

1 THOMAS R. BURKE (State Bar No. 141930)  
DAVIS WRIGHT TREMAINE LLP  
2 505 Montgomery Street, Suite 800  
San Francisco, California 94111  
3 Telephone: (415) 276-6500  
Facsimile: (415) 276-6599  
4 Email: thomasburke@dwt.com

5 Attorneys for Plaintiffs  
HENRY J. KAISER FAMILY FOUNDATION  
6 dba KAISER HEALTH NEWS

7  
8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION

11 HENRY J. KAISER FAMILY FOUNDATION  
dba KAISER HEALTH NEWS,

12 Plaintiff,

13 v.

14 U.S. CENTERS FOR MEDICARE AND  
15 MEDICAID SERVICES; U.S. DEPARTMENT  
16 OF HEALTH AND HUMAN SERVICES,

17 Defendants.

Case No. 19-cv-6130

**COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF FOR VIOLATION  
OF THE FREEDOM OF INFORMATION  
ACT, 5 U.S.C. § 552 et seq.**

DAVIS WRIGHT TREMAINE LLP

18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 Plaintiff HENRY J. KAISER FAMILY FOUNDATION dba KAISER HEALTH NEWS  
2 (“KHN”), by its undersigned attorneys, allege as follows:

3 **INTRODUCTION**

4 1. KHN seeks access to key information regarding administration of one of the largest  
5 healthcare providers in the United States. KHN requested that the U.S. Centers for Medicare and  
6 Medicaid Services (“CMS”) produce documents reflecting Medicare Advantage Risk Adjustment  
7 Data Validation (“RADV”) reviews for payment years 2001, 2012 and 2013 – including both the  
8 audit spreadsheets, payment error calculations and any extrapolations. The RADV records  
9 represent the federal government’s primary means for assuring the integrity of Medicare  
10 Advantage billing, which accounts for some \$200 billion in taxpayer funds every year.

11 2. Medicare audits of every other arena of medicine, hospitals, nursing homes,  
12 doctors, etc., are public records and many are posted by CMS on government websites for public  
13 inspection and scrutiny. Medicare Advantage plans, which are run by some of the nation's largest  
14 and most profitable private health insurance companies, are being treated differently. These audits  
15 are improperly being withheld by CMS, even though CMS estimates that these audits have  
16 identified some \$650 million in improper charges. In spite of KHN’s efforts to obtain access to  
17 this vital information, it has been withheld by CMS, necessitating the filing of this FOIA lawsuit.

18 3. In response to a recent report by the Inspector General of the U.S. Department of  
19 Health and Human Services (“HHS”) that health insurers have overcharged Medicare by nearly  
20 \$30 billion over the past three years, on September 17, 2019, U.S. Senators Sherrod Brown,  
21 Bernard Sanders, Amy Klouchar, Christopher S. Murphy, Richard Blumenthal and Debbie  
22 Stabenow wrote to CMS Administrator Seema Verma demanding that CMS explain how the  
23 agency plans to recoup taxpayer dollars that CMS used to overcompensate private insurers  
24 involved in Medicare Advantage plans. See

25 [https://www.brown.senate.gov/newsroom/press/release/brown-colleagues-urge-cms-to-](https://www.brown.senate.gov/newsroom/press/release/brown-colleagues-urge-cms-to-investigate-medicare-advantage-overbilling-protect-taxpayer-dollars-and-improve-care-for-older-ohioans)  
26 [investigate-medicare-advantage-overbilling-protect-taxpayer-dollars-and-improve-care-for-older-](https://www.brown.senate.gov/newsroom/press/release/brown-colleagues-urge-cms-to-investigate-medicare-advantage-overbilling-protect-taxpayer-dollars-and-improve-care-for-older-ohioans)  
27 [ohioans.](https://www.brown.senate.gov/newsroom/press/release/brown-colleagues-urge-cms-to-investigate-medicare-advantage-overbilling-protect-taxpayer-dollars-and-improve-care-for-older-ohioans)

DAVIS WRIGHT TREMAINE LLP

DAVIS WRIGHT TREMAINE LLP

1 4. KHN brings this action under the Freedom of Information Act, 5 U.S.C. § 552 *et*  
2 *seq.*, as amended (“FOIA”), to enjoin the U.S. Centers for Medicare and Medicaid Services and  
3 the U.S. Department of Health and Human Services from continuing to improperly withhold  
4 agency records that are responsive to a FOIA request sent by KHN on July 3, 2019, a copy of  
5 which is attached as Exhibit A. This FOIA action is necessary because CMS has not produced the  
6 requested documents to KHN. The constructive denial of KHN’s Request is improper and in  
7 violation of FOIA.

8 5. The Freedom of Information Act “focuses on the citizens’ right to be informed  
9 about ‘what their government is up to,’ by requiring the release of “[o]fficial information that  
10 sheds light on an agency’s performance of its statutory duties.” *DOJ v. Reporters Comm. for*  
11 *Freedom of the Press*, 489 U.S. 749, 750, 773 (1989) (citation omitted). “[D]isclosure, not  
12 secrecy, is the dominant objective” of FOIA. *Dept. of Interior v. Klamath Water Users Protective*  
13 *Ass’n*, 532 U.S. 1, 8, (2001) (internal quotation marks and citations omitted). KHN plays a critical  
14 role in providing information to citizens about “what their government is up to.” Indeed, the First  
15 Amendment’s guarantee of freedom of the press is meant to enable journalists to play an “essential  
16 role in our democracy,” to “bare the secrets of government and inform the people.” *New York*  
17 *Times. Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J. concurring).

