

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<hr/>)
U.S. RIGHT TO KNOW,)
)
<i>Plaintiff,</i>)
)
v.)
	Civil Action No. 21-2936 (TSC))
)
NATIONAL INSTITUTES OF HEALTH,)
)
<i>Defendant.</i>)
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AMENDED 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 requests, including October 5, 2020 (FOI Case No. 55201); November 3, 2020 (FOI Case No. 55344); November 5, 2020 (FOI Case No. 55351); December 18, 2020 (FOI Case No. 55569); December 18, 2020 (FOI Case No. 55570); March 25, 2021 (FOI Case No. 56077); April 21, 2021 (FOI Case No. 56212); April 29, 2021 (FOI Case No. 56247) [perfected May 3, 2021]; and May 11, 2021 (FOI Case No. 56301).

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 and actually 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.

NIH FOI Case No. 55201

17. Plaintiff sent a FOIA request to the NIH on October 5, 2020. Exhibit 101 is attached and made part of this Amended Complaint. The request was received the same day and assigned FOI Case No. 55201. Exhibit 102 is attached and made part of this Amended Complaint.

18. Plaintiff amended its request via email on February 23, 2021, “withdrawing Part 2 of [Plaintiff’s] FOI 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.” Exhibit 103 is attached and made part of this Amended Complaint.

19. Plaintiff sent two formal requests for Defendant to provide an estimated completion date for FOI Case No. 55201 on June 29, 2021, and August 25, 2021. Exhibit 104, from June 29, 2021, is attached and made part of this Amended Complaint. Plaintiff sent the second request for an estimated completion date on August 25, 2021.

20. As of the date of this filing of the Amended Complaint, Plaintiff has received no records responsive to FOI Case 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 promptly release them.

NIH FOI Case No. 55344

22. Plaintiff sent a FOIA request to the NIH on November 3, 2020. Exhibit 105 is attached and made part of this Amended Complaint. It was received the same day and assigned FOI Case No. 55344. Exhibit 106 is attached and made part of this Amended Complaint.

23. Plaintiff amended its request on November 16, 2020, and Defendant sent Plaintiff an acknowledgement letter detailing the amended request it had received. Exhibit 107 is attached and made part of this Amended Complaint.

24. Plaintiff sent two formal requests on June 29, 2021, and August 25, 2021, for Defendant to provide an estimated completion date regarding FOI Case No. 55344. The first request for the estimated completion date is Exhibit 108, which is attached and made part of this Amended Complaint.

25. As of the date of this filing of the Amended Complaint, Plaintiff has received no records responsive to FOI Case 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 promptly release them.

NIH FOI Case No. 55351

27. Plaintiff sent a FOIA request to the NIH on November 5, 2020. Exhibit 109 is attached and made part of this Amended Complaint. It was received the same day and assigned FOI Case No. 55351. Exhibit 110 is attached and made part of this Amended Complaint.

28. Plaintiff amended its request on November 13, 2021, and Defendant sent Plaintiff an acknowledgement letter detailing the amended request it had received. Exhibit 110 is attached and made part of this Amended Complaint.

29. Plaintiff sent a formal request on June 29, 2021, for Defendant to provide an estimated completion date regarding FOI Case No. 55351. Exhibit 111 is attached and made part of this Amended Complaint. 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.” Exhibit 112 is attached and made part of this Amended Complaint.

30. Plaintiff sent another formal request on August 25, 2021, for Defendant to provide an estimated completion date regarding FOI Case No. 55351. 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.”

31. As of the date of this filing of the Amended Complaint, Plaintiff has received no records responsive to FOI Case No. 55351.

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

NIH FOI Case No. 55569

33. Plaintiff sent a FOIA request to the NIH on December 18, 2020. Exhibit 113 is attached and made part of this Amended Complaint. On December 22, 2020, Defendant sent Plaintiff a final response letter. Exhibit 114 is attached and made part of this Amended Complaint. 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.” Exhibit 115 is attached and made part of this Amended Complaint.

