

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. RIGHT TO KNOW,)	
)	
Plaintiff,)	
v.)	Civil Action No. 21-2936 (TSC)
)	
NATIONAL INSTITUTES OF HEALTH,)	
)	
Defendant.)	
_____)	

JOINT STATUS REPORT

Now come the parties in the above captioned matter, U.S. Right to Know (“Plaintiff”) and the National Institutes of Health (“Defendant” or “NIH”), and submit this joint status report pursuant to the Court’s Minute Order dated August 7, 2022.

The Plaintiff filed an amended complaint on February 14, 2022 and Defendant filed its answer on February 28, 2022. This case involves nine separate FOIA requests to NIH. Defendant is in the process of identifying the number of responsive documents to the nine requests and has released two tranches of documents to date. The parties do not see at this time the need for the filing of dispositive motions.

Plaintiff has filed a motion to set a processing schedule (ECF No. 17), which Defendant will be opposing. Defendant’s opposition is due on June 1, 2023. Plaintiff will file its Reply on or before July 21, 2023.

Plaintiff and Defendant provide additional information to the Court below. The parties request that another joint status report be filed on or before July 10, 2023, per the Court’s August 7, 2022 Minute Order, to update the Court on the status of the FOIA requests.

DEFENDANT’S STATEMENT:

The FOIA burden at NIH as a result of the pandemic is enormous. NIH is currently dealing with 55 FOIA cases in litigation and approximately 1000 FOIA requests in backlog. This has created an enormous burden on the limited FOIA staff at NIH. Despite this burden, NIH has nonetheless produced to Plaintiff approximately 8000 pages.

Plaintiff has another FOIA case pending against the NIH seeking records that also relate to COVID-19, EcoHealth Alliance, etc., at *U.S. Right to Know v. NIH*, 20-3196 (CKK) in the U.S. District Court for the District of Columbia. These two lawsuits, encompassing 10 requests and tens of thousands of pages, are placing a great burden on the limited FOIA resources available to the NIH. In the instant case, Plaintiff’s amended complaint (ECF No. 9) involves nine separate FOIA requests (see the exhibits to the amended complaint) which are extremely broad and Defendant finds very burdensome. NIH is inundated with FOIA requests and at present has approximately 1000 requests that are overdue and in the queue for processing, in addition to 55 open FOIA litigation cases. Plaintiff alone has filed 23 requests with NIH, some of which are extremely broad. NIH has processed and closed 11 of them. NIH is operating as best it can to handle the FOIA requests and litigations given limited staffing. Documents responsive to Plaintiff’s numerous requests in this case involving COVID-19 also involve several layers of review before they can be produced. With respect to Plaintiff’s nine requests, here is the present status of the searches:

55201- Search Complete. Review Complete. 101 pages referred to the Defense Advanced Research Projects Agency (“DARPA”) for direct response to the requester. NIH has completed and closed this request.

55344- Search Complete. 711 pages pending at the Office of the Director for: Responsiveness and FOIA for review, and consultation with any government stakeholders prior to release.

55351- Search Complete. 5,158 pages pending at the Office of the Director for: Responsiveness and FOIA for review, and consultation with any government stakeholders prior to release.

55569- Search Complete. 2,321 pages pending at the Office of the Director for: Responsiveness and FOIA for review, and consultation with any government stakeholders prior to release.

55570- Search Complete. Approximately 5,000 pages pending at the NIH institute for review. The records would subsequently be provided to the NIH Office of the Director for: Responsiveness and FOIA for review, and consultation with any government stakeholders prior to release. Approximately 600 of these pages were previously produced in connection with an unrelated request to another requester.

56077- Search Complete. 7,344 pages were identified as potentially responsive. Plaintiff has since agreed to narrow the scope of this request and NIH is working to quantify an updated page count.

56212- Search Complete. 1078 pages pending at the Office of the Director for: Responsiveness and FOIA for review, and consultation with any government stakeholders prior to release.

56247- Search Complete. 69 pages ready for final review and release.

56301- Search Complete. 259 pages pending at the Office of the Director for: Responsiveness and FOIA for review, and consultation with any government stakeholders prior to release.

Thus, Defendant has identified approximately 22,041 potentially responsive pages, though this total must now be updated in view of recent negotiations between the parties. Given the several layers of review, other litigation from this plaintiff and others and the limited staffing as noted above, it has been extremely difficult for Defendant to set a processing schedule. NIH is also in the midst of another ongoing FOIA litigation production to Plaintiff, making this the second parallel stream of FOIA productions that Plaintiff will benefit from ahead of earlier FOIA requesters.

