

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,)	
)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Case No. 17-827
)	
U.S. DEPARTMENT OF)	
HEALTH AND HUMAN SERVICES and)	
OFFICE OF MANAGEMENT AND BUDGET)	
)	
<i>Defendants.</i>)	
)	

PLAINTIFF’S MOTION FOR A PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65, Plaintiff American Oversight respectfully moves this Court to issue a preliminary injunction enjoining Defendants the U.S. Department of Health and Human Services and the Office of Management and Budget from unlawfully impeding American Oversight’s access to records that must be made available under the Freedom of Information Act (“FOIA”). American Oversight seeks injunctive relief ordering Defendants to expedite the processing of American Oversight’s pending FOIA requests for records relating to the administration’s recent attempts to pass health care reform legislation, and ordering Defendants to search for and produce all documents responsive to American Oversight’s FOIA requests within twenty days of the Court’s order, or by such other date as the Court deems appropriate.

The grounds for this motion are set forth in the accompanying Memorandum in Support of Plaintiff’s Motion for a Preliminary Injunction. Pursuant to Local Rule 65.1(d), Plaintiff asks that the Court schedule a hearing on this motion at the Court’s earliest convenience.

Dated: May 4, 2017

Respectfully submitted,

/s/ Sara Kaiser Creighton

Sara Kaiser Creighton

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Counsel for Plaintiff

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U.S. DEPARTMENT OF)	
HEALTH AND HUMAN SERVICES and)	
OFFICE OF MANAGEMENT AND BUDGET,)	
)	
)	<i>Defendants.</i>
_____)	

PROPOSED ORDER

Upon consideration of Plaintiff’s Motion for a Preliminary Injunction, Defendants’ Response thereto, and the entire record, it is hereby

ORDERED that Plaintiff’s Motion for a Preliminary Injunction is **GRANTED**; and it is further

ORDERED that Defendant the U.S. Department of Health and Human Services shall expedite the processing of Plaintiff’s FOIA request dated March 15, 2017 (HHS request number 2017-00516-FOIA-OS); and it is further

ORDERED that Defendant the U.S. Department of Health and Human Services shall produce all records responsive to Plaintiff’s FOIA request dated March 15, 2017 (HHS request number 2017-00516-FOIA-OS) within ___ days of the date of this order; and it is further

ORDERED that Defendant the Office of Management and Budget shall expedite the processing of Plaintiff’s FOIA request sent on March 21, 2017 (OMB request number 2017-127); and it is further

ORDERED that Defendant the Office of Management and Budget shall produce all records responsive to Plaintiff's FOIA request sent on March 21, 2017 (OMB request number 2017-127) within ___ days of the date of this order; and it is further

SO ORDERED.

Date: _____

United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2017, copies of the foregoing Motion for a Preliminary Injunction have been served on all defendants via U.S. mail at the following addresses:

U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Office of Management and Budget
725 17th Street NW
Washington, DC 20503

In addition, a courtesy copy has been sent to:

Channing Phillips
U.S. Attorney for the District of Columbia
555 4th Street NW
Washington, DC 20530

Dated: May 4, 2017

/s/ Sara Kaiser Creighton
Sara Kaiser Creighton
D.C. Bar No. 1002367
AMERICAN OVERSIGHT
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Counsel for Plaintiff

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AMERICAN OVERSIGHT,

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v.

U.S. DEPARTMENT OF
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Defendants.

Case No. 17-827

**MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION
FOR A PRELIMINARY INJUNCTION**

Republicans in the House of Representatives have introduced legislation, styled the American Health Care Act of 2017, to “repeal and replace” the Affordable Care Act, a proposal that would fundamentally rework a significant segment of the American economy.

Notwithstanding the wide-ranging impact of this legislation, Republicans have sought to move this proposed legislation on an accelerated timetable, scheduling votes in advance of the scoring of the proposed legislation by the Congressional Budget Office and limiting the public’s opportunity to evaluate the proposed legislation before congressional debate.

This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking the release of records to promote transparency around these recent attempts at health care reform legislation. Plaintiff American Oversight submitted two nearly identical FOIA requests, one each to the U.S. Department of Health and Human Services (HHS) and the Office of Management and Budget (OMB), seeking communications between certain agency staff and Congress regarding the recent health care reform efforts. This category of information—

communications between the Executive Branch and Congress—is discrete, easy to search for, and highly unlikely to be subject to FOIA exemptions.

American Oversight requested that the agencies process those FOIA requests on an expedited basis, because the records sought could meaningfully inform the public debate about pending or anticipated legislation on an issue of pressing national concern.

OMB erroneously denied American Oversight’s request for expedited processing, while HHS has yet to make a determination on that request, notwithstanding the clear statutory requirement that it do so within ten days. Neither agency has provided any substantive response to American Oversight’s FOIA request, again notwithstanding the clear statutory requirement that they do so within twenty working days.

