

**Congress of the United States**  
Washington, DC 20515

May 20, 2016

The Honorable Shaun Donovan  
Director  
Office of Management and Budget  
725 17th Street, NW  
Washington, DC 20503

Dear Director Donovan:

Last month, the Committee on Ways and Means and the Committee on Energy and Commerce wrote to you requesting that you voluntarily produce one document—a legal memorandum drafted by the Office of Management and Budget (OMB) regarding the source of funding for the Affordable Care Act’s cost sharing reduction program. Your failure to produce this document voluntarily forced us to issue subpoenas to OMB for this document. OMB, however, continues to withhold this document from the Committees because you wish to “maintain the confidentiality of [your] internal deliberations.”<sup>1</sup> We disagree that OMB 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. The litigation did not deprive the Committees of their respective oversight authorities and obligations, and was not a valid basis for the Administration 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 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 the Administration violated the U.S. Constitution clearly demonstrates that misconduct has occurred. We remind you that the deliberative process privilege, if grounds for one ever

---

<sup>1</sup> Letter from Tamara L. Fucile, Associate Dir. of Leg. Affairs, Office of Management and Budget, to Hon. Fred Upton, Chairman, H. Comm. on Energy & Comm. and Hon. Kevin Brady, Chairman, H. Comm. on Ways & Means (May 3, 2016).

Letter to The Honorable Shaun Donovan  
Page 2

existed, “disappears altogether when there is any reason to believe government misconduct [has] occurred.”<sup>2</sup> Therefore, we expect you 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

---

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