Congress of the United States
Washington, DC 20515

September 8, 2004

The Honorable William H. Frist, M.D.
United States Senate Majority Leader
461 Dirksen Senate Office Building
Washington, DC 20510

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
235 Cannon House Office Building
Washington, DC 20515

Dear Senator Frist and Mr. Speaker:

On June 22, 2004, we wrote to you asking for an investigation into whether the Bush Administration misled Congress about the costs of the Medicare prescription drug law and withheld relevant cost estimates. We have not yet received a response from you.

In that letter, we identified four questions that need to be investigated:

1. Who in the Administration knew about the higher cost estimates?

2. Who in the Administration participated in the decision to withhold the cost estimates from Congress?

3. Were senior leaders in Congress part of the effort to withhold the cost estimates from the rest of Congress?

4. Has the Administration taken any actions to obstruct congressional investigations on this matter?

In the meantime, two reports have concluded that suppression of information occurred. The first, from the Inspector General, found that Mr. Scully did seek to prevent Mr. Foster from providing information to Congress.[1] However, as she writes in the attached correspondence, the Inspector General acknowledges that her investigation "focused on the interactions between Scully and Foster" and "did not seek information relating to others within the government or out, who might have been aware of the subject cost estimates."[2] She specifically states that her office did not investigate any involvement by the White House in this matter.

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[1] HHS Office of Inspector General, *Statement of Dara Corrigan, Acting Principal Deputy Inspector General, Department of Health and Human Services, on Thomas Scully and Richard Foster Investigation* (July 6, 2004) (online at http://oig.hhs.gov/publications/docs/press/2004/070704IGStatement.pdf).

[2] Letter from HHS Acting Principal Deputy Inspector General Dara Corrigan to Rep. Henry A. Waxman (July 20, 2004).

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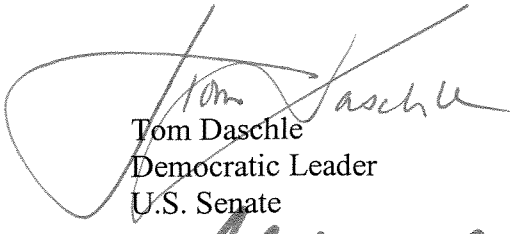
In the second report, the General Accountability Office determined that Mr. Scully's actions constituted a violation of sections of the Consolidated Appropriations Resolution of 2003 and Act of 2004.[3] These laws provide that federal funds cannot be used to pay the salary of a federal official who prevents another federal employee from communicating with Congress. GAO found that a major goal of the provisions is to ensure congressional access to information on legislation under debate. According to GAO, Mr. Scully's actions were "a prime example of what Congress was attempting to prohibit by those provisions."

The Inspector General's report and GAO's finding of legal violations highlight major problems in how this Administration dealt with the Medicare cost estimates. However, neither addressed the questions of who knew about, or was involved with, the suppression of information. Therefore, we renew our request for an investigation into the extent of the Administration's involvement in this matter. To restore the integrity of the legislative process, it is more important than ever for Congress to exercise its oversight and demand answers to these serious questions.

Sincerely,



Tom Daschle
Democratic Leader
U.S. Senate

Nancy Pelosi
Democratic Leader
U.S. House of Representatives

Edward M. Kennedy
Ranking Minority Member
Committee on Health, Education, Labor, and Pensions
U.S. Senate

Henry A. Waxman
Ranking Minority Member
Committee on Government Reform
U.S. House of Representatives

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[3] GAO, *Report from GAO General Counsel Anthony H. Gamboa to Sens. Frank R. Lautenberg, Tom Daschle, Edward M. Kennedy, et al., Re: Department of Health and Human Services — Chief Actuary's Communications with Congress* (Sept. 7, 2004) (B-302911).

Bob Graham
Senator
U.S. Senate

John D. Dingell
Ranking Minority Member
Committee on Energy and Commerce
U.S. House of Representatives

Frank Lautenberg
Senator
U.S. Senate

Charles B. Rangel
Ranking Minority Member
Committee on Ways and Means
U.S. House of Representatives

Hillary Rodham Clinton
Senator
U.S. Senate

Fortney Pete Stark
Ranking Minority Member
Subcommittee on Health
Committee on Ways and Means
U.S. House of Representatives

John D. Rockefeller IV
Senator
U.S. Senate

Steny H. Hoyer
Democratic Whip
U.S. House of Representatives

Sherrod Brown
Ranking Minority Member
Subcommittee on Health
Committee on Energy and Commerce
U.S. House of Representatives

Enclosure

Tim Johnson
Senator
U.S. Senate

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Inspector General

Washington, D.C. 20201

JUL 20 2004

The Honorable Henry A. Waxman
Ranking Minority Member
Committee on Government Reform
House of Representatives
Washington, D.C. 20515

Dear Mr. Waxman:

By letter of July 15, 2004, you and your colleagues sought additional information regarding the investigation of allegations that Thomas Scully, former Administrator of the Centers for Medicare & Medicaid Services (CMS), inappropriately prevented Actuary Richard Foster from providing information to Congress about cost estimates associated with the Medicare Prescription Drug, Improvement and Modernization Act (MMA). In separate instances, my office has received similar inquiries from Members of both the Senate Finance and House Ways and Means Committees. Below I address the issues raised in your letter, as well as those posed by your colleagues in the House of Representatives and the Senate.

