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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

12 US RIGHT TO KNOW,
13 Plaintiff,
14 v.
15 UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
16 Defendant.

CASE NO. 3:22-cv-04328-TSH
**INITIAL JOINT CASE MANAGEMENT
STATEMENT**

17
18 Plaintiff US Right to Know and Defendant the United States Department of Health and Human
19 Services (“HHS”) submit this Joint Initial Case Management Statement.

20 **1. Jurisdiction and Service**

21 This is an action brought under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, as
22 amended. Defendant does not contest subject matter jurisdiction or that it has been properly served.

23 **2. Facts**

24 **DEFENDANT’S POSITION:**

25 Plaintiff filed this action on July 27, 2022, regarding two FOIA requests. (ECF 1.) In the first
26 Request (No. 1469) Plaintiff seeks, among other things, records and communication between several
27 HHS officials and other government and nongovernment individuals regarding the origins of the SARS-
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1 CoV-2 virus and the COVID-19 pandemic. (*Id.* Exhibit A.) Plaintiff narrowed the scope of the Request
2 because it would draw voluminous records, and so that HHS could produce only the documents Plaintiff
3 is interested in obtaining. HHS identified 1,119 pages subject to potential release. However, HHS
4 cannot process or release the pages at this time because approximately half of the pages belong to the
5 United States Department of Homeland Security (“DHS”), and the other half belong to the National
6 Academy of Sciences (“NAS”), a nongovernmental private entity. HHS has submitted the respective
7 pages to DHS for review and release determinations. HHS is also in the process of contacting the
8 appropriate NAS individuals that would assist with evaluating the pages. Since NAS is a
9 nongovernmental private entity, HHS also needs to determine if NAS is subject to FOIA privileges and
10 exemptions, such as provided in FOIA Exemption 4.¹

11 Similar to the First Request, in the Second (No. 747) Request Plaintiff seeks, among other things,
12 records regarding twenty four HHS officials and communications between them and other government
13 and nongovernment individuals regarding SARS-CoV-2 virus and the COVID-19 pandemic. (*Id.*
14 Exhibit B.) As written, this Request is also drawing voluminous records – 12,000 items/35 GB – which
15 would take years to process and release. The Parties have been working toward narrowing the Request
16 so that Plaintiff receives only the information it needs within a reasonable time frame. This Request
17 seeks email from Dr. Anthony Fauci of the United States National Institutes of Health (“NIH”). The
18 NIH-FOIA Reading Room ([https://www.nih.gov/institutes-nih/nih-office-director/office-](https://www.nih.gov/institutes-nih/nih-office-director/office-communications-public-liaison/freedom-information-act-office/nih-foia-library)
19 [communications-public-liaison/freedom-information-act-office/nih-foia-library](https://www.nih.gov/institutes-nih/nih-office-director/office-communications-public-liaison/freedom-information-act-office/nih-foia-library)) contains the majority (if
20 not all) of Dr. Fauci’s email inbox concerning COVID-19. In light of the public availability of Dr.
21 Fauci’s email, HHS suggested omitting Dr. Fauci from the Request, or narrowing the request to seek
22 only information that Plaintiff believes is not publicly available in the NIH-FOIA Reading Room. At
23 this time Plaintiff has declined to eliminate Dr. Fauci from this Request. The Parties have agreed to
24 meet and confer again in January 2023 in order to decide if the narrowing decisions they have made
25 adequately reduces the volume of records or whether they need to further narrow or prioritize the
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27 _____
28 ¹ FOIA Exemption (b)(4) protects, trade secrets and commercial or financial information
obtained from a person that is privileged or confidential.

1 Request.

2 **PLAINTIFF'S SUBMISSION:**

3 USRTK provides the following factual submission, which USRTK recognizes is longer than
4 what would typically appear in a Case Management Statement. USRTK believes the Court will benefit
5 from a full factual record prior to the parties' December 8, 2022, Case Management Conference.

6 USRTK submitted two FOIA requests to Defendant HHS on July 14, 2020 ("Request One") and
7 March 8, 2021 ("Request Two"). As the Complaint details, HHS did not respond to those Requests in a
8 manner that is consistent with the FOIA, despite USRTK's efforts to narrow the scope of Request One
9 and avoid litigation. *See, e.g.*, ECF No. 1 at ¶¶ 43-50 (Request One); 65-73 (Request Two). But no
10 records were ever produced, and USRTK commenced this action on July 27, 2022.

