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dba KAISER HEALTH NEWS

IN THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

HENRY J. KAISER FAMILY FOUNDATION
dba KFF HEALTH NEWS,

Plaintiff,

v.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES; U.S. CENTERS FOR
MEDICARE AND MEDICAID SERVICES,

Defendant.

Case No. [Type Case Number Here]

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF FOR
VIOLATION OF THE FREEDOM OF
INFORMATION ACT, 5 U.S.C. § 552
et seq.**

1 Plaintiff HENRY J. KAISER FAMILY FOUNDATION dba KFF HEALTH NEWS
2 (“KFF”), by its undersigned attorneys, allege as follows:

3 **INTRODUCTION**

4 1. For decades, metastasizing health care costs have bedeviled this country, and
5 Congress has tried, and failed, many times to reign them in. The Medicare Advantage program
6 is emblematic of these failures. When Congress first proposed Medicare Advantage in 2003,
7 legislators hoped that private insurers would make Medicare more efficient and cost-effective.
8 Doctors and hospitals had long been paid by the government for each service they provided to
9 seniors and people with disabilities – meaning that they were incentivized to provide more
10 services than patients truly needed. But under Medicare Advantage, private insurers would get a
11 lump sum to cover all services, giving them an incentive to keep patients healthier, thereby
12 keeping costs down.

13 2. The opposite has happened. Medicare Advantage pays out more to insurers when
14 patients are diagnosed with certain serious health conditions, and the government has allowed
15 insurers to diagnose those conditions through home health visits by nurses to patients, who are
16 often financially rewarded for participating. As a result, the number of highly lucrative
17 diagnoses – which often do not lead to treatment by a patient’s doctor (who is often unaware of
18 the diagnosis), and which are often medically implausible, if not impossible – issued under
19 Medicare Advantage has skyrocketed. According to the Medicare Payment Advisory
20 Commission, a nonpartisan agency that advises Congress on health costs, because of Medicare
21 Advantage the government has had to pay \$591 billion more than it would have if Medicare was
22 administered without the help of private insurance plans.

23 3. The federal government has known about this serious problem for years. In fact,
24 the U.S. Department of Health and Human Services (“HHS”) Office of Inspector General (“HHS
25 OIG” or “Defendant”) has audited the Medicare Advantage program more than three dozen
26 times since 2019, with the resulting reports revealing hundreds of millions of dollars in
27 overpayments. One audit concluded that a Humana plan in South Florida overcharged the
28 government by nearly \$200 million in 2015 alone, and just last month, HHS OIG found that

1 private insurers received over \$4 billion in extra payments in 2023 because of diagnoses made
2 during insurer-driven home visits – leading HHS OIG to recommend that Medicare cut off
3 payments for home-visit diagnoses entirely.

4 4. Despite these findings, however, HHS OIG has failed to recoup a single dollar
5 from the insurers who have profited handsomely from private insurers’ pay-for-diagnosis
6 scheme. HHS OIG’s failure has left taxpayers footing the bill for billions of dollars in
7 overpayments – even though HHS OIG’s primary purpose is to combat fraud and waste in
8 Medicare and other federally funded health programs. In fact, taxpayers have been forced to pay
9 for the Medicare Advantage program’s wasteful spending twice – first, because of the program
10 itself, and second, because of the costs of the audits, which the government spends millions of
11 dollars to conduct.

12 5. On August 8, 2024, Hannah Norman Thompson, a producer at KFF, made a
13 Freedom of Information Act request (the “FOIA Request”) to HHS OIG for information about its
14 audits of Medicare Advantage, including correspondence and records relating to decisions to
15 limit the dollar recovery for overpayments discovered through the audits, information about the
16 cost-effectiveness of the program, and financial information related to the costs of the audits.
17 More than two months later, no documents, responsive or otherwise, have been produced.

18 6. KFF brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C.
19 § 552 *et seq.*, as amended, to enjoin HHS OIG from continuing to improperly withhold agency
20 records that are responsive to the FOIA Request. This FOIA action is necessary because HHS
21 OIG continues to withhold responsive records since KFF made the FOIA Request over two
22 months ago, a constructive denial of the FOIA Request.