Scope of OIG Investigation (Questions 1-8)

Your letter requests specific information as to who in the Department of Health and Human Services (HHS) was aware of the Actuary's estimates; who in the Congress, administration and industry were told of the estimates; and whom Scully consulted concerning his instructions to Foster or his decision to withhold the cost estimates.

The scope of our investigation was determined in part by a written request from five Members of the Congress who asked that we "launch an investigation to determine whether Foster indeed faced inappropriate pressure to withhold information from lawmakers, and if so, to take action to ensure that any such incidents do not take place in the future." A copy of their letter dated March 12, 2004 is enclosed for your reference. In response to this and other requests, our investigation focused on the interactions between Scully and Foster. Accordingly, we did not seek information relating to others, within government or out, who might have been aware of the subject cost estimates, and, as such, we have no information responsive to these questions.

Withholding of Information by Scully (Question 9)

Scully stated that he did not recall every specific instance where he was asked for information and it was not provided, or not timely provided. As to those requests he could recall, Scully stated that information was not provided because of concerns that the requestor(s) may not have sat on the committees of jurisdiction, or this information was

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sought solely to defeat the legislation. Scully did not reference any privilege, but asserted his right to supervise the workflow of the Chief Actuary.

Possible Violations of Ethics Standards (Question 10)

Our summary report and press statement indicate that we would have "referred this matter to the Department for possible administrative action associated with the Department's Standards of Ethical Conduct." Referring to this statement, you have asked what particular ethics rule(s) was potentially violated by Scully.

When an OIG investigation develops information indicating that there may have been a violation of a departmental rule or standard by any individual of the Department, OIG will refer that information as appropriate. If the conduct presents reasonable grounds to believe that a crime has been committed, the information would be referred to the Department of Justice (DOJ). Otherwise, OIG would refer the matter to the appropriate HHS component, recommending that the matter be administratively reviewed, and, if appropriate, that disciplinary action be taken. Because of the range of possible administrative actions, OIG does not generally make specific recommendations of possible actions to consider. For example, we believe Scully's behavior in dealing with Foster may raise issues of compliance with Department standards requiring courtesy in dealing with co-workers. See 45 C.F.R. § 73.735-301(b). In this case, no such referral was made because Scully no longer worked for CMS.

Possible Administrative Action Against Employees Other Than Scully (Question 11)

You have asked whether and why (or why not) OIG referred information to agency officials with respect to misconduct of employees other than Scully. In particular, the letter references Scully's aide, Jeffrey Flick. We have made no referrals for administrative action with respect to Flick or any other HHS employees. Our investigation disclosed no findings that would support such a referral.

Legal Opinions (Question 12)

A number of questions have been raised regarding the consideration given by OIG to the legal opinions of DOJ's Office of Legal Counsel (OLC) and HHS's Office of the General Counsel (OGC).

As part of our investigation into whether Scully exceeded his authority in directing the CMS Actuary to withhold certain cost information from the Congress, OIG necessarily examined the statutory authorities establishing the Office of the Actuary. We also obtained and reviewed the position description of the Chief Actuary, consulted the legislative history of the Balanced Budget Act of 1997, and reviewed pertinent information on CMS's website. In addition, we requested and considered the views of HHS's OGC.

When conducting audits and investigations, it is not unusual for OIG to inquire of OGC as to historical interpretations of a legal issue, prior opinions on the subject (if any), and to seek their views, especially on matters requiring interpretation of administrative or programmatic rules and regulations. The Secretary and his senior staff, themselves, rely on the legal interpretations of OGC, and it is often prudent for OIG to be informed of that advice. Importantly, though, OIG is not *bound* by the legal conclusions of the Office of the General Counsel and is free to disagree with OGC. We did not disagree in this case.

After we asked OGC to provide us with its views with respect to the nature and scope of the authorities of the CMS Actuary, OGC, on its own initiative, requested a legal opinion from DOJ. We did not directly request input from OLC. The Attorney General's authority to render opinions on questions of law when requested by the President and the heads of executive departments arises from the Judiciary Act of 1789. The Attorney General has delegated to OLC (within the Office of the Assistant Attorney General) the responsibility for rendering formal opinions of the Attorney General and rendering legal opinions to the various Federal agencies on questions of law arising in the administration of the agency. This delegation and authority is codified at 28 U.S.C. §§ 510-512. See also 28 C.F.R. § 0.25.

It is our understanding that legal opinions of OLC represent the views of the Attorney General and, as such, are effectively binding on OIG and other members of the Executive Branch.[1] Moreover, as an investigative organization, OIG is accustomed to relying on DOJ for legal guidance. Indeed, we are charged by law with conducting fact-finding investigations and consulting with officials of the Justice Department concerning possible violations of Federal criminal law presented by those facts. 5 U.S.C. App. §§ 4(a), (d). Nonetheless, had OIG materially disagreed with a conclusion of OLC, we could and would have sought additional clarification from OLC. However, we did not have information that would cause us to disagree with OLC's legal conclusions.

