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19 **UNITED STATES DISTRICT COURT**

20 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

21 US RIGHT TO KNOW, a California Non-
22 Profit Corporation,

23 Plaintiff,

24 v.

25 NATIONAL INSTITUTES OF HEALTH,

26 Defendant.

27 Case No. _____

28 **COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Freedom of Information Act

INTRODUCTION

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2 1. This action, through which Plaintiff US Right to Know (“USRTK” or “Plaintiff”) seeks
3 access to government records held by Defendant National Institutes of Health (“NIH” or “Defendant”) is
4 premised upon, and consequent to, violations of the federal Freedom of Information Act (“FOIA”), 5
5 U.S.C. § 552 *et seq.*, and applicable United States Department of Health and Human Services
6 regulations promulgated thereunder, 45 C.F.R. Part 5 – “FREEDOM OF INFORMATION
7 REGULATIONS.” This action challenges the unlawful failure of the Defendant to abide by the statutory
8 requirements of the FOIA and applicable implementing regulations.

9 2. Defendant is unlawfully withholding from public disclosure information sought by
10 USRTK, information to which USRTK is entitled and for which no valid disclosure exemption applies
11 or has been properly asserted. In particular, Defendant has violated, and remains in violation of, the
12 statutory mandates imposed by the FOIA by: (Count I) failing to provide a timely final determination on
13 USRTK’s FOIA Requests; (Count II) unlawfully withholding records from public disclosure for which
14 no valid disclosure exemption applies or has been properly asserted, or to provide the reasonably
15 segregable portions of those records; and (Count III) failing to provide an updated “estimated date of
16 completion.”

17 3. The records requested by USRTK are likely to contribute significantly to the
18 understanding of the operations or the activities of the government. USRTK is a 501(c)(3) nonprofit
19 organization and, by its nature, has no commercial interest in the requested records.

20 4. USRTK seeks declaratory relief establishing that NIH has violated the FOIA and that
21 such actions entitle USRTK to relief thereunder. USRTK also seeks injunctive relief directing NIH to
22 conduct a reasonably adequate search for records and to promptly provide responsive material, to
23 reasonably segregate portions of non-exempt records, and to provide proper justifications for any
24 disclosure exemptions that are applied. Finally, USRTK requests that the Court award Plaintiff its
25 reasonable attorneys’ fees and costs incurred in bringing this action.

JURISDICTION AND VENUE

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27 5. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B). That provision of the
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1 FOIA grants jurisdiction to “the district court of the United States in the district in which the
2 complainant resides, or has his principal place of business[.]” USRTK both resides and maintains its
3 principal place of business in the Northern District of California.

4 6. The Court also has federal question jurisdiction pursuant to 28 U.S.C. § 1331 because
5 this action arises under the FOIA and the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*

6 **INTRADISTRICT ASSIGNMENT**

7 7. Pursuant to Local Rule 3-2(c), this case is properly brought in the San Francisco Division
8 of the Northern District of California because a substantial part of the events and omissions which give
9 rise to the claims alleged herein occurred in the County of San Francisco.

10 8. Under the FOIA, 5 U.S.C. § 552(a)(4)(B), jurisdiction vests in the district court where
11 “the complainant resides” or “has his principal place of business.”

12 9. Plaintiff resides in the County of San Francisco.

13 10. Plaintiff has its principal place of business in the County of San Francisco.

14 11. As such, under the L.R. 3-2(c), (d), intradistrict assignment to the San Francisco division
15 is proper.

16 **PARTIES**

17 12. Plaintiff USRTK is a 501(c)(3) nonprofit corporation organized under the laws of the
18 State of California. USRTK is a public interest, investigative research group focused on promoting
19 transparency for public health. USRTK works nationally and globally to expose corporate wrongdoing
20 and government failures that threaten the integrity of food systems, the environment, and human health.

21 13. Defendant National Institutes of Health is an agency of the United States executive
22 branch.

