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Attorneys for Plaintiff US RIGHT TO KNOW

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

US RIGHT TO KNOW, a California Non-
Profit Corporation,

Plaintiff,

v.

UNITED STATES AGENCY FOR
INTERNATIONAL DEVELOPMENT,

Defendant.

Case No. 3:21-cv-8058

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Freedom of Information Act

INTRODUCTION

1. This action, through which Plaintiff US Right to Know (“USRTK” or “Plaintiff”) seeks access to government records held by Defendant United States Agency for International Development (“USAID” or “Defendant”) is premised upon, and consequent to, violations of the federal Freedom of Information Act (“FOIA”), 5 U.S.C. section 552 *et seq.*, and USAID FOIA regulations promulgated thereunder, 22 C.F.R. Part 212 – “PUBLIC INFORMATION.” This action challenges the unlawful failure of the Defendant to abide by the statutory requirements of the FOIA and USAID’s own implementing regulations.

2. Defendant is unlawfully withholding from public disclosure information sought by USRTK, information to which USRTK is entitled and for which no valid disclosure exemption applies or has been properly asserted. In particular, Defendant has violated, and remains in violation of, the statutory mandates imposed by the FOIA by: (Count I) failing to provide a timely final determination on USRTK’s FOIA Request; (Count II) unlawfully withholding records from public disclosure for which no valid disclosure exemption applies or has been properly asserted, or to provide the reasonably segregable portions of those records; (Count III) failing to grant USRTK’s request for a fee waiver under the FOIA; and (Count IV) failing to provide an “estimated date of completion.”

3. The records requested by USRTK are likely to contribute significantly to the understanding of the operations or the activities of the government. USRTK is a 501(c)(3) nonprofit organization and, by its nature, has no commercial interest in the requested records.

4. USRTK seeks declaratory relief establishing that USAID has violated the FOIA and that such actions entitle USRTK to relief thereunder. USRTK also seeks injunctive relief directing USAID to conduct a reasonably adequate search for records and to promptly provide responsive material, to reasonably segregate portions of non-exempt records, and to provide proper justifications for any disclosure exemptions that are applied. Finally, USRTK requests that the Court award Plaintiff its reasonable attorneys’ fees and costs incurred in bringing this action.

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 5 U.S.C. section 552(a)(4)(B). That provision of

1 the FOIA grants jurisdiction to “the district court of the United States in the district in which the
 2 complainant resides, or has his principal place of business[.]” USRTK both resides and maintains its
 3 principal place of business in the Northern District of California.

4 6. The Court also has federal question jurisdiction pursuant to 28 U.S.C. section 1331
 5 because this action arises under the FOIA and the Declaratory Judgment Act, 28 U.S.C. section 2201 *et*
 6 *seq.*

7 **INTRADISTRICT ASSIGNMENT**

8 7. Pursuant to Local Rule 3-2(c), this case is properly brought in the San Francisco Division
 9 of the Northern District of California because a substantial part of the events and omissions which give
 10 rise to the claims alleged herein occurred in the County of San Francisco.

11 8. Under the FOIA, 5 U.S.C. section 552(a)(4)(B), jurisdiction vests in the district court
 12 where “the complainant resides” or “has its principal place of business.”

13 9. Plaintiff resides in the County of San Francisco.

14 10. Plaintiff has its principal place of business in the County of San Francisco.

15 11. As such, under the L.R. 3-2(c), (d), intradistrict assignment to the San Francisco division
 16 is proper.

17 **PARTIES**

18 12. Plaintiff USRTK is a 501(c)(3) nonprofit corporation organized under the laws of the
 19 State of California. USRTK is a public interest, investigative research group focused on promoting
 20 transparency for public health. USRTK works nationally and globally to expose corporate wrongdoing
 21 and government failures that threaten the integrity of food systems, the environment, and human health.

22 13. Defendant United States Agency for International Development is an agency of the
 23 United States executive branch.

24 14. USAID qualifies as an “agency” under the FOIA, the records sought are “records” under
 25 the FOIA, and because USAID is in possession and control of the records sought by USRTK, USAID is
 26 subject to the FOIA pursuant to 5 U.S.C. section 552(f).

LEGAL FRAMEWORK

15. The FOIA requires U.S. government agencies to “promptly” make public records available to any person if that person makes a request which (1) reasonably describes the records sought and (2) complies with any applicable agency rules for making such a request. 5 U.S.C. § 552(a)(3)(A).

