



August 7, 2014

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I am writing to you concerning the ongoing response of the Department of Health and Human Services (HHS or Department) to the Committee's October 30, 2013, subpoena for documents regarding the Health Insurance Marketplace.

During this time of fiscal restraints, the Department has committed significant resources to responding to the Committee's requests. In responding to the Committee's requests since October 2013, HHS has expended more than 23,000 staff hours. Since the Affordable Care Act became law in 2010, HHS and the Centers for Medicare & Medicaid Services (CMS) have made agency staff available to the Committee for dozens of interviews and briefings on a wide array of topics. In fact, since October 2013 alone, the Committee has conducted more than a dozen transcribed interviews of both current and former HHS employees, totaling well over 100 hours. In addition, to date, the Department has produced nearly 135,000 pages of documents in response to the Committee's October 30 subpoena.

We have worked diligently and have produced documents from the five priority custodians (Frank Baitman, Kevin Charest, Tony Trenkle, Teresa Fryer, and George Linares) identified by the Committee in December 2013. As the Committee requested, we have since turned our attention to the documents of four additional priority custodians (Bill Corr, Marilyn Tavenner, Julie Bataille, and Amanda Cowley) whom the Committee identified in April 2014.

At a June 17 meeting with your staff, they asked us for the number of documents for the next four custodians that have been pulled in response to the agreed upon search terms for the time period of April 1, 2013, to October 29, 2013. The number of documents for these custodians is reflected below. The number of documents we provide to the Committee will likely be smaller when the documents are reviewed by the Department for responsiveness to the Committee's subpoena.

The number of documents broken down by custodian and month are:

	April 2013	May 2013	June 2013	July 2013	August 2013	September 2013	Oct. 1-29, 2013
Amanda Cowley	4,135	4,905	4,938	6,545	7,008	7,780	7,830
Bill Corr	1,332	1,140	1,248	1,373	1,199	1,403	2,173
Julie Bataille	2,966	3,123	3,531	3,817	3,032	6,665	7,756
Marilyn Tavenner *	5,698	1,406	1,238	5,505	4,850	3,464	11,887

*The number of documents responsive to the search terms for Administrator Tavenner includes documents already collected and contained in the files of HHS custodians with whom Administrator Tavenner corresponded via email.

As was mentioned during our June 17 meeting, it was my understanding that the Administrator copied and forwarded emails to immediate staff for retention and retrieval. In the course of compiling and reviewing the documents for these priority custodians, we determined that some of Ms. Tavenner's potentially responsive emails might not be retrievable. It appears that most, but not all, of the Administrator's email records were sent within HHS and therefore were likely saved within HHS records. While we have not identified any specific emails that we will be unable to retrieve, it is possible that some emails may not be available to HHS.

In order to recover and produce as many of Administrator Tavenner's responsive documents as possible, HHS is searching the files of other individuals within the Department with whom the Administrator regularly corresponded and we are collecting those documents for review. We have already identified at least 71,000 documents that contain the agreed upon search terms from the time period requested by the Committee that include Administrator Tavenner. We will produce these documents to the Committee if they are responsive to the subpoena.

Additionally, after discussions of this issue with the National Archives and Records Administration (NARA), HHS believes that a report to NARA is not currently required, but, out of an abundance of caution, we have filed the enclosed report with NARA.

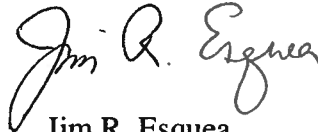
Please know that at HHS we understand and take seriously the importance of managing the disposition of all records in accordance with the applicable federal records management requirements and policies. To that end, we are taking steps to strengthen our existing records retention processes by reminding all employees and contractors of the requirements relating to the maintenance of federal records and ensuring that those employees are completing annual records retention training.

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We wish to reiterate that we take the Committee's interest in our work to implement the Affordable Care Act seriously, including the Committee's current interest in the website. We will continue working to accommodate the Committee's requests. We hope that you will work with us to ensure that the website operates efficiently and effectively so that Americans in need of health coverage have access to quality, affordable, and competitive private health insurance plans that work best for them.