23 14. NIH qualifies as an “agency” under the FOIA, the records sought are “records” under the
24 FOIA, and because NIH is in possession and control of the records sought by USRTK, NIH is subject to
25 the FOIA pursuant to 5 U.S.C. § 552(f).

26 **LEGAL FRAMEWORK**

27 15. The FOIA requires U.S. government agencies to “promptly” make public records
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1 available to any person if that person makes a request which (1) reasonably describes the records sought
2 and (2) complies with any applicable agency rules for making such a request. 5 U.S.C. § 552(a)(3)(A).

3 16. The FOIA requires an agency to issue a final determination on any such information
4 request within twenty business days from the date of its receipt. 5 U.S.C. § 552(a)(6)(A)(i). In issuing a
5 final determination, an agency is required to inform the requester of three things: (1) the agency's
6 determination of whether or not it must comply with the request; (2) the reasons for its decision; and (3)
7 notice of the right of the requester to appeal to the head of the agency. 5 U.S.C. § 552(a)(6)(A)(i).

8 17. The FOIA allows an agency to extend the twenty-day determination deadline, however,
9 by ten working days when "unusual circumstances" exist and when the agency so notifies a requester in
10 writing. 5 U.S.C. § 552(a)(6)(B)(i)-(iii); 45 C.F.R. § 5.24(f). A notice informing a requester of the
11 invocation of the "unusual circumstances" provision must specify the applicable "unusual
12 circumstances." *Id.*

13 18. Permissible "unusual circumstances" are limited to: "(I) the need to search for and collect
14 the requested records from field facilities or other establishments that are separate from the office
15 processing the request; (II) the need to search for, collect, and appropriately examine a voluminous
16 amount of separate and distinct records which are demanded in a single request; or (III) the need for
17 consultation, which shall be conducted with all practicable speed, with another agency having a
18 substantial interest in the determination of the request or among two or more components of the agency
19 having substantial subject-matter interest therein." 5 U.S.C. § 552(a)(6)(B)(iii).

20 19. An agency is entitled to one ten-business day extension. 5 U.S.C. § 552(a)(6)(B)(i). The
21 written notice provided to the requester must specify the specific unusual circumstances justifying the
22 extension and the date on which a final determination is expected to be dispatched. *Id.*; 45 C.F.R. §
23 5.24(f).

24 20. In some circumstances, the FOIA allows an agency to invoke an extension beyond ten
25 days. To invoke a longer extension, the FOIA requires an agency to provide written notification to the
26 requester that (1) offers the requester an opportunity to limit the scope of the request so that it may be
27 processed within that time limit, or (2) offers the requester an opportunity to arrange with the agency an
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1 “alternative time frame” for processing the request. 5 U.S.C. § 552(a)(6)(B)(ii); 45 C.F.R. § 5.24(f).

2 21. As part of invoking an “alternative time frame” extension, the agency must also make
3 available to the requester its FOIA Public Liaison, who is tasked to resolve any dispute between the
4 requester and the agency. 5 U.S.C. § 552(a)(6)(B)(ii); 45 C.F.R. § 5.24(f).

5 22. FOIA Public Liaisons “shall serve as supervisory officials” and “shall be responsible for
6 assisting in reducing delays, increasing transparency and understanding of the status of requests, and
7 assisting in the resolution of disputes.” 5 U.S.C. § 552(l).

8 23. Even when an “unusual circumstances” extension is made, the agency must still notify
9 the requester of its expected date on which a final determination will be dispatched. 5 U.S.C. §
10 552(a)(6)(B)(i); 45 C.F.R. § 5.24(f) (“Whenever we cannot meet the statutory time limit for processing a
11 request because of ‘unusual circumstances,’ as defined in the FOIA, and we extend the time limit on that
12 basis, we will notify you, before expiration of the 20-day period to respond and in writing of the unusual
13 circumstances involved and of the date by which we estimate processing of the request will be
14 completed.”).