16. The FOIA requires an agency to issue a final determination on any such information request within twenty business days from the date of its receipt. 5 U.S.C. § 552(a)(6)(A)(i). In issuing a final determination, an agency is required to inform the requester of three things: (1) the agency’s determination of whether or not it must comply with the request; (2) the reasons for its decision; and (3) notice of the right of the requester to appeal to the head of the agency. 5 U.S.C. § 552(a)(6)(A)(i).

17. The FOIA allows an agency to extend the twenty-day determination deadline, however, by ten working days when “unusual circumstances” exist and when the agency so notifies a requester in writing. 5 U.S.C. § 552(a)(6)(B)(i)-(iii); 22 C.F.R. § 212.8(c). A notice informing a requester of the invocation of the “unusual circumstances” provision must specify the applicable “unusual circumstances.” *Id.*

18. Permissible “unusual circumstances” are limited to: (1) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (2) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or (3) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein. 5 U.S.C. § 552(a)(6)(B)(iii).

19. An agency is entitled to one ten-business day extension. 5 U.S.C. § 552(a)(6)(B)(i). The written notice provided to the requester must specify the specific unusual circumstances justifying the extension and the date on which a final determination is expected to be dispatched. *Id.*; 22 C.F.R. § 212.8(c).

20. In some circumstances, the FOIA allows an agency to invoke an extension beyond ten days. To invoke a longer extension, the FOIA requires an agency to provide written notification to the

1 requester that (1) offers the requester an opportunity to limit the scope of the request so that it may be
2 processed within that time limit, or (2) offers the requester an opportunity to arrange with the agency an
3 “alternative time frame” for processing the request. 5 U.S.C. § 552(a)(6)(B)(ii); 22 C.F.R. § 212.8(c).

4 21. As part of invoking an “alternative time frame” extension, the agency must also make
5 available to the requester its FOIA Public Liaison, who is tasked to resolve any dispute between the
6 requester and the agency. 5 U.S.C. § 552(a)(6)(B)(ii); 22 C.F.R. § 212.8(c).

7 22. FOIA Public Liaisons “shall serve as supervisory officials” and “shall be responsible for
8 assisting in reducing delays, increasing transparency and understanding of the status of requests, and
9 assisting in the resolution of disputes.” 5 U.S.C. § 552(l).

10 23. Even when an “unusual circumstances” extension is made, the agency must still notify
11 the requester of its expected date on which a final determination will be dispatched. 5 U.S.C. §
12 552(a)(6)(B)(i); 22 C.F.R. § 212.8(c) (“Whenever the statutory time limit for processing a request
13 cannot be met because of “unusual circumstances,” as defined in the FOIA, and the Agency extends the
14 time limit on that basis, the Agency shall, before expiration of the 20-day period to respond, notify the
15 requester in writing of the unusual circumstances involved and of the date by which processing of the
16 request can be expected to be completed.”).

17 24. “Exceptional circumstances” for failure to comply with applicable time limits “does not
18 include a delay that results from predictable agency workload of requests under this section, unless the
19 agency demonstrates reasonable progress in reducing its backlog of pending requests.” 5 U.S.C. §
20 552(a)(6)(C)(ii).

21 25. If an agency fails to provide a final determination on a FOIA request within the statutory
22 timeframe, the requester is deemed to have exhausted its administrative remedies and may immediately
23 file suit against the agency. 5 U.S.C. § 552(a)(6)(C)(i).

24 26. The FOIA also requires agencies to provide “an estimated date on which the agency will
25 complete action on the request.” 5 U.S.C. § 552(a)(7)(B)(ii); *see also* 5 U.S.C. § 552(a)(6)(B)(i).

26 27. Agencies shall make reasonable efforts to maintain their records so they are reproducible
27 for FOIA purposes, and “shall make reasonable search efforts” for responsive records. 5 U.S.C. §
28

1 552(a)(3)(B), (C). The term “search” “means to review, manually or by automated means, agency
2 records for the purpose of locating those records which are responsive to a request.” 5 U.S.C. §
3 552(a)(3)(D).

4 28. In furnishing records responsive to a request under the FOIA, an agency may, for a
5 limited set of categories of information, exclude or withhold such information from disclosure. 5 U.S.C.
6 § 552(b). However, even where proper justification exists for withholding such information, the agency
7 must provide the remaining portions of records that are reasonably segregable from the properly
8 withheld portions thereof. *Id.*

9 29. Except in certain circumstances, when an agency produces a record in response to a
10 FOIA request but withholds a portion thereof, the agency must indicate the volume of information
11 withheld and the exemption under which such information has been withheld. *Id.*; 5 U.S.C. §
12 552(a)(6)(F).

