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9 Attorneys for Plaintiff U.S. RIGHT TO KNOW

10 **UNITED STATES DISTRICT COURT**

11 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

12 U.S. RIGHT TO KNOW, a California Non-  
13 Profit Corporation,

14 Plaintiff,

15 v.

16 UNITED STATES DEFENSE THREAT  
17 REDUCTION AGENCY,

18 Defendant.

Case No. \_\_\_\_\_

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

Freedom of Information Act

1 **INTRODUCTION**

2 1. This action, through which Plaintiff US Right to Know (“USRTK” or “Plaintiff”) seeks  
3 access to government records held by Defendant United States Defense Threat Reduction Agency  
4 (“DTRA” or “Defendant”) is premised upon, and consequent to, violations of the federal Freedom of  
5 Information Act (“FOIA”), 5 U.S.C. section 552 *et seq.*, and Department of Defense FOIA regulations  
6 promulgated thereunder, 32 C.F.R. Part 286. This action challenges the unlawful failure of the  
7 Defendant to abide by the statutory requirements of the FOIA and DTRA’s own implementing  
8 regulations.

9 2. Defendant is unlawfully withholding from public disclosure information sought by  
10 USRTK; information to which USRTK is entitled and for which no valid disclosure exemption applies  
11 or has been properly asserted. In particular, Defendant has violated, and remains in violation of, the  
12 statutory mandates imposed by the FOIA by: (Count I) failing to provide a timely final determination on  
13 USRTK’s FOIA Request; (Count II) unlawfully withholding records from public disclosure for which  
14 no valid disclosure exemption applies or has been properly asserted, or to provide the reasonably  
15 segregable portions of those records.

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

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

25 **JURISDICTION AND VENUE**

26 5. This Court has jurisdiction pursuant to 5 U.S.C. section 552(a)(4)(B). That provision of  
27 the FOIA grants jurisdiction to “the district court of the United States in the district in which the  
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1 complainant resides, or has his principal place of business[.]” USRTK both resides and maintains its  
2 principal place of business in the Northern District of California.

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

### 6 INTRADISTRICT ASSIGNMENT

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

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

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

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

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

### 16 PARTIES

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

21 13. Defendant United States Defense Threat Reduction Agency is an agency of the United  
22 States executive branch.

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

### 26 LEGAL FRAMEWORK

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

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

8 17. The FOIA allows an agency to extend the twenty-day determination deadline, however,  
9 by ten working days when "unusual circumstances" exist and when the agency so notifies a requester in  
10 writing. 5 U.S.C. § 552(a)(6)(B)(i)-(iii); 32 C.F.R. § 286.8(c). A notice informing a requester of the  
11 invocation of the "unusual circumstances" provision must specify the applicable "unusual  
12 circumstances." *Id.*

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

20 19. An agency is entitled to one ten-business day extension. 5 U.S.C. § 552(a)(6)(B)(i). The  
21 written notice provided to the requester must specify the specific unusual circumstances justifying the  
22 extension and the date on which a final determination is expected to be dispatched. *Id.*; 32 C.F.R. §  
23 286.8(c).

24 20. In some circumstances, the FOIA allows an agency to invoke an extension beyond ten  
25 days. To invoke a longer extension, the FOIA requires an agency to provide written notification to the  
26 requester that (1) offers the requester an opportunity to limit the scope of the request so that it may be  
27 processed within that time limit, or (2) offers the requester an opportunity to arrange with the agency an  
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1 “alternative time frame” for processing the request. 5 U.S.C. § 552(a)(6)(B)(ii); 32 C.F.R. § 286.8(c).

2 21. As part of invoking an “alternative time frame” extension, the agency must also make  
3 available to the requester its FOIA Public Liaison, who is tasked to resolve any dispute between the  
4 requester and the agency. 5 U.S.C. § 552(a)(6)(B)(ii); 32 C.F.R. § 286.8(c).

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

8 23. Even when an “unusual circumstances” extension is made, the agency must still notify  
9 the requester of its expected date on which a final determination will be dispatched. 5 U.S.C. §  
10 552(a)(6)(B)(i); 32 C.F.R. § 286.8(c) (“Whenever the statutory time limit for processing a request  
11 cannot be met because of “unusual circumstances,” as defined in the FOIA, and the DoD Component  
12 extends the time limit on that basis, the DoD Component must, before expiration of the 20-day period to  
13 respond, notify the requester in writing of the unusual circumstances involved and of the date by which  
14 processing of the request can be expected to be completed.”).

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

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

22 26. The FOIA also requires agencies to provide “an estimated date on which the agency will  
23 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).

24 27. Agencies shall make reasonable efforts to maintain their records so they are reproducible  
25 for FOIA purposes, and “shall make reasonable search efforts” for responsive records. 5 U.S.C. §  
26 552(a)(3)(B), (C). The term “search” “means to review, manually or by automated means, agency  
27 records for the purpose of locating those records which are responsive to a request.” 5 U.S.C. §  
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1 552(a)(3)(D).

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

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

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

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

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

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

### 23 STATEMENT OF OPERATIVE FACTS

24 34. USRTK submitted a FOIA Request to DTRA on August 14, 2020. The Request sought a  
25 waiver of all fees associated with processing the Request. On August 20, 2020, DTRA responded to  
26 USRTK’s request by asking for additional information that better describes the records sought. On  
27 August 31, 2020, USRTK submitted an amended FOIA Request (the “Request”) to DTRA. A copy of  
28

1 the Request is attached hereto as Exhibit A.