23 7. The Freedom of Information Act “focuses on the citizens’ right to be informed
24 about ‘what their government is up to,’” by requiring the release of “[o]fficial information that
25 sheds light on an agency’s performance of its statutory duties.” *DOJ v. Reporters Comm. for*
26 *Freedom of the Press*, 489 U.S. 749, 773 (1989) (citation omitted). “[D]isclosure, not secrecy, is
27 the dominant objective” of FOIA. *Dept. of Interior v. Klamath Water Users Protective Ass’n*,
28 532 U.S. 1, 8 (2001) (internal quotation marks and citations omitted). KFF plays a critical role

1 in providing information to citizens about “what their government is up to.” Indeed, the First
2 Amendment’s guarantee of freedom of the press is meant to enable journalists to play an
3 “essential role in our democracy,” to “bare the secrets of government and inform the people.”
4 *New York Times. Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J. concurring).

5 8. The Medicare Advantage program now covers approximately 30 million
6 Americans – more than half of individuals on Medicare – costing as much as \$600 billion in
7 2024. Through this FOIA action, KFF seeks to fulfill its journalistic function by ensuring
8 transparency into HHS OIG’s failure to seek reimbursement of any portion of the millions of
9 dollars by which Americans taxpayers have been overbilled.

10 **PARTIES**

11 9. Plaintiff KFF is a non-profit news service committed to in-depth coverage of
12 health care policy and politics. KFF reports on how the health care system—hospitals, doctors,
13 nurses, insurers, governments, consumers—works. In addition to publishing on
14 kffhealthnews.org, KFF-authored stories are published by news organizations throughout the
15 country.

16 10. Defendant HHS OIG is a component of Defendant U.S. Department of Health and
17 Human Services, itself a component of the Executive Branch of the United States Government.
18 Defendant is an “agency” within the meaning of 5 U.S.C. § 552(f). Plaintiff is informed and
19 believes that HHS OIG has possession and control of the records sought by the Request.

20 **JURISDICTION**

21 11. This Court has subject-matter jurisdiction over this action and personal
22 jurisdiction over the parties under 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 701-706, and 28 U.S.C. §
23 1331.

24 **VENUE**

25 12. Venue in the Northern District of California is proper under 5 U.S.C.
26 § 552(a)(4)(B) as KFF’s FOIA Request to HHS OIG occurred within the City and County of San
27 Francisco. For the same reason, venue also is proper under 28 U.S.C. § 1391(e).

1 13. Assignment to the San Francisco Division is proper under Civil Local Rule 3-2(c)
2 and (d) because KFF's FOIA Request to HHS OIG occurred within the City and County of San
3 Francisco, within this District.

4 **FACTS**

5 14. On August 8, 2024, KFF sent the FOIA Request to HHS OIG. The request
6 seeks:

- 7 • Records of contacts between HHS officials or their representatives and Medicare
8 Advantage organizations concerning risk adjustment diagnosis code audits and
9 their findings, including all Congressional correspondence and other records
10 concerning these audits and their findings, including financial penalties.
- 11 • Records concerning the cost of performing HHS OIG audits of Medicare
12 Advantage diagnostic coding and decisions to impose penalties on Medicare
13 Advantage organizations pursuant to these audits or any other evaluations.
- 14 • Records concerning extrapolation of risk adjustment diagnosis code audit findings
15 and the impact of extrapolation on the cost effectiveness of the audit program,
16 including budgetary documents and requests for the Medicare Advantage audit
17 program, including the numbers and costs of these audits.
- 18 • Copies of contracts awarded for conducting audits of Medicare Advantage
19 companies published from 2020 to the August 8, 2024 and any evaluations or
20 other emails and documents concerning the performance and conclusions of these
21 audits.
- 22 • Records concerning ongoing and future HHS OIG audits of Medicare Advantage
23 diagnostic coding practices and any discussions of the cost effectiveness of
24 conducting these audits or any alternative steps taken to oversee the finances and
25 operations of Medicare Advantage programs.
- 26 • Records reflecting contact between HHS officials or their representatives and
27 Centers for Medicare & Medicaid Services officials concerning the January 2023
28 CMS decision to limit dollar recoveries of Medicare Advantage audits from 2011-

1 2013 and for HHS OIG Medicare Advantage audits in later years, including all
 2 Congressional correspondence and other records concerning polices on collecting
 3 audit financial penalties.

