

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.)	
_____)	

DECLARATION OF GORKA GARCIA-MALENE

I, Gorka Garcia-Malene, declare as follows:

1. I am the Freedom of Information Act (“FOIA”) Officer, National Institutes of Health (“NIH”), U.S. Department of Health and Human Services (“HHS” or the “Department”). I have held this position with NIH since October 15, 2017.
2. My duties include responding to requests for NIH records under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. These duties include managing searches for NIH records in response to FOIA requests, providing guidance to NIH record custodians or personnel regarding these searches, and determining whether to release or withhold records or portions of records in accordance with FOIA and the HHS regulations implementing FOIA.
3. I make this Declaration based upon my personal knowledge and information available to me in my official capacity. I have reviewed the administrative record in the above-captioned litigation.
4. The purpose of this declaration is to support NIH’s proposed processing schedule and to oppose Plaintiff U.S. Right to Know’s (“Plaintiff” or “USRTK”) request for a processing rate of 4000 pages per month. Specifically, given NIH’s incredible FOIA caseload and limited

staffing, NIH is able to process potentially responsive records in this matter at a rate of no more than 300 pages a month.

5. NIH is the nation's medical research agency, seeking to make discoveries that improve health and save lives. It is made up of 27 different components, each of which has its own research agenda.

6. FOIA operations at NIH are decentralized in that each of NIH's 27 different components have their own FOIA coordinators. Requesters are encouraged to send their requests to the NIH component with responsibility for the program to which the requested records relate. Upon receipt of a FOIA request, the NIH component to whom the request is directed is responsible for logging the request into the NIH-wide FOIA Tracking System and coordinating the search for and processing of responsive records for subsequent release.

7. The FOIA coordinators at NIH's various components report to me for purposes of FOIA request management and processing.

8. NIH primarily relies on custodian-mediated data pulls for its FOIA requests. Custodians or their staff are often the only employees that know where to search for records, particularly non-email records. Information technology-directed searches, where the records are available in email accounts tend to be clumsy and return extremely large volumes of records, most of which are not responsive.

9. Even with remote data pulls performed by information technology staff, the custodians must be consulted to ascertain which of the nine FOIA exemptions are potentially applicable.

SPIKE IN NIH'S FOIA OBLIGATIONS

10. The coronavirus disease 2019 ("COVID-19") pandemic has placed unprecedented

pressure on NIH, as our staff and leadership work to minimize the number of casualties who succumb to this pandemic through internal work and collaborations with other government agencies. The custodians at issue in the instant lawsuit, as well as their support staff, work tirelessly to advance the science surrounding the pandemic as well as the communications outreach to inform the public on the latest developments on our understanding of the COVID-19 pandemic. In many cases, these dedicated professionals are working seven days a week for the good of the country.

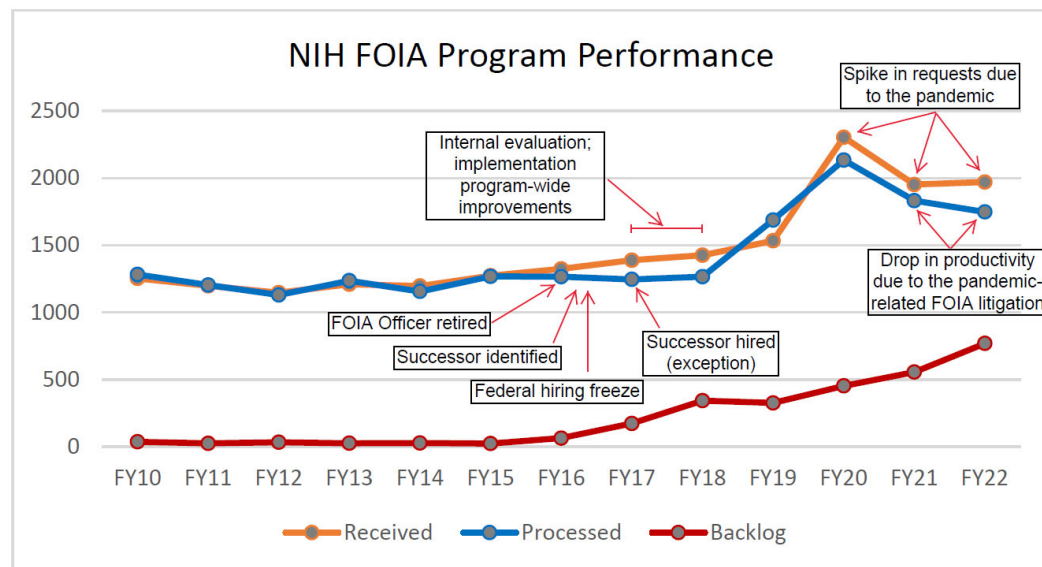
11. As a result of the COVID-19 pandemic, the NIH FOIA program is experiencing corresponding pressure, where a spike in FOIA requests for information on the COVID-19 pandemic continues to far outstrip the agency's ability to process requests.