Further, your letter requests that we provide additional "examples of the inspector general's determination about the right of Congress to obtain documents." In the instant case, we did not render any determination as to the right of the Congress to obtain documents. Instead, we investigated whether the CMS Administrator violated any statutes or rules in directing the CMS Actuary as to which information would be provided to Congress. We know of no examples where OIG has opined about the *right* of Congress to obtain documents.

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[1] See "Use of General Agency Appropriations to Purchase Employee Business Cards, 1997 WL 1188110 (August 11, 1997), " . . . in the event of a conflict between a legal opinion of the Attorney General and that of the Comptroller General, the opinion of the Attorney General is controlling for executive branch officers." See also Smith v. Jackson, 246 U.S. 388, 389-91 (1918) (finding a Federal official had no power to refuse to perform a specific statutory responsibility, and "any doubt which he might have had should have been subordinated, first, to the ruling of the Attorney General . . . ").

Assessment of Possible Violations of the Appropriations Law

A number of Members have raised the issue as to why our investigation did not address whether Federal appropriations law was violated. Both OIG and the Government Accountability Office (GAO) were asked to investigate the allegations that CMS withheld from Congress information relating to the costs of the MMA. Only GAO was specifically requested by 18 Senators to investigate whether Federal appropriations laws were violated.

Section 4(c) of the Inspector General Act provides:

> In carrying out the duties and responsibilities established under this Act, each Inspector General shall give particular regard to the activities of the Comptroller General of the United States with a view toward avoiding duplication and insuring effective coordination and cooperation.

In keeping with the above, before initiating the investigation, we met with GAO officials to discuss our relative responsibilities in this inquiry. At that meeting, it was agreed that OIG would conduct the necessary factual inquiry and that GAO would analyze those facts under the relevant Federal appropriations law (P.L. 108-199, Div. F, Title VI, section 618), which prohibits the use of any appropriation to pay for the salary of any Federal employee who prevents or prohibits another from having direct oral or written communication or contact with Congress. This division of responsibility seemed appropriate, given the specific congressional request that GAO advise as to CMS's compliance with the cited appropriations law, as well as GAO's statutory authority to "analyze expenditures of each executive agency the Comptroller General believes will help Congress decide whether public money has been used and expended economically and efficiently." 31 U.S.C. § 712(3).

Possible Involvement by White House

While not part of your letter, we have been asked by other Members about any alleged involvement of the White House and our understanding as to the authority of HHS/OIG to investigate or take action with respect to staff of the White House or other agencies outside of HHS. The Inspector General Act (IG Act) sets forth a broad list of duties and responsibilities of each Inspector General, among them performing investigations and audits, recommending policies, reviewing legislation and regulations, and advising the Secretary and the Congress concerning fraud, waste and abuse. IG Act, 5 U.S.C. App. §§ 4(a)(1)-(5). All of these authorities, however, are specifically limited to the programs and operations of the agency "within which [that Inspector General's] Office is established." IG Act, § 4(a). This language authorizes this OIG to investigate the conduct of employees of HHS, but not employees of other Federal agencies. In contrast, the Federal Bureau of Investigation is broadly authorized, by statute, to investigate

violations of Federal criminal law involving *any* Government officer or employee. 28 U.S.C. § 535.

The jurisdiction of the Offices of Inspector General was addressed by the Department of Justice in 1989, when the Solicitor of Labor requested that the then-Assistant Attorney General for Legal Counsel advise on the scope of an Inspector General's investigative jurisdiction. In its March 9, 1989 response, OLC extensively analyzed the language and legislative history of the Inspector General Act, and concluded that OIG jurisdiction was limited to "employees and operations of the Department, as well as its contractors, grantees and other recipients of federal funds . . ." *Inspector General Authority to Conduct Regulatory Investigations,* 13 Op. Off. Legal Counsel 54, 55 (1989).

Accordingly, when HHS/OIG receives credible information indicating a violation of law by an employee of a Federal agency other than HHS, we refer that information to officials with jurisdiction over the individual in question. On rare occasions, we have accommodated requests of other departments, such as from other Offices of Inspectors General, to investigate alleged misconduct by officials in those departments. However, to comply with the IG Act and our appropriations language (which authorizes expenditure of funds on fulfilling responsibilities set forth in the IG Act), we have performed these reviews pursuant to Interagency Agreements entered under the authority of the Economy Act, 31 U.S.C. § 1535.

Conclusion

I hope that the above information is helpful in clarifying the scope of our investigation as well as our investigative findings. As always, I am happy to answer any additional questions that you may have either in writing or in person. Please feel free to call me, or your staff may contact Stuart Wright, Director of External Affairs, at 202-205-9523.

An identical letter is being sent to all Members who signed the July 15, 2004 letter.

Sincerely,

Dara Corrigan
Acting Principal Deputy Inspector General

Enclosure:
March 12, 2004 congressional letter regarding the CMS Actuary matter