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ONE HUNDRED EIGHTH CONGRESS

# Congress of the United States

## House of Representatives

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April 26, 2004

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The Honorable Tommy G. Thompson  
Secretary of Health and Human Services  
U.S. Department of Health and Human Services  
200 Independence Avenue, SW  
Washington, DC 20201

Dear Mr. Secretary:

We have received the letter dated April 16, 2004, from Dennis G. Smith, the Director of the Center for Medicaid and State Operations, that responds to our request for Medicare cost estimates under the Seven Member Rule. This response does not satisfy our request.

The integrity of the legislative process depends on the ability of members of Congress to obtain accurate information from the executive branch. In the case of the Medicare Modernization Act, there is evidence that the Administration undermined this process by withholding essential cost estimates and other analyses from Congress. We are investigating what happened and what legislative remedies need to be taken to prevent similar occurrences in the future.

Unfortunately, there appears to be a concerted effort by the Administration to obstruct legitimate congressional inquiries into its actions in this matter. The White House refused to permit Doug Badger, a key White House health official, to appear before the House Ways and Means Committee on April 1, 2004, to answer questions about the withholding of the cost estimates. Now you are refusing to comply with your obligations under the Seven Member Rule to provide us with the estimates prepared by the Administration of the costs of the Medicare legislation and the various versions that preceded it.

This obstruction is wrong. Accountability is a bedrock principle of our government. Instead of blocking legitimate inquiries, the Administration should cooperate fully with congressional committees investigating the withholding of the Medicare cost estimates and meet its obligations under the Seven Member Rule.

While generally nonresponsive, the HHS response does contain some significant information. The letter states that "HHS made conferees aware that HHS expected its final scoring to be higher than CBO's final scoring." This disclosure confirms that the Administration

shared information about its cost estimates selectively. The fact that the HHS scoring would be higher than the CBO scoring was important information that was not available from any other source and that should have been available to all House conferees — and indeed to all members of Congress prior to voting on the legislation. But this information was never provided to any of the Democratic conferees from the House (Charles Rangel, the ranking member of the Ways and Means Committee, John Dingell, the ranking member of the Energy and Commerce Committee, and Marion Berry) or to any of us. The letter specifically mentions Rep. Nancy Johnson, the Republican chair of the Subcommittee on Health and member of the Medicare Conference Committee, as one member who “knew about these numbers.”

The HHS response also includes one document that had not been previously released, a two-page cost estimate entitled “Rough estimates of increase in net Medicare and other Federal costs under selected draft Senate Finance Proposals” that was prepared by the Office of the Actuary on June 11, 2003. This document demonstrates that the Actuary’s estimates were \$599 billion in June 2003, the highest estimate revealed to date. Yet at the very same time, Administration officials continued to assert publicly that the legislation would cost only \$400 billion. For example, at a June 25, 2003, news briefing, White House spokesman Ari Fleischer said: “Certainly, the very fact that the president’s proposal was a \$400 billion proposal that has indeed been accepted as a \$400 [billion] proposal is helpful.”<sup>1</sup>

In this letter, we are expanding our request under the Seven Member Rule to include all communications relating to the cost of the Medicare Modernization Act between any executive branch official and any member of the conference committee, any member of the House or Senate leadership, and any staff working for any of these members. We will also explain why your refusal to comply with the Seven Member Rule is wrong. We urge you to avoid litigation by fully complying with your legal obligations.

### **The Inadequate HHS Response**

On March 2, 2004, we made a request under the Seven Member Rule for cost estimates and other materials prepared by the HHS Office of the Actuary. We specifically requested:

All estimates of the costs of adding a new prescription drug benefit to Medicare, as well as any cost estimates and other analyses (e.g. plan and beneficiary participation and effect on solvency of the Medicare Hospital Insurance Trust Fund) for legislation to increase the participation of HMOs and other private plans under Medicare, prepared since January 1, 2003, by the HHS Office of the Actuary, including any estimates and analyses by the office of the Actuary of:

- (1) S. 1, the legislation passed by the Senate (including any estimates and analyses of the legislation as it was introduced and as it was reported out of committee);

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<sup>1</sup> *Press Briefing by Ari Fleischer* (June 25, 2003).

- (2) H.R. 1, the legislation passed by the House (including any estimates and analyses of the bill as it was introduced and as it was reported out of committee);
- (3) Versions of the final legislation that were under consideration by the House-Senate conference committee; and
- (4) The final legislation signed by the President on December 8, 2003 (P.L. 108-173).