13 30. An agency that withholds public records from a requestor under the FOIA bears the
14 burden of sustaining the legality of its action. 5 U.S.C. § 552(a)(4)(B).

15 31. Requesters under the FOIA may ask that an agency waive fees associated with any
16 request for records “if disclosure of the information is in the public interest because it is likely to
17 contribute significantly to the public understanding of the operations or activities of the government and
18 is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(E)(iii).

19 32. An agency may only charge certain fees depending on the category of requester. For non-
20 commercial requesters such as USRTK, fees “shall be limited to reasonable standard charges for
21 document search and duplication.” 5 U.S.C. § 552(a)(4)(E)(ii)(III).

22 33. Agencies are prohibited from assessing search fees if the agency fails to comply the
23 FOIA’s twenty-day determination deadline or any lawful extension under the statute’s “unusual
24 circumstances” provisions. 5 U.S.C. § 552(a)(4)(A)(viii).

25 **STATEMENT OF OPERATIVE FACTS**

26 34. USRTK submitted a FOIA Request (the “Request”) to USAID on December 18, 2020.
27 The Request sought a waiver of all fees associated with processing the Request. A copy of the Request
28

1 is attached hereto as Exhibit A.

2 35. The Request seeks agency records concerning “USAID grants to EcoHealth Alliance,
3 Inc., involving research in China on bat-associated pathogens,” including “records of grant applications,
4 progress reports, agreements between recipient and sub-recipient(s), and communications about funding
5 in relation to EcoHealth Alliance, Inc.’s work in China on bat-associated pathogens.” Exhibit A at 1.

6 36. USRTK has no commercial interest or value in records responsive to the Request.

7 37. The records requested by USRTK are likely to contribute significantly to the public
8 understanding of the operations and activities of the government, especially as they pertain to the origins
9 of the SARS-CoV-2 virus and the COVID-19 pandemic in the United States.

10 38. USRTK has a demonstrated track record of obtaining and disseminating information
11 obtained under the FOIA and state public records laws concerning public health. Since 2015, USRTK
12 has obtained, posted online, and reported on thousands of industry and government documents gathered
13 via public records requests. USRTK’s work has contributed to three New York Times investigations,
14 eleven academic papers, 11 articles in the British Medical Journal, one of the world’s top medical
15 journals, and global media coverage documenting how food and chemical corporations impact public
16 health and the environment. USRTK’s staff has expertise in investigative journalism and advanced
17 research, especially as it concerns impacts on human health.

18 39. USRTK shares its findings with media outlets, public health and medical journals, and
19 through its own library of information, available online at: <<http://www.usrtk.org>>. Many of USRTK’s
20 documents are available through the USRTK Agrichemical Collection of the University of California,
21 San Francisco’s (“UCSF”) Chemical Industry Documents Archive, available online at:
22 <<https://www.industrydocuments.ucsf.edu/chemical/collections/usrtk-agrichemical-collection/>>, and the
23 USRTK Food Industry Collection of the UCSF Food Industry Documents Archive, available online at:
24 <<https://www.industrydocuments.ucsf.edu/food/collections/usrtk-food-industry-collection/>>.

25 40. The Request was received and acknowledged by USAID via email on December 21,
26 2020, and assigned tracking number “#F-00049-21.”

27 41. On December 22, 2020, USRTK provided USAID with a revision to its initial FOIA
28

Request, supplying specific search terms and identifying specific grants and/or cooperative agreements to be used in connection with the FOIA Request. A copy of the revision is attached hereto as Exhibit B.

42. On December 23, 2020, USAID provided a formal acknowledgment of USRTK's revision to the FOIA Request. In that acknowledgment, USAID invoked the "unusual circumstances" exception to the FOIA's standard twenty-day determination deadline, but did not identify "the date by which processing of the request can be expected to be completed." 22 C.F.R. § 212.8(c).

43. USAID's December 23, 2020, acknowledgment also did not provide USRTK with an estimated date on which USAID would complete action on the Request.

44. On March 11, 2021, USRTK wrote to the FOIA specialist assigned to the Request, Theresa Morris. USRTK requested an update on the processing of the request and an estimated date of completion.