2 35. The Request seeks DTRA records concerning “[c]ontainment failures” or “accidental or  
3 deliberate release of biological agents in dual-use biosafety research” facilities throughout the world, as  
4 well as “assessments of risks, hazards and efficacy” of containment schemes or assessments of potential  
5 flaws or failings of those containment schemes. *See* Exhibit A. The Request also sought records related  
6 to specific grants and contracts issued by DTRA to EcoHealth Alliance and Metabiota, Inc. *Id.*

7 36. DTRA responded to the amended FOIA Request on September 2, 2020. It informed  
8 USRTK that the Request was “perfected” as of August 31, 2020.

9 37. USRTK has no commercial interest or value in records responsive to the Request.

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

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

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

1 41. The Request was assigned tracking number “FOIA Case 20-063.”

2 42. On October 1, 2020, USRTK wrote to the FOIA specialist assigned to the Request,  
3 Angela L. Wiggins. In that correspondence, USRTK requested that DTRA issue a formal  
4 “determination” under the FOIA and provide an estimated date of completion.

5 43. Ms. Wiggins responded on behalf of DTRA on October 1, 2020. In her correspondence,  
6 DTRA did not provide USRTK with a “determination” that informs USRTK of (1) DTRA’s  
7 determination of whether or not to comply with the Request; (2) the reasons for its decision; and (3)  
8 notice of the right of USRTK to appeal to the head of the agency. 5 U.S.C. § 552(a)(6)(A)(i).

9 44. Ms. Wiggins’ October 1, 2020 correspondence stated that the estimated date of  
10 completion for the Request was “the end of February 2021.”

11 45. On December 17, 2020, USRTK wrote again to Ms. Wiggins, requesting an update about  
12 the processing of the FOIA Request and “if you are still on schedule for completing this by the end of  
13 February 2021.”

14 46. DTRA did not respond to USRTK’s December 17, 2020 correspondence.

15 47. Having received no records and no communications from DTRA, on September 28,  
16 2021, USRTK wrote again to Ms. Wiggins. In that correspondence, USRTK noted that DTRA had yet to  
17 produce a single record in response to the FOIA Request, had not provided a formal determination  
18 consistent with the statutory requirements of the FOIA, and had not provided an updated estimated date  
19 of completion, as the original February 2021 completion date had long passed.

20 48. On September 28, 2021, DTRA responded to USRTK’s correspondence. The message  
21 stated that the FOIA Request was *still* being “processed” and adjusted DTRA’s estimated date of  
22 completion to October 29, 2021, “but we hope to have it to you sooner.”

23 49. To date, no further written communication has been received by USRTK from DTRA  
24 about the Request.

25 50. To date, no updated estimated date of completion has been provided to USRTK by  
26 DTRA.

27 51. To date, DTRA has not provided USRTK with a timely and lawful “determination” that  
28



1 informs USRTK of (1) DTRA’s determination of whether or not to comply with the Request; (2) the  
2 reasons for its decision; and (3) notice of the right of USRTK to appeal to the head of the agency. 5  
3 U.S.C. § 552(a)(6)(A)(i).

4 52. At no time has DTRA lawfully invoked the FOIA’s “unusual circumstances” exception to  
5 the FOIA’s twenty-day determination deadline.

6 53. DTRA has not shown due diligence in responding to the request. 5 U.S.C.  
7 § 552(a)(6)(C)(i).

8 54. To date, DTRA has not produced a single record responsive to the Request.

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

11 56. USRTK has been forced to retain the services of counsel and to expend funds litigating  
12 Defendant’s unlawful actions and omissions under the FOIA.

13 **CAUSES OF ACTION**

14 **COUNT I**

15 **VIOLATIONS OF THE FREEDOM OF INFORMATION ACT**  
16 **AND DTRA REGULATIONS:**

17 **FAILURE TO PROVIDE TIMELY FINAL DETERMINATION**

18  
19 57. The allegations made in all preceding paragraphs are realleged and incorporated by  
20 reference herein.

21 58. USRTK has a statutory right to have Defendant process its FOIA request in a manner that  
22 complies with the FOIA. USRTK’s rights in this regard were violated by DTRA’s failure to provide a  
23 timely and legally adequate final determination.

24 59. To date, USRTK has not received any written communication from DTRA about whether  
25 the agency will comply with the FOIA Request, the Defendant’s reasons for making that decision, and  
26 any right of USRTK to administratively appeal that decision. 5 U.S.C. § 552(a)(6)(A)(i); 22 C.F.R. Part  
27 212.

28 60. Based on the nature of USRTK’s organizational activities, USRTK will continue to

1 employ FOIA's provisions to request information from Defendant in the foreseeable future. These  
2 activities will be adversely affected if Defendant is allowed to continue violating FOIA's response  
3 deadlines.

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

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

8 **COUNT II**

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

10 **UNLAWFUL WITHHOLDING OF NON-EXEMPT PUBLIC RECORDS**

11  
12 63. The allegations made in all preceding paragraphs are realleged and incorporated by  
13 reference herein.

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

19 65. DTRA is unlawfully withholding public disclosure of information sought by USRTK,  
20 information to which it is entitled and for which no valid disclosure exemption applies.

21 66. USRTK has constructively exhausted its administrative remedies with respect to this  
22 claim.

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

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

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

1 70. Unless enjoined and made subject to a declaration of USRTK’s legal rights by this Court,  
2 DTRA will continue to violate the rights of USRTK to receive public records under the FOIA.

3  
4 **REQUEST FOR RELIEF**

5 Wherefore, USRTK prays that this Court:

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

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

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

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

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

16  
17 DATED: January 14, 2022.

18  
19  
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