4 The FOIA also requested waiver of all fees as well as expedited processing on the
 5 grounds that KFF “is a nonprofit organization engaged in news gathering and reporting on health
 6 issues of national importance including Medicare Advantage. A true and correct copy of the
 7 FOIA Request to HHS OIG is attached as **Exhibit A**.

8 15. On August 9, 2024, HHS OIG granted KFF’s fee waiver. On August 21, 2024,
 9 HHS OIG denied KFF’s request for expedited processing, stating that it “[did] not meet the
 10 requirements under the FOIA” and “[did] not clearly demonstrate[] a ‘compelling need.’” The
 11 denial also claimed that the request for expedited processing lacked “urgency to inform the
 12 public. KFF filed an appeal of the expedited processing denial on August 27, 2024, arguing that
 13 there is not only urgency to educate patients about the “often confusing” messaging surrounding
 14 the Medicare Advantage program, but also to provide taxpayers an understanding of how billions
 15 in tax dollars are spent. This included whether “the nation’s largest health insurers are playing
 16 by the rules.” The urgency was underscored by “more than \$16 billion in ‘improper payments,’”
 17 as well as denial of necessary medical care by Medical Advantage plans while related companies
 18 experienced record profits. True and correct copies of HHS OIG’s fee waiver response and
 19 expedited processing denial are attached as **Exhibits B** and **C**, respectively. KFF’s
 20 administrative appeal of the expedited processing denial is attached as **Exhibit D**. As of the date
 21 this Complaint, HHS OIG has not responded to KFF’s appeal.

22 16. To date, there has been no response from HHS OIG to the FOIA Request itself.
 23 HHS OIG has therefore missed the deadline of 20 business days to respond.

24 17. Therefore, KFF has exhausted its administrative remedies under 5 U.S.C.
 25 § 552(a)(6)(C)(i).

FIRST CAUSE OF ACTION

(Violation of FOIA)

28 1. KFF realleges and incorporates the allegations contained in the preceding

1 paragraphs as if fully set forth herein.

2 2. KFF’s FOIA Request seeks “agency” records within HHS OIG’s custody and
3 control.

4 3. HHS OIG has failed to produce any responsive records to KFF’s FOIA Request.
5 KFF has a legal right under FOIA to obtain the agency records it requested in its FOIA Request,
6 and there exists no “exceptional circumstances” or legal basis for the HHS OIG’s failure to
7 respond to KFF’s FOIA Request and to make these records available.

8 4. HHS OIG’s failure to make promptly available the records sought by KFF’s
9 FOIA Request violates FOIA, 5 U.S.C. § 552(a)(3)(A) and (a)(6)(A)(ii), and applicable
10 regulations promulgated thereunder.

11 5. KFF is entitled to declaratory relief finding that HHS OIG has violated FOIA and
12 is immediately entitled to receive all records responsive to its requests.

13 6. KFF is further entitled to injunctive relief, ordering HHS OIG to immediately
14 produce copies of all records responsive to Plaintiffs’ FOIA Request without further delay.

15 **PRAYER FOR RELIEF**

16 WHEREFORE, Plaintiff KFF request the Court award it the following relief:

17 7. Declare that HHS OIG violated FOIA in its failure to respond to KFF’s FOIA
18 appeal;

19 8. Order HHS OIG to immediately disclose the requested records to KFF and enter
20 an injunction prohibiting HHS and CMS from continuing to withhold the requested records;

21 9. Award KFF its reasonable costs and attorney’s fees;

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10. Grant any further relief that the court may deem just and proper.

Dated: November 7, 2024

Respectfully submitted,
DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE
SAM F. CATE-GUMPert

By: /s/ Thomas R. Burke
THOMAS R. BURKE

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