45. To date, no further written communication has been received by USRTK from USAID about the Request.

46. To date, no estimated date of completion has been provided to USRTK by USAID.

47. To date, USAID has not provided USRTK with a timely and lawful "determination" that informs USRTK of (1) USAID's determination of whether or not to comply with the Request; (2) the reasons for its decision; and (3) notice of the right of USRTK to appeal to the head of the agency. 5 U.S.C. § 552(a)(6)(A)(i).

48. At no time has USAID lawfully invoked the FOIA's "unusual circumstances" exception to the FOIA's twenty-day determination deadline.

49. USAID has not shown due diligence in responding to the request. 5 U.S.C. § 552(a)(6)(C)(i).

50. To date, USAID has failed to issue a decision on USRTK's request for a waiver of fees associated with the processing of the Request.

51. To date, USAID has not produced a single record responsive to the Request.

52. USRTK has constructively exhausted all administrative remedies required by the FOIA. 5 U.S.C. § 552(a)(6)(A), (a)(6)(C).

53. USRTK has been forced to retain the services of counsel and to expend funds litigating Defendant's unlawful actions and omissions under the FOIA.

CAUSES OF ACTION

COUNT I

VIOLATIONS OF THE FREEDOM OF INFORMATION ACT AND USAID REGULATIONS:

FAILURE TO PROVIDE TIMELY FINAL DETERMINATION

54. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

55. USRTK has a statutory right to have Defendant process its FOIA request in a manner that complies with the FOIA. USRTK's rights in this regard were violated by USAID's failure to provide a timely and legally adequate final determination.

56. To date, USRTK has not received any written communication from USAID about whether the agency will comply with the FOIA Request, the Defendant's reasons for making that decision, and any right of USRTK to administratively appeal that decision. 5 U.S.C. § 552(a)(6)(A)(i); 22 C.F.R. Part 212.

57. Based on the nature of USRTK's organizational activities, USRTK will continue to employ FOIA's provisions to request information from Defendant in the foreseeable future. These activities will be adversely affected if Defendant is allowed to continue violating FOIA's response deadlines.

58. Unless enjoined and made subject to a declaration of USRTK's legal rights by this Court, USAID will continue to violate the rights of USRTK to receive public records under the FOIA.

59. USAID's failure to make a final determination on USRTK's FOIA Request within the statutory timeframe has prejudiced USRTK's ability to timely obtain public records.

COUNT II

VIOLATION OF THE FREEDOM OF INFORMATION ACT:

UNLAWFUL WITHHOLDING OF NON-EXEMPT PUBLIC RECORDS

60. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

61. USRTK has a statutory right to have Defendant process its FOIA request in a manner that complies with FOIA. USRTK's rights in this regard were violated when USAID failed to promptly provide public, non-exempt records to USRTK, 5 U.S.C. §§ 552(a)(3)(A) & (b), to provide a reasonable estimate of the volume of withheld records, 5 U.S.C. § 552(a)(6)(F), and to reasonably segregate all non-exempt portions of otherwise exempt material, 5 U.S.C. § 552(b).

62. USAID is unlawfully withholding public disclosure of information sought by USRTK, information to which it is entitled and for which no valid disclosure exemption applies.

63. USRTK has constructively exhausted its administrative remedies with respect to this claim.

64. USRTK is entitled to injunctive relief to compel production of all non-exempt, responsive records.

65. Based on the nature of USRTK's organizational activities, USRTK will undoubtedly continue to employ FOIA's provisions to request information from Defendant in the foreseeable future.

66. USRTK's organizational activities will be adversely affected if Defendant is allowed to continue violating FOIA's response deadlines as it has in this case.

67. Unless enjoined and made subject to a declaration of USRTK's legal rights by this Court, USAID will continue to violate the rights of USRTK to receive public records under the FOIA.

COUNT III

VIOLATION OF THE FREEDOM OF INFORMATION ACT:

FAILURE TO TIMELY APPROVE USRTK'S FEE WAIVER REQUEST

68. The allegations made in all preceding paragraphs are realleged and incorporated by

1 reference herein.

2 69. USRTK has a statutory right to have Defendant process its FOIA request in a manner that
3 complies with FOIA.

4 70. USRTK's rights in this regard were violated by Defendant's unlawful delay in informing
5 USRTK of its decision concerning USRTK's request for a fee waiver.