35. On June 29, 2021, Plaintiff sent Defendant a formal request for an estimated completion date. Defendant responded on July 2, 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.” Exhibit 116 is attached and made part of this Amended Complaint.

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.

37. On October 4, 2021, Defendant sent Plaintiff a “partial response” to its December 18, 2020 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." Exhibit 117 is attached and made part of this Amended Complaint. 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.

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. Exhibit 118 is attached and made part of this Amended Complaint.

39. As of the date of this filing of the Amended Complaint, 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 promptly release them.

NIH FOI Case No. 55570

41. Plaintiff sent a FOIA request to the NIH on December 18, 2020. Exhibit 119 is attached and made part of this Amended Complaint. On that same day Defendant sent Plaintiff a final response letter. Exhibit 120 is attached and made part of this Amended Complaint. 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." Exhibit 121 is attached and made part of this Amended Complaint.

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. Exhibit 122 is attached and made part of this Amended Complaint.

44. As of the date of this filing of the Amended Complaint, Plaintiff has received no records responsive to FOI Case 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 promptly release them.

NIH FOI Case No. 56077

47. Plaintiff submitted the request to the NIH on March 25, 2021. Exhibit 123 is attached and made part of this Amended Complaint. On that same day, Defendant sent an acknowledgment letter to Plaintiff detailing its receipt of the request. Exhibit 124 is attached and made part of this Amended Complaint.

48. On March 25, 2021, Plaintiff amended its request, and on the following day, Defendant recognized its receipt of Plaintiff's amended request.

49. Plaintiff sent Defendant a formal request for an estimated completion date on August, 25, 2021. Exhibit 125 is attached and made part of this Amended Complaint.

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. Exhibit 126 is attached and made part of this Amended Complaint.

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. Exhibits 127 and 128 are attached and made part of this Amended Complaint.

52. As of the date of this filing of the Amended Complaint, Plaintiff has received no records responsive to FOI Case 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 promptly release them.

NIH FOI Case No. 56212

54. Plaintiff sent a FOIA request to the NIH on April 21, 2021. Exhibit 129 is attached and made part of this Amended Complaint.

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'. Exhibit 130 is attached and made part of this Amended Complaint.

56. Receiving no other notice from Defendant, Plaintiff sent a formal request for an estimated completion date on August 25, 2021. Exhibit 131 is attached and made part of this Amended Complaint.

57. As of the date of this filing of the Amended Complaint, Plaintiff has received no records responsive to FOI Case 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 promptly release them.

NIH FOI Case No. 56247

59. Plaintiff sent a FOIA request to the NIH on April 29, 2021. Exhibit 132 is attached and made part of this Amended Complaint.

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. Exhibit 133 is attached and made part of this Amended Complaint.

61. On May 24, 2021 Defendant sent Plaintiff an email asking if it was willing to exclude "draft versions of the summary statement" from its request. Exhibit 134 is attached and made part of this Amended Complaint. 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.

63. Plaintiff, not receiving any more contact from Defendant, sent Defendant a request for an estimated completion date on August 25, 2021. Exhibit 135 is attached and made part of this Amended Complaint.

64. As of the date of this filing of the Amended Complaint, Plaintiff has received no records responsive to FOI Case 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 promptly release them.

NIH FOI Case No. 56301

66. Plaintiff sent a FOIA request to the NIH on May 11, 2021. Exhibit 136 is attached and made part of this Amended Complaint. On that same day Defendant sent an acknowledgement letter detailing Plaintiff's request and its receipt. Exhibit 137 is attached and made part of this Amended Complaint.

67. On August 25, 2021, Plaintiff sent Defendant a request for an estimated completion date. Exhibit 138 is attached and made part of this Amended Complaint. After an email exchange, Defendant provided a December 31, 2021 estimated completion date. Exhibit 139 is attached and made part of this Amended Complaint.

68. As of the date of this filing of the Amended Complaint, Plaintiff has received no records responsive to FOI Case No. 56301.

69. Plaintiff has a statutory right to the requested records and there is no legal basis for Defendant's failure to promptly release 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 10th day of February, 2022.

Respectfully Submitted,

/s/ C. Peter Sorenson

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