



November 7, 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.¹ 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 Centers for Medicare and Medicaid Services (“CMS”) role in using taxpayer information to market Affordable Care Act (“ACA”) health insurance plans to individuals who have opted out of the program.

In an effort to boost enrollment in ACA programs, it appears the Obama Administration is attempting to market the ACA to individuals who declined coverage by using information obtained from individual tax returns.² A fact sheet released by CMS entitled “Strengthening the Marketplace by Covering Young Adults,” highlights CMS’s plan to boost ACA enrollment by using taxpayer information.³ According to the fact sheet, “[f]or the first time this fall, we will conduct outreach to individuals and families who paid the fee for being uninsured, or claimed an exemption from that fee, for 2015.”⁴ CMS’s decision to use protected taxpayer information raises serious concerns that CMS may be in violation of the law.

Federal laws protect the confidentiality of tax returns and tax information. According to 26 § U.S.C. 6103, it is unlawful for an employee of the United States or a State to “disclose any

¹ See CAUSE OF ACTION INSTITUTE, *About*, www.causeofaction.org/about/.

² Lauren Clason, *Top Republicans Probe ObamaCare Marketing Proposal*, THE HILL, Sept. 22, 2016, available at <http://extra.thehill.com/healthcare/policy/297098-top-republicans-probe-obamacare-marketing-proposal>.

³ Centers for Medicare & Medicaid Services, *Strengthening the Marketplace by Covering Young Adults*, Fact Sheet, Jun. 26, 2016, available at <https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2016-Fact-sheets-items/2016-06-21.html>.

⁴ *Id.*

return or return information obtained by him in any manner in connection with his service...”⁵ The law allows for tax information to be used for the limited purpose of determining ACA subsidy eligibility. It does not, however, permit CMS to market ACA subsidies to taxpayers who have already rejected ObamaCare.⁶ Further, the disclosure of protected taxpayer information by IRS raises additional concerns about whether the information is appropriately being safeguarded and how many individuals at CMS and throughout the government may have access to the information.

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:⁷

1. All records related to CMS using taxpayer information to contact individuals and families who paid the individual responsibility penalty for being uninsured, or claimed an exemption from the fee, for 2015, 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, the Internal Revenue Service, and the Executive Office of the President.
2. All records referring or relating to the June 2016, CMS document entitled “Strengthening the Marketplace by Covering Young Adults.”⁸

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.”⁹ In this case, the requested records unquestionably shed light on the “operations or activities of the government,” namely learning how CMS intends to use protected taxpayer information to market ACA health insurance plans, what safeguards are in place to protect taxpayer information, and who has access to the

⁵ 26 § U.S.C. 6103.

⁶ See Letter from Hon. Kevin McCarthy, et. al, Majority Leader, U.S. House of Representatives, to Hon. John Koskinen, Commissioner, IRS, Sept. 21, 2016, *available at* <https://www.majorityleader.gov/2016/09/21/mccarthy-scalise-and-brady-object-to-irs-misuse-of-taxpayer-info/>.

⁷ 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”).

⁸ CMS, *supra* 3.

⁹ 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).

information. In addition, the information requested will likely shed light on the legality or illegality of the use of protected taxpayer information by CMS. 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.¹⁰ 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.¹¹ 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.¹² 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.¹³ 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.¹⁴ These distinct works

¹⁰ 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).

¹¹ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 45 C.F.R. § 5.5.

¹² See *Cause of Action*, 799 F.3d at 1121.

¹³ 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.

¹⁴ 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 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>.

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."¹⁵ 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.¹⁶

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.¹⁷

¹⁵ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹⁶ 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).

¹⁷ 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).

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. Thank you for your attention to this matter.



Lamar Echols
Counsel