6 71. Based on the nature of USRTK's organizational activities, USRTK will continue to
7 employ FOIA's provisions to request information from USAID in the foreseeable future. These
8 activities will be adversely affected if Defendant is allowed to continue violating the FOIA's
9 requirements and deadlines for fee waiver requests.

10 72. USRTK's request for a waiver of all fees associated with the FOIA Request is
11 appropriate and satisfies all elements required for approval of a fee waiver.

12 73. Unless enjoined and made subject to a declaration of USRTK's legal rights by this Court,
13 Defendant will continue to violate the rights of USRTK to receive public records under the FOIA.

14 74. USAID's failure to make a timely determination on USRTK's fee waiver request has
15 prejudiced USRTK's ability to timely obtain public records.

16
17 **COUNT IV**

18 **VIOLATION OF THE FREEDOM OF INFORMATION ACT:**

19 **FAILURE TO PROVIDE ESTIMATED DATE OF COMPLETION**

20 75. The allegations made in all preceding paragraphs are realleged and incorporated by
21 reference herein.

22 76. USRTK has a statutory right to have Defendant process its FOIA request in a manner that
23 complies with FOIA. USRTK's rights in this regard were violated by USAID's unlawful failure to
24 provide an estimated date of completion, as required by the FOIA, 5 U.S.C. section 552(a)(7)(B)(ii).

25 77. USRTK formally requested that USAID provide an estimated date of completion on
26 March 11, 2021.

27 78. At no time has Defendant provided an estimated date of completion.
28

79. Based on the nature of USRTK's organizational activities, USRTK will continue to employ FOIA's provisions to request information from USAID in the foreseeable future. These activities will be adversely affected if USAID is allowed to continue violating the FOIA's requirements for providing USRTK with an estimated date of completion on its FOIA requests.

80. Unless enjoined and made subject to a declaration of USRTK's legal rights by this Court, Defendant will continue to violate the rights of USRTK to receive public records under the FOIA.

81. USAID's failure to make a timely determination on USRTK's fee waiver request has prejudiced USRTK's ability to timely obtain public records.

REQUEST FOR RELIEF

Wherefore, USRTK prays that this Court:

1. Order Defendant to promptly provide USRTK all of the information sought in this action and to immediately disclose the requested documents in unredacted format unless an exemption is properly claimed and properly applies.

2. Declare Defendant's failure to provide USRTK with a final determination as unlawful under the FOIA.

3. Declare Defendant's failure to promptly provide USRTK with all non-exempt records as unlawful under the FOIA.

4. Declare Defendant's failure to timely approve USRTK's request for a waiver of all fees associated with the FOIA Request unlawful, and order Defendant's to approve USRTK's fee waiver request.

5. Declare Defendant's failure to provide USRTK with an estimated date of completion, as required by 5 U.S.C. section 552(a)(7)(B)(ii), unlawful under the FOIA.

5. Award USRTK its reasonable attorneys' fees and costs pursuant to 5 U.S.C. section 552(a)(4)(E) or 28 U.S.C. section 2412.

6. Grant such other and further relief to USRTK as the Court may deem just and proper.

1 DATED: October 14, 2021.

2
3 /s/ Rachel Doughty

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10 *Attorneys for Plaintiff US Right to Know*

Exhibit A to Complaint

*US Right to Know v. United States Agency for International
Development Case No. 3:21-cv-8058
N.D. Cal. (October 14, 2021)*



December 18, 2020

Christopher A. Colbow
Division Chief, Information and Records Division
U.S. Agency for International Development
1300 Pennsylvania Avenue, NW
USAID Annex, M/MS/IRD, Room 2.4.0A
Washington, DC 20523

RE: Freedom of Information Act request

Dear Mr. Colbow:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, et seq., to the U.S. Agency for International Development (USAID) seeking the production of documents. We request records of USAID grants to EcoHealth Alliance, Inc., involving research in China on bat-associated pathogens. We specifically request records of grant applications, progress reports, agreements between recipient and sub-recipient(s), and communications about funding in relation to EcoHealth Alliance, Inc.'s work in China on bat-associated pathogens.

Please narrow the search results to exclude any published papers, organizational newsletters or other widely available published materials.

We request that you disclose these documents and materials as they become available to you, without waiting until all the documents have been assembled. If documents are denied in whole or in part, please specify which exemption(s) is (are) claimed for each passage or whole document denied. Give the number of pages in each document and the total number of pages pertaining to this request and the dates of documents withheld. We request that excised material be "blackened out" rather than "whited out" or cut out and that the remaining non-exempt portions of documents be released as provided under the Freedom of Information Act.

