

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

DEMOCRACY FORWARD
FOUNDATION,
1333 H Street NW, 11th Floor
Washington, D.C. 20005,

Plaintiff,

v.

OFFICE OF MANAGEMENT AND
BUDGET,
725 17th Street, NW
Washington, D.C. 20503; and

CENTERS FOR MEDICARE AND
MEDICAID SERVICES,
7500 Security Boulevard
Baltimore, MD 21244,

Defendants.

Case No.

COMPLAINT

1. Plaintiff Democracy Forward Foundation (“Democracy Forward”) brings this action against Defendants the Office of Management and Budget (“OMB”) and the Centers for Medicare and Medicaid Services (“CMS”) to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”).

2. Plaintiff submitted FOIA requests to Defendants OMB and CMS on February 19, 2019 seeking records relating to the respective roles that OMB and CMS played in a potential drug pricing agreement between Defendants and the pharmaceutical company Novartis regarding a chimeric antigen receptor t-cell (“CAR-T”) cancer therapy.

3. Defendants have failed to respond sufficiently to Plaintiff’s requests. Plaintiff therefore respectfully requests that the Court compel Defendants OMB and CMS to comply with

the FOIA and produce the requested records.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

5. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

6. Democracy Forward is a not-for-profit organization incorporated under the laws of the District of Columbia and based in Washington, D.C. Democracy Forward works to promote transparency and accountability in government, in part, by educating the public on government actions and policies.

7. Defendant OMB is a federal agency within the meaning of FOIA, *see* 5 U.S.C. § 552(f)(1), that is headquartered in Washington, D.C. OMB has possession, custody, and control of records to which Plaintiff seeks access.

8. Defendant CMS is a federal agency within the meaning of FOIA, *see id.*, that is headquartered in Baltimore, Maryland. CMS has possession, custody, and control of records to which Plaintiff seeks access.

FACTUAL ALLEGATIONS

Plaintiff's OMB FOIA Request

9. Plaintiff submitted a request under the FOIA to OMB on February 19, 2019, seeking the following categories of records:

- (1) Any and all records: (1) Sent to or from Joseph.J.Grogan@omb.eop.gov, Sophia_M._Wright@omb.eop.gov, or Thomas_M._Reilly@omb.eop.gov; and (2) That contain any of the following terms: CAR-T, value-based, outcomes-based, indications-based, Michael Cohen, Essential Consultants, Novartis, @novartis.com,

Jimenez, Narasimhan, Alston & Bird, @alston.com, Brownstein Hyatt, @bhfs.com, Capitol Counsel, @capitolcounsel.com, Capitol Hill Consulting Group, @caphillgrp.com, East End Group, @eastendgrp.com, McManus, @mcmanusgrp.com, Monument Policy Group, @monumentpolicy.com, Scully, Roskey & Missmar, @wileyrein.com, Thorn Run Partners, @thornrun.com, Tiber Creek Health Strategies, @pmj-dc.com, Williams & Jensen, @wms-jen.com, Madigan Jones, @pmj-dc.com, Trimpa Group, @trimpagroup.com, Daniel Casserly, dan.casserly@novartis.com, O’Neil, Farber, Haller, Sussman, Phipps, McGowan, or Mui-Lipnik.

- (2) Any and all records than contain any of the following key terms: Michael Cohen, Essential Consultants, Novartis, @novartis.com, Jimenez, Narasimhan, Alston & Bird, @alston.com, Brownstein Hyatt, @bhfs.com, Capitol Counsel, @capitolcounsel.com, Capitol Hill Consulting Group, @caphillgrp.com, East End Group, @eastendgrp.com, McManus, @mcmanusgrp.com, Monument Policy Group, @monumentpolicy.com, Scully, Roskey & Missmar, @wileyrein.com, Thorn Run Partners, @thornrun.com, Tiber Creek Health Strategies, @pmj-dc.com, Williams & Jensen, @wms-jen.com, Peck Madigan Jones, @pmj-dc.com, Trimpa Group, @trimpagroup.com, Daniel Casserly, dan.casserly@novartis.com, Shawn O’Neil, Leo Farber, Sarah Haller, Wendy Sussman, Candie Phipps, Joseph McGowan, or Shelly Mui-Lipnik.
- (3) Any and all records relating to a January 2018 meeting between President Donald Trump and Novartis CEO Vas Narasimhan.
- (4) Any and all records relating to any January 2017 meeting between President Donald Trump and Pharmaceutical executives, including Novartis CEO Joe Jimenez. This includes communications following up on discussions that occurred [sic] at the meeting.
- (5) Any and all records relating to any May 2017 meeting between Novartis representatives and administration officials, as reported by Novartis executive Joe Jimenez. This includes communications following up on discussions that occurred at the meeting.

Ex. A at 2 (footnote omitted).

10. Democracy Forward specified that “[t]he time period for this search should be from January 20, 2017, to the time the search is conducted.” *Id.*

11. Democracy Forward sought a waiver of search and duplication fees under 5 U.S.C. § 552(a)(4)(A)(iii), which requires a fee waiver if the disclosure 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.” *See id.* at 3-4.

12. By email dated February 22, 2019, Defendant OMB responded to acknowledge receipt of the request, and assigned it OMB FOIA number 19-184.

13. Defendant OMB wrote again on March 25, 2019, asserting that Plaintiff’s request was overly broad and requesting that Plaintiff narrow the request.

14. On March 29, 2019, Plaintiff responded to OMB by email with suggestions for narrowing the request, including by identifying potential custodians for the requested categories of records and providing specific time frames for each individual request. *See Ex. B.*

15. As of the date of this complaint, Plaintiff has received no further communications from OMB, and Defendant OMB has neither informed Plaintiff whether it will comply with the request, *see* 5 U.S.C. § 552(a)(6)(A)(i), nor produced the requested records.