The Department's April 16 response is plainly incomplete and does not even purport to comply fully with our request. Rather, HHS provided only a few documents that the agency is preparing to release to a separate requestor under the Freedom of Information Act (FOIA), and which Mr. Smith claims have already been released publicly. Specifically, the Department provided four documents: (1) a single estimate of the costs of the Senate Finance Committee's Chairman's Mark as of June 11, 2003; (2) a June 21, 2003, memo to Rep. Bill Thomas, the chair of the Ways and Means Committee, estimating the number of beneficiaries who would purchase drug coverage under a draft version of H.R. 1; (3) a June 26, 2003, memo to ranking member Rangel estimating the impact of H.R. 1 on premiums for fee-for-service beneficiaries; and (4) a February 5, 2004, memo to then-Acting CMS Administrator Dennis Smith summarizing the differences between the CMS Actuary's and CBO's cost estimates for the final legislation.

These four documents do not satisfy our request. For example, they do not include the cost estimates of either the version of the legislation that the House voted on and passed on June 27, 2003, or the final version of the legislation that the House voted on and passed on November 22, 2003. In fact, the documents that the Department did provide make internal references to other responsive records that HHS failed to turn over. Endnote 3 of the June 11, 2003, spreadsheet prepared by the Office of the Actuary refers to "a June 5, 2003 note on alternative benchmarks" that describes why costs would increase under the Medicare Advantage PPO option. This endnote also refers to a "cover e-mail regarding the nature of HMO cost increase." Both of these documents would have been responsive to our request, but the Department failed to turn them over.

The HHS letter acknowledges that the Office of the Actuary prepared more estimates than the one provided. It states: "HHS's Chief Actuary projected that various provisions of or proposed amendments to the Medicare bill would cost substantially more than CBO estimated."<sup>2</sup> The President's spokesman, Scott McClellan, also said repeatedly in a January 30, 2004, press briefing covering the Medicare legislation's costs that "actuaries are always looking at different aspects of legislation."<sup>3</sup> He added: "There are many aspects to this legislation, it's a very complex piece of legislation. And so different aspects of that were looked at by the actuaries."<sup>4</sup> Like the HHS response, Mr. McClellan's statements make clear that HHS actuaries continued to analyze the legislative proposals as they moved through the process. However, with the

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<sup>2</sup> Letter from Dennis Smith to Rep. Henry Waxman (Apr. 16, 2004).

<sup>3</sup> *Press Briefing by Scott McClellan* (Jan. 30, 2004).

<sup>4</sup> *Id.*

exception of the June 11, 2003, spreadsheet, these analyses were not provided in response to our letter.

Besides failing to provide the documents we requested, the HHS response improperly treated our request as a request under FOIA. Our request was made under the Seven Member Rule, not FOIA. This statute expressly provides that “an Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof . . . shall submit any information requested of it relating to any matter within the jurisdiction of the committee.”<sup>5</sup>

Yet even measured against FOIA, the Department’s response is inadequate. FOIA requires that all records of federal agencies be accessible to the public unless subject to one of nine narrowly construed exemptions.<sup>6</sup> The Supreme Court has explained that “disclosure, not secrecy, is the dominant objective of the Act.”<sup>7</sup> HHS has failed to identify, as it must, the existence of records that it is refusing to release and any applicable exemptions that protect the requested records from mandatory disclosure.<sup>8</sup>

Moreover, there is no basis that could be cited under FOIA for withholding the cost estimates that we seek. The actuarial estimates that we requested are factual documents that are not protected by the deliberative process privilege or the FOIA exemption for intra-agency memoranda. The Supreme Court has made clear that this exemption protects advice, recommendations, and opinions that are part of the deliberative processes of government.<sup>9</sup> The documents that we are seeking are not opinions or recommendations on policy matters, but technical cost estimates prepared by the Office of the Actuary. Such estimates are subject to disclosure under FOIA.

It is no answer to say that members had access to the cost estimates of the Congressional Budget Office. The higher HHS cost estimates would have had tremendous relevance to Congress. At the very least, as CMS Actuary Richard Foster pointed out in his February 5, 2004, memo to Dennis Smith, the difference in estimates “is a useful reminder of the inherent uncertainty and a rough indication of the sensitivity of future costs to the underlying cost

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<sup>5</sup> 5 U.S.C. § 2954.

<sup>6</sup> 5 U.S.C. § 552(b).

<sup>7</sup> *Department of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001) (citing *Department of Air Force v. Rose*, 425 U.S.352 (1976)).

<sup>8</sup> 5 U.S.C. § 552(a)(6).