Plaintiff’s Motion for a Preliminary Injunction therefore seeks to compel both Defendants to process American Oversight’s FOIA requests on an expedited basis and produce all requested records without further delay. Such relief is necessary to avoid the irreparable harm that would occur if Congress engages in serious deliberations regarding, much less passes, health care reform legislation before these records are made public.

STATEMENT OF FACTS

On March 6, 2017, Republicans in the House of Representatives introduced the American Health Care Act (AHCA), a set of bills designed to “repeal and replace” the Affordable Care Act (ACA). News media reports revealed that prior to the introduction of the AHCA, there were numerous meetings between the White House, congressional leadership, and executive branch agencies, including HHS Secretary Tom Price and OMB Director Mick Mulvaney. After the bills were introduced there were reportedly additional meetings between the agency heads and congressional staff, as the Trump administration sought to build support for the proposal.

Although House Republicans eventually withdrew the AHCA after failing to gain enough support to pass the proposal, they have since reportedly continued negotiations to try to revive health care reform efforts. Current reports indicate that they may be close to finalizing a bill that will be put up for a vote in the House of Representatives.

The FOIA Requests

On March 15, 2017, Plaintiff American Oversight submitted a FOIA request to HHS seeking communications between HHS and Congress related to health care reform. *See* Ex. 1 (“HHS FOIA Request”). The request sought the following records:

1. All communications, meeting notices, meeting agendas, informational material, draft legislation, talking points, or other materials exchanged between HHS and any members of Congress or congressional staff relating to health care reform.
2. All calendar entries for the Secretary, any political or SES appointees in the Secretary’s office, and the Acting Assistant Secretary for Legislation, or anyone maintaining calendars on behalf of these individuals, relating to health care reform.

See Ex. 1. Six days later, American Oversight submitted a virtually identical request to OMB.

See Ex. 2 (“OMB FOIA Request”).

American Oversight sought expedited processing of both requests. In the HHS FOIA Request, American Oversight sought expedited review pursuant to 5 U.S.C. § 552(a)(6)(E)(v)(II) and 45 C.F.R. § 5.27(b)(2), both of which provide for expedited processing upon a determination that there is an urgent need to inform the public about an actual or alleged federal government activity when the request is made by a person primarily engaged in disseminating information to the public. In the OMB FOIA Request, American Oversight sought expedition on two grounds: first, on the same ground described above, pursuant to 5 U.S.C. § 552(a)(6)(E)(v)(II) and 5 C.F.R. § 1303.10(d)(1)(ii); and second, pursuant to 5 U.S.C. § 552(a)(6)(E)(i) and 5 C.F.R.

§ 1303.10(d)(1)(iv), under which OMB has provided that expedited treatment will be given whenever a request involves “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which [a]ffect public confidence.”

HHS’s Response

On April 5, 2017, HHS responded to American Oversight’s FOIA request. *See* Ex. 3 (HHS Response Letter 2017-00516-FOIA-OS). HHS notified American Oversight that it had initiated a search to locate records falling within the scope of the request. The letter further noted HHS’s obligation under FOIA to respond to the request within 20 working days, but noted that if any unusual and exceptional circumstances should arise in the processing of the request, they would utilize a “10 working day extension” to process the request. The letter stated that American Oversight’s “request for expedited processing will be determined soon.” *See* Ex. 3 at 2.

On April 6, 2017, an attorney for American Oversight had a phone call with a woman who identified herself as Natasha Taylor at HHS. *See* Creighton Decl. ¶ 7. During the call, Ms. Taylor provided some information about how HHS was interpreting the HHS FOIA Request. *See* Creighton Decl. ¶ 8. HHS had read the request as being related to part (2), and so had directed it to the Immediate Office of the Secretary and the Assistant Secretary for Legislation. *See* Creighton Decl. ¶ 8. Ms. Taylor and American Oversight’s lawyer agreed that the search would encompass all political appointees and SES staff in those offices. *See* Creighton Decl. ¶ 9. They further agreed that if the initial search demonstrated that individuals from other offices were likely to have responsive records, HHS would search the files of those individuals as well. *See* Creighton Decl. ¶ 10.

American Oversight has not received any further communication from HHS about its FOIA request.

OMB's Response

OMB sent a letter to American Oversight on April 4, 2017, responding to American Oversight's request for expedited processing. *See* Ex. 4 (OMB Response Letter for 17-127¹). In the letter, OMB denied American Oversight's request for expedited processing, stating that the request "does not demonstrate an urgency to inform the public about an actual or alleged Federal government activity, if made by a person primarily engaged in disseminating information; and does not contain enough evidence to support this criteria." In other words, OMB determined that American Oversight's request did not satisfy the standard for expedition under OMB regulation 5 C.F.R. § 1303.10(d)(1)(ii); OMB made no determination, however, as to whether American Oversight's request for expedition involved "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which [a]ffect public confidence," 5 C.F.R. § 1303.10(d)(1)(iv), as American Oversight had argued.

