

# EXHIBIT T



**Kandi K. Hidde**  
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July 31, 2019

**VIA EMAIL FOIA\_REQUEST@CMS.HHS.GOV AND OVERNIGHT DELIVERY**

Hugh Gilmore  
Centers for Medicare & Medicaid Services  
Freedom of Information Group  
7500 Security Boulevard, N2-20-16  
Baltimore, MD 21244-1850

**Re: CMS Response for Control Numbers 052220187046, 052220187048,  
052220187050, 052320187007, and 052320187013**

Dear Mr. Gilmore:

We write regarding CMS's July 18, 2019 "second interim response" to our FOIA requests assigned Control Numbers 052220187046, 052220187048, 052220187050, 052320187007, and 052320187013 (the "Requests"). Despite the concerns we articulated in our April 25, 2019 and July 12, 2019 letters (enclosed) regarding the deficiencies in CMS's first interim response, CMS has not remedied these deficiencies and, indeed, repeated the same problems in its second interim production, without so much as acknowledging our April 25 and July 12 letters, let alone seeking to address its production flaws and mounting delays. For the reasons described below, CMS's second interim response is deficient. We request that, consistent with its legal obligations, CMS (i) identify the sub-categories of our FOIA Requests to which each produced document responds, (ii) confirm that it is searching non-publicly available sources for responsive documents, and (iii) produce documents on a rolling basis every thirty days, including the *Poehling* documents described below, along with a timeline by when it expects to complete its review and production of responsive documents.

The Requests encompass five of six FOIA request letters that we submitted to CMS over a year ago, on May 21, 2018, and include multiple sub-categories as follows:

- Control No. 052220187046 seeks documents categorized in fourteen subparts grouped by: 1) Attestation and Compliance; 2) Fee-For-Service Adjuster; and 3) Reconciliation Payments;

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- Control No. 052220187048 seeks documents categorized in seven subparts related to FOIA and other Document Productions (*see* April 25, 2019 Letter addressing this Control Number and its subparts);
- Control No. 052220187050 seeks documents categorized in twelve subparts grouped by: 1) Overpayments/Overpayment Rule; and 2) Actuarial Equivalence;
- Control No. 052320187007 seeks documents categorized in eight subparts grouped by: 1) Medicare Managed Care Manual; 2) Filter Logic; and 3) RADV Audits/Bids/Coding Intensity Adjustment; and
- Control No. 052320187013 seeks documents categorized into twelve subparts grouped by: 1) Retrospective Chart Reviews; 2) Encounter Data Work Groups; and 3) Decision Not to Finalize Proposed Chart Review Rule.

With respect to our sixth FOIA request letter (Control No. 052320187010), neither CMS's first nor second interim response purports to address that letter, which contains eight requests related to Data Accuracy. CMS's June 22, 2018 fee request letter references this Control Number, along with each other Control Number referenced above. However, it does not appear that CMS ever provided us with a PIN for Control No. 052320187010. CMS provided PINs for every other Request via individual letter. Please provide a PIN for Control No. 052320187010 immediately and confirm that the Request is in fact being processed.

### **Identifying Produced Documents to Sub-Categories in FOIA Requests**

The second interim response consists of a mere fifteen documents, spanning 2,142 pages, all of which are publicly available on CMS's website. These fifteen documents generally fall into four categories: 1) annual Notes to Medicare Advantage Organizations ("MAOs") regarding Announcement of Calendar Year Medicare Advantage Capitation Rates and Payment Policies; 2) annual Instructions for Completing the Medicare Advantage Bid Pricing Tool and the Medical Savings Account Bid Pricing Tool; 3) Medicare & Medicaid Research Review, 2014 Vol. 4, No. 2, "Measuring Coding Intensity in the Medicare Advantage Program"; and 4) Medicare Managed Care Manual, Chapter 7.

Like CMS's first interim response, the documents CMS produced in this second interim response are neither Bates Numbered nor identified by CMS in any way. Contrary to its legal obligations, CMS does not identify which of these documents relates to which Request, let alone which sub-category of the Requests. Instead, CMS merely states that the produced documents "address some of the bullets listed in your requests." Specifically, Section 30.14(A) of CMS's FOIA Policy and Procedures Guide, titled "Processing Requirements for All Agency Staff and Contractors – High Priority Issues: Organizing Responsive Records by Item (labeling and bundling)," states:

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FOIA requests frequently contain lists of multiple categories of records being requested. When providing responsive records to multi-item FOIA requests, the providing office(s) must organize the records in relation to each separate item on the request and label them accordingly, for ease of reference and analysis.<sup>1</sup>

It is still not clear to which Requests, and further sub-category, the produced documents are responsive, if any. Please identify and label the documents that are responsive to the specific listed Requests identified by sub-category, as required by CMS policy. We expect that all future responses to our multiple FOIA requests will identify and label the documents responsive to the specific requests.

