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BY EMAIL TO Hugh.Gilmore@cms.hhs.gov

November 25, 2020

Mr. Hugh Gilmore, Director
Division of Freedom of Information, Office of Strategic
Operations and Regulatory Affairs
Centers for Medicare and Medicaid Services
7500 Security Boulevard
Baltimore, Maryland 21244

Dear Mr. Gilmore:

I am writing in response to your October 30, 2020 letter to Bruce Quinn, claiming that a document called the “Master Edit File” from Palmetto CBA, that your agency released to him under the Freedom of Information Act (“FOIA”) in December 2019 “contained confidential commercial information which needs to be either returned to CMS or destroyed.” I called you last week to ask you several questions about the basis for your contentions; for the most part, you declined to answer my questions but rather said that you would need to check with others in your agency and then get back to me. Unfortunately, I have not heard from you further; consequently, Quinn is not going to comply with your demand.

First of all, although courts have in a few cases ordered the return of information provided under the FOIA, *Ecological Rights Found. v. FEMA*, 2017 WL 24859, at *2 (N.D. Cal. Jan. 3, 2017); *ACLU v. Dep’t of Defense*, 2012 WL 13075284, at *5 (S.D.N.Y. Mar. 20, 2012) *Hersh & Hersh v. U.S. Dep’t of Health & Human Serv.*, 2008 WL 901539, at *9 (N.D. Cal. Mar. 31, 2008), every such case involved conditions that are absent here. In each case, the documents had been provided under the auspices of a court after an action had been brought seeking to enforce the FOIA, and in each case the documents subject to claw back orders were small items that had been inadvertently included in a larger document production. Courts also consider the amount of time between the disclosure and the claw-back request, and whether the records fall within the scope of a FOIA exemption.

None of these conditions supports your request for the return of the record. First, CMS produced the document out of court, in response to an ordinary FOIA request; so far as I have been able to determine, the government does not have any cause of action that would allow it to bring a freestanding motion to compel return of a produced document. Second, the one thing you acknowledged outright when we spoke was that the release was deliberate, not inadvertent. You are now seeking the return of the document because Palmetto complained about its release. But you could not even tell me whether Palmetto had been consulted about Quinn’s FOIA request last year,

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and whether, if consulted, it had responded to CMS's inquiry, or simply stayed silent. So far as we know, Palmetto waived its objections when the document was requested last year; indeed, in September of **this** year, Palmetto itself willingly gave out a later version of the same document in response to a FOIA request that it received from Jack Meehan of the financial analysis firm Nephron. Third, it has been almost a year since the document was provided under FOIA.

Finally, nothing you told me gave me any reason to believe that the document would have been exempt from disclosure under FOIA. I asked you a number of questions about the supposedly proprietary nature of some of the information included in the Master Edit File (your letter appears to concede that at least some of the fields in the file contain public information), but you were unwilling to identify the subject of concern or explain **why** it is a subject of concern. Indeed, it appeared to me that the agency is not making its own judgments about the proprietary nature of some of the information; rather, apparently your plan is to allow Palmetto GBA to redact its document in ways that **it** would determine, and you would simply act as a messenger, forwarding to Quinn the document as redacted by Palmetto. Although I have tried to speak to Palmetto's lawyer to get **his** explanation of his "proprietary information" claim, he has not been willing to give me any explanations. And finally, although Palmetto has apparently asked CMS to try to claw back the documents after seeing Quinn's online commentary, as noted above, it recently gave out a more recent version of the Master Edit File in response to a FOIA request that it received in its capacity as a Medicare Administrative Contractor.

For all of these reasons, Quinn declines your request to "claw back" CMS's FOIA disclosure of last year.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Paul Alan Levy", written over a light blue horizontal-lined background.

Paul Alan Levy