12. NIH is not accustomed to carrying large FOIA backlogs. For example, the agency's backlog in 2016 totaled 64 requests. However, the increasing frequency and breadth of requests and a government-wide hiring freeze in 2017 caused the backlog to increase to 343 by the end of fiscal year 2018. A concerted effort by the agency in 2019 to improve the FOIA program led to strong gains, so that by the end of that fiscal year and despite an increase in requests and hundreds of hours dedicated to program improvement, NIH brought its backlog down to 326 and decreased the number of requests pending by 16%. Our data indicate that the NIH and the public continue to benefit from NIH's 2019 programmatic improvements. In fact, NIH projected that the backlog would be virtually eliminated due to the program's improved efficiency.

13. Everything changed with the unprecedented Covid-19 pandemic, resulting in a huge surge of FOIA requests and a resulting backlog. No one anticipated the effect the pandemic would have on NIH's FOIA program. For context, in the 3 years prior to the pandemic, NIH had

received 4,347 requests. In contrast, in the 3 years since the outbreak, NIH received 6,226. The pandemic has therefore caused a 43% surge in FOIA requests. Alternatively, for the first calendar quarter of 2019, NIH received 356 requests. For the same quarter this year, NIH received 520 requests: an increase of just over 46%.

14. The below graph illustrates NIH's excellent track record in minimal backlogs, and how the agency battled against forces outside its control to meet the growing demand for records.



15. In addition, the NIH response to the COVID-19 pandemic is necessarily part of a broad collaboration with numerous government agencies and departments. Consequently, the unusual number of consultations with other agencies with equity in a small number of pages has given way to the need for routine consultations with multiple agencies and departments, requiring a great deal of time and coordination unprecedented at the NIH FOIA program, vastly increasing processing times for requests regarding the COVID-19 pandemic and all other requests behind them.

16. Pandemic records usually include other government stakeholders, including other federal agencies working on the response to the pandemic and the White House, as well as

corresponding time-consuming consultations. As a result, the NIH FOIA Office continues to work with the department at large, and with sister agencies to develop novel and more efficient ways to share and comment on records. For instance, NIH has dedicated a portion of its staff to pandemic records review so that, through their specialization, the review of these records will proceed more efficiently. Nonetheless, keeping track of the growing partially overlapping consultations that go out to multiple stakeholders monthly across the various litigation productions grows in complexity with every passing month.

17. Another complicating factor is that requests about the pandemic tend to be written broadly, as the nine requests in this case are, and therefore NIH's electronic platforms cannot easily ingest the volume of responsive records for review, significantly extending the loading and de-duplication process. In order to minimize these delays, NIH recently negotiated an improved workflow folding the vendors into the document ingestion process, thereby somewhat minimizing delays due to technical issues with the platforms. NIH has also invited the FOIA processing vendors to join the whole of NIH's FOIA community to provide advanced training on tools available on their platforms to streamline document processing.

18. Despite these gains in efficiencies, the sheer volume of requests is overwhelming NIH's ability to respond to requests in a timely manner, particularly when these requests are so broadly written, that they could encompass almost every document possessed by NIH related to the pandemic. As a result, NIH expends additional resources interfacing with requesters to provide them with data as to the breadth of documents encompassed by their requests and continually seeks the requesters' cooperation and input in narrowing and refining the search terms to better tailor the requests to those documents the requesters actually seek.

19. The nine requests from the Plaintiff at issue in this case are broad and

unnecessarily burdensome. The nine requests are attached as Exhibits 101, 105, 109, 114, 120, 124, 130, 133, and 137 to Plaintiff's motion. Taken together, Plaintiff phrased these 9 slightly differently only to arrive at about 22,000 pages that should largely cover same communications. In other words, because of the way the searches are written, NIH has large collections of potentially responsive records which we cannot deduplicate but that should be largely duplicative. NIH approached Plaintiff to render these searches more efficient, offering several recommendations to Plaintiff, which only accepted one small recommendation.

NIH'S EFFORTS TO RESPOND TO BACKLOG AND SURGE IN REQUESTS

20. In 2018, NIH created the Optimize NIH initiative, in which the agency identified several programs to explore how to best increase their efficiency. One of these was the NIH FOIA program. To this end, the agency convened agency executives, efficiency experts and program staff to identify ways to streamline and automate operations to increase the program's productivity. After hundreds of hours of data-gathering and analysis, the Optimize NIH FOIA work group provided its recommendations.

