

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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January 29, 2018

The Honorable Alex Michael Azar II
Secretary
Department of Health and Human Services
330 C Street, S.W.
Washington, DC 20416

Dear Mr. Secretary:

The Department's congressional liaison and legislative affairs function is not working properly with respect to the Committee. Our authority to access executive branch information is well settled. The Supreme Court established congressional requestors can compel the production of such information because Congress's power "to conduct investigations is inherent in the legislative process. The power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."¹ More often than not, agency respondents choose to cooperate voluntarily, expeditiously, and in good faith with our requests for information. Of late, this is not the case with the Department of Health and Human Services (HHS).

The Department, since October of last year, has departed from this cooperative posture. Rather than work in good faith to accommodate the Committee's oversight and investigative requirements and constitutional prerogatives, and despite the Committee's effort to accommodate HHS's legitimate interests, the Department has missed mutually-agreed deadlines, produced meager and incomplete sets of information (much of which is available publicly), and taken a posture of nonchalance with respect to the Committee's requests.

The Committee's October 11, 2017, request seeking information relating to federal disaster preparedness and response in Puerto Rico and U.S. Virgin Islands (USVI).

To accommodate the Department's interest in an efficient document search and production process, the Committee prioritized the Department's communications with the Puerto Rican and USVI governments.² On December 19, 2017—more than two months after the request was submitted—the Department produced 182 pages on a single CD, consisting of mostly public information, including flyers, press releases, HHS web pages, and a page of hyperlinks to HHS

¹ Watkins v. United States, 354 U.S. 178, 187 (1957).

² Phone call between staff, H. Comm. On Oversight & Gov't Reform, with U.S. Dep't of Health and Human Serv. (Dec. 7, 2017).

websites. The production did not contain any of the requested communications. In a briefing on January 23, 2018, HHS staff from the Office of the Assistant Secretary for Preparedness and Response (ASPR) were unable to provide any update on the status of the response, whatsoever.³

The Committee's October 19, 2017, request for documents relating to the Medicare Part D program and opioid addiction or diversion.

It is of particular concern HHS is unable to identify and produce documents to assist the Committee's effort to conduct oversight of the federal government's response to the ongoing opioid epidemic—a significant public health crisis. The Department produced only one of five categories of documents by the requested date, and now over three months later, HHS has yet to fully respond to the remainder of the request.⁴ After receiving the letter, HHS informed the Committee “ongoing work related to hurricane recovery and the approaching open enrollment season” may inhibit a timely or complete response.⁵

The Committee's November 2, 2017, request for information relating to cost-sharing reduction payments.

After acknowledging receipt of the request, the Department notified us it had yet to assign the request for processing.⁶ After committing to make progress, HHS staff eventually provided an outdated 2013 memo not responsive to the Committee's original request.⁷ To date, HHS has produced none of the “prioritized” documents identified by Committee staff as an accommodation to relieve some of the burden on the agency.⁸

The Committee's December 8, 2017, request for a list of guidance documents.

As an accommodation, the Committee requested HHS to identify agency guidance issued in the last ten years (i.e., provide a simple list). The list was in lieu of a document production. After grumbling the request arrived on a Friday in December, HHS staff, again seemingly, went to the internet for documents, producing generic, publicly-available information of no probative value, rather than the requested list.⁹ The Department's response, which arrived on December 22,

³ Briefing by Ofc. Asst. Sec'y for Preparedness & Response, U.S. Dep't of Health and Human Serv. to staff, H. Comm. On Oversight & Gov't Reform (Jan. 23, 2018).

⁴ Letter from Centers for Medicare and Medicaid Services, Dep't of Health & Human Serv. to House Oversight & Gov't Reform Committee (Nov. 2, 2017).

⁵ Email from Sean Hayes, Dir. Oversight & Investigations, U.S. Dep't of Health and Human Serv., to majority staff, H. Comm. on Oversight & Gov't Reform (Oct. 20, 2017) (on file with the Committee).

⁶ Phone call between staff, H. Comm. On Oversight & Gov't Reform, with U.S. Dep't of Health and Human Serv. (Nov. 16, 2017).

⁷ Memorandum from Dep't of Treasury, Funding for Advance Cost-Sharing Reduction Payments, (Dec. 17, 2013).

⁸ Phone call between staff, H. Comm. On Oversight & Gov't Reform, with U.S. Dep't of Health and Human Serv. (Dec. 7, 2017).

