

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

U.S. RIGHT TO KNOW  
4096 Piedmont Avenue #963  
Oakland, California 94611-5221

Plaintiff,

v.

NATIONAL INSTITUTES OF HEALTH  
9000 Rockville Pike  
Bethesda, Maryland 20892

Defendant.

Civil Action No. 21-cv-2936

**COMPLAINT**

**I. INTRODUCTION**

1. Plaintiff, U.S. Right to Know (hereafter “USRTK” or “Plaintiff”) brings this action seeking declaratory and injunctive relief to redress violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 et. seq., by Defendant National Institutes of Health (hereinafter “NIH” or “Defendant”) in failing to provide Plaintiff with all non-exempt records responsive to nine FOIA matters, including October 5, 2020 (FOIA Case No. 55201); November 3, 2020 (FOIA Case No. 55344); November 5, 2020 (FOIA Case No. 55351); December 18, 2020 (FOIA Case No. 55569) [appealed/remanded January 29, 2021]; December 18, 2020 (FOIA Case No. 55570) [appealed/remanded on February 23 2021]; March 25, 2021 (FOIA Case No. 56077); April 21, 2021 (FOIA Case No. 56212) [portal response only]; April 29, 2021 (FOIA Case No. 56247) [perfected May 3, 2021]; and May 11, 2021 (FOIA Case No. 56301) requests and associated appeals.

## **II. JURISDICTION**

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA citizen suit provision) and 28 U.S.C. § 1331 (federal question).

## **III. VENUE**

3. Venue in this Court is proper pursuant to 5 U.S.C. § 552(a)(4)(B).

## **IV. PARTIES**

4. Plaintiff USRTK, is a nonprofit, public interest organization based in the State of California that works to advance public health and transparency by investigating matters that may be hidden from the public. The organization shares its findings via media outlets, public health and medical journals, social media and through its own published reports.

5. Defendant NIH is a Federal agency of the United States, and as such, is an agency subject to the FOIA, pursuant to 5 U.S.C. § 552(f).

## **V. LEGAL FRAMEWORK OF FOIA**

6. FOIA requires, inter alia, that all federal agencies must promptly provide copies of all non-exempt agency records to those persons who make a request for records that reasonably describes the nature of the records sought, and which conform with agency regulations and procedures in requesting such records. 5 U.S.C. § 552(a)(3)(A).

7. FOIA requires federal agencies to make a final determination on all FOIA requests that it receives within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such request, unless the agency expressly provides notice to the requester of “unusual circumstances” meriting additional time for responding to a FOIA request. 5 U.S.C. § 552(a)(6)(A)(i)(I).

8. Furthermore, FOIA requires agencies to provide an estimated completion date on which the agency will complete its actions on a request. 5 U.S.C. § 552(a)(7)(B)(ii).

9. FOIA also requires federal agencies to make a final determination on FOIA administrative appeals that it receives within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal, unless the agency expressly provides notice to the requester of “unusual circumstances” meriting additional time for responding to a FOIA request. 5 U.S.C. § 552(a)(6)(A)(ii).

10. In “unusual circumstances,” the time limits prescribed may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. 5 U.S.C. § 552(a)(6)(B).

11. FOIA expressly provides that a person shall be deemed to have constructively exhausted their administrative remedies if the agency fails to comply with the applicable time limitations provided by 5 U.S.C. § 552(a)(6)(A)(i) - (ii). *See* 5 U.S.C. § 552(a)(6)(C).

12. FOIA provides that any person who has not been provided the records requested pursuant to FOIA, after exhausting their administrative remedies, may seek legal redress from the Federal District Court to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

13. Under FOIA, the federal agency has the burden to sustain its actions. 5 U.S.C. § 552(a)(4)(B).

14. Pursuant to FOIA, this Court may assess attorneys' fees and litigation costs against the United States if the Plaintiff prevails in this action. 5 U.S.C. § 552(a)(4)(E).