11 The parties first conferred by phone on September 23, 2022. During that call, HHS represented
12 that it would begin a search for responsive records for Request One, and estimated approximately 40-
13 50K pages of responsive material to Request Two, but the search was not complete. USRTK stated that
14 it would work with HHS to narrow the scope of Request Two, but required information from the Agency
15 to do so, such as identifying what search terms were providing large number of "hits." On October 11,
16 counsel for Defendant informed USRTK by email that it "anticipates completing the search on the first
17 FOIA request by the end of this week," and that it was not possible to identify which search terms were
18 drawing voluminous results for Request Two. Counsel for Defendant further represented that "[w]e have
19 asked the Agency to suggest ways for narrowing the search." Based on these representations, HHS
20 requested that USRTK consent to continue the originally scheduled Case Management Conference to
21 December 8, 2022. USRTK consented, and the parties filed a stipulation to continue the Case
22 Management Conference, which was granted by the Court on October 18. ECF Nos. 17, 18.

23 USRTK did not hear again from HHS until November 28, 2022, just three days before the
24 parties' Case Management Statement was due. In an email, defense counsel asked whether USRTK had
25 an opportunity to consider narrowing Request Two. USRTK directed HHS' counsel back to their
26 October 11 email, wherein HHS represented it would itself consider and propose narrowing ideas to
27 USRTK. Nonetheless, USRTK stated that HHS could exclude published papers, articles, and newsletters
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1 from the production. After additional exchanges, by email of November 29, 2022, HHS responded to
2 USRTK's counsel's request for narrowing the scope of the Request as follows: "They can keep the
3 limiting term "origin" and also add an additional term. The more limiting terms used, the narrower the
4 search will be. Just by looking at the request, I can see where the enormous amount of hits are coming
5 from. My suggestions for narrowing: --Use a limiting term for "Wuhan Institute." --Use a limiting term
6 for "Eco Health Alliance" --Use a more specific limiting term for "Covid." The current request uses
7 "origin" which is likely to pull in a vast amount of data. Other options: --Eliminate some custodians --
8 Narrow the date range --Eliminate attachments." USRTK responded to HHS's email that same day,
9 stating that it could not narrow Request Two in a targeted way unless it knew what specific search terms
10 were producing large number of responsive hits. Despite that information deficit, however, USRTK
11 proposed additional narrowing for three specific search terms, limiting the Boolean search for those
12 terms from "within 50" to "within 10" words.

13 The parties held a second teleconference on November 30. During that call, USRTK requested
14 production timeframes and processing rates for both Request One and Request Two, as this litigation
15 had been pending since July and no record productions were forthcoming. Unfortunately, HHS did not
16 have an answer for either Request. Instead, HHS represented as follows²:

- 17 1. There will be no production of responsive records in 2022.
- 18 2. Review of all HHS FOIA requests concerning the pandemic or COVID-19 go through
19 four additional layers of review by a specific group within the legal department at
20 HHS, wherein other attorneys review the FOIA staff's initial application of the
21 FOIA's exemptions to otherwise responsive records. This slows down the process of
22 providing responsive records for requests seeking Covid-19 related information.
- 23 3. HHS' ability to respond to the Requests and produce records is hindered by scheduled
24 holiday vacations for HHS staff and lawyers during the end of the year period that
25 started in November.
- 26

27 ² Present on the call were USRTK's attorneys Daniel Snyder and Christian Bucey, HHS attorney
28 Elizabeth Bowen, and AUSA Gioconda Molinari.

1 4. HHS asked USRTK to review a “BuzzFeed” litigation production concerning Dr.
2 Fauci’s e-mails, found in the National Institutes of Health’s (“NIH”) “FOIA Reading
3 Room.” From that review, HHS asked USRTK if it would consider dropping Dr.
4 Fauci from the Request, or to identify records that were not included in the Reading
5 Room but it would like to obtain. USRTK responded that it would be impracticable
6 for USRTK to speculate about what other records may exist following a review of the
7 “BuzzFeed” litigation, which are thousands of pages long. Additionally, the NIH
8 FOIA reading room contains emails Dr. Fauci sent between November 1, 2019, and
9 May 5, 2020, that mention “Coronavirus” or “COVID-19.” Request Two is a broader
10 request, both in scope of time and in search terms. *See* ECF No. 1, Ex. B (Request
11 Two) (time frame is January 1, 2020 to January 1, 2021; search terms include
12 “Wuhan Institute of Virology,” “EcoHealth Alliance,” and “SARS-CoV-2,” as well
13 as “origin” within 50 words of “COVID” or “Covid” and “origin” within 50 words of
14 “coronavirus.”).

15 5. HHS could not provide a specific production timeframe for either Request.

16 a. For Request One, HHS identified 1,119 pages of responsive records, but that
17 these records originate with the Department of Homeland Security (“DHS”) and
18 the National Academy of Sciences (“NAS”). USRTK asked whether these
19 records had been sent out for “consultation,” and was told that the DHS
20 documents had been sent out on November 28, but not the NAS documents.
21 USRTK expressed its substantial disappointment that no meaningful activity
22 occurred with regard to Request One following the October 18 continuance of
23 the Case Management Conference. This is especially concerning because
24 Request One has been on file with HHS since July 14, 2020.