### **First and Second Interim Productions Unduly Narrowed to Publicly Available Documents**

As you know, on August 14, 2018, we tendered \$120,000 to CMS in good faith to process our FOIA requests. In the nearly one year since our payment, CMS has only provided two paltry productions, containing less than forty documents total, all of which are publicly available.<sup>2</sup> We reiterate our request that CMS confirm that it is searching non-publicly available records—including CMS communications related to the creation of the publicly available documents in CMS's productions—for documents responsive to all six FOIA request letters that we submitted on May 21, 2018.

### **Second Interim Production Ignores Requests for *Poehling* Documents**

CMS appears to have completely ignored our July 12, 2019 letter requesting production of the approximately 22,000 documents that CMS was ordered to produce in the case captioned *United States of America v. United Health Group, Inc. et al*, C.D. Cal. Case No. 2:16-CV-08697 (the "*Poehling* Documents"), which relate to a number of our standing Requests. It is unclear why those documents have not been provided to us despite being ordered for production just weeks ago in the *Poehling* litigation. We demand that the *Poehling* documents be produced immediately.

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<sup>1</sup> CMS Freedom of Information Act (FOIA) Policy and Procedural Instructions at 17 (Jan. 24, 2012), <https://www.cms.gov/Regulations-and-Guidance/Legislation/FOIA/Downloads/FOIAProcessingPolicyProceduresGuide-.pdf>.

<sup>2</sup> <https://www.cms.gov/medicare/health-plans/medicareadvtspecratestats/announcements-and-documents.html>; <https://www.cms.gov/Medicare/Health-Plans/MedicareAdvtspecRateStats/Bid-Forms-Instructions.html>; [www.cms.gov/MMRR/](https://www.cms.gov/MMRR/); <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/internet-Only-Manuals-IOMs-Items/CMS019326.html>

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### Document Production Pace and Schedule

Both the first and second interim response letters indicate that CMS will continue to produce documents every sixty days. Yet we received the second interim response one hundred and fourteen days after the first interim response, nearly double CMS's own timeline, without any explanation for the delay. We believe that significant delays in the production of documents will continue. Our multiple FOIA requests have already been pending for over a year and CMS has only provided a marginal set of publicly available documents. We, therefore, again request that CMS provide (i) rolling document productions every thirty days and (ii) a proposed production schedule that ensures a reasonable completion date for production.

We have been extremely patient in our multiple attempts to obtain a response to our FOIA requests. We have engaged in written and oral communications with CMS on multiple occasions to address our concerns, but we have been ignored. We paid a very large fee of \$120,000 for very few publicly available documents. That does not include the time and costs expended by us to attempt to obtain documents. On June 14, 2019, I was advised that a CMS analyst would call me to discuss our concerns. I have not received a return call.

We request that the continued delays and deficiencies described above be remedied no later than August 30, 2019. We continue to reserve all rights to take legal action to enforce our FOIA requests.

Sincerely,

FROST BROWN TODD LLC



Kandi K. Hidde

KKH

Encl.: April 25, 2019 Letter  
July 12, 2019 Letter

0131135.0653839 4812-8516-3677v2



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April 25, 2019

**VIA EMAIL FOIA\_REQUEST@CMS.HHS.GOV AND OVERNIGHT DELIVERY**

Hugh Gilmore  
Centers for Medicare & Medicaid Services  
Freedom of Information Group  
7500 Security Boulevard, N2-20-16  
Baltimore, MD 21244-1850

**Re: CMS Responses for Control Number 052220187048**

Dear Mr. Gilmore:

We write regarding CMS's March 19, 2019 "interim response" to our FOIA request assigned Control Number 052220187048 (the "Request"). For the reasons described below, CMS's interim response is deficient and we request that, consistent with its legal obligations, CMS (i) identify the sub-categories of our FOIA requests to which each produced document responds, (ii) confirm that it is searching non-publicly available sources for responsive documents, and (iii) produce documents on a rolling basis every thirty days, along with a timeline by when it expects to complete its review and production of responsive documents.

The Request is one of six that we submitted to CMS nearly one year ago, on May 21, 2018. The Request includes sub-categories that seek: 1) documents produced to Petrillo & Powell, P.L.L.C. in response to FOIA requests; 2) documents produced to Fred Schulte of the Center for Public Integrity in response to FOIA requests; 3) records that CMS released to the Government Accountability Office (GAO) to prepare GAO-16-76; 4) any sworn statements on behalf of the government that CMS used in litigation where the government asserted submission of invalid or unsupported diagnosis codes or RAPS data by an MAO; 5) the same information enumerated in No. 4 for all investigations, enforcement actions and settlement actions concerning the same subject matter; 6) documents that CMS produced to any Member of Congress regarding retrospective medical chart reviews by MAOs; and 7) all documents that CMS produced in response to other FOIA requests relating to the topics set forth in categories listed in the Request.

