

September 27, 2017

The Honorable Paul Ryan  
Speaker of the House of Representatives  
1233 Longworth House Office Building  
Washington, DC 20515

The Honorable Kevin McCarthy  
Majority Leader  
2421 Rayburn House Office Building  
Washington, DC 20515

The Honorable Steve Scalise  
Majority Whip  
2338 Rayburn House Office Building  
Washington, DC 20515

The Honorable Nancy Pelosi  
Minority Leader  
233 Cannon House Office Building  
Washington, DC 20515

The Honorable Steny Hoyer  
Minority Whip  
1705 Longworth House Office Building  
Washington, DC 20515

Dear Members of the Bipartisan Legal Advisory Group of the House of Representatives:

We the undersigned groups urge you to consider the consequences of expanding categories of records not subject to the Freedom of Information Act (FOIA). Your recent decision to approve the House Committee on Ways and Means's Motion to Intervene filed in *American Oversight v. U.S. Department of Health and Human Services*<sup>1</sup> highlights the issue of when records can be considered Congressional records not subject to FOIA. In light of incorrect FOIA to the Department of the Treasury by Chairman Jeb Hensarling of the House Committee on Financial Services,<sup>2</sup> we wanted to take this opportunity to reach out to emphasize the importance of recognizing the limits to this category of records.

As you know, FOIA is one of the most useful tools the public has to educate itself about the workings of the federal government and to hold the government accountable. Congress recently demonstrated its support of this tool by passing language to strengthen it further. Any limit on access to records under the FOIA must be carefully examined against the spirit of the law.

Chairman Hensarling's letter to the Department of the Treasury unilaterally attempted to push the limits of the Congressional records exception to FOIA to apply to a much broader category of records than it does currently, contrary to your Motion to Intervene. Chairman Hensarling's

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<sup>1</sup> U.S. House of Representatives Committee on Ways and Means Motion to Intervene, September 15, 2017. <https://www.americanoversight.org/document/u-s-house-representatives-motion-intervene> (Downloaded September 18, 2017) (Hereinafter U.S. House of Representatives Motion to Intervene)

<sup>2</sup> Letter to Department of the Treasury Secretary Steven Mnuchin from the House Committee on Financial Services regarding Committee Intent to Control Congressional Records, April 3, 2017. <https://www.documentcloud.org/documents/3700409-Treas-Letter.html> (Downloaded May 5, 2017)

guidance is not only confusing to agencies that now have Congressional guidance running counter to case law and statutory language but it infringes on the public's right to use the FOIA to hold the federal government accountable.

FOIA requires agencies to release agency records upon request unless they fall within the scope of one of the nine exemptions provided in the law and, when necessary, the agency reasonably foresees that disclosure would harm an interest provided by that exemption. As set forth in more detail below, the issue at the heart of both the Motion to Intervene and Chairman Hensarling's letter is whether or not categories of information are "agency records" or "congressional records."

In April of this year, Chairman Hensarling advised Secretary Mnuchin, after extensive communications between the Committee and the agency, that "the Committee intends to retain control of all...communications [between the Committee and the agency], and will be entrusting them to your agency only for use in handling [matters in connection with the legislative, oversight, and investigative jurisdictions of the Committee]." The Chairman also asserted the Committee would retain control of "any documents created or compiled" by the agency in response to such communications.

These assertions improperly restrict the ability of the public to use FOIA to access those documents. In 5 U.S.C. §552(b), Congress provided for narrow and specific exemptions to FOIA. Chairman Hensarling's letter appears to create a new category of exemption through a unilateral action by a single Member of Congress, or possibly even congressional staff, creating a troubling precedent.