## VI. FACTUAL ALLEGATIONS

15. For all requests described below in paragraphs 17-69 (Sections (A) - (I)), Plaintiff has constructively exhausted its administrative remedies. Consequently, due to the exhaustion of administrative remedies, Plaintiff has been required to expend costs and to obtain the service of a law firm consisting of attorneys, law clerks and legal assistants, to prosecute this judicial review.

16. Furthermore, for all requests described below in paragraphs 17-69 (Sections (A) - (I)), Defendant has failed to provide a final determination within the required twenty working day time period, and has not notified the requester of any “unusual circumstances” for doing so.

### **A) NIH FOIA Request No. 55201**

17. Plaintiff sent a FOIA request to the NIH on July 5, 2020, and it was received the same day and assigned FOIA request No. 55201. (\*Tracking#55201 10.5.20.pdf)

18. Plaintiff amended its request via email on February 23, 2021, “withdrawing Part 2 of [Plaintiff’s] FOIA request (#55201) pertaining to Rocky Mountain Labs Institutional Biosafety Committee meeting minutes from January 1, 2003 to the present.” On that same day, Marge Moore from the NIAID FOIA Office, responded by saying “NIAID completed our review of [Plaintiff’s] amended request and forwarded [Plaintiff’s] case to NIH FOIA for additional processing.” (\*USRtk NIH Feb emails.pdf)

19. Plaintiff sent two formal requests for Defendant to provide an estimated completion date on June 29, 2021, and August 25, 2021, regarding request No. 55201. (\*USRtk Mail EDC request June 29.pdf; \*USRtk Mail - EDC request #2 Aug 25.pdf)

20. As of the date of this filing, November 8, 2021, Plaintiff has received no records responsive to request No. 55201 nor any estimated completion dates indicating when it might

receive responsive records.

21. Plaintiff has a statutory right to the requested records, and there is no legal basis for Defendant's failure to disclose them.

**B) NIH FOIA Request No. 55344**

22. Plaintiff sent a FOIA request to the NIH on November 3, 2020, and it was received the same day and assigned FOIA request No. 55344. (\*NIH Received 11.3.20.pdf)

23. Plaintiff amended its request on November 16th, 2021, and Defendant sent Plaintiff an acknowledgement letter detailing the amended request it had received. (\*NIH Ack amended request 11.18.20.pdf)

24. Plaintiff sent two formal requests on June 29, 2021, and August 25, 2021, for Defendant to provide an estimated completion date regarding request No. 55344. (\*USRTK Mail - EDC request #4 June 29.pdf ; \*USRTK Mail - EDC request #4 Aug 25.pdf)

25. As of the date of this filing, November 8, 2021, Plaintiff has received no records responsive to request No. 55344 nor any estimated completion dates indicating when it might receive responsive records.

26. Plaintiff has a statutory right to the requested records and there is no legal basis for Defendant's failure to disclose them.

**C) NIH FOIA Request No. 55351**

27. Plaintiff sent a FOIA request to the NIH on November 5, 2020, and it was received the same day and assigned FOIA request No. 55351. (\*NIH Interim Response 11.13.20.pdf)

28. Plaintiff amended its request on November 13th, 2021, and Defendant sent Plaintiff an

acknowledgement letter detailing the amended request it had received. (\*NIH Interim Response 11.13.20.pdf)

29. Plaintiff sent a formal request on June 29, 2021, for Defendant to provide an estimated completion date regarding request No. 55351. (\*USRTK Mail - EDC request #5 June 29.pdf)

Defendant responded to this request on July 8, 2021, by stating:

An NIAID FOIA processor is currently working on Case #55351. We anticipate that NIAID will finish processing on September 7, 2021. The case will then be transferred to NIH FOIA for additional review and processing. NIH FOIA will be able to give you their estimate once the case has been transferred to them.

