

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

THE FOUNDATION FOR GOVERNMENT
ACCOUNTABILITY,

Plaintiff,

v.

CENTERS FOR MEDICARE AND
MEDICAID SERVICES,

Defendant.

Case No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff Foundation for Government Accountability (“FGA”) brings this action against Defendant Centers for Medicare and Medicaid Services (“CMS”) to compel compliance with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Specifically, FGA requests that the Court order CMS to formally respond to FGA’s FOIA requests and subsequently produce to FGA all responsive documents that it unlawfully failed to produce.

JURISDICTION AND VENUE

2. This Court has subject-matter jurisdiction under 5 U.S.C. §§552(a)(4)(B) and 28 U.S.C. §1331, 2201(a), 2202.

3. Venue is proper because FGA resides in this district. 5 U.S.C. §552(a)(4)(b); 28 U.S.C. §1391(e)(1).

PARTIES

4. Plaintiff FGA is a non-partisan, non-profit organization that helps millions achieve the American dream by improving welfare, work, health care, and election integrity policy in the states and in Washington, D.C. FGA is located in Naples, Florida.

5. Defendant CMS is an “agency” of the federal government within the meaning of 5 U.S.C. §552(f)(1). CMS is in possession, custody, and control of the records responsive to FGA’s requests.

STATUTORY FRAMEWORK

6. FOIA is an effective tool for the public to shed light on agencies’ actions and hold them accountable for their decisions. FOIA “codified ‘a strong public policy in favor of public access to information in the possession of federal agencies.’” *Broward Bulldog, Inc. v. U.S. Dep’t of Just.*, 939 F.3d 1164, 1175 (11th Cir. 2019). And FOIA serves to “ensure an informed citizenry, vital to the function of a democratic society.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Robust enforcement of FOIA is thus “needed” to “hold the governors accountable to the governed.” *Id.*

7. Under FOIA, federal agencies must release requested records to the public unless one or more specific statutory exemptions apply. 5 U.S.C. §552(a)(3).

8. FOIA requires an agency to respond “within 20 [working] days . . . after the receipt of any such request,” notifying the requester of the agency’s “determination” whether or not to comply with the request, the reasons therefor, and the right to appeal any adverse determination to the head of the agency. *Id.* §552(a)(6)(A)(i).

9. This 20-working-day requirement mandates “more than just an initial statement that the agency will generally comply with a request and will produce non-exempt documents and claim exemptions in the future.” *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013). Rather, the agency must at least “gather and review the documents” and then specifically “determine and communicate the scope of the documents it intends to produce and withhold.” *Id.*

10. Although FOIA provides that under “unusual circumstances,” an agency may request an additional 10 days to make a determination, the agency must do so by “timely written notice” that “set[s] forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched.” 5 U.S.C. §552(a)(4)(A)(viii)(II)(aa), (a)(6)(B)(i).

11. Courts have jurisdiction to “order the production of any agency records improperly withheld from the complainant.” *Id.* §552(a)(4)(B). Ordinarily, a FOIA requester must exhaust administrative appeal prior to seeking judicial remedy. However, the requester is “deemed to have exhausted

administrative remedies” if the agency violates the 20-day time limit. *Id.* §552(a)(6)(C)(i).

12. And the agency “may not assess any search fees” if it fails to comply with the 20-work-day time limit. *Id.* §552(a)(4)(A)(viii) (I), (II)(aa).

13. FOIA also allows the court to assess “reasonable attorney fees and other litigation costs reasonably incurred in any case . . . in which the complainant has substantially prevailed.” *Id.* §552(a)(4)(E).

FACTUAL ALLEGATIONS

14. It is no secret that figuring out the prices for health care can be extremely difficult and confusing. As former CMS Administrator Seema Verma once said, “healthcare prices are about as clear as mud to patients.” CMS Press Release, *Trump Administration Announces Historic Price Transparency Requirements to Increase Competition and Lower Healthcare Costs for All Americans* (Nov. 15, 2019), <https://go.cms.gov/3TdSwJD>.

15. Executive Order 13877 sought to address this significant problem by directing the Department of Health and Human Services to issue regulations requiring hospitals to publicly post standard charge information “that will meaningfully inform patients’ decision making and allow patients to compare prices across hospitals.” 84 Fed. Reg. 30849, 30850 (June 24, 2019) (“Improving Price and Quality Transparency in American Healthcare To Put Patients First”).