Sincerely,

A handwritten signature in black ink that reads "Jim R. Esquea". The signature is written in a cursive style with a large initial "J" and "E".

Jim R. Esquea

Assistant Secretary for Legislation

Enclosure

cc: The Honorable Elijah Cummings
Ranking Member
Committee on Oversight and Government Reform



DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid Services

Date: August 6, 2014

To: The National Archives and Records Administration
Records Management Service

From: Kathleen Cantwell *KmCantwell*
Records Management Official
Director, Office of Strategic Operations and Regulatory Affairs
The Centers for Medicare & Medicaid Services

Subject: CMS Email Records

This memorandum is to formally notify the National Archives and Records Administration (NARA) that the Department of Health and Human Services (HHS) is taking several steps to gather email records belonging to Marilyn Tavenner, Administrator of the Centers for Medicare & Medicaid Services (CMS),¹ and to strengthen its existing records retention processes. After discussions of this issue with NARA's General Counsel, HHS believes that a report to NARA is not currently required, but, out of an abundance of caution, this memorandum is being filed.²

DESCRIPTION OF EMAILS THAT ARE THE SUBJECT OF THIS REPORT AND THE CIRCUMSTANCES SURROUNDING THEIR POSSIBLE LOSS

Upon arriving at CMS in February 2010, Administrator Tavenner used the current CMS system of recordkeeping for hard copy documents which is designed to ensure that the following documents are maintained in accordance with NARA document retention standards.

- A copy of the Administrator's Daily Briefing Notebook containing paper copies of her calendar, agency materials and policy papers;
- A copy of all internal memoranda signed by the Administrator;
- A copy of all correspondence (including reports to Congress) signed by the Administrator or submitted by the Administrator for signature by the Secretary; and

¹ Ms. Tavenner has served as the Administrator of CMS since May 17, 2013. From February 14, 2010 until May 16, 2013, Ms. Tavenner served as the Principal Deputy Administrator of CMS. During her tenure as Principal Deputy Administrator, she served as Acting Administrator from April 20, 2010 until July 11, 2010 and from December 2, 2011 until May 16, 2013.

² The General Counsel of NARA advised the HHS General Counsel that a report to NARA is not required if there is no evidence that records have been destroyed.

- A copy of agency documents that the Administrator approves by signature.

During her entire tenure at CMS, Ms. Tavenner's CMS email address, which is accessible to both colleagues and the public, has been subject to write-in campaigns involving thousands of emails from the public. Therefore, she receives an extremely high volume of emails that she manages daily. To keep an orderly email box and to stay within the agency's email system capacity limits, the Administrator generally copied or forwarded emails to immediate staff for retention and retrieval, and did not maintain her own copies. This continued until November 2013, when the Administrator began to maintain her own copies of her email records.

Based on a recent analysis of emails (which was completed on July 31, 2014) undertaken in connection with a request from a congressional committee, it appears that most, but not all, of the Administrator's email records were sent within HHS and therefore were likely saved within HHS records. While we have not identified any specific emails that we will be unable to retrieve, it is possible that some emails may not be available to HHS, and we are therefore filing this memorandum.

PLAN TO PREVENT ANY FUTURE LOSS OF EMAIL RECORDS

As noted above, since November 20, 2013, the Administrator has been retaining her emails and those files now are being backed up to a central server.

In addition, HHS records management officials have informed CMS that HHS is planning to take the following steps to strengthen existing records retention processes:

- HHS will remind all current employees and contractors of the requirements relating to the maintenance of Federal records. In that respect, the Deputy Secretary will send an email to all current HHS employees to remind them of the recordkeeping requirements, including the requirement to retain email records;
- HHS will continue its program of training new Department employees in recordkeeping requirements;
- HHS is taking steps to assure that employees are completing the required annual records retention training; and
- HHS will, as soon as feasible, implement procedures to automatically archive all of the emails of senior HHS officials.

Please know that at CMS we understand and take seriously the importance of managing the disposition of all records in accordance with the applicable Federal Records management requirements and policies. We would be happy to discuss these record-keeping issues with you. Should you have any questions concerning this incident, please feel free to contact me at (202) 690-8390.