(\*NIH EDC #5response.pdf)

30. Plaintiff sent a formal request on August 25, 2021, for Defendant to provide an estimated completion date regarding request No. 55351. (\*USRTK Mail - EDC request #5 Aug 25.pdf)

Defendant responded to this request on August 26, 2021, by stating:

“Initial review of these records has been completed. This case has been moved into secondary review. We hope to complete that review and forward the records to NIH FOIA for additional review and processing by October 22, 2021.” (\*USRTK Mail - EDC response for FOIA request #55351.pdf)

31. As of the date of this filing, November 8, 2021, Plaintiff has received no records responsive to request No. 55351, nor any estimated completion dates indicating when it might receive responsive records.

32. Plaintiff has a statutory right to the requested records and there is no legal basis for Defendant’s failure to disclose them.

**D) NIH FOIA Request No. 55569**

33. Plaintiff sent a FOIA request to the NIH on December 18, 2020, and on December 22, 2020, Defendant sent Plaintiff a final response letter. (\*NIH FOIA 55569 - # 6 Final determination letter - 12.22.20.pdf). In that letter, Defendant explained it was withholding records “pursuant to Exemption 7(A), 5 U.S.C. § 552, and section 5.31 (g)(l) of the HHS FOIA Regulations, 45 CFR Part 5.” *Id.*

34. Plaintiff appealed Defendant’s decision to withhold the responsive records on January 25, 2021, and after its review, on January 29, 2021, Defendant wrote Plaintiff stating it had “decided to reverse the initial decision and remand [Plaintiff’s] appeal to the NIH. On remand, the NIH will issue a new determination in response to [Plaintiff’s] initial request.” (\*HHS Appeal Response #6 1.29.21.pdf).

35. On June 29, 2021, Plaintiff sent Defendant a formal request for an estimated completion date. (\*NIH response to EDC request July 2.pdf) Defendant responded on July 6, 2021, by stating,

Unfortunately I am unable to provide an estimated completion date because we follow a first in first out system when it comes to reviewing FOIA Requests. Litigation is also prioritized which is another reason why it is challenging to provide an estimated completion date. I can update you when the request comes up in our queue or any progress regarding your request.

*Id.*

36. Plaintiff sent another formal request for Defendant to provide an estimated completion date on August 25, 2021, and again never received an estimated completion date from Defendant. (\*USRTK Mail - Forwarded Mail RE EDC request #6 for FOIA request #55569.pdf)

37. On October 4, 2021, Defendant sent Plaintiff a “partial response” to its December 18th request. In the response, Defendant told Plaintiff it had posted 914 responsive pages on the “NIH Reading Room” (<https://www.nih.gov/institutes-nih/nih-office-director/office-communications-public-liaison/freedom-information-act-office/nih-foia-library>) and that Plaintiff’s request for the remaining grants and item 2 [communication about funding] will be responded to separately.” (\*NIH Response\_ 10.04.21\_Partial Release 55569.pdf). Defendant continued by asserting that Requesters usually only want to receive materials “that will help in understanding the process that led to the awards, or to improve their own methods of drafting grant applications.” *Id.* Consequently, Defendant decided only to disclose responsive records that grantees of the responsive grants advised Defendant to release; instead of all the responsive records Plaintiff was entitled to. *Id.*

38. Plaintiff wrote to Defendant on October 4, 2021, expressing its dissatisfaction with the improper withholding of responsive records, and requested that all responsive records be released. (\*10.4.21 USRTK Mail - Response to Partial Request - FOIA Request 55569.pdf)

39. As of the date of this filing, November 8, 2021, Plaintiff has not received the records Defendant unlawfully withheld without a FOIA exemption, nor has Plaintiff received the other records that Defendant had said it would release “separately.”

40. Plaintiff has a statutory right to the requested records and there is no legal basis for Defendant’s failure to disclose them.