16. To implement this executive order, CMS proposed and finalized the Calendar Year (CY) 2020 Outpatient Prospective Payment System (OPPS) & Ambulatory Surgical Center (ASC) Price Transparency Requirements for Hospitals to Make Standard Charges Public, 84 Fed. Reg. 65524 (Nov. 27, 2019) (codified at 45 C.F.R. part 180) (“Transparency Rule”).

17. The Transparency Rule requires all hospitals operating in the United States to, *inter alia*, make public a machine-readable file that contains the hospital’s gross charges and payer-specific negotiated charges for all items and services in a consumer-friendly manner. *See* 84 Fed. Reg. at 65524-25. Furthermore, the Transparency Rule created an enforcement mechanism, including the imposition of civil monetary penalties on noncompliant hospitals. *See id.*

18. Several hospital groups sued to challenge the Transparency Rule, arguing that it exceeded CMS’s statutory authority, was arbitrary and capricious, and violated the First Amendment. The U.S. Court of Appeals for the D.C. Circuit unanimously rejected all of those challenges. *See American Hospital Ass’n v. Azar*, 983 F.3d 528 (D.C. Cir. 2020). The Transparency Rule thus became effective on January 1, 2021.

19. Two years after CMS finalized the Transparency Rule, CMS issued another final rule, Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality

Reporting Programs; Price Transparency of Hospital Standard Charges; Radiation Oncology Model, 86 Fed. Reg. 63458 (Nov. 16, 2021) (“CMS-1753FC”). This update modified the Transparency Rule to increase compliance by, for example, enhancing civil monetary penalties and further requiring that the machine-readable files be accessible to automated searches and direct downloads. *See id.* at 63462. The update became effective on January 1, 2022.

20. On March 29, 2022, FGA submitted the following 14 FOIA requests to CMS. *See also* FGA FOIA Requests (Ex. A).

Number	Request
1	Any and all warning letters sent to hospitals by CMS regarding noncompliance with the federal hospital price transparency rule (RIN 0938-AU22) from January 1, 2021 to the present.
2	Any and all corrective action plans requested to hospitals by CMS regarding non-compliance with the federal hospital price transparency rule (RIN 0938-AU22) from January 1, 2021 to the present.
3	Any and all civil monetary penalties requested to hospitals by CMS regarding non-compliance with the federal hospital price transparency rule (RIN 0938-AU22) from January 1, 2021 to the present (including any penalties issued under the increased fine amounts stipulated in CMS-1753FC and effective January 1, 2022).
4	The actual amount of civil monetary penalties collected by CMS relating to non-compliance with the federal hospital price transparency rule (and CMS-1753FC) from January 1, 2021 to the present.
5	Any and all communications between CMS and Jackson Memorial Hospital of Miami relating to the federal hospital price transparency rule (RIN 0938-AU22) from January 1, 2021, to the present.
6	Any and all communications between CMS and Yale New Haven Hospital of Connecticut relating to the federal hospital price

	transparency rule (RIN 0938-AU22) from January 1, 2021, to the present.
7	Any and all communications between CMS and AdventHealth Orlando relating to the federal hospital price transparency rule (RIN 0938-AU22) from January 1, 2021, to the present.
8	Any and all communications between CMS and Mayo Clinic Hospital-Saint Marys Campus of Minnesota relating to the federal hospital price transparency rule (RIN 0938-AU22) from January 1, 2021, to the present.
9	Any and all communications between CMS and the Cleveland Clinic relating to the federal hospital price transparency rule (RIN 0938-AU22) from January 1, 2021, to the present.
10	Any and all communications between CMS and Barnes-Jewish Hospital of St. Louis relating to the federal hospital price transparency rule (RIN 0938-AU22) from January 1, 2021, to the present.
11	Any and all communications between CMS and Atrium Health Carolinas Medical Center of North Carolina relating to the federal hospital price transparency rule (RIN 0938-AU22) from January 1, 2021, to the present.
12	Any and all communications between CMS and UAB Hospital of Birmingham relating to the federal hospital price transparency rule (RIN 0938-AU22) from January 1, 2021, to the present.
13	Any and all communications between CMS and The Johns Hopkins Hospital of Baltimore relating to the federal hospital price transparency rule (RIN 0938-AU22) from January 1, 2021, to the present.
14	Any and all communications between CMS and Mount Sinai Hospital of New York City relating to the federal hospital price transparency rule (RIN 0938-AU22) from January 1, 2021, to the present.

