

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

US RIGHT TO KNOW)
4096 Piedmont Avenue, # 963)
Oakland, CA 94611-5221)

Plaintiff,)

v.)

Civil Case No. 1:22-cv-3555

UNITED STATES DEPARTMENT OF HEALTH)
AND HUMAN SERVICES)
200 Independence Ave., S.W., Room 713-F)
Washington, DC 20201)

and)

NATIONAL LIBRARY OF MEDICINE)
8600 Rockville Pike)
Bethesda, MD 20894)

Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff US RIGHT TO KNOW (“USRTK”) for its complaint against Defendant UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES (“HHS”) and its constituent entity known as the NATIONAL LIBRARY OF MEDICINE, alleges as follows:

- 1) This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel production of records and/or a lawful response on the part of the Defendants to a June 1, 2022 request for certain described agency records, which the defendants denied on the ostensible grounds that they possessed no responsive records. Plaintiff properly appealed Defendants’ denial through the administrative process by letter dated June 15, 2022. Although Defendants acknowledged Plaintiff’s administrative appeal, they have entirely failed in any way to act on such appeal or to issue a lawful determination on the appeal.

- 2) These records are central to a matter of timely, current political and legal deliberations, of great public interest and policy and legal significance. Specifically, the records relate to the origins of the COVID-19 pandemic.
- 3) A true and correct copy of the FOIA request that is at issue is attached hereto as Exhibit A.
- 4) A true and correct copy of the Defendants' response to the FOIA request that is at issue is attached hereto as Exhibit B.
- 5) A true and correct copy of the Plaintiff's administrative appeal is attached hereto as Exhibit C.
- 6) A true and correct copy of the Defendants' letter acknowledging receipt of Plaintiff's administrative appeal is attached hereto as Exhibit D. Plaintiff has not yet received any lawful determination relating to its appeal.
- 7) Plaintiff requested fee waiver on multiple bases, but Defendants have not made any determination relating to the Plaintiff's fee waiver request(s) or to properly and timely process the Plaintiff's request.
- 8) Defendants' failure to timely provide Plaintiff with the requisite records or to timely make a determination relating to the Plaintiff's administrative appeal within the 20-day time limit established under, *inter alia*, 5 U.S.C.S. § 552(a)(6)(A)(i), violates FOIA. This violation is made plain in binding precedent from the D.C. Circuit Court of Appeals in *Citizens for Responsibility and Ethics in Washington (CREW) v. Federal Election Commission*, 711 F.3d 180 (D.C. Cir. 2013). That case explains that a FOIA "determination" requires more than a mere letter acknowledging the existence of a

request and that the failure to timely make a “determination” renders a case ripe for judicial review.

- 9) Defendants’ failure to respond in any meaningful way, whatsoever, to Plaintiff’s administrative appeal, despite the passage of approximately five months, has constructively exhausted all of Plaintiff’s administrative remedies, leaving Plaintiff no choice but to file this lawsuit to compel Defendants to comply with the law regarding release of agency records and the making of a determination.
- 10) In this context, Plaintiff asks this Court to compel Defendants to search for and release records responsive to its FOIA request, and to provide an index of any claimed exempt material for purposes of further judicial review.

PARTIES

- 11) Plaintiff USRTK is a nonprofit investigative research group focusing on promoting transparency for public health. It works globally to expose corporate wrongdoing and government failures that threaten the integrity of health, the environment, and the food system. Since 2015, it has obtained, posted online, and shared with the media, thousands of industry and government documents, including many obtained through judicial enforcement of open records laws. Tens of thousands of pages of documents obtained by USRTK are now available for free public access.
- 12) Defendant U.S. Department of Health and Human Services (“HHS”) is a federal agency headquartered in Washington, DC. It is sued for actions of its constituent organization known as the National Library of Medicine.
- 13) Defendant National Library of Medicine is a part of the National Institutes for Health, (“NIH”) which is itself a part of the U.S. Department of Health and Human Services (“HHS”).

JURISDICTION AND VENUE

14) This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), because this action is brought in the District of Columbia, and 28 U.S.C. § 1331, because the resolution of disputes under FOIA presents a federal question.

15) Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because the records are likely managed from within Washington, DC (insofar as HHS manages the affairs of NIH or the National Library of Medicine from its offices in the District of Columbia) and because defendants are each a federal agency or a component part of a federal agency.