18 6. CMS’s own statistics show that more than 22.6 million Americans receive their  
19 health care through Medicare Advantage insurers – more than one in three people on Medicare.  
20 By this FOIA action, KHN seeks to shine a public light on CMS’s activities on behalf of millions  
21 of Americans and their families.

**PARTIES**

23 7. Plaintiff KHN is a non-profit news service committed to in-depth coverage of  
24 health care policy and politics. KHN reports on how the health care system — hospitals, doctors,  
25 nurses, insurers, governments, consumers — works. In addition to publishing on KHN.org, KHN-  
26 authored stories are published by news organizations throughout the country.

27 8. Defendant Centers for Medicare and Medicaid Services is a component of  
28 Defendant U.S. Department of Health and Human Services, itself a component of the Executive

1 Branch of the United States Government. Defendants are each an “agency” within the meaning of  
2 5 U.S.C. § 552(f). Plaintiff is informed and believes that CMS has possession and control of the  
3 records sought by the Request.

4 **JURISDICTION**

5 9. This Court has subject-matter jurisdiction over this action and personal jurisdiction  
6 over the parties under 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 701-706, and 28 U.S.C. § 1331.

7 **VENUE**

8 10. Venue in the Northern District of California is proper under 5 U.S.C.  
9 § 552(a)(4)(B) as KHN’s FOIA request to CMS occurred within the City and County of San  
10 Francisco. For the same reason, venue also is proper under 28 U.S.C. § 1391(e).

11 11. Assignment to the San Francisco Division is proper under Civil Local Rule 3-2(c)  
12 and (d) because KHN’s FOIA request to CMS occurred within the City and County of San  
13 Francisco, within this District.

14 **FACTS**

15 12. Through a FOIA request that was emailed to CMS on July 3, 2019 and also sent by  
16 mail on July 8, 2019, KHN Senior Correspondents Anna Maria Barry-Jester and Fred Schulte,  
17 while employed by KHN, requested access to and copies of RADV reviews for the payment years  
18 2011, 2012 and 2013, including both the audit spreadsheets and payment error calculations,  
19 including any extrapolations. In its request, KHN expressly disclaimed interest in the names, or  
20 dates of birth of any Medicare beneficiaries. In formulating this FOIA request, KHN was  
21 informed by CMS’ press office that at least 90 of these audits have been conducted for these three  
22 years. KHN also requested all correspondence, memoranda, emails or other records of any  
23 meetings, communications or enforcement actions concerning these audits and Medicare  
24 Advantage providers involved. Finally, KHN also requested all correspondence, memoranda,  
25 emails or other records concerning the January 2017 decision to move the RADV audit program  
26 from the CMS Center for Medicare to the agency’s Center for Program Integrity. KHN requested  
27 that the responsive documents be produced by CMS in an electronic format.

DAVIS WRIGHT TREMAINE LLP

1 13. KHN also requested that since the release of the requested information is “clearly  
2 in the public interest” and because KHN is a media requester, that CMS waive any fees for  
3 production of the requested documents. KHN also asked that its request be treated as a simple  
4 request under CMS rules. KHN’s FOIA request is attached as Exhibit A.

5 14. As of the filing of this Complaint, more than two months have elapsed since KHN  
6 sent its Request. Because CMS failed to further respond, KHN is deemed to have exhausted its  
7 administrative remedies with respect to the Request under 5 U.S.C. § 552(a)(6)(C)(i).

8 **FIRST CAUSE OF ACTION**

9 **(Violation of FOIA)**

10 15. CMS and HHS have a legal duty under FOIA to determine whether to comply with  
11 a request within 20 days after receiving the request, and also have a legal duty to immediately  
12 notify the requester of the agency’s determination and the reasons therefore. KHN has a legal  
13 right under FOIA to obtain the agency records they requested in its Request, and there exists no  
14 legal basis for CMS’s failure to respond to KHN’s request and to make these records available to  
15 KHN.

16 16. CMS and HHS’s failure to make promptly available the records sought by KHN’s  
17 Request violates FOIA, 5 U.S.C. § 552(a)(3)(A) and (a)(6)(A)(ii), and applicable regulations  
18 promulgated thereunder.

DAVIS WRIGHT TREMAINE LLP

19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff KHN request the Court award it the following relief:

- A. Declare that CMS and HHS violated FOIA in their failure to respond to KHN’s FOIA Request;
- B. Order CMS and HHS to immediately disclose the requested records to KHN and enter an injunction prohibiting CMS and HHS from continuing to withhold the requested records;
- C. Award KHN its reasonable costs and attorney’s fees;
- D. Grant such further relief as the court may deem just and proper.

Dated: September 26, 2019

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: /s/ Thomas R. Burke  
THOMAS R. BURKE

Attorneys for Plaintiff  
HENRY J. KAISER FAMILY FOUNDATION  
dba KAISER HEALTH NEWS

DAVIS WRIGHT TREMAINE LLP

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28