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FREEDOM OF INFORMATION ACT APPEAL

May 6, 2011

VIA FEDERAL EXPRESS

Deputy Assistant Secretary for Public Affairs (Media)
Freedom of Information/Privacy Acts Division
U.S. Department of Health and Human Services
330 C Street, S.W.
Room 2221
Mary E. Switzer Building
Washington, D.C. 20201

Re: Appeal of Denial of Freedom of Information Request No. 2011-0245KS

Dear Sir or Madam:

This firm represents Bloomberg L.P. ("Bloomberg") and its reporter Alexander Wayne in connection with their above-referenced Freedom of Information Act ("FOIA") request to the Department of Health and Human Services, Office of Inspector General (the "OIG"). I am writing to appeal the OIG's denial of Mr. Wayne's request.

The Request

On January 19, 2011, Bloomberg reporter Alexander Wayne submitted a FOIA request (the "Request") to the OIG seeking copies of the audits performed on 50 Medicare Advantage plans as referenced in report A-07-10-01080 (the "Report"). On April 6, 2011, the OIG responded that it had located 950 pages of responsive records (the "April 6 Letter" or the "Denial"). The OIG produced 882 pages of records to Mr. Wayne, with redactions, and withheld the remaining 68 pages in full. The OIG asserts in the April 6 Letter that the documents and information withheld are protected from disclosure by Exemption 4 of the FOIA, which protects from disclosure "trade secrets and commercial or financial information obtained from a person that is privileged or confidential." 5 U.S.C. § 552(b)(4). In addition, the OIG stated in the Denial that it was unable to locate any documents responsive to the Request for documents identifying the person(s) or organization(s) that requested the Report.

For the reasons discussed below, the OIG has failed to sustain its burden of demonstrating that certain information redacted from the 882 pages produced on April 6, 2011 is

exempt from disclosure pursuant to Exemption 4. The OIG has also failed to demonstrate that it has produced all reasonably segregable information responsive to the Request.

Argument

I. The OIG Has Failed To Sustain Its Burden Of Demonstrating That The Information Redacted From The Audit Reports Performed On 50 Medicare Advantage Plans Is Exempt From Disclosure.

Among the documents produced by the OIG on April 6, 2011 are copies of the OIG's final reports on estimated investment income earned from Medicare Advantage payments to unnamed Medicare Advantage organizations ("MA Organizations") in 2007 (the "Audit Reports"). The Medicare Part C program offers beneficiaries managed care options through the Medicare Advantage program, which is financed by the Centers for Medicare & Medicaid Services ("CMS") through the Federal Hospital Insurance (Part A) and Supplementary Medical Insurance (Part B) trust funds. CMS makes advance capitated payments ("prepayments") to MA Organizations for each enrollee at the beginning of each month, and the MA Organizations can invest these funds in interest-bearing instruments until they are needed to pay for medical and administrative expenses. MA Organizations submit, on an annual basis, bid proposals containing their anticipated revenue requirements for providing medical services under each of their plans for the upcoming year, but neither Federal regulations nor CMS guidelines require MA Organizations to include anticipated investment income earned in their bid proposals. The purpose of the Audit Reports was therefore to determine the financial impact on the Medicare program of investment income that MA Organizations earned and retained from Medicare funds in 2007 — a topic of great public interest. However, the OIG redacted the majority of the information contained in the Audit Reports including, *inter alia*, the names of the MA Organizations, their contract numbers, the prepayments received, the number of managed care plans administered, and the investment income earned in 2007. The April 6 Letter cites Exemption 4 as a basis for withholding the redacted information.

Exemption 4 of the FOIA permits an agency to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential" where disclosure of the information is likely to cause substantial competitive harm to the person or entity that submitted the information. 5 U.S.C. § 552(b)(4). In order to properly invoke Exemption 4, an agency must "show exactly who will be injured by the release of [the] information and explain the concrete injury." Delta Ltd. v. U.S. Customs & Border Prot. Bureau, 393 F. Supp. 2d 15, 19 (D.D.C. 2005). "Conclusory and generalized allegations of substantial competitive harm . . . cannot support an agency's decision to withhold the requested documents." Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 (D.C. Cir. 1983); see also Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., 649 F. Supp. 2d 262, 279 (S.D.N.Y. 2009) ("An agency must point to specific evidence substantiating an assertion that release of a record would cause substantial competitive harm to the person from whom the information was obtained. . . . The agency must provide evidence that if the requested information is disclosed, competitive harm would be 'imminent.'") (internal citation omitted), aff'd, Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys., 601 F.3d 143 (2d Cir. 2010), cert. denied, No. 10-543 (U.S. Mar. 21, 2011).