Please advise of any destruction of records and include the date of and authority for such destruction. As we expect to appeal any denials, please specify the office and address to which an appeal should be directed.

REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *NARA v. Favish*, 541 U.S. 157, 171 (2004) quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted).

Pursuing truth and transparency in public health

In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as U.S. Right to Know access to government records without the payment of fees. Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and *non-profit public interest groups*." *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information" 132 Cong. Rec. S. 14298 (statement of Senator Patrick Leahy).

I. U.S. Right to Know Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). EPA's regulations at 40 C.F.R. § 2.107(l)(1)-(3) establish the same standard.

Thus, USAID must consider six factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns "the operations or activities of the Federal government," (2) whether the disclosure is "likely to contribute" to an understanding of government operations or activities, (3) whether the disclosure "will contribute to public understanding" of a reasonably broad audience of persons interested in the subject, (4) whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. *Id.* § 2.107(1)(2), (5) whether a commercial interest exists and its magnitude, and (6) the primary interest in disclosure. As shown below, U.S. Right to Know meets each of these factors.

A. The Subject of This Request Concerns "The Operations and Activities of the Government."

The subject matter of this request concerns the funding activities of USAID toward understanding bat-associated pathogens with pandemic potential. This request asks for records associated with USAID funding to EcoHealth Alliance, Inc. about bat-associated pathogens, which can enhance public understanding of how SARS-CoV-2 might have originated from bats.

This FOIA will provide U.S. Right to Know and the public with crucial insight into USAID's activities toward understanding potential pandemic pathogens and mitigating the risk of future pandemics of animal origin. It is clear that a federal agency's oversight of health, safety and security threats, both foreign and in the U.S. is a specific and identifiable activity of the government, and in this case, it is the executive branch agency of the USAID. *Judicial Watch*, 326 F.3d at 1313 ("[R]easonable specificity is all that FOIA requires with regard to this factor") (internal quotations omitted). Thus, U.S. Right to Know meets this factor.

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

Disclosure of the requested records will allow U.S. Right to Know to convey to the public information about USAID’s activities toward understanding bat-associated pathogens with pandemic potential. Once the information is made available, U.S. Right to Know will analyze it and present it to the general public in a manner that will meaningfully enhance the public’s understanding of this topic.

Thus, the requested records are likely to contribute to an understanding of USAID-grantee activities and operations in relation to understanding and mitigating pandemic disasters.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons’ Understanding of the origins of the COVID-19 pandemic

The requested records will contribute to public understanding of whether the USAID’s actions concerning the COVID-19 pandemic are consistent with its mission, which includes “preventing the spread of pandemic disease.” As explained above, the records will contribute to public understanding of this topic.

Activities of the USAID generally, and specifically its oversight of pandemics such as the COVID-19 pandemic are areas of interest to a reasonably broad segment of the public. U.S. Right to Know will use the information it obtains from the disclosed records to educate the public at large about this topic. See *W. Watersheds Proj. v. Brown*, 318 F. Supp.2d 1036, 1040 (D. Idaho 2004) (finding that “WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment”).

Through U.S. Right to Know’s synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained in and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F. Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dept. of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), cert. denied, 513 U.S. 823 (1994) (applying “public” to require a sufficient “breadth of benefit” beyond the requester’s own interests); *Cnty. Legal Servs. v. Dep’t of Hous. & Urban Dev.*, 405 F. Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester’s “work by its nature is unlikely to reach a very general audience,” “there is a segment of the public that is interested in its work”).

Indeed, the public does not currently have an ability to easily evaluate the requested records, which are not currently in the public domain. See *Cnty. Legal Servs.*, 405 F. Supp.2d at 560 (because requested records “clarify important facts” about agency policy, “the CLS request would likely shed light on information that is new to the interested public.”). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), “[FOIA] legislative history suggests

that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations... ."1[1]

Disclosure of these records is not only "likely to contribute," but is certain to contribute, to public understanding of USAID's work toward understanding the COVID-19 pandemic and mitigating the risk of future such pandemics. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about this pressing issue.

II. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

U.S. Right to Know is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public's understanding of what USAID knows about bat-associated pathogens with pandemic potential, as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be *significantly* increased as a result of disclosure because the requested records will help reveal more about this subject matter.