**Identifying Produced Documents to Sub-Categories in FOIA Requests**

CMS's interim response to the Request consists of a mere twenty-two documents, spanning 2,080 pages, all of which are publicly available on CMS's website. These twenty-two documents generally fall into three categories: 1) charts with advance questions submitted to actuarial-

Hugh Gilmore  
April 25, 2019  
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bids@cms.hhs.com; 2) annual Notes to MAOs with Advance Notice of Methodological Changes for Calendar Year for MA Capitation Rates; and 3) annual Notes to MAOs regarding Announcement of Calendar Year MA Capitation Rates and Payment Policies. The documents produced by CMS are Bates Numbered “CMS\_FOIA,” but—contrary to requirements—CMS does not identify which of these documents relates to which sub-category of the Request. Specifically, Section 30.14(A) of CMS’s FOIA Policy and Procedures Guide, titled “Processing Requirements for All Agency Staff and Contractors – High Priority Issues: Organizing Responsive Records by Item (labeling and bundling),” states:

FOIA requests frequently contain lists of multiple categories of records being requested. When providing responsive records to multi-item FOIA requests, the providing office(s) must organize the records in relation to each separate item on the request and label them accordingly, for ease of reference and analysis.<sup>1</sup>

Upon our review, it is not clear which sub-category the provided documents are responsive to, if any. Please identify and label the documents that are responsive to the specific listed requests identified by sub-category, as required by CMS policy. We also expect that all future responses to our multiple FOIA requests will identify and label the documents responsive to the specific requests.

### **Delayed Production of Publicly Available Documents**

As you know, on August 14, 2018, we tendered \$120,000 to CMS in good faith to process our FOIA requests. Yet in the almost year since our FOIA Request and more than eight months since our payment, the single interim response to one of our six FOIA requests contained documents that appear to all be publicly available.<sup>2</sup> Please confirm that CMS is searching non-publicly available records—including CMS communications related to creation of the publicly available documents in CMS’s March 19, 2019 production—for documents responsive to all six FOIA request letters (including the Request) that we submitted on May 21, 2018.

### **Document Production Pace and Schedule**

The March 19, 2019 interim response letter indicates that CMS will continue to produce documents every sixty days. We believe that proposal will result in continued significant delays in the production of documents. Our multiple FOIA requests already have been pending for nearly one year and CMS has only provided publicly available documents thus far. We, therefore, request that CMS provide (i) rolling document productions every thirty days and (ii) a proposed production

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<sup>2</sup> See CMS, Announcements and Documents, <https://www.cms.gov/Medicare/Health-Plans/MedicareAdvtgSpecRateStats/Announcements-and-Documents.html> and CMS, Actuarial Bid Questions, <https://www.cms.gov/Medicare/Health-Plans/MedicareAdvtgSpecRateStats/ActuarialBidQuestions.html>.

Hugh Gilmore  
April 25, 2019  
Page 3

schedule that ensures a reasonable completion date for production. We appreciate your prompt attention to our concerns.

Sincerely,

FROST BROWN TODD LLC

A handwritten signature in cursive script that reads "Kandi K. Hidde".

Kandi K. Hidde

KKH

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July 12, 2019

**VIA EMAIL FOIA\_REQUEST@CMS.HHS.GOV AND OVERNIGHT DELIVERY**

Hugh Gilmore  
Centers for Medicare & Medicaid Services  
Freedom of Information Group  
7500 Security Boulevard, N2-20-16  
Baltimore, MD 21244-1850

**Re: CMS Responses for Control Numbers 052220187048; 052220187046;  
052320187013; 052320187007; and 052220187050**

Dear Mr. Gilmore:

This letter serves as a follow up to our numerous attempts to contact CMS via written correspondence and telephone calls over the last year in an effort to obtain responses to the above referenced Control Numbers. Recently, on April 25, 2019, we sent you the enclosed letter regarding CMS's deficient March 19, 2019 "interim response" to our FOIA request assigned Control Number 052220187048. Specifically, we identified the following three core deficiencies with CMS's interim response:

1. Contrary to FOIA statutory requirements, CMS's interim response failed to identify the sub-categories in our FOIA request to which the produced documents correspond. We asked that CMS remedy this deficiency but it has not.
2. The interim production – made a year after the request was submitted and nearly eight months after our \$120,000 payment was tendered in August 2018 – contained a mere twenty-two publicly available documents. We asked that CMS confirm it is searching non-publicly available records but have not received any response.
3. CMS's proposed sixty-day rolling production timeline would result in continued significant delays. We requested, instead, that rolling productions be made every thirty days, along with a proposed production schedule. Not only have we not received documents on a rolling thirty-day basis, we have received no further productions from CMS at all, despite more than 100 days passing since CMS's initial March 19, 2019 production – well beyond CMS's own sixty-day rolling production deadline.

