

VIA EMAIL & PAL PORTAL

April 8, 2020

Michael Marquis  
FOIA Officer  
Department of Health and Human Services  
Hubert H. Humphrey Building, Room 729H  
200 Independence Avenue, SW  
Washington, DC 20201  
E-mail: [FOIARequest@hhs.gov](mailto:FOIARequest@hhs.gov)

Dear Mr. Marquis:

This letter constitutes an urgent request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the U.S. Department of Health and Human Services (“HHS”).

EPIC seeks the memo submitted by three major health care technology companies to HHS that predicted their ability to supply the government with health care data which can assist in creating a national coronavirus surveillance system.<sup>1</sup>

### Documents Requested

The March 22, 2020 memo from Collective Medical, PatientPing and Juvare to HHS concerning the health technology companies’ ability to supply the government with COVID-19 patient information.<sup>2</sup>

### Background

COVID-19 is a disease caused by a new strain of coronavirus that began spreading in people in December 2019.<sup>3</sup> The World Health Organization officially declared this novel coronavirus

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<sup>1</sup> See Adam Cancryn, *Kushner’s Team Seeks National Coronavirus Surveillance System*, Politico (Apr. 8, 2020), <https://www.politico.com/news/2020/04/07/kushner-coronavirus-surveillance-174165> (The system would “represent a significant expansion of government use of individual patient data, forcing a new reckoning over privacy limits amid a national crisis.”).

<sup>2</sup> *Id.*

<sup>3</sup> World Health Org., *Q&A on Coronaviruses (COVID-19)* (Mar. 9, 2020), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

outbreak a pandemic.<sup>4</sup> In response to the global pandemic, the White House has convened several task forces, including a task force led by White House senior adviser Jared Kushner.<sup>5</sup>

One of these proposals is the creation of a national COVID-19 surveillance database that would give the federal government real-time access to patient healthcare data and hospital data.<sup>6</sup> The database would draw detailed information from multiple private-sector health databases to track where to allocate resources and to determine which areas need to maintain social-distancing rules.<sup>7</sup> This program would significantly expand the federal government's use of, and access to, patient health data.

According to POLITICO, Collective Medical, PatientPing, and Juvare presented a memo on March 22, 2020 "at the behest of administration officials" describing a "a national coronavirus surveillance system to give the government a near real-time view of where patients are seeking treatment and for what, and whether hospitals can accommodate them."<sup>8</sup> In the memo, the companies predict they can "supply the government with information on where and how many patients are seeking care across 80 percent of the U.S. 'in short order.'"<sup>9</sup> The March 22, 2020 memo was sent to Mr. Kushner, Vice President Pence, and Health Secretary Alex Azar and has circulated widely within the administration.<sup>10</sup>

The collection and use of sensitive medical data raises profound privacy concerns, and specifically whether the system described in the March 22, 2020 memo complies with the Health Insurance Portability and Accountability Act and other laws and regulations that safeguard the personal information of Americans.<sup>11</sup>

The public has the right to know the contents of the March 22, 2020 memo from certain health care companies to Mr. Kushner, Vice President Pence, and Health Secretary Alex Azar, and whether the proposed system complies with federal privacy law.

### Request for Expedition

EPIC is entitled to expedited processing of this request under the FOIA and HHS's FOIA regulations. 5 U.S.C § 552(a)(6)(E)(v)(II); 45 C.F.R. § 5.27(a). Specifically, this request is entitled to expedited processing because: first, there is "an urgent need to inform the public about an actual

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<sup>4</sup> Dr. Tedros Adhanom Ghebreyesus, Dir. Gen., World Health Org., Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

<sup>5</sup> Franco Ordonez, *Jared Kushner's Role in Coronavirus Response Draws Scrutiny, Criticism*, NPR (Apr. 4, 2020), <https://www.npr.org/2020/04/04/826922646/jared-kushners-role-in-coronavirus-response-draws-scrutiny-criticism>.

<sup>6</sup> Cancryn, *supra* note 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

or alleged Federal Government activity,” and second, because the request is “made by a person primarily engaged in disseminating information to the public.” 45 C.F.R. § 5.27(b)(2).

First, there is “an urgent need to inform the public about an actual or alleged Federal Government activity.” 45 C.F.R. § 5.27(b)(2). The “actual . . . Federal Government activity” is HHS’s coordinated efforts with the White House and private-sector health technology companies to create a national COVID-19 surveillance system. It has been reported that the requested memo was delivered to HHS Secretary Azar and widely circulated within the administration. The urgency to inform the public about these government activities is clear from the extensive press coverage and extraordinary privacy implications of collecting individual health data to support new surveillance measures in the midst of a global pandemic.<sup>12</sup> Senator Markey (D-MA) even issued a statement about the reported national coronavirus surveillance system stating,

I am deeply concerned to see reports that the White House wants to create a vast surveillance network involving sensitive information about the American people . . . While we should certainly use technological innovations and evidence-driven collaborations to combat the ongoing coronavirus crisis, we must also reject proposals and policies that promise harmful invasions of privacy.<sup>13</sup>

Second, EPIC is an organization “primarily engaged in disseminating information to the public.” 45 C.F.R. § 5.27(b)(2). As the Court explained in *EPIC v. DOD*, “EPIC satisfies the definition of ‘representative of the news media’” entitling it to preferred fee status under the FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003). EPIC’s primary purpose is to focus public attention on emerging privacy and civil liberties issues and frequently disseminates information obtained through the FOIA on its website, EPIC.org.

