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ONE HUNDRED TENTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515-6115

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February 27, 2008

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The Honorable Michael O. Leavitt
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Mr. Secretary:

We have reviewed the letter from your agency dated February 11, 2008, refusing to comply with our subpoena requesting certain documents used to brief Dr. Andrew von Eschenbach for the Committee's March 22, 2007, hearing. The subpoena was authorized by a unanimous, bipartisan vote of the Subcommittee on Oversight and Investigations.

According to your letter dated February 11, 2008, you are refusing to comply with the subpoena on the grounds that the records in question are "confidential and deliberative materials" and that producing them "risks chilling the open exchange of views" within the agency. This is a radical departure from the previous practice of your agency and is contrary to law.

We note that the types of records requested by the subpoena have been provided for years by both Democratic and Republican Secretaries of the Department of Health and Human Services (HHS) in response to requests from both Democratic and Republican Chairmen of this Committee. You have not articulated any distinguishing reason for departing from this past practice.

In addition, your letter fails to cite any legal basis whatsoever for the proposition that your fear of a "chilling effect" is a valid reason for withholding these documents. The law is quite settled on this issue. There is no "deliberative materials" or "chilling effect" privilege for withholding records from a Congressional committee. Moreover, you have not asserted executive privilege and the records are not classified. Under these circumstances, and given a long line of precedents established by this Committee, Congress, and the courts, the records must be produced.¹

¹ See, e.g., *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Watkins v. U.S.*, 354 U.S. 178 (1957); *Barrenblatt v. U.S.*, 360 U.S. 109 (1950); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *U.S. v. House of Representatives*, 557 F.Supp 150 (D.D.C. 1983). See also, Morton Rosenberg, *Investigative Oversight: An Introduction to the Law, Practice, and Procedure of Congressional Inquiry*, CRS Report No. 95-464A (April 7, 1995).

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We did give careful consideration to your letter of February 11, 2008, and, in particular, your offer to provide the Committee with a further briefing. Unfortunately, your suggestion does not meet our requirements.

In order to exhaust all possibilities, however, and in an attempt to avoid needlessly wasting time and resources, we suggest the following compromise, reserving our right to enforce the subpoena. We propose that you arrange for our staff to interview those Food and Drug Administration employees who originally briefed Commissioner von Eschenbach in preparation for the March 22, 2007, hearing. In addition, we are willing to have our staff review the records covered by the subpoena at either your offices or those of the Committee to determine if we will need copies of said records. Upon completion of the interviews and records review, we will identify those records, if any, of which we still need copies.

Please let us know within the next two days if you agree to this compromise. If we do not have either the records covered by the subpoena or your agreement to this compromise by the close of business on Friday, February 29, 2008, a meeting of the Subcommittee will be scheduled next week to consider a motion to hold you in contempt of Congress.

Should you have any questions, please have your staff contact John F. Sopko, Chief Counsel for Oversight, at (202) 226-2424 or Alan Slobodin, Minority Chief Counsel for Oversight and Investigations, at (202) 225-3641 with the Committee on Energy and Commerce staff.

Sincerely,



John D. Dingell
Chairman



Joe Barton
Ranking Member



Bart Stupak
Chairman
Subcommittee on Oversight and Investigations



John Shimkus
Ranking Member
Subcommittee on Oversight and Investigations