The records are also certain to shed light on USAID's compliance with its own mission and purpose. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, U.S. Right to Know meets this factor as well.

III. Obtaining the Requested Records is of No Commercial Interest to U.S. Right to Know .

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to U.S. Right to Know's role of educating the general public. Founded in 2014, U.S. Right to Know is a 501(c)(3) nonprofit public interest, public health organization (EIN: 46-5676616). U.S. Right to Know has no commercial interest and will realize no commercial benefit from the release of the requested records.

IV. U.S. Right to Know's Primary Interest in Disclosure is the Public Interest.

As stated above, U.S. Right to Know has no commercial interest that would be furthered by disclosure. Although even if it did have an interest, the public interest would far outweigh any pecuniary interest.

U.S. Right to Know is a non-profit organization that informs, educates, and counsels the public regarding corporate wrongdoing and government failures that threaten the integrity of our food system, our environment and our health. U.S. Right to Know has been substantially involved in the activities of numerous government agencies for over five years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In granting U.S. Right to Know's fee waivers, agencies have recognized: (1) that the information requested by U.S. Right to Know contributes significantly to the public's understanding of the

¹ In this connection, it is immaterial whether any portion of U.S. Right to Know's request may currently be in the public domain because U.S. Right to Know requests considerably more than any piece of information that may currently be available to other individuals. *See Judicial Watch*, 326 F.3d at 1315.

government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that U.S. Right to Know possesses the expertise to explain the requested information to the public; (4) that U.S. Right to Know possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes U.S. Right to Know as an established expert in the field of public health. U.S. Right to Know's track record of active participation in oversight of governmental activities and decision making, and its consistent contribution to the public's understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

U.S. Right to Know intends to use the records requested here similarly. U.S. Right to Know's work appears frequently in news stories online and in print, radio and TV, including reporting in outlets such as *The New York Times* and *The Guardian*, as well as medical and public health journals such as the *BMJ*. Many media outlets have reported about the food and chemical industries using information obtained by U.S. Right to Know from federal agencies. Thus far in 2020, more than 700,000 people visited U.S. Right to Know's extensive website, and viewed pages a total of 1.6 million times. More than 8,500 people follow U.S. Right to Know on Facebook, and there are regular postings about transparency in issues of public health and the environment. U.S. Right to Know and its staff regularly tweet to a combined following of more than 44,000 on Twitter. U.S. Right to Know intends to use any or all of these media outlets to share with the public information obtained as a result of this request.

Public oversight and enhanced understanding of USAID's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably broad audience of persons interested in the subject. *Carney*, 19 F.3d 807. U.S. Right to Know need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for U.S. Right to Know to show how it distributes information to the public generally. *Id.*

Please send the documents electronically in PDF format to Sainath Suryanarayanan at sainath@usrtk.org.

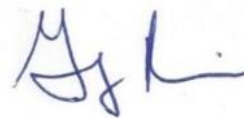
If you need additional information please call, rather than write, Gary Ruskin. He can be reached at (415) 944-7350.

Thank you so much for your help in filling this request.

Sincerely,



Sainath Suryanarayanan, PhD
Staff Scientist



Gary Ruskin
Executive Director

Exhibit B to Complaint

*US Right to Know v. United States Agency for International
Development Case No. 3:21-cv-8058
N.D. Cal. (October 14, 2021)*



December 22, 2020

Christopher A. Colbow
Division Chief, Information and Records Division
U.S. Agency for International Development
1300 Pennsylvania Avenue, NW
USAID Annex, M/MS/IRD, Room 2.4.0A
Washington, DC 20523

RE: Revised FOIA request #F-00049-21

Dear Mr. Colbow:

This is a revision of request #F-00049-21 under the Freedom of Information Act, 5 U.S.C. § 552, et seq., to the U.S. Agency for International Development (USAID) seeking the production of documents. We request records of USAID funding to EcoHealth Alliance, Inc., which was a lead Consortium Partner in USAID-funded projects in the Emerging Pandemic Threats programs.