In submitting this request for expedited processing, EPIC certifies that this explanation is true and correct to the best of its knowledge and belief. 5 U.S.C. 552(a)(6)(E)(vi); 45 C.F.R. § 5.27(a).

#### Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes. *EPIC v. DOD*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the request records with only duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

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<sup>12</sup> See e.g., Rosie Gray & Caroline Haskins, *The Coronavirus Pandemic Has Set Off a Massive Expansion of Government Surveillance. Civil Libertarians Aren’t Sure What to Do.*, BuzzFeed News (Mar. 30, 2020), <https://www.buzzfeednews.com/article/rosiegray/they-were-opposed-to-government-surveillance-then-the-natasha-singer-choe-sang-hun>; Natasha Singer & Choe-Sang-Hun, *As Coronavirus Surveillance Escalates, Personal Privacy Plummet*, N.Y. Times (Mar. 24, 2020), <https://www.nytimes.com/2020/03/23/technology/coronavirus-surveillance-tracking-privacy.html>; Cancryn, *supra* note 1.

<sup>13</sup> Press Release, Senator Ed Markey, Senator Markey Statement on Reported White House National Coronavirus Surveillance System (Apr. 8, 2020), <https://www.markey.senate.gov/news/press-releases/senator-markey-statement-on-reported-white-house-national-coronavirus-surveillance-system>.

Further, any duplication fees should also be waived because disclosure because (1) “disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government;” and (2) “disclosure is not primarily in the commercial interest” of EPIC, the requester. 5 U.S.C. § 552(a)(4)(A)(iii); 45 C.F.R. § 5.54(a). EPIC’s request satisfies this standard based on HHS’s three-factor consideration for granting a fee waiver. 45 C.F.R. § 5.54(b)(1)–(3).

*(1) Disclosure of the requested information would shed light on the operations or activities of the government.*

First, disclosure of the requested documents concern “identifiable operations or activities of the Federal Government.” 45 C.F.R. § 5.54(b)(1). HHS, in coordination with the White House, received the March 22, 2020 memo, which was also circulated widely throughout the administration.

*(2) Disclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government.*

Second, disclosure of the requested documents would be “likely to contribute significantly to public understanding of [government] operations or activities.” 45 C.F.R. § 5.54(b)(2). HHS evaluates two factors to determine whether this requirement is met: (i) disclosure “must be meaningfully informative about government operations or activities;” and (ii) “disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject.” *Id.*

On the first factor, disclosure is “meaningfully informative about government operations or activities” because the release of the requested information will contribute to public debate over the federal government’s proposed collection of personal health data in response to the COVID-19 pandemic. 45 C.F.R. § 5.54(b)(2)(i). Moreover, a system that gives the government the ability to track real-time patient information may be prone to data breaches and excessive collection of personal data.

On the second factor, disclosure “contribute[s] to the understanding of a reasonably broad audience of persons interested in the subject.” 45 C.F.R. § 5.54(b)(2)(ii). As provided in HHS FOIA regulations, HHS shall “presume that a representative of the news media will satisfy this consideration.” *Id.*

*(3) Disclosure of the information is not primarily in the commercial interest of the requester.*

Third, disclosure is not “primarily in the commercial interest of” EPIC, the requester. 45 C.F.R. § 5.54(b)(3). EPIC has no commercial interest in the records. EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.<sup>14</sup> EPIC consistently publishes critical documents obtained through the FOIA and through litigation on its robust website, EPIC.org, and its online newsletter, *EPIC Alert*.<sup>15</sup> Under HHS FOIA regulations, the agency “will

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<sup>14</sup> EPIC, *About EPIC*, <https://www.epic.org/epic/about.html>.

<sup>15</sup> See EPIC.org, <https://www.epic.org/>; EPIC, *EPIC Alert*, <https://www.epic.org/alert/>.

presume that when a news media requester has satisfied factors (b)(1) and (2) of [the fee waiver section], the request is not primarily in the commercial interest of the requester.” 45 C.F.R. § 5.54(b)(3)(ii). Again, EPIC is a news media requester and, as set out above, this request satisfies the public interest factors (b)(1) and (2).

For these reasons, EPIC’s request for a full fee waiver should be granted.

Conclusion

Thank you for your consideration of this request. EPIC anticipates your determination on its request within ten calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I); 45 C.F.R. § 5.27(c). For questions regarding this request contact Enid Zhou at Zhou@epic.org, cc: FOIA@epic.org.

Respectfully submitted,

/s Enid Zhou

Enid Zhou

EPIC Open Government Counsel

/s John Davisson

John Davisson

EPIC Counsel