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After not receiving a response to our April 25, 2019 letter, I contacted CMS by phone on June 14, 2019. I left voicemail messages for Vendetta Dutton and on the FOIA Hotline. I then called and spoke to a CMS analyst, Valencia Carter. Ms. Carter informed that she could not give me the name of the CMS Analyst assigned to the above-referenced Control Numbers, but that she would leave a message with that CMS Analyst to call me back. However, I have not received a return phone call from any CMS Analyst in the month that has since passed.

In addition, we are aware that CMS was recently ordered to produce approximately 22,000 documents by June 20, 2019 in the case captioned *United States of America v. United Health Group, Inc. et al*, C.D. Cal. Case No. 2:16-CV-08697 (the "*Poehling Documents*"). We have enclosed the *Poehling* court's June 6, 2019 order for reference. The *Poehling Documents* relate to a number of our standing FOIA requests, referenced in the Control Numbers above. We request that the *Poehling Documents* be produced to us as soon as possible pursuant to those standing requests, but in no case later than thirty (30) days from the date of this letter. We also request that CMS remedy the ongoing deficiencies outlined in our April 25, 2019 letter no later than thirty (30) days from the date of this letter.

We reserve all right to take legal action to enforce our FOIA requests. Please contact me at your earliest convenience to address these issues. Thank you.

Sincerely,

FROST BROWN TODD LLC



Kandi K. Hidde

KKH

Enclosures: April 25, 2019 Letter  
*Poehling Documents Order*

0131135.0653839 4810-9200-4763v1



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April 25, 2019

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April 25, 2019  
Page 2

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### **Delayed Production of Publicly Available Documents**

As you know, on August 14, 2018, we tendered \$120,000 to CMS in good faith to process our FOIA requests. Yet in the almost year since our FOIA Request and more than eight months since our payment, the single interim response to one of our six FOIA requests contained documents that appear to all be publicly available.<sup>2</sup> Please confirm that CMS is searching non-publicly available records—including CMS communications related to creation of the publicly available documents in CMS’s March 19, 2019 production—for documents responsive to all six FOIA request letters (including the Request) that we submitted on May 21, 2018.

### **Document Production Pace and Schedule**

The March 19, 2019 interim response letter indicates that CMS will continue to produce documents every sixty days. We believe that proposal will result in continued significant delays in the production of documents. Our multiple FOIA requests already have been pending for nearly one year and CMS has only provided publicly available documents thus far. We, therefore, request that CMS provide (i) rolling document productions every thirty days and (ii) a proposed production

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<sup>2</sup> See CMS, Announcements and Documents, <https://www.cms.gov/Medicare/Health-Plans/MedicareAdvtgSpecRateStats/Announcements-and-Documents.html> and CMS, Actuarial Bid Questions, <https://www.cms.gov/Medicare/Health-Plans/MedicareAdvtgSpecRateStats/ActuarialBidQuestions.html>.

Hugh Gilmore  
April 25, 2019  
Page 3

schedule that ensures a reasonable completion date for production. We appreciate your prompt attention to our concerns.

Sincerely,

FROST BROWN TODD LLC

A handwritten signature in cursive script, appearing to read "Kandi K. Hidde".

Kandi K. Hidde

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ex rel.  
BENJAMIN POEHLING,

Plaintiffs,

v.

UNITED HEALTH GROUP, INC., et al.,

Defendants.

Case No. CV 16-8697 FMO (SSx)

**ORDER RE: PENDING MOTIONS**

Having reviewed and considered all the briefing filed with respect to plaintiff United States' Motion for Review of Discovery Order ("Motion"), IT IS ORDERED that the Motion (**Document No. 334**) is **denied**. The Magistrate Judge's Memorandum Decision and Order of December 14, 2018, (Dkt. 324, "Court's Order of December 14, 2018"), is neither clearly erroneous nor contrary to law. See Fed. R. Civ. P. 72. The United States shall provide responsive documents to all the discovery requests encompassed by the Court's Order of December 14, 2018, no later than **June 20, 2019**, or at such other date as may be set by the Magistrate Judge. Failure to comply with this Order or any order issued by the Magistrate Judge shall result in the imposition of sanctions.

IT IS FURTHER ORDERED that the Joint Motion for Issuance of Scheduling Order (**Document No. 261**) is **denied as moot** pursuant to the Case Management and Scheduling Order issued on June 5, 2019.

Dated this 6th day of June, 2019.

\_\_\_\_\_  
/s/  
Fernando M. Olguin  
United States District Judge