The OIG has failed to demonstrate that the information redacted from the Audit Reports is exempt from disclosure under Exemption 4. See 5 U.S.C. § 552(a)(4)(B) ("the burden is on the

agency to sustain its action"); see also In Def. of Animals v. USDA, 656 F. Supp. 2d 68, 79 (D.D.C. 2009) (ordering the Department of Agriculture to produce 1,017 pages withheld from disclosure pursuant to Exemption 4 where the Department failed to sustain its burden of demonstrating that the entity investigated would "suffer a substantial competitive injury if the information withheld [was] released"). The April 6 Letter does not provide *any* explanation as to how disclosure of the information redacted from the Audit Reports would cause competitive harm to the MA Organizations that participated in the OIG's audit. See Bloomberg L.P., 649 F. Supp. 2d at 279 (agency "must show that the competitive harm will result from the affirmative use of the information by competitors of the person from whom the information was obtained, not merely injuries to that person's competitive position in the marketplace or 'embarrassing publicity attendant upon public relations.'") (citing Pub. Citizen Health Research Group, 704 F.2d at 1291 n. 30). In particular, it is difficult to see how the release of the names of the MA Organizations, their contract numbers, or the number of managed care plans administered by those organizations would cause substantial competitive harm, given that the MA Organizations that participated in the Medicare Advantage program during 2007 are publicly available on CMS's website.[1]

The OIG has also failed to demonstrate how disclosure of the other withheld data would cause substantial competitive harm. For example, even if the other redacted information was competitively sensitive in 2007 — which the OIG has failed to demonstrate — that could no longer be the case over three years later. And if the OIG maintains its position that the names of the MA Organizations are exempt from disclosure, then any plausible justification for withholding the other data completely evaporates. It would be impossible for competitors to use the estimated investment income earned from Medicare Advantage payments in 2007 to harm the MA Organizations where the names of those organizations are kept confidential. Courts have rejected similar attempts by agencies to redact more information than is necessary to meet the narrow goals of the applicable exemption. See, e.g., Long v. DOJ, 450 F. Supp. 2d 42, 76 (D.D.C. 2006) ("To permit the [DOJ] to withhold categorically [on the basis of Exemption 7(A)] all of the 'criminal lead charge' entries from the records at issue in the face of [evidence that disclosure of some of the information would not interfere with law enforcement proceedings] would eviscerate the principles of openness in government that the FOIA embodies.") (citation omitted).

II. The OIG Failed To Disclose All "Reasonably Segregable" Portions Of The Requested Records.

The FOIA requires an agency to disclose "[a]ny reasonably segregable portion" of a document that is, in part, exempt from disclosure. 5 U.S.C. § 552(b); see also Ctr. for Int'l Env't. Law v. Office of the U.S. Trade Representative, 505 F. Supp. 2d 150, 158 (D.D.C. 2007) (even if a FOIA exemption applies, a government agency "may not automatically withhold the full document as categorically exempt without disclosing any segregable portions"). In contravention of this requirement, the OIG has withheld 68 pages of responsive records in their entirety.

The April 6 Letter does not describe what records have been withheld, in a Vaughn index or otherwise, and therefore it is impossible for Bloomberg to evaluate whether any of the

[1] See Rollup Review of Impact on Medicare Program for Investment Income That Medicare Advantage Organizations Earned and Retained From Medicare Funds in 2007 (A-07-10-01080) (Jan. 18, 2011), http://oig.hhs.gov/oas/reports/region7/71001080.pdf.

information contained in those records may properly be exempt from disclosure under FOIA. Vaughn v. Rosen, 484 F.2d 820, 826-27 (D.C. Cir. 1973) (requiring an agency to provide an index that describes with specificity the documents withheld and the proffered justification for the nondisclosure). Nevertheless, it is incredible that the disclosure of *any portion* of these documents would cause imminent and substantial competitive harm to the MA Organizations nearly three years after the 2007 Medicare Advantage program. Thus, the OIG has failed to sustain its burden of demonstrating that any nonprotected, reasonably segregable information located in response to the Request has been produced. See, e.g., In Def. of Animals, 656 F. Supp. 2d at 73 ("In addition to establishing that information is properly withheld under the claimed FOIA exemption, an agency seeking to withhold information bears the burden of establishing that all reasonably segregable non-exempt portions of records are disclosed.") (holding that the Department of Agriculture failed to meet its burden of demonstrating that all reasonably segregable nonexempt information from 1,017 withheld pages had been disclosed).

Bloomberg respectfully requests that the OIG respond to this appeal within 20 days. See 5 U.S.C. § 552(a)(6)(A)(ii). Bloomberg further requests that the OIG immediately provide a Vaughn index describing the 68 documents that were withheld in full. If you have any questions or require any additional information, please contact me directly at (212) 728-8657.

Sincerely,

Thomas H. Golden

cc: Charles Glasser (via e-mail)
Global Media Counsel, Bloomberg News

Alexander Wayne (via e-mail)
Reporter, Bloomberg News