⁹ Email from Sean Hayes, Dir. Oversight & Investigations, U.S. Dep't of Health and Human Serv., to majority staff, H. Comm. on Oversight & Gov't Reform (Dec. 8, 2017, 6:45 PM) (on file with the Committee).

2017, included links to three websites with some guidance documents.¹⁰ In response to a follow-up request for information responsive to the request, the Department stated “[i]n our review we did not find a document created by the previous administration cataloging guidance documents in the manner requested by your letter.”¹¹ It seems HHS does not have a handle on these supposedly authoritative guidance materials. HHS is, after all, responsible for nearly a quarter of federal outlays and administers more grant dollars than other federal agencies combined. This exchange and others raise questions of competence and basic operational functionality of the legislative affairs department.

The Committee’s November 14, 2017, request for an action plan for compiling guidance documents.

On November 14, 2017, during a Committee hearing, Associate Deputy Secretary Charles Keckler promised to provide a “14-day plan of action” to show how HHS intends to compile its guidance documents. He did not. After the Department failed to produce the plan, we reiterated the request by letter on December 20, 2017.¹² Despite assurance that such a plan was forthcoming,¹³ the Department has yet to make any such production.

The Committee’s December 20, 2017, request for information relating to HIPAA/HITECH guidance.

On November 17, 2017, the Department committed to provide documents and information relevant to HIPAA/HITECH on a voluntary basis.¹⁴ But the Department did not. We formalized the request in a letter dated December 20, 2017. We were advised, however, the holiday season was afoot including “two federal holidays coming up.”¹⁵ On January 10, 2018, your staff promised to immediately produce certain documents to the Committee, and to provide a more robust response no later than January 17.¹⁶ If you have read this far, it will come as no surprise the Department has not done so.

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¹⁰Letter from Barbara Pisaro Clark, Acting Assistant Secretary for Legislation, Dep’t of Health & Human Serv. to House Oversight & Gov’t Reform Committee (Dec. 22, 2017).

¹¹ Email from Sean Hayes, Dir. Oversight & Investigations, U.S. Dep’t of Health and Human Serv., to majority staff, H. Comm. on Oversight & Gov’t Reform (Dec. 22, 2017, 4:49 PM) (on file with the Committee).

¹² Letter from Trey Gowdy, Chairman, H. Comm. on Oversight & Gov’t Reform, to Eric D. Hargan, Acting Sec’y, Dep’t of Health & Human Serv.; *Regulatory Reform Task Forces Check-In: Part II: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 115th Cong. (Nov. 14, 2017) (testimony of Charles Keckler, Associate Deputy Secretary, U.S. Dep’t of Health and Human Serv.).

¹³ Phone call between staff, H. Comm. On Oversight & Gov’t Reform, with U.S. Dep’t of Health and Human Serv. (Jan. 10, 2018).

¹⁴ Phone call between staff, H. Comm. On Oversight & Gov’t Reform, with U.S. Dep’t of Health and Human Serv. (Nov. 17, 2017).

¹⁵ Email from Sean Hayes, Dir. Oversight & Investigations, U.S. Dep’t of Health and Human Serv., to majority staff, H. Comm. on Oversight & Gov’t Reform (Dec. 20, 2017, 4:54 PM) (on file with the Committee).

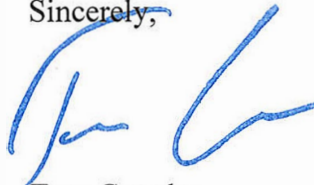
¹⁶ *Supra* note 13.

The Department's pattern of nonresponsiveness and wanton disregard for the Committee's requests for information undermines our ability to perform our oversight duties of the Department and its programs. Furthermore, the Department has provided no compelling reason—legal or otherwise—for withholding documents from the Committee. This creates the appearance the Department's legislative affairs function has fallen into a state of permanent disrepair.

So the Committee can perform its duties, I request the Department produce the requested documents and information **no later than Monday, February 5, 2018**, or immediately tender a legitimate, legal basis for withholding them from the Committee. Otherwise, the Committee may use compulsory process to obtain those materials.

Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Trey Gowdy', with a large, sweeping initial 'T' and a long, horizontal stroke extending to the right.

Trey Gowdy

cc: The Honorable Elijah E. Cummings