STATUTORY BACKGROUND

16) FOIA provides that a requesting party is entitled to a substantive agency response within twenty working days, including a determination of whether the agency intends to comply with the request. 5 U.S.C. § 552(a)(6)(A)(i). Within that deadline, the agency must also “determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents,” and “inform the requester that it can appeal whatever portion of” the agency’s “determination” is adverse to the requestor. *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013); *accord Shermco Industries v. Secretary of U.S. Air Force*, 452 F. Supp. 306, 317 (N.D. Tex. 1978).

17) 5 U.S.C.S. § 552(a)(6)(A) prescribes that the 20-day time limit shall not be tolled by the agency except in two narrow scenarios: The agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester, § 552(a)(6)(A)(ii)(I), and agencies may also toll the statutory time limit if necessary to clarify with the requester issues regarding fee assessment. § 552(a)(6)(A)(ii)(II). In either case, the agency’s receipt of

the requester's response to the agency's request for information or clarification ends the tolling period. Neither apply here because Defendants did not seek additional information from Plaintiff regarding the request at issue in this suit.

- 18) Defendants owed USRTK responses to their administrative appeal, including a "determination" as that term is defined in *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013), by approximately July 15, 2022 (or at the latest July 29, 2022, if Defendants had demonstrated "unusual circumstances" truly prevented an earlier response). To date, however, Defendants have provided no substantive response or "determination" with respect to the administrative appeal of the agency's response to the request at issue.
- 19) In *Bensman v. National Park Service*, 806 F. Supp. 2d 31 (D.D.C. 2011), this Court noted: "[The effect of] the 2007 Amendments was to impose consequences on agencies that do not act in good faith or otherwise fail to comport with FOIA's requirements. See S. Rep. No. 110-59. To underscore Congress's belief in the importance of the statutory time limit, the 2007 Amendments declare that '[a]n agency shall not assess search fees... if the agency fails to comply with *any time limit*' of FOIA" (*emphasis added*).
- 20) Defendants are now past its statutory period for issuing determinations on the above-described request and administrative appeal of the agency's response to that request. Further, that time has elapsed without the Defendants having provided any substantive response to Plaintiff's request or appeal other than the rote denial that they possess responsive records. Among the consequences of Defendants violation(s) of the statutory time limits of FOIA, including their failure to timely respond to the administrative appeal filed by the Plaintiff, is that Defendants cannot now seek fees.

21) Defendants are improperly failing to search for records and are denying Plaintiff access to agency records and a lawful determination with respect to such records in violation of FOIA.

FIRST CLAIM FOR RELIEF

Duty to Produce Records – Declaratory Judgment

22) Plaintiff re-alleges paragraphs 1-21 as if fully set out herein.

23) Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.

24) Plaintiff has a statutory right to the information it seeks and that Defendants have unlawfully withheld.

25) Plaintiff is not required to further pursue administrative remedies, or alternatively has constructively exhausted such remedies.

26) Plaintiff asks this Court to enter a judgment declaring that:

- a. Plaintiff is entitled to records responsive to its FOIA request described above, and any attachments thereto, but Defendants failed to provide them; and that
- b. Defendants' processing of Plaintiff's FOIA request and administrative appeal described above is not in accordance with the law, and does not satisfy Defendants' obligations under FOIA; and that
- c. Defendants must now produce records responsive to Plaintiff's request and must do so at no cost to the Plaintiff.

SECOND CLAIM FOR RELIEF

Duty to Produce Records – Injunctive Relief

27) Plaintiff re-alleges paragraphs 1-26 as if fully set out herein.

- 28) Plaintiff is entitled to injunctive relief compelling Defendants to search for and produce the records responsive to the FOIA request described in this pleading.
- 29) Plaintiff asks the Court to enter an injunction ordering Defendants to search for and produce to Plaintiff, within 10 business days of the date of the order, the requested records sought in Plaintiff's FOIA request described above, and any attachments thereto.
- 30) Plaintiff asks the Court to order the parties to consult regarding withheld documents and to file a status report to the Court within 30 days after plaintiff receives the last of the produced documents, addressing defendant's preparation of a *Vaughn* log and a briefing schedule for resolution of remaining issues associated with Plaintiff's challenges to Defendant's withholdings, if any, and any other remaining issues.

THIRD CLAIM FOR RELIEF
Costs And Fees – Injunctive Relief

- 31) Plaintiff re-allege paragraphs 1-30 as if fully set out herein.
- 32) Pursuant to 5 U.S.C. § 552(a)(4)(E), the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
- 33) This Court should enter an injunction or other appropriate judgment or order requiring the Defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for its attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 22nd day of November, 2022,

US RIGHT TO KNOW

By Counsel:

/s/Matthew D. Hardin

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