ARGUMENT

The Trump administration and Congress have placed great urgency and importance on passing legislation to "reform" the health care sector of the American economy. As a consequence of the issue's sensitivity and the interest in moving legislation as quickly as possible, very little is known about how the AHCA has been negotiated aside from shifting, often contradictory talking points. Plaintiff American Oversight seeks to cure the opacity

¹ On a phone call with an attorney at American Oversight, an individual at OMB explained that OMB had assigned tracking number 17-127 to the OMB FOIA Request. *See* Creighton Decl. ¶ 4. The April 4 letter also related to two additional FOIA requests, which OMB dubbed 17-128 and 17-129, and which are not at issue in this lawsuit.

surrounding these negotiations to ensure the public has the insight to which it is entitled about how such consequential legislation is drafted. But agencies central to the process have failed to meet their statutory obligations in responding to Plaintiff American Oversight's FOIA requests, undermining American Oversight's efforts to promote an informed public and transparent debate. American Oversight seeks this Court's assistance in requiring Defendants to comply with their obligations under the Freedom of Information Act to produce the requested records so that those records can inform the public's participation in this policy debate.

American Oversight clearly meets the requirements for preliminary injunctive relief. American Oversight is likely to succeed in establishing that it is not only entitled to receive the requested records, but is entitled to do so on an expedited basis. Moreover, anything less than immediate relief requiring Defendants to expedite the processing of American Oversight's FOIA requests and produce the requested records on an accelerated basis would irreparably harm American Oversight's ability to use the requested records to inform the general public about the ongoing health care reform debate in a timely fashion. The requested injunction would not harm either Defendants' interests or the interests of the general public; in fact, it would be in the public's interest because it would meaningfully further the public's understanding of the current legislative deliberations and negotiations. Because all four of the relevant factors weigh in American Oversight's favor, this Court should grant the requested injunctive relief.

I. THIS COURT HAS JURISDICTION TO GRANT THE REQUESTED RELIEF.

The FOIA statute itself provides jurisdiction for this Court to consider this matter and grant all necessary injunctive relief. It states:

On complaint, the district court of the United States . . . in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any

agency records improperly withheld from the complainant. . . . In such a case the court shall determine the matter de novo.

5 U.S.C. § 552(a)(4)(B). That review explicitly extends to an agency’s denial or inaction on a request for expedited processing: FOIA states that “[a]gency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4).” 5 U.S.C. § 552(a)(6)(E)(iii); *see also Al-Fayed v. CIA*, 254 F.3d 300, 308 (D.C. Cir. 2001) (“a district court must review *de novo* an agency’s denial of a request for expedition under FOIA”).

When an agency fails to comply with the applicable time limit provisions in the FOIA statute, a requester “shall be deemed to have exhausted his administrative remedies with respect to such request.” 5 U.S.C. § 552(a)(6)(C); *see also Oglesby v. Dep’t of Army*, 920 F.2d 57, 62 (D.C. Cir. 1990) (holding that a requester may bring suit if an agency fails to comply with statutory time limits). Moreover, a FOIA complainant need not administratively appeal an agency’s denial of expedited processing. *See* 5 U.S.C. § 552(a)(6)(E)(iii); *ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 28-29 (D.D.C. 2004). American Oversight has therefore exhausted all applicable administrative remedies, and this claim is ripe for adjudication.

II. AMERICAN OVERSIGHT IS ENTITLED TO A PRELIMINARY INJUNCTION.

In considering a plaintiff’s request for injunctive relief, a court must weigh four factors: (1) whether the plaintiff has a substantial likelihood of success on the merits; (2) whether the plaintiff would suffer irreparable injury absent injunctive relief; (3) whether an injunction would substantially injure other interested parties; and (4) whether the grant of an injunction would further the public interest. *Al-Fayed*, 254 F.3d at 303; *Serono Labs., Inc. v. Shalala*, 158 F.3d

1313, 1317-18 (D.C. Cir. 1998). A consideration of these factors here demonstrates American Oversight's entitlement to injunctive relief.

A. American Oversight is Likely to Succeed on the Merits.

FOIA provides clear statutory directives to agencies in responding to FOIA requests, and those requirements have been violated by Defendants in this case. Consequently, there can be little doubt that American Oversight will ultimately prevail in demonstrating its entitlement to expedited processing and prompt disclosure of any non-exempt records responsive to American Oversight's FOIA requests.