**E) NIH FOIA Request No. 55570**

41. Plaintiff sent a FOIA request to the NIH on December 18, 2020, and on that same day Defendant sent Plaintiff a final response letter. (\*NIH FOIA 55570 - Final Response letter #7



12.18.20.pdf). In that letter, Defendant explained it was withholding records “pursuant to Exemption 7(A), 5 U.S.C. § 552, and section 5.31 (g)(l) of the HHS FOIA Regulations, 45 CFR Part 5.” *Id.*

42. Plaintiff appealed Defendant’s decision to withhold the responsive records on February 19, 2021, and after its review, on February 23, 2021 Defendant wrote Plaintiff stating it had “decided to reverse the initial, NIH decision and remand [Plaintiff’s] appeal to the NIH. On remand, the NIH will issue a new determination in response to [Plaintiff’s] initial request.” (\*HHS Letter Feb 23.pdf)

43. On June 29, 2021, and August 25, 2021, Plaintiff sent Defendant formal requests for an estimated completion date for its request, but Defendant never provided Plaintiff with any dates. (\*USRTK Mail - EDC request for FOIA request #55570; \*USRTK Mail - EDC request #2 for FOIA request #55570.pdf)

44. As of the date of this filing, November 8, 2021, Plaintiff has received no records responsive to request No. 55570, nor any estimated completion dates indicating when it might receive responsive records.

45. Furthermore, as of the date of this filing, Plaintiff has not received a final determination letter regarding its request after its successful appeal and remand.

46. Plaintiff has a statutory right to the requested records and there is no legal basis for Defendant’s failure to disclose them.

**F) NIH FOIA Request No. 56077**

47. Plaintiff submitted the request to the NIH on March 25, 2021, and on that same day, Defendant sent an acknowledgment letter to Plaintiff detailing its receipt of the request. (\*NIH Interim Letter #56077 (1).pdf)

48. On March 25, 2021, Plaintiff amended its request, and on the following day, Defendant recognized its receipt of Plaintiff's amended request. (\*USRTK NIH emails March.pdf)

49. Plaintiff sent Defendant a formal request for an estimated completion date on August, 25, 2021. (USRTK Mail - EDC request Aug 25.pdf)

50. On August 31, 2021, Defendant sent two requests for Plaintiff to narrow its request in order to save time on processing, but Plaintiff refused to do so. (\*USRTK Mail - Response #10 A NIAID FOIA Request 56077\_31 August 21.pdf; see also corresponding email chain)

51. Subsequently, on September 2, 2021, Defendant sent two emails indicating it would take 10-12 months for NIAID to process records responsive to Plaintiff's request, and NIH would need additional time to review the responsive records after NIAID's initial processing. (USRTK Mail - EW\_2\_NIAID FOIA Request 56077\_2\_Sept\_21.pdf; see also corresponding email)

52. As of the date of this filing, November 8, 2021, Plaintiff has received no records responsive to request No. 56077 nor any estimated completion date indicating when it might receive responsive records.

53. Plaintiff has a statutory right to the requested records and there is no legal basis for Defendant's failure to disclose them.

#### **G) NIH FOIA Request No. 56212**

54. Plaintiff sent a FOIA request to the NIH on April 21, 2021. (\*NIH FOIA request #11 4.21.2.pdf)

55. Plaintiff received an email on April 21, 2021, from FOIA\_noreply@nih.gov stating, "The status of [Plaintiff's] FOIA request #56212 has been updated to the following status 'Assigned for Processing'. (\*NIH Status update # 11 Apr 21.pdf)

56. Receiving no other notice from Defendant, Plaintiff sent a formal request for an estimated completion date on August 25, 2021. (\*USRTK Mail - EDC request #11 for FOIA Aug 26.pdf)

57. As of the date of this filing, November 8, 2021, Plaintiff has received no records responsive to request No. 56212 nor any estimated completion date indicating when it might receive responsive records.

58. Plaintiff has a statutory right to the requested records and there is no legal basis for Defendant's failure to disclose them.