21. The work group recommended: an increase in staff, the consolidation of 9 disparate tracking and redacting systems into one system designed specifically for processing FOIA, the acquisition of de-duplicating software and a web portal permitting for the automated ingestion of requests submitted online to dramatically reduce the time spent entering requests manually. NIH leadership approved and financed the costly recommendations.

22. NIH's costly investment into its FOIA program in 2018 and 2019 proved extremely beneficial to the requester community. In 2018, NIH processed 1,243 requests. In contrast, as a direct result of the improvements financed by the agency, NIH processed 1,834 requests by the end of 2019: an increase in productivity of over 47% in one year. Despite the

increase in requests that year, NIH managed to decrease the number of requests pending by 16% and was on track to generating more pronounced reductions in its backlog in subsequent years.

23. The requester community continues to benefit from the increase in efficiency. However, the overwhelming increase in requests relating to the COVID-19 pandemic renders these hard-won gains in efficiency negligible. Cognizant of the sharp increase in requests, NIH continues to dedicate additional energy and resources to meet its responsibilities. For example, NIH hired a total of three seasoned FOIA professionals in February and March of 2020 and an additional two seasoned FOIA professionals in September of 2022. In addition, NIH is preparing to add an additional FOIA reviewer in the next few months. Even with these additions, the sheer number of pandemic related FOIA requests remained insurmountable. NIH is trying its best to deal with the unprecedented surge in pandemic related FOIA requests.

24. As a result of the ongoing increase in pandemic related FOIA litigation, NIH is actively working to fill two new reviewer positions and evaluating new case management software programs to increase both its productivity and its efficiency.

25. Despite NIH's best efforts as described above to reduce the backlog of FOIA requests, the pandemic and the resulting surge in related FOIA requests, NIH has a current backlog of 869 requests in the queue for processing and 53 active litigations, and most of the litigations involve more than one FOIA request, such as the instant case.

IMPACT OF LITIGATION ON NIH'S FOIA PROCESS

26. The agency has received legal complaints for constructive denial on broad FOIA requests for records relating primarily to the pandemic, but also increasingly on additional topics. In these cases, Plaintiffs seek to be processed before earlier requests, effectively pulling agency resources from those requesters that have been patiently waiting in the queue to those requesters

that seek to jump the line.

27. For example, USRTK currently has four active litigations involving 12 FOIA requests, 11 of which remain open. One request in the instant suit, 55201, is closed by NIH because the records were referred to the originating agency. This lawsuit encompasses approximately 22,000 pages of records. Even though there are 140 open requests prior to the first open case and 184 open prior to the last case in this litigation, NIH has already produced about 3,000 pages to Plaintiff in response to 3 of the 9 requests involved. For additional context, USRTK has filed 36 FOIA requests, all but one of which were filed after the start of the pandemic. Of the 36, NIH has completed 21 of USRTK's requests, and 15 remain open. Eleven of the 15 requests are open because they are in active litigation. More specifically, this is USRTK's second FOIA lawsuit against NIH seeking to jump the queue ahead of other requesters. With this litigation, Plaintiff seeks to bypass hundreds of other requesters, 184 requests to be exact – or about 20 % of the agency's queue.

28. Litigation invariably places additional burdens on the Agency's FOIA program, decreasing the speed in which it can reach other, earlier requests. However, litigation in the context of the COVID-19 pandemic continues to prove particularly demanding because NIH is being sued in short succession and on broad requests, each of which would take years to complete. We are actively negotiating with the requesters through counsel in an effort to reduce the scope of voluminous requests. Other motivated requesters have many and more voluminous requests for documents related to COVID-19 that are pending and ripe for litigation. In addition, this Plaintiff has 4 other broad FOIA requests pending before NIH not already in litigation. For example, in request 57943, Plaintiff appears to seek the same records as sought in requests 56212, 54077, and 55351 in this litigation and in 54696 in another litigation, but from a different set of

custodians. Processing overlapping sets of records in three parallel streams is time consuming and difficult from a de-duplication and consistency standpoint, slowing the processing of records due to the need to continually cross-check between production streams. Another example is request 59152. Just one small portion of that request seeks, e.g., Ashley Sanders' emails with anyone in the Office of the Director (where she works) for a 4-month period. Simply put, this Plaintiff, USRTK, is creating a huge burden on NIH's FOIA Department and negatively impacting other requesters and taking up an inordinate amount of NIH's time and resources.

29. Plaintiff's third FOIA litigation against the agency involves enormous amounts of data. Printing out the reams of data responsive to one part of that request has been estimated to encompass 461 million pages. All of which would then require review by FOIA staff and production to Plaintiff.

30. The broad searches, automated processing that encumbers staff computers for days at a time, iterative negotiations through counsel, drafting court filings and abiding by rigid production schedules is extremely time-consuming for the NIH FOIA program and prevents NIH from responding to the large number of requests which were filed long before Plaintiff's.