25 b. For Request Two, the Agency had not made any progress. The Agency did not
26 have any proposals to narrow Request Two, beyond what the suggestions they
27 made on November 29, and the wholesale exclusion of Dr. Fauci as a
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1 custodian based on the narrower BuzzFeed production. The Agency had not
2 uploaded the potentially responsive data set into its software, because the
3 software was crashing due to the size of the production, allegedly 35 GB.
4 USRTK questioned whether HHS had split the data file, such that the overall
5 size being loaded was smaller. HHS did not know what steps had been taken
6 but said that it would ask if it was possible. USRTK expressed similar dismay
7 that no progress had been made since this case was filed and since the parties
8 originally conferred in October. The problems facing HHS appear to be
9 technical in nature, but HHS was not forthcoming on what steps it had taken
10 to address those problems.

11 6. Finally, HHS acknowledged that it had long delayed production of responsive records
12 to the Requests.

13 Based on the foregoing, USRTK expects to discuss with the Court the best mechanism by which
14 a production schedule can be put in place, whether that be through a Case Management Order or motion
15 practice. In light of the delays since the initiation of this case, and the fact that no record productions are
16 forthcoming, USRTK believes that the only way that Defendant will conform its actions to the statutory
17 mandates of the FOIA is through a Court order setting a production deadline.

18 **3. Legal Issues**

19 As stated above, at issue is the processing and releasing of the two Requests, as well as the
20 lawfulness of any FOIA exemption applied by HHS to responsive records.

21 **4. Motions**

22 There are no prior or pending motions. If the Court so requests, USRTK is prepared to engage in
23 motion practice to set a production deadline for this matter. If subsequent issues are not resolved
24 between the parties, they anticipate filing cross-motions for summary judgment to resolve the case.

25 **5. Amendment of Pleadings**

26 The parties do not anticipate that the pleadings will be amended.
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1 **6. Evidence Preservation**

2 The parties certify that they have reviewed the Guidelines Relating to the Discovery of
3 Electronically Stored Information and confirm that the parties have met and conferred pursuant to Rule
4 26(f) regarding reasonable and proportionate steps taken to preserve evidence relevant to the issues
5 reasonably evident in this action.

6 **7. Disclosures**

7 The parties agree and stipulate pursuant to Federal Rule of Civil Procedure 26(a)(1)(A) that
8 initial disclosures are not necessary, as this is a FOIA action.

9 **8. Discovery**

10 The parties have not taken any discovery and do not anticipate based on current information that
11 discovery will be necessary. Defendant notes that discovery is generally not appropriate in FOIA
12 actions. *See Lane v. Dep't of Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008) (noting that discovery is
13 limited in FOIA cases “because the underlying case revolves around the propriety of revealing certain
14 documents”).

15 **9. Class Actions**

16 N/A.

17 **10. Related Cases**

18 The parties are not aware of any related cases.

19 **11. Relief**

20 Plaintiff seek declaratory and injunctive relief, as well as costs and reasonable attorneys' fees.
21 Defendant deny that Plaintiff is entitled to any relief.

22 **12. Settlement and ADR**

23 At this time engaging in ADR is premature.

24 **13. Consent to Magistrate for All Purposes**

25 They parties will consent to have a magistrate judge conduct all further proceedings including
26 trial and entry of judgment.

1 **14. Other References**

2 Not applicable.

3 **15. Narrowing of Issues**

4 As stated in paragraph 2 above, the parties have been engaged through the meet and confer
5 process to narrow the issues covered the FOIA Requests and releases.

6 **16. Expedited Trial Procedure**

7 The parties believe that this is not the type of case that can be handled under the Expedited Trial
8 Procedure of General Order No. 64.

9 **17. Scheduling**

10 There are no scheduling issues at this time.

11 **18. Trial**

12 The parties do not anticipate that a trial will be necessary.

13 **19. Disclosure of Non-Party Interested Entities or Persons**

14 HHS, a government entity, is exempt from this disclosure.

15 **20. Professional Conduct**

16 Counsel for the parties are familiar with and have reviewed the Guidelines for Professional
17 Conduct for the Northern District of California.

18 **21. Other matters as may facilitate the just speedy and inexpensive disposition of this**
19 **matter**

20 None.

22 DATED: December 1, 2022

STEPHANIE M. HINDS
United States Attorney

24 /s/ _____
GIOCONDA R. MOLINARI
Assistant United States Attorney

28 /s/ Daniel C. Snyder _____

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DANIEL C. SNYDER, *pro hac vice*

/s/ Rachel Doughty
RACHEL DOUGHTY
GREENFIRE LAW, PC

Attorneys for Plaintiff

CERTIFICATION

Pursuant to Civil L.R. 5-1(i)(3), the undersigned hereby attests that Plaintiff’s counsel has concurred in the filing of this document.