<sup>9</sup> *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150–54 (1975).

factors.”<sup>10</sup> Furthermore, there are important aspects of the legislation that CBO cannot analyze. Only the HHS Actuary, for instance, could analyze the impact of the legislation on the Medicare Hospital Insurance Trust Fund.

### **Communications with the Conference Committee**

While the HHS response rejects our request under the Seven Member Rule, it does reveal that important information about the cost of the Medicare Modernization Act was disclosed to Republican members of the conference committee considering the legislation. The response states:

HHS made conferees aware that HHS expected its final scoring to be higher than CBO’s final scoring. Indeed, Rep. Nancy Johnson has confirmed that “[a]bsolutely, we knew about these numbers.”

There was no justification for this selective disclosure of important cost information and other analyses during the conference committee. And there is no legal basis for continuing to withhold this information from us now. Information that is voluntarily provided to individuals outside of the executive branch is not subject to any claim of privilege and would be required to be disclosed under FOIA. Indeed, the Supreme Court specifically held in 2001 that communications between Department officials and outside parties are not protected from mandatory disclosure.<sup>11</sup>

For this reason, we are expanding our request under the Seven Member Rule to include all communications relating to the costs of the legislation between executive branch officials and the conference committee or House or Senate leadership. Specifically, we request any communications (whether written or electronic) or any notes of any communications between January 1, 2003, and December 31, 2003 relating to the costs of H.R. 1, S. 1, or the final legislation signed by the President on December 8, 2003, between members of the executive branch and (1) any member of the conference committee; (2) any staff of any member of the conference committee; (3) any member of the House or Senate leadership; or (4) any staff of any member of the House or Senate leadership. You may exclude from this request any communications already shared with Reps. Rangel or Dingell or their staffs or made during the course of committee hearings.

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<sup>10</sup> Memo from Rick Foster to Dennis Smith, *Summary of Differences between OACT and CBO Cost Estimates for P.L.108-173, the “Medicare Prescription Drug, Improvement, and Modernization Act of 2003”* — Updated (Feb. 5, 2004).

<sup>11</sup> *Department of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 9–11 (2001).

**Conclusion**

Important information was withheld from Congress during the deliberation of the Medicare Modernization Act. Instead of providing members with the HHS Actuary's cost estimates and analyses of the different legislative proposals, some of which CBO cannot perform, this information was actively suppressed by the Administration. This is a very serious breach of the integrity of the legislative process. We need to understand how this breach occurred so that we can act to ensure that it will not recur in the future.

We therefore urge you to provide a complete response to this letter, as well as to our letter of March 2, by May 10, 2004.

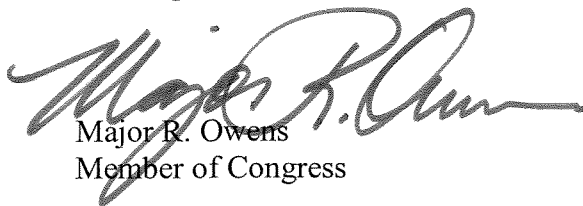
Sincerely,



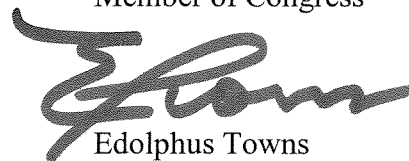
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Ranking Minority Member



Tom Lantos  
Member of Congress



Major R. Owens  
Member of Congress



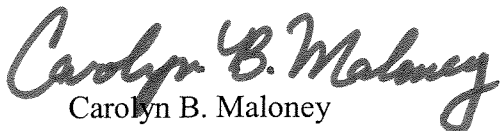
Edolphus Towns  
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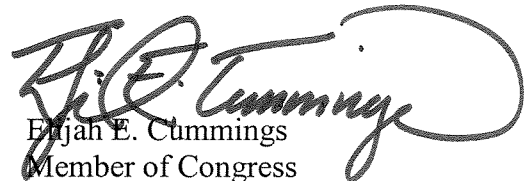
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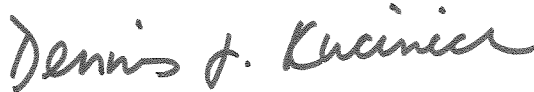
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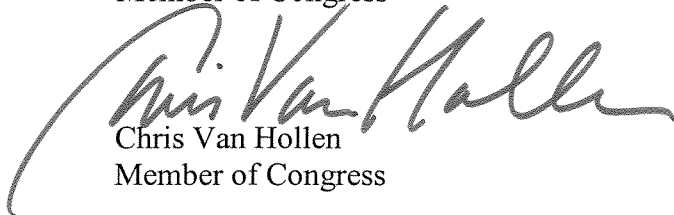
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