In general, the Supreme Court uses a two-part test to determine what constitutes an agency record.<sup>3</sup> To satisfy the first prong, the requested documents must have been "create[d] or obtain[ed]" by the agency.<sup>4</sup> To satisfy the second prong, the requested documents must be in the agency's control when the request is made.<sup>5</sup>

Chairman Hensarling contended that communications between Members or staff of his Committee and the Department of the Treasury are Congressional records and therefore cannot be released in response to a FOIA request. Case law, including multiple decisions of the U.S. Court of Appeals for the D.C. Circuit, however, makes clear that Congressionally generated documents can become agency records and only under specific, limited circumstances may records be deemed Congressional records exempt from FOIA.<sup>6</sup> Specifically, D.C. Circuit case

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<sup>3</sup> *DOJ v. Tax Analysts*, 492 U.S. 136, 144-146. (1989)

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Paisley v. CIA*, 712 F.2d 686, 693 (D.C. Cir., 1983) (explaining "Whether a congressionally generated document has become an agency record depends on whether under all the facts of the case the document has passed from the control of Congress and become property subject to the free disposition of the agency with which the document resides.")

law focuses on the existence of a clear and contemporaneous manifestation of intent by Congress to retain control of specific documents that it shares with an executive branch agency to determine whether a document is under agency control or not. Courts have not, however, provided a bright line rule.

To accept the assertions in the Chairman's letter would unilaterally create a new FOIA exemption not provided for in the law, exempting agency communications with Congress as a category. Indeed, the relevant case law states "post-hoc [committee] objections to disclosure cannot manifest the clear assertion of congressional control that our case law requires."<sup>7</sup> At the very least, should some communications or portions thereof ultimately be deemed Congressional records, agencies are still required to segregate and release agency records, as required by the statute.<sup>8</sup>

Second, the Chairman further contended that Congress controls the documents created and compiled by the agency in connection to communications with his Committee. In defending the Chairman's letter, a Committee spokesperson claimed that "the D.C. Circuit has long recognized that Congress's constitutional oversight role may be threatened if agencies do not maintain the confidentiality of congressional records."<sup>9</sup> However, this is an incorrect application of a narrow principal, and does not apply to records created or compiled by the agency, as the Committee asserted it should. The narrow principal cited by the spokesperson applies only when an agency creates a record in direct response to a formal Congressional request and *only* exempts the portions of the responsive record that would disclose the Congressional request.<sup>10</sup>

The spokesperson's selective quoting of the case law neglects to point out that the same decision justifies only a targeted withholding of information, not a categorical exemption, which covers only the portion of IRS-created documents that would reveal the underlying Congressional request.<sup>11</sup>

There is no question that records created or compiled by the Department of the Treasury in response to the Committee on Financial Services' communications and inquiries are agency records, and therefore the blanket assertion of control by the Chairman should be immaterial to the agency's handling of these records under FOIA. The agency must release these records if requested, subject to legislated FOIA exemptions.

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<sup>7</sup> *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 600 (D.C. Cir., 2004).

<sup>8</sup> 5 USC § 552(a)(8)(A)(ii)(II).

<sup>9</sup> Hensarling Calls on Treasury to Deny FOIA Requests, *Politico Pro*, May 5, 2017.

<sup>10</sup> *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 603 (D.C. Cir., 2004).

<sup>11</sup> *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 603 (D.C. Cir., 2004) (stating "we conclude that the Joint Committee's directive and expectation of confidentiality extend only to its April 28 request and to those portions of the IRS response that would effectively disclose that request. Put in terms of *Burka's* second factor, the IRS retains the "ability to use and dispose of" any portions of its response that would not reveal the Joint Committee's request.")

The Motion to Intervene filed in *American Oversight v. U.S. Department of Health and Human Services*<sup>12</sup> presents an expansive interpretation of current D.C. Circuit case law. This reading ignores some of the finer points of the Court's limits to the issue of Congressional records, and we caution you against advancing any more extensive interpretation of that case law, such as the one pushed by Chairman Hensarling. The spirit of the Freedom of Information Act is clear and any attempt by the House of Representatives to expand categories of records exempted from the law must go through the legislative process.

If you have any questions or would like to discuss this further, please contact Elizabeth Hempowicz, POGO's Policy Counsel, and [ehempowicz@pogo.org](mailto:ehempowicz@pogo.org) or (202) 347-1122.

Sincerely,

American Association of Law Libraries  
American Society of News Editors  
Association of Alternative Newsmedia  
Associated Press Media Editors  
Cause of Action  
Citizens for Responsibility and Ethics in Washington  
Demand Progress  
Federation of American Scientists  
Government Information Watch  
National Security Archive  
OpenTheGovernment  
Project On Government Oversight  
Protect Democracy  
Reporters Committee for Freedom of the Press  
Sunlight Foundation

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<sup>12</sup> U.S. House of Representatives Motion to Intervene