1. American Oversight Is Entitled to Expedited Processing.

Defendants have improperly failed to grant American Oversight expedited processing of its requests. The FOIA statute provides that “[e]ach agency shall promulgate regulations . . . providing for expedited processing of requests for records (I) in cases in which the [requester] demonstrates a compelling need; and (II) in other cases determined by the agency.” 5 U.S.C. § 552(a)(6)(E)(i)(I)-(II). In pertinent part, the statute defines a “compelling need” as an “urgency to inform the public concerning actual or alleged Federal Government activity,” when a request is made “by a person primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(v)(II). HHS's implementing regulations provide for expedited processing in those same circumstances. *See* 45 C.F.R. § 5.27(b). OMB provides for expedited processing for these same reasons identified in the FOIA statute, 5 C.F.R. § 1303.10(d)(1)(ii), but also provides for expedited processing when a request involves “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which [a]ffect public confidence.” 5 C.F.R. § 1303.10(d)(1)(iv).

American Oversight is entitled to expedited processing under both of those standards. HHS has not yet made any determination on American Oversight’s request for expedition, notwithstanding the requirement that each agency make “a determination of whether to provide expedited processing . . . within 10 days after the date of the request.” 5 U.S.C.

§ 552(a)(6)(E)(ii)(I). OMB did make a determination—albeit erroneously—that American Oversight’s request did not meet the “urgency to inform” standard under prong (ii) of its regulations, but failed to make any determination whether or not the request met the “widespread media interest” standard under prong (iv).

Had Defendants properly evaluated American Oversight’s requests, they would have granted expedition on both grounds.

a. There Is an “Urgency to Inform” the Public Regarding the Government Activities That Are the Subject of Plaintiff’s FOIA Requests and Plaintiff is “Primarily Engaged in Disseminating Information.”

American Oversight’s FOIA requests are entitled to expedition because it was “made by a person primarily engaged in disseminating information,” and involves an “urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C.

§ 552(a)(6)(E)(v)(II), *see also* 45 C.F.R. § 5.27(b)(2), 5 C.F.R. § 1303.10(d)(1)(ii).

First, American Oversight is primarily engaged in disseminating information. As American Oversight made clear in its initial requests, 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. *See* Exs. 1, 2; Evers Decl. ¶¶ 4-5. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition, American Oversight “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that

work to an audience.”” *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC v. Dep’t of Defense*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)); Evers Decl. ¶ 6. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, and other media. See Exs. 1, 2; Evers Decl. ¶ 7. American Oversight also makes materials it gathers, as well as editorialized content, available on its website and promotes their availability on social media platforms, such as Facebook and Twitter. See Exs. 1, 2; Evers Decl. ¶¶ 8, 12. American Oversight currently has over 10,700 page likes on Facebook, and over 32,300 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 2, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight>, (last visited May 2, 2017). See Evers Decl. ¶¶ 13-14.

One example of American Oversight’s demonstrated commitment to disseminating information to the public and the creation of editorial content is its “Audit the Wall” effort, where the organization is gathering and analyzing information and evaluating and commenting on public releases of information related to the administration’s proposed construction of a barrier along the U.S.-Mexico border. See Evers Decl. ¶ 15; see also *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.auditthewall.org/>. The organization intends to issue similar public-facing analysis and disclosures based on its health care FOIA requests. See *Who Promised What: Investigating the Secret Health Care Negotiations*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/our-actions/health-care-investigation>. Evers Decl. ¶ 16.

American Oversight has issued numerous press releases relating to its investigations of government activity. See *News*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/news>. Those press releases have been further distributed via

numerous national media outlets, including NPR, Politico, USA Today, and the L.A. Times, among others. *See* Evers Decl. ¶ 11; *see also* Evers Decl. Exs. A-F.

Second, this request involves an urgency to inform the public about government activity. *See* Exs. 1, 2. The legislative history of the FOIA explains that the “urgency to inform” standard “should pertain to a matter of current exigency to the American public.” *See Al-Fayed*, 254 F.3d at 310 (quoting H.R. Rep. No. 104-795, at 26 (1996)). The FOIA requests at issue here seek information about communications between agencies in the Trump administration and Congress relating to health care reform legislation; there can hardly be a matter that is of greater “current exigency to the American public” than Congress’s recent efforts to “repeal and replace” the existing health care regime, legislation that would fundamentally rework a substantial portion of the U.S. economy.