Plaintiff’s CMS FOIA Request

16. Plaintiff submitted a request to Defendant CMS on February 19, 2019 seeking the following categories of records:

- (1) Any and all records than contain any of the following key terms: CAR-T, Michael Cohen, Essential Consultants, Novartis, @novartis.com, Jimenez, Narasimhan, Alston & Bird, @alston.com, Brownstein Hyatt, @bhfs.com, Capitol Counsel, @capitolcounsel.com, Capitol Hill Consulting Group, @caphillgrp.com, East End Group, @eastendgrp.com, McManus, @mcmanusgrp.com, Monument Policy Group, @monumentpolicy.com, Scully, Roskey & Missmar, @wileyrein.com, Thorn Run Partners, @thornrun.com, Tiber Creek Health Strategies, @pmj-dc.com, Williams & Jensen, @wms-jen.com, Peck Madigan Jones, @pmj-dc.com, Trimpa Group, @trimpagroup.com, Daniel Casserly, dan.casserly@novartis.com, Shawn O’Neil, Leo Farber, Sarah Haller, Wendy Sussman, Candie Phipps, Joseph McGowan, or Shelly Mui-Lipnik.
- (2) Any and all records sent to or from Joseph.J.Grogan@omb.eop.gov, Sophia_M._Wright@omb.eop.gov, or Thomas_M._Reilly@omb.eop.gov.
- (3) Any and all records relating to a January 2018 meeting between President Donald

Trump and Novartis CEO Vas Narasimhan.

- (4) Any and all records relating to any January 2017 meeting between President Donald Trump and Pharmaceutical executives, including Novartis CEO Joe Jimenez. This includes communications following up on discussions that occurred at the meeting.
- (5) Any and all records relating to any May 2017 meeting between Novartis representatives and administration officials, as reported by Novartis executive Joe Jimenez. This includes communications following up on discussions that occurred at the meeting.

Ex. C at 1-2 (footnote omitted).

17. Plaintiff specified that “[t]he time period for this search should be from January 20, 2017, to the time the search is conducted,” and requested that CMS search for responsive records within the following CMS offices: Office of Administrator, Principal Deputy Administrator for Operations, Principal Deputy Administrator for Medicare & Director Center for Medicare, Deputy Chief of Staff, Deputy Chief Operating Officer, Center for Medicare Medicaid Innovation. *See* Ex. C at 2.

18. Plaintiff sought a waiver of search and duplication fees under 5 U.S.C. § 552(a)(4)(A)(iii), which requires a fee waiver if the disclosure 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.” *See id.* at 3-4.

19. By email dated February 20, 2019, CMS requested that Plaintiff re-submit its request and include additional contact information. Plaintiff provided this additional information on February 20, 2019.

20. As of the date of this Complaint, Plaintiff has heard nothing further from Defendant CMS, and Defendant CMS has neither informed Plaintiff whether it will comply with the request, *see* 5 U.S.C. § 552(a)(6)(A)(i), nor produced the requested records.

21. Because Defendants OMB and CMS have “fail[ed] to comply with the applicable

time limit provisions” of the FOIA, Plaintiff is “deemed to have exhausted [its] administrative remedies.” *Id.* § 552(a)(6)(C)(i).

CLAIM FOR RELIEF

Count One (Violation of the FOIA, 5 U.S.C. § 552, Failure to Sufficiently Respond to Plaintiff’s February 19, 2019 Request)

22. Plaintiff repeats and incorporates by reference the foregoing paragraphs as if fully set forth herein.

23. As of the date of this Complaint, Defendants have failed to produce the categories of records, identified above, that Plaintiff requested in its February 19, 2019 requests, or to demonstrate that such records are lawfully exempt from production. *See* 5 U.S.C. § 552(a)(6)(C). Nor have Defendants notified Plaintiff of the scope of any responsive records they intend to produce or withhold and the reasons for any withholdings, or informed Plaintiff that it may appeal any adequately specific adverse determination.

24. By failing to respond to Plaintiff’s request within the statutorily mandated time period, Defendants OMB and CMS have violated their respective duties under FOIA, *see* 5 U.S.C. § 552 *et seq.*, including but not limited to their duties to conduct a reasonable search for responsive records, to produce all responsive, reasonably segregable, nonexempt information, and to not withhold responsive records.

25. Plaintiff is being irreparably harmed by Defendants’ violations of the FOIA, and Plaintiff will continue to be irreparably harmed unless Defendants OMB and CMS are compelled to comply with the FOIA.

REQUESTED RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. order Defendants to conduct searches for any and all records responsive to

Plaintiff's FOIA requests, as identified above, and demonstrate that they have each used search methods reasonably likely to lead to the discovery of all records responsive to Plaintiff's FOIA requests;

2. order Defendants to produce, by a date certain, any and all non-exempt records responsive to Plaintiff's requests, as identified above, and a *Vaughn* index of any responsive records withheld under a claim of exemption;

3. enjoin Defendants from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA requests, as identified above;

4. order Defendants to grant in full Plaintiff's requests for fee waivers;

5. grant Plaintiff an award of attorney's fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and

6. grant any other relief this Court deems appropriate.

Dated: July 18, 2019

Respectfully submitted,

/s/ Benjamin Seel

Javier M. Guzman (D.C. Bar No. 462679)

Benjamin Seel (D.C. Bar No. 1035286)

Democracy Forward Foundation

P.O. Box 34553

Washington, D.C. 20043

(202) 448-9090

jguzman@democracyforward.org

bseel@democracyforward.org

Counsel for Plaintiff