 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>20</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>21</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

## **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>22</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) 407-9964 or by e-mail at [lamar.echols@causeofaction.org](mailto:lamar.echols@causeofaction.org). Thank you for your attention to this matter.



Lamar Echols  
Counsel

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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).

<sup>22</sup> See 15 C.F.R. § 4.3(d) ("Components shall not dispose records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.") 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).