This remains the case notwithstanding the fact that Congress’s initial schedule to enact health care reform legislation was postponed when House Republicans announced on March 24, 2017, that the AHCA would not be put up for a vote. *See, e.g.*, Ex. 5, Mike DeBonis et al., *GOP Health-Care Bill: House Republican Leaders Abruptly Pull Their Rewrite of the Nation’s Health-Care Law*, WASH. POST, Mar. 24, 2017, <http://wapo.st/2qbRtMW>. Indeed, the opposite is the case because health care reform remains the most significant legislative issue of the moment. The documents requested about the original legislative negotiations are of urgent importance because Congress is primed to try again; there have been numerous reports of additional negotiations to try to revive the reform efforts, as House Republicans have declared that they are still determined to pass health care reform legislation, ideally before moving on to other legislative priorities. *See, e.g.*, Ex. 6, Robert Costa & Paige Winfield Cunningham, *House Freedom Caucus Leaders Back New Health-Care Plan*, WASH. POST, Apr. 25, 2017,

<http://wapo.st/2pqadbz>; Ex. 7, Evan Vucci, *House, White House Considering Friday Health Care Vote*, AXIOS, Apr. 26, 2017, <http://bit.ly/2pcQzkL>; Ex. 8, Tara Palmeri, *Inside Trump's Quiet Effort to Revive the Health Care Bill*, POLITICO (Apr. 26, 2017, 5:41 PM), <http://politi.co/2pAKgsH>. A new iteration of the AHCA is expected at any time, and every indication is that the House will move quickly as soon as they have secured the bare minimum of votes needed to pass the proposed legislation. Should that happen, the only remaining opportunity for the public to weigh in would be during deliberations in the Senate. As discussed in more detail below, there is an urgent need to inform the public about negotiations involved in health care reform legislation before Congress engages in serious deliberations regarding, much less passes health care reform legislation, depriving the public of the opportunity to play an informed role in those deliberations.

There is therefore a strong likelihood that American Oversight will succeed in establishing that both HHS and OMB should have granted American Oversight's request for expedited processing under 5 U.S.C. § 552(a)(6)(E)(v)(II) and will prevail on Counts I and III of the Complaint.

b. Republican Efforts to Pass Health Care Reform Legislation Constitute a Matter of "Exceptional Media Interest" and the Nature of the Negotiations Raises Questions of Public Confidence.

In addition to the arguments above, OMB should have granted expedited processing for another reason: there is undoubtedly "widespread and exceptional media interest" in the subject matter of this request, a subject matter that raises "possible questions about the government's integrity which [a]ffect public confidence." 5 C.F.R. § 1303.10(d)(1)(iv).

Both at the time of American Oversight's requests and continuing through the present, there has been extensive media coverage of the recent efforts to "repeal and replace" the ACA,

with numerous articles in major publications virtually every day. *See, e.g.*, Exs. 1, 2, (citing Ex. 9, Amy Goldstein et al., *House Republicans Release Long-Awaited Plan to Replace Obamacare*, WASH. POST, Mar. 6, 2017, <http://wapo.st/2pq0MbV>; Ex. 10, Lauren Fox & Deirdre Walsh, *Republicans Unveil Bill to Repeal and Replace Obamacare*, CNN (Mar. 7, 2017, 9:32 AM), <http://cnn.it/2pGBjhw>; Ex. 11, Mike DeBonis et al., *House GOP Proposal to Replace Obamacare Sparks Broad Backlash*, WASH. POST, Mar. 7, 2017, <http://wapo.st/2pGuRXB>; Ex. 12, Russell Berman, *The Conservative Uprising Against the Republican Health-Care Bill*, THE ATLANTIC (Mar. 7, 2017, 12:22 PM), <http://theatlantic.com/2017/03/07/health-care-reform/>; *see also, e.g.*, Ex. 13, Philip Wegmann, *Could Cutting Recess Short Kickstart Healthcare Reform and Reboot Trump's Agenda? Maybe.*, WASH. EXAMINER (Apr. 11, 2017, 5:00 PM), <http://washex.com/2017/04/11/health-care-reform/>; Ex. 14, Lauren Fox, *Is Health Care Reform Back on the Table? Talks Resume*, CBS46.COM (Apr. 12, 2017, 10:07 PM), <http://bit.ly/2oTCxIk>. That coverage has specifically included a discussion of the involvement of HHS Secretary Tom Price and OMB Director Mick Mulvaney in the negotiations. *See, e.g.*, Exs. 1, 2 (citing Ex. 15, Juliet Eilperin & Mike DeBonis, *Doctors, Hospitals, and Insurers Oppose Republican Health Plan*, WASH. POST, Mar. 8, 2017, <http://wapo.st/2oTuPru>; Ex. 16, Jordain Carney, *Pence, Price Huddle with Senate GOP*, THE HILL BLOG (Mar. 9, 2017, 1:26 PM), <http://bit.ly/2pGEDJf>); Ex. 2 (citing Ex. 17, DeBonis et al., *Obamacare Revision Clears Two House Committees as Trump, Others Tried to Tamp Down Backlash*, WASH. POST, Mar. 9, 2017, <http://wapo.st/2qnDkv1>).