31. Cumulatively, this increase in litigation requires the agency's FOIA program to dedicate much of its energy to processing litigations, including Plaintiff's multiple lawsuits, to the detriment of all other requesters and the program's overall efficiency. For context, NIH typically litigates about three FOIA suits per year. However, NIH is now sued about once every month under the FOIA. At this moment, NIH is in the midst of 53 active FOIA lawsuits, which is unprecedented. In addition, program officials who are custodians of the records in question increasingly turn their attention from furthering medical science and helping Americans avoid the effects of the pandemic to run searches and review voluminous collections of requested

records with short turn-around times to keep up with strict FOIA litigation production timelines.

32. NIH retains its legislated responsibilities under the FOIA, with demanding timelines to fill all incoming FOIA requests. NIH ended fiscal year 2019 with a backlog of 326 requests, a decrease from the backlog of 343 requests at the end of fiscal year 2018, as a result of its work to improve the FOIA program. However, due to the pandemic, the backlog has significantly increased to 869 requests.

33. NIH OD has dedicated five of its most senior staff members – all but one of its senior reviewers, to meet its obligations in ongoing FOIA lawsuits. Due to the complexity and sensitivity of the records involved in COVID requests, only senior staff members can review such records. The remaining senior staff members not working full time on litigation are the only FOIA specialists currently closing NIH's complex FOIA requests as well as NIH's denials and appeals. One of these two individuals is about to retire in two months.

34. In sum, despite NIH's efforts to increase efficiencies in its processing capabilities, the influx of requests and unavailability of custodians in response to the pandemic has overwhelmed the NIH FOIA Office. NIH is currently working to respond to numerous other FOIA requests, including cases with court-ordered deadlines, and is working with limited resources. NIH currently has 1,011 pending requests, 869 of those requests are backlogged requests, is engaged in 53 litigations filed by repeat litigants demanding to jump ahead of all requesters and faces staffing challenges that cannot be readily remedied. NIH is currently producing 300 pages per month to USRTK in their first litigation, and if processing 300 pages is ordered by this Court as requested in the current litigation, NIH will be producing 600 pages per month to Plaintiff. Once negotiations over scope are finished for Plaintiff's third litigation and processing begins at the hoped-for rate of 300 pages per month in that litigation, NIH will most

likely be producing at least 900 pages of pandemic-related records to this Plaintiff alone per month. This gives an indication of how this Plaintiff is burdening NIH's FOIA system.

35. NIH is simply unable to process potentially responsive records at a rate greater than 300 pages per month. Processing potentially responsive records at a rate greater than 300 pages per month would cripple NIH's ability to meet agreed-upon and court-imposed deadlines in other FOIA litigation cases and would hamper the ability to respond to new requests. It bears noting that NIH has typically produced 300 pages in all of its FOIA litigations, including those before the pandemic. NIH continues to endeavor to produce at this rate in good faith, even though its resources are severely strained by the onslaught of pandemic related requests and litigations like those of Plaintiff.

36. Specifically, NIH has dedicated 5 of its most efficient staff to meet its obligations in ongoing FOIA lawsuits. Depending on how many more pages NIH has to process a month, NIH would have to transfer our remaining senior staff to this litigation (due to the complexity and sensitivity of the records involved in COVID requests, e.g., communications involving the White House) and they would have to be seasoned staff. Even so, their participation would not meet Plaintiff's proposed pace of production. These are the only 2 remaining team members processing all of NIH's denials and appeals.

37. Simply put, the pandemic and the resulting FOIA requests related to it have placed a burden on NIH which is not sustainable. The Agency is working overtime to respond to the thousands of requests for pandemic related information. NIH's processing rate of 300 pages per month capitalizes on its workflow and ensures that more pages for more requests are processed per month. This allows for fair and equitable processing of all NIH FOIA requests. This is particularly true in light of the demands posed by the growing number, size, and complexity of

pandemic related FOIA requests received by NIH. Implementing an extreme page review requirement as requested by Plaintiff in this litigation would result in a diverting of resources from the office in responding to myriad other FOIA requests. This would create even more delays in processing other requests and create an even worse bottleneck of requests, and likely result in other litigations being filed against the already overburdened agency. Any large page review requirement, even one not as large as that requested by Plaintiff, would stress NIH's FOIA Offices' operations, create serious consequences for other requesters, and create delay and other complications. At that point, NIH would seek an *Open America* Stay in the interest of the many other requesters predating Plaintiff who continue to wait patiently for their records.

I declare under penalty of perjury that the foregoing is true and correct.

GORKA GARCIA-MALENE

Executed this 9th day of June 2023.