21. CMS failed to notify FGA of its “determination” within 20 working days, and it failed to request an additional 10 days based on unusual circumstances.

22. After months of delay, on June 1, 2022, FGA followed up with CMS, suggesting that FGA could streamline its FOIA requests. And on July

21, 2022, FGA further sent a letter to CMS requesting an update on the status of FGA's FOIA requests and, again, offering to discuss how FGA's requests could be streamlined. To date, CMS has not responded to either of FGA's follow-ups or attempted to discuss with FGA how and whether FGA could limit the scope of any of its FOIA requests. And to date, CMS has not produced any documents.

CLAIMS FOR RELIEF

COUNT I

Failure to Comply with FOIA 5 U.S.C. §552

23. FGA repeats and re-alleges the allegations in the foregoing paragraphs as if set forth fully herein.

24. FGA properly requested records within CMS's possession, custody, and control.

25. CMS was required to conduct a reasonable search for records responsive to FGA's FOIA requests.

26. CMS failed to make and communicate the "determination" as to each of FGA's requests to FGA within 20 working days.

27. FGA has constructively exhausted administrative remedies under 5 U.S.C. §552(a)(6)(C)(i).

28. Under 5 U.S.C. §552(a)(3)(A), CMS was required to promptly produce all responsive records that are subject to disclosure under FOIA.

29. CMS failed to produce the records responsive to FGA's FOIA requests.

30. FGA is entitled to an order compelling CMS to conduct reasonable searches sufficient to locate responsive records and to promptly produce all responsive records.

31. To the extent that CMS seeks to invoke any of the applicable FOIA exemptions, FGA is entitled to an order compelling CMS to produce sufficiently detailed indexes justifying withholding of responsive records.

COUNT II
Preclusion of Assessment of Fees
5 U.S.C. §552

32. FGA repeats and re-alleges the allegations in the preceding paragraphs as if set forth fully herein.

33. FGA is a non-profit organization that seeks the requested records for scholarly and public-interest purposes and not for a commercial use.

34. CMS failed to comply with the time limits under FOIA.

35. CMS failed to provide timely written notice to FGA of any unusual circumstances.

36. FGA is entitled to a declaration that CMS may not assess any search fees associated with FGA's FOIA requests, pursuant to 5 U.S.C. §552(a)(4)(A)(viii).

PRAYER FOR RELIEF

WHEREFORE, FGA ask this Court to enter judgment in its favor and to provide the following relief:

- (1) An order compelling CMS to expeditiously conduct a reasonable search for all records responsive to FGA's FOIA requests, to the extent that CMS has not already conducted any searches, and to demonstrate that it employed search methods reasonably likely to lead to the discovery of responsive records;
- (2) An order compelling CMS to produce within twenty (20) days or such other times the Court deems proper all records responsive to FGA's FOIA requests that are subject to disclosure under FOIA and/or any indexes to the extent that CMS seeks to invoke any FOIA exemptions;
- (3) A judgment declaring that CMS failed to comply with the time limits under 5 U.S.C. §552(a)(6) and that search fees may not be assessed under § 552(a)(4)(viii);
- (4) Attorney's fees and costs incurred in relation to this case, pursuant to 5 U.S.C. §552(a)(4)(E); and
- (5) All other relief to which FGA is entitled that the Court deems just and proper.

Dated: August 30, 2022

Respectfully Submitted,

Jeffrey M. Harris*
Frank H. Chang*
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com
frank@consovoymccarthy.co

/s/ Michael A. Sasso
Michael A. Sasso
Florida Bar No. 93814
Christian Bonta
Florida Bar No. 1010347
SASSO & SASSO, P.A.
1031 W. Morse Boulevard, Suite 120
Winter Park, FL 32789
(407) 644-7161
masasso@sasso-law.com
Christian Bonta
cbonta@sasso-law.com
Counsel for Plaintiff
The Foundation for Government
Accountability

**Pro hac vice motions forthcoming*