Moreover, the requested records could raise questions about the government's integrity that would affect public confidence. As American Oversight noted in its FOIA requests, major pieces of legislation like the current effort to repeal and replace the ACA often involve significant backdoor negotiations that remain hidden from the general public. Indeed, during the

legislative battle in 2009–2010 that led to the ACA itself, numerous significant, state-specific deals were cut to win the support of lawmakers. *See, e.g.*, Exs. 1, 2 (citing Ex. 18, Chris Frates, *Payoffs for States Get Reid to 60*, POLITICO, Dec. 19, 2009, <http://politi.co/2jIPvss>). Undisclosed negotiations do not necessarily match the public rhetoric about the bill and its consequences. The public has a pressing need to know what administration officials are saying to members of Congress on an issue of such national concern, including whether the public and private discussions to secure support for the legislation match up. Indeed, none other than OMB Director Mulvaney has spoken to the importance of transparency with regard to the integrity of health care reform legislation, stating that an open process was “dramatically missing in Obamacare.” Ex. 19, Glenn Kessler, *White House Budget Director’s False Claims About the Obamacare Legislative Process*, WASH. POST, Mar. 14, 2017, <http://wapo.st/2qlN78Q>.

There is therefore a strong likelihood that American Oversight will succeed in establishing that OMB should have granted American Oversight’s expedited processing under 5 C.F.R. § 1303.10(d)(1)(iv) and will prevail on Count II of the Complaint.

2. American Oversight Is Entitled to the Requested Records.

The FOIA statute itself clearly and unambiguously provides that federal agencies—like the named defendants in this case—must make records “promptly available to any person” who reasonably describes the records they seek in accordance with established procedures. 5 U.S.C. § 552(a)(3)(A). American Oversight’s requests “reasonably described” the records sought, and complied with all necessary procedures. American Oversight is therefore more than likely to succeed in establishing its entitlement to the requested records. The fact that FOIA entitles American Oversight to the requested records within twenty working days by law alone suffices to establish likelihood of success on the merits.

But here there is an additional reason that American Oversight is almost certain to prevail—the records requested by American Oversight are also highly unlikely to be subject to one of the nine FOIA exemptions, 5 U.S.C. § 552(b), or three FOIA exclusions, 5 U.S.C. § 552(c), that would prevent the agency from disclosing the records. American Oversight seeks access to the following records:

3. All communications, meeting notices, meeting agendas, informational material, draft legislation, talking points, or other materials exchanged between [Defendants] and any members of Congress or congressional staff relating to health care reform.
4. All calendar entries for the Secretary, any political or SES appointees in [particular offices], or anyone maintaining calendars on behalf of these individuals, relating to health care reform.

See Exs. 1, 2. Because these communications relate solely to legislation on domestic policy, they are highly unlikely to contain any classified information or implicate national security interests, such that they might fall within Exemption 1 or Exclusion 3. Nor should such communications relate to personnel rules and practices of an agency (Exemption 2), trade secrets (Exemption 4), personnel and medical files (Exemption 6), law enforcement matters (Exemption 7 and Exclusions 1 and 2), the regulation of financial institutions (Exemption 8), or geological and geophysical information (Exemption 9). American Oversight is aware of no other statute that would specifically exempt the disclosure of these records pursuant to Exemption 3. Finally, because the communications sought are between the agencies and Congress, they cannot be considered “inter-agency” or “intra-agency” communications subject to possible withholding under Exemption 5. *See Lucaj v. FBI*, 852 F.3d 541, 546 (6th Cir. 2017) (holding that for Exemption 5 to apply, not only must the document’s source be a Government agency, but “the destination of the document must be a Government agency as well”); *Dow Jones & Co. v. Dep’t*

of Justice, 917 F.2d 571, 574 (D.C. Cir. 1990) (“Congress is simply not an agency.”); *see also* 5 U.S.C. § 551(1)(A) (excluding Congress from definition of term “agency”).

Because the records American Oversight seeks are within the proper scope of FOIA, American Oversight is likely to prevail on the merits of its request that Defendants search for and produce all responsive records under Counts IV and V of the Complaint.

B. American Oversight Will Be Irreparably Harmed Absent the Requested Relief.

American Oversight’s statutory right to expedited processing of its FOIA request—by definition a claim in which “time is of the essence”—will be irretrievably lost if the Court does not issue preliminary injunctive relief ordering Defendants to begin promptly processing the request. As this Court has previously noted, “[t]o afford the plaintiff less than expedited judicial review would all but guarantee that the plaintiff would not receive expedited agency review of its FOIA request.” *Wash. Post v. Dep’t of Homeland Sec.*, 459 F. Supp. 2d 61, 66 (D.D.C. 2006); *see also EPIC v. Dep’t of Justice*, 416 F. Supp. 2d 30, 40-41 (D.D.C. 2006) (“[T]he statutory right to expedition in certain cases underlined Congress’ recognition of the value in hastening release of certain information. As [the plaintiff] correctly notes, the loss of that value constitutes a cognizable harm. As time is necessarily of the essence in cases like this such harm will likely be irreparable.” (internal citations and quotation marks omitted)). Thus, if the Court agrees that American Oversight is likely to succeed on the merits of its claim for expedited processing, there is necessarily an urgency to obtaining the requested information that cannot be satisfied with less than immediate injunctive relief.

