

Congress of the United States
Washington, DC 20515

May 20, 2016

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

Dear Secretary Burwell:

For more than a year, the Department of Health and Human Services has obstructed the ongoing oversight by the Committee on Ways and Means and the Committee on Energy and Commerce into the Administration's decision to make the Affordable Care Act's cost sharing reduction payments from the permanent appropriation for tax refunds and credits.

Since February 2015, when the Committees first wrote to you requesting documents and information about the source of funding for the cost sharing reduction program, your Department has made only three productions of documents. One of these productions consisted of only one substantive document, and another production consisted entirely of publicly available documents. The third production—the first containing any non-final internal documents—came only after each Committee was forced to issue subpoenas to you compelling the production of all responsive documents. Your Department, however, continues to withhold information from the Committees that, in your opinion, “implicates significant Executive Branch confidentiality interests in internal deliberations.”¹ We disagree that the Department can withhold this information. Furthermore, you have not asserted a single valid legal principle to support your position.

Much of the Administration's objection to the Committees' oversight is seemingly rooted in its purported concerns about disclosing information related to the ongoing litigation brought by the House regarding the cost sharing reduction program. As we explained to you in December, the litigation did not deprive the Committees of their respective oversight authorities and obligations, and was not a valid basis for the Department to refuse to respond to congressional oversight requests.

Those objections notwithstanding, however, the district court has rendered its decision on the merits of the case. On May 12, 2016, Judge Collyer of the U.S. District Court for the District of Columbia held that the Department of the Treasury and the

¹ See, Letter from Jim R. Esquea, Assistant Sec'y for Leg., U.S. Dep't of Health & Human Serv., to Hon. Fred Upton, Chairman, H. Comm. on Energy & Comm. (Mar. 18, 2016).

Department of Health and Human Services have made billions of dollars in payments to health insurers under the cost sharing reduction program without an appropriation, in violation of the U.S. Constitution.

The district court's ruling that the cost sharing reduction payments made by your Department violated the U.S. Constitution clearly demonstrates that misconduct has occurred. We remind you that the deliberative process privilege, if grounds for one ever existed, "disappears altogether when there is any reason to believe government misconduct [has] occurred."² Therefore, we expect your Department to immediately produce all documents responsive to the subpoenas issued on May 4, 2016.

If you have any questions, please contact Jessica Donlon with Committee on Energy and Commerce staff at (202) 225-2927 or Amanda Neely with Committee on Ways and Means staff at (202) 225-9263.

Sincerely,



Fred Upton
Chairman
Committee on Energy and Commerce



Kevin Brady
Chairman
Committee on Ways and Means

CC: The Honorable Frank Pallone, Jr., Ranking Member,
Committee on Energy and Commerce

The Honorable Sander Levin, Ranking Member,
Committee on Ways and Means

² *In re Sealed Case (Espy)*, 121 F.3d 729, 745 (D.C. Cir. 1997).