#### **H) NIH FOIA Request No. 56247**

59. Plaintiff sent a FOIA request to the NIH on April 29, 2021. (NIH FOIA request #13 CSR.pdf)

60. After resolving some clarification issues, on May 17, 2021, Defendant sent Plaintiff an acknowledgement letter detailing the request and its receipt, as well as the clarifications Plaintiff made on May 3, 2021. (NIH Letter May 17.pdf)

61. On May 24th, 2021 Defendant sent Plaintiff an email asking if it was willing to exclude "draft versions of the summary statement" from its request. (USRTK CSR Mails May 24.pdf). Plaintiff responded the same day saying it was unwilling to do so. *Id*

62. On May 28, 2021, Defendant sent Plaintiff an email stating it was transferring the request and records to the NIH FOIA Office for final determination. (CSR email May 28.pdf)

63. Plaintiff, not receiving any more contact from Defendant, sent Defendant a request for an estimated completion date on August 25, 2021. (USRTK Mail - EDC request Aug 25.pdf)

64. As of the date of this filing, November 8, 2021, Plaintiff has received no records responsive to request No. 56247 nor any estimated completion date indicating when it might receive responsive records.

65. Plaintiff has a statutory right to the requested records and there is no legal basis for Defendant's failure to disclose them.

**I) NIH FOIA Request No. 56301**

66. Plaintiff sent a FOIA request to the NIH on May 11, 2021, and on that same day Defendant sent an acknowledgement letter detailing Plaintiff's request and its receipt. (\*NIH Interim Letter # 14 May 11.pdf)

67. On August 25, 2021, Plaintiff sent Defendant a request for an estimated completion date, and after a little back and forth communication Defendant provided a December 31, 2021 estimated completion date. (\*USRTK Mail - EDC request #14 Aug 25.pdf; \*USRTK Mail - Confirm\_EDC request for FOIA request #56301.pdf)

68. As of the date of this filing, November 8, 2021, Plaintiff has received no records responsive to request No. 56301.

69. Plaintiff has a statutory right to the requested records and there is no legal basis for Defendant's failure to disclose them.

**VII. CAUSES OF ACTION**

**COUNT 1**

**Violation of the FOIA for Failure to make Promptly Available the Records Sought by Plaintiff's Requests**

70. Paragraphs 1-69 are realleged and reincorporated herein by reference.

71. Defendant's failure to make promptly available the records sought by Plaintiff's requests described above in paragraphs 15-69 (Sections (A) - (I)) violates the FOIA, 5 U.S.C. § 522(a)(3)(A).

**COUNT 2**

**Violation of the FOIA for Failure to Timely Respond to Plaintiff's Requests**

72. Paragraphs 1-69 are realleged and reincorporated herein by reference.
73. Defendant's failure to timely respond to Plaintiff's requests described above in paragraphs 15-69 (Sections (A) - (I)) violates the FOIA, 5 U.S.C. § 522(a)(6)(A)(i).

**COUNT 3**

**Violation of the FOIA for Failure to Provide Plaintiff  
with Estimated Completion Dates**

74. Paragraphs 1-69 are realleged and reincorporated herein by reference.
75. Defendant's failure to provide Plaintiff with estimated completion dates for its requests described above in paragraphs 15-64 (Sections (A) - (H)) violates the FOIA, 5 U.S.C. § 552(a)(7)(B)(ii).

**VIII. DEMAND FOR RELIEF**

**WHEREFORE**, Plaintiff USRTK, request for the following relief:

1. Declare that Defendant's failure to disclose records responsive to Plaintiff's request is unlawful.
2. Order defendant to immediately state which records it intends to disclose in response to Plaintiff's FOIA requests;
3. Order defendant to provide a schedule of production to Plaintiff;
4. Order defendant to disclose all responsive, non-exempt records by a date certain without further delay;

5. Award Plaintiff its costs and reasonable attorneys' fees incurred in this action; and
6. Grant such other relief as the Court may deem just and proper.

DATED: This 8th day of November, 2021.

Respectfully Submitted,

/s/ C. Peter Sorenson

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