We specifically request records of grant applications, cooperative agreements, progress reports, agreements between recipient and sub-recipient(s), and communications about funding in relation to USAID's oversight of **EcoHealth Alliance, Inc.'s work in China on bat-associated pathogens**. Key search phrases include, but are not limited to:

- (1) "China National Global Virome Initiative" OR "CNGVI"
- (2) "China Virome Project"
- (3) "PREDICT-China"

The records we request pertain to the following USAID grants and/or cooperative agreements:

- 1. Program name: Emerging Pandemic Threats
Project name: PREDICT
Funding Year: 2009
- 2. Program name: Emerging Pandemic Threats 2
Project name: PREDICT 2
Funding Year: 2014
- 3. Cooperative Agreement #AID486A130000
Project description: Land use change and disease emergence
Funding Year(s): 2013, 2016

The date range for the request is 1 January 2012 until 31 December 2019.

Pursuing truth and transparency in public health

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Please narrow the search results to exclude any published papers, organizational newsletters or other widely available published materials.

We request that you disclose these documents and materials as they become available to you, without waiting until all the documents have been assembled. If documents are denied in whole or in part, please specify which exemption(s) is(are) claimed for each passage or whole document denied. Give the number of pages in each document and the total number of pages pertaining to this request and the dates of documents withheld. We request that excised material be "blacked out" rather than "whited out" or cut out and that the remaining non-exempt portions of documents be released as provided under the Freedom of Information Act.

Please advise of any destruction of records and include the date of and authority for such destruction. As we expect to appeal any denials, please specify the office and address to which an appeal should be directed.

REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *NARA v. Favish*, 541 U.S. 157, 171 (2004) quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as U.S. Right to Know access to government records without the payment of fees. Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and *non-profit public interest groups*." *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information" 132 Cong. Rec. S. 14298 (statement of Senator Patrick Leahy).

I. U.S. Right to Know Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial

interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). EPA’s regulations at 40 C.F.R. § 2.107(l)(1)-(3) establish the same standard.

Thus, USAID must consider six factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns “the operations or activities of the Federal government,” (2) whether the disclosure is “likely to contribute” to an understanding of government operations or activities, (3) whether the disclosure “will contribute to public understanding” of a reasonably broad audience of persons interested in the subject, (4) whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. *Id.* § 2.107(1)(2), (5) whether a commercial interest exists and its magnitude, and (6) the primary interest in disclosure. As shown below, U.S. Right to Know meets each of these factors.

A. The Subject of This Request Concerns “The Operations and Activities of the Government.”

The subject matter of this request concerns the funding activities of USAID toward understanding bat-associated pathogens with pandemic potential. This request asks for records associated with USAID funding to EcoHealth Alliance, Inc. about bat-associated pathogens, which can enhance public understanding of how SARS-CoV-2 might have originated from bats.

This FOIA will provide U.S. Right to Know and the public with crucial insight into USAID’s activities toward understanding potential pandemic pathogens and mitigating the risk of future pandemics of animal origin. It is clear that a federal agency’s oversight of health, safety and security threats, both foreign and in the U.S. is a specific and identifiable activity of the government, and in this case, it is the executive branch agency of the USAID. *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). Thus, U.S. Right to Know meets this factor.

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

Disclosure of the requested records will allow U.S. Right to Know to convey to the public information about USAID’s activities toward understanding bat-associated pathogens with pandemic potential. Once the information is made available, U.S. Right to Know will analyze it and present it to the general public in a manner that will meaningfully enhance the public’s understanding of this topic. Thus, the requested records are likely to contribute to an understanding of USAID-grantee activities and operations in relation to understanding and mitigating pandemic disasters.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding of the origins of the COVID-19 pandemic

The requested records will contribute to public understanding of whether the USAID's actions concerning the COVID-19 pandemic are consistent with its mission, which includes "preventing the spread of pandemic disease." As explained above, the records will contribute to public understanding of this topic.

Activities of the USAID generally, and specifically its oversight of pandemics such as the COVID-19 pandemic are areas of interest to a reasonably broad segment of the public. U.S. Right to Know will use the information it obtains from the disclosed records to educate the public at large about this topic. *See W. Watersheds Proj. v. Brown*, 318 F. Supp.2d 1036, 1040 (D. Idaho 2004) (finding that "WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment").

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that the news media recognizes U.S. Right to Know as an established expert in the field of public health. U.S. Right to Know's track record of active participation in oversight of governmental activities and decision making, and its consistent contribution to the public's understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

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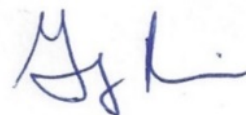
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Thank you so much for your help in filling this request.

Sincerely,



Sainath Suryanarayanan, PhD
Staff Scientist



Gary Ruskin
Executive Director