Moreover, any further delay in processing the request will irreparably harm the ability of American Oversight—and the public—to obtain information in a timely fashion that is vital to the current debate on health care reform legislation. Our system of representative democracy

depends upon an informed citizenry; the legislative process is often shaped by constituents' communications to their elected officials about their support for or opposition to pending legislation. Members of the public cannot reliably fulfill that role in the process without adequate information on which to base their opinions. The records sought in the FOIA requests at issue here—which reflect communications between Trump administration officials and members of Congress—would shed significant light on the inner workings of the legislative process that could shape the public's view of any eventual health care reform legislation that Congress may debate and enact. In light of the potentially imminent vote by the House of Representatives on a new iteration of the bill, and subsequent deliberations in the Senate, there is an urgent need to inform the public about these communications, which may contain discussions of the impact of different policy approaches; commitments regarding how provisions will be implemented administratively; or deals to secure support that may have been cut behind the scenes. If the agencies are allowed to drag their feet in processing American Oversight's requests and Congress engages in serious deliberations regarding, much less passes, a health care reform bill without the public having the benefit of the insight contained in the records sought by these requests, the public's ability to offer informed input into the debate will have been irreparably harmed, as will American Oversight's interest in obtaining its statutorily-entitled access to these records.

This case is therefore much like *Washington Post v. Department of Homeland Security*, 459 F. Supp. 2d 61 (D.D.C. 2006), in which the plaintiff sought visitor logs for the Vice President's office and residence, which the plaintiff asserted would “assist the public in the degree to which lobbyists and special interest representatives may have influenced policy decisions of the Bush administration.” *Id.* at 65 (internal quotation marks omitted). The plaintiff

explained that “[w]ith the midterm elections looming, any delay in processing this request would deprive the public of its ability to make its views known in a timely fashion.” *Id.* Issuing its opinion in October of 2006, this Court concluded that “[b]ecause the urgency with which the plaintiff makes its FOIA request is predicated on a matter of current national debate, due to the impending election, a likelihood for irreparable harm exists if the plaintiff’s FOIA request does not receive expedited treatment.” *Id.* at 75.² The same is true here; the current administration’s efforts to “repeal and replace” the ACA are undoubtedly a “matter of current national debate,” and with House Republicans claiming that they could vote on a modified version of the AHCA at any time, the public needs information as soon as possible. *See, e.g.,* Ex. 20, Kelsey Snell et al., *Lawmakers Poised to Approve One-Week Spending Bill to Keep Government Open*, Wash. Post, Apr. 28, 2017, <http://wapo.st/2qnM1pn> (quoting House Majority Leader Kevin McCarthy as saying of health care reform: “As soon as we have the votes, we’ll vote on it.”).

Indeed, by now it is almost axiomatic that “stale information is of little value.” *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988); *accord Calderon v. U.S. Dep’t of Ag.*, No. 14-0425, 2017 WL 680367, at *11 (D.D.C. Feb. 21, 2017). Thus, “failure to process FOIA requests in a timely fashion is ‘tantamount to denial.’” *Wash. Post*, 459 F. Supp. 2d at 74 (quoting H.R. Rep. No. 93-876, at 6 (1974)). That is no doubt why courts in this jurisdiction have repeatedly issued preliminary injunctions in FOIA cases where the requester seeks information urgently needed to inform a pending or developing situation. *See, e.g., Wash. Post*, 459 F. Supp. 2d at 74-75 (finding irreparable harm where requested records could inform public

² In subsequent, unrelated litigation, the D.C. Circuit held that White House visitor logs are not “agency records” for purposes of FOIA. *See Judicial Watch v. U.S. Secret Service*, 726 F.3d 208 (D.C. Cir. 2013). However, nothing in that decision affects this Court’s analysis regarding irreparable harm in *Washington Post v. Department of Homeland Security*, 459 F. Supp. 2d 61 (D.D.C. 2006).

opinion in advance of upcoming election); *EPIC*, 416 F. Supp. 2d at 40-41 (finding irreparable harm where requested records related to “current and ongoing debate surrounding the legality of the Administration’s warrantless surveillance program”); *Aguilera v. FBI*, 941 F. Supp. 144, 151-52 (D.D.C. 1996) (finding irreparable harm where requested records related to prisoner’s challenge to conviction while already serving prison sentence); *Cleaver v. Kelley*, 427 F. Supp. 80 (D.D.C. 1976) (granting preliminary injunction for records needed for upcoming criminal trial); *cf. Sai v. Transp. Sec. Admin.*, 54 F. Supp. 3d 5, 10-11 (D.D.C. 2014) (finding no irreparable harm because plaintiff offered no evidence that requested records would be of “vital public interest for an upcoming congressional election or congressional or agency decision-making process requiring public input” (internal citations and quotation marks omitted)); *Leadership Conf. on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (finding urgency requirement for expedition satisfied based on “upcoming expiration of the special provisions of the Voting Rights Act in 2007”).