Nonetheless, Defendant has produced two tranches of documents to Plaintiff. The first production of 1,260 pages went out on Monday, February 27, 2023. This was a partial production with respect to request 55569. The second production of 6698 pages went out on March 6, 2023. These were productions with respect to requests 55570 and 56212.

Counsel for Defendant had sent a proposal to Plaintiff with regard to narrowing several of the nine FOIA requests, without significant progress, and the parties will continue their consultations. Defendant disagrees with Plaintiff's position below, and reiterates that it considers Plaintiff's requests to be overbroad and burdensome, the Agency is dealing with an overwhelming number of requests related to the COVID-19 pandemic, and has received numerous other FOIA requests from the Plaintiff.

Given the foregoing, Defendant can agree to process 300 pages per month, with the next production to take place on July 12, 2023 and thereafter on the 12th day of each successive month.

PLAINTIFF'S STATEMENT:

Plaintiff filed its complaint in this matter on November 8, 2021 seeking records from nine FOIA requests to Defendant. For more than 16 months afterwards, Defendant produced no documents in response to these requests.

On February 27, 2023, Defendant finally produced an incomplete set of documents related to only one out of the nine FOIA requests at issue. Defendants have already produced many if not most of these documents through FOIA litigation to The Intercept.

Hours before the joint status report was due on March 6, 2023, Defendant produced a batch of documents that appears to have been previously produced in litigation with BuzzFeed, and as well as one additional document.

At this time, after more than 18 months of delay, Defendants have provided partial responses for three out of nine FOIA requests at issue in this matter. Most of these productions

have been previously produced to other FOIA litigants. None of the productions for any of the FOIA requests are complete.

Defendant has not provided any documents for the other six FOIA requests at issue in this matter. Defendant has not conveyed to Plaintiff when production of these documents will begin, or when it will be complete.

Defendant has not committed to a rate of production for any of the nine FOIA requests at issue.

Plaintiff believes this pace of production is woefully inadequate.

Concerning Defendant's proposal made in March 2023, Plaintiff considers this to be a settlement proposal. Plaintiff responded to the settlement proposal. Should settlement occur, Plaintiff will immediately notify the Court.

Plaintiff's counsel has conferred with Defendant's counsel on Plaintiff's impending Motion to Establish Release Dates. On December 19, 2022, Plaintiff's counsel first wrote Defendant's counsel concerning the Motion. The parties held a settlement discussion on January 6, 2023. Because Plaintiff heard nothing from Defendant for several weeks, Plaintiff's counsel wrote again to Defendant's counsel on February 17, 2023 informing Defendant's counsel that Plaintiff was both interested in any settlement proposals, but having heard none Plaintiff was proceeding with the Motion to Establish Release Dates. Plaintiff's counsel has discussed Plaintiff's Motion with Defendant's counsel several times in phone calls.

Defendant is not meeting either the letter or spirit of the FOIA. The Court of Appeals for the District of Columbia Circuit has said, in a majority opinion written by then Judge and now Justice Kavanaugh:

To be clear, a "determination" does not require actual *production* of the records to the requester at the exact same time that the "determination" is communicated to the requester. Under the statutory scheme, a distinction exists between a "determination" and subsequent production. See [*Spannaus v. DOJ*, 824 F.2d 52, 59 n. 7 \(D.C.Cir.1987\)](#). As to actual production, FOIA requires that the agency make the records "promptly available," which depending on the circumstances typically would mean within days or a few weeks of a "determination," not months or years. 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i).

Plaintiff filed its Motion for Order to Establish Record Processing on March 16, 2023. [ECF No. 17]. The Court's May 1, 2023 Minute Order states the following:

MINUTE ORDER: Defendants' [19] Consent Motion for Extension of Time to File Response/Reply is hereby GRANTED. Defendant shall file its Response no later than June 1, 2023, and Plaintiff shall file its Reply no later than July 21, 2023. Signed by Judge Tanya S. Chutkan on 5/1/2023. (lcja)"

Plaintiff will be filing its Reply on or before the due date of July 21, 2023. After that date, the matter will be committed to the Court's sound discretion.

Dated: May 8, 2023

Respectfully Submitted,

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