As in many of those cases, American Oversight’s ability to contribute to the national conversation on health care reform will be irreparably harmed if Defendants are not required to expedite the processing of American Oversight’s FOIA requests and produce all responsive documents on an accelerated schedule.

C. The Requested Relief Will Not Burden Others’ Interests.

No other interests would be harmed by granting American Oversight its requested relief. To be sure, the agencies themselves cannot claim to be harmed by an order compelling them to comply with their statutory obligations. Nor would granting the requested relief unfairly burden other FOIA requesters with pending requests before Defendants, as the whole purpose of the addition of the expedited processing provision in 1996 was to prioritize requesters with an urgent

need for information. *See EPIC*, 416 F. Supp. 2d at 36 (explaining 1996 amendment adding expedited processing requirements). Thus, Congress itself contemplated that certain requesters would go to the head of the queue upon a showing of compelling need like the one American Oversight has made in this case.

Furthermore, granting American Oversight its requested relief “should not cause delay to other expedited FOIA requests” at the Defendant agencies, because those agencies have “relatively small FOIA caseloads and handle few, if any, expedited requests.” *Id.* at 41. According to its 2016 Annual Report, the HHS Office of the Secretary received only nineteen expedited requests over the course of the entire year, and granted only eight of those requests. *See* Ex. 21, HHS Fiscal Year 2016 Freedom of Information Annual Report, Section VIII.A, <http://bit.ly/2ptP8Pp>. Given its staff of ten full-time FOIA employees, *see id.* at Section IX, it is not unduly burdensome to require the Office of the Secretary to process one more expedited request on an accelerated schedule. Similarly, although OMB’s 2015 Annual Report—the most recent report made available online—reported only two full-time FOIA employees, *see* Ex. 22, OMB Annual FOIA Report 2015, Section IX, <http://bit.ly/2oQDlq9>, the agency reported *zero* expedited FOIA requests during that year, *see id.* Section VIII.A.

Thus, an order from this Court that Defendants process American Oversight’s request on an expedited basis and provide all non-exempt responsive records on an accelerated schedule set by this Court will not harm the interests of the non-moving party or any other entity.

D. The Public Interest Favors the Requested Relief.

The public would benefit from the grant of the requested relief in numerous ways. First, courts in this jurisdiction have long recognized that “there is an overriding public interest . . . in the general importance of an agency’s faithful adherence to its statutory mandate.” *Jacksonville*

Port Auth. v. Adams, 556 F.2d 52, 59 (D.C. Cir. 1977); accord *Wash. Post*, 459 F. Supp. 2d at 76. Moreover, the very existence of the Freedom of Information Act is premised on the view that there is public benefit in the release of information that “sheds light on an agency’s performance of its statutory duties.” *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989); see also *Ctr. to Prevent Handgun Violence v. Dep’t of the Treasury*, 49 F. Supp. 2d 3, 5 (D.D.C. 1999) (“There is public benefit in the release of information that adds to citizens’ knowledge” of government activities).

Not only does the public benefit from the release of government records as a general matter, but the public interest will be particularly furthered by the issuance of injunctive relief in this case, as it will allow the citizenry to become more informed participants in the current national debate about potential health care reform legislation prior to serious congressional deliberations or a congressional vote on the bill. *See supra* at 16-17. Moreover, because the requested records are highly unlikely to implicate any of the exemptions, *see supra* at 15-16, it is unlikely that there are compelling public interests that would be harmed by expedited processing of these requests.

CONCLUSION

For the foregoing reasons, Plaintiff American Oversight respectfully requests that this Court grant a preliminary injunction requiring Defendants to expedite the processing of Plaintiff’s FOIA requests and produce all non-exempt responsive records and an index justifying the withholding of any withheld records within twenty days, or by such other date as the Court deems appropriate.

Dated: May 4, 2017

Respectfully submitted,

/s/ Sara Kaiser Creighton
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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2017, copies of the foregoing Memorandum In Support of Plaintiff's Motion for a Preliminary Injunction, and all exhibits thereto, have been served on all defendants via U.S. mail at the following addresses:

U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Office of Management and Budget
725 17th Street NW
Washington, DC 20503

In addition, a courtesy copy has been sent to:

Channing Phillips
U.S. Attorney for the District of Columbia
555 4th Street NW
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Dated: May 4, 2017

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