15 24. “Exceptional circumstances” for failure to comply with applicable time limits “does not
16 include a delay that results from a predictable agency workload of requests under this section, unless the
17 agency demonstrates reasonable progress in reducing its backlog of pending requests.” 5 U.S.C. §
18 552(a)(6)(C)(ii).

19 25. If an agency fails to provide a final determination on a FOIA request within the statutory
20 timeframe, the requester is deemed to have exhausted its administrative remedies and may immediately
21 file suit against the agency. 5 U.S.C. § 552(a)(6)(C)(i).

22 26. The FOIA also requires agencies to provide “an estimated date on which the agency will
23 complete action on the request.” 5 U.S.C. § 552(a)(7)(B)(ii); *see also* 5 U.S.C. § 552(a)(6)(B)(i).

24 27. Agencies shall make reasonable efforts to maintain their records so they are reproducible
25 for FOIA purposes, and “shall make reasonable efforts to search” for responsive records. 5 U.S.C. §
26 552(a)(3)(B), (C). The term “search” “means to review, manually or by automated means, agency
27 records for the purpose of locating those records which are responsive to a request.” 5 U.S.C. §
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1 552(a)(3)(D).

2 28. In furnishing records responsive to a request under the FOIA, an agency may, for a
3 limited set of categories of information, exclude or withhold such information from disclosure. 5 U.S.C.
4 § 552(b). However, even where proper justification exists for withholding such information, the agency
5 must provide the remaining portions of records that are reasonably segregable from the properly
6 withheld portions thereof. *Id.*

7 29. Except in certain circumstances, when an agency produces a record in response to a
8 FOIA request but withholds a portion thereof, the agency must indicate the volume of information
9 withheld and the exemption under which such information has been withheld. *Id.*; 5 U.S.C. §
10 552(a)(6)(F).

11 30. An agency that withholds public records from a requestor under the FOIA bears the
12 burden of sustaining the legality of its action. 5 U.S.C. § 552(a)(4)(B).

13 31. Requesters under the FOIA may ask that an agency waive fees associated with any
14 request for records “if disclosure of the information is in the public interest because it is likely to
15 contribute significantly to the public understanding of the operations or activities of the government and
16 is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

17 32. An agency may only charge certain fees depending on the category of requester. For non-
18 commercial requesters such as USRTK, “fees shall be limited to reasonable standard charges for
19 document search and duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(III).

20 33. Agencies are prohibited from assessing search fees if the agency fails to comply with the
21 FOIA’s twenty-day determination deadline or any lawful extension under the statute’s “unusual
22 circumstances” provisions. 5 U.S.C. § 552(a)(4)(A)(viii).

23 STATEMENT OF OPERATIVE FACTS

24 *FOIA Request One - #57943*

25 34. USRTK submitted a FOIA Request (“Request One”) to NIH on November 5, 2021.
26 Request One sought a waiver of all fees associated with processing the Request. A copy of Request One
27 is attached hereto as **Exhibit A**.

1 35. Request One seeks agency records related to the SARS-CoV-2 virus and the COVID-19
2 pandemic in the United States. For Part I of the Request, USRTK sought records of all email
3 correspondence between four identified individuals at NIH and two identified email domains. Part II of
4 the Request sought email correspondence to or from Dr. Erik Stemmy and seven identified individuals.
5 The time frame for Request One is 11/1/2013 to 1/1/2018.

6 36. USRTK has no commercial interest or value in records responsive to Request One.

7 37. The records requested by USRTK are likely to contribute significantly to the public
8 understanding of the operations and activities of the government, especially as they pertain to the SARS-
9 CoV-2 virus and the COVID-19 pandemic in the United States.

10 38. USRTK has a demonstrated track record of obtaining and disseminating information
11 obtained under the FOIA and state public records laws concerning public health. Since 2015, USRTK
12 has obtained, posted online, and reported on thousands of industry and government documents gathered
13 via public records requests. USRTK's work has contributed to three New York Times investigations, 15
14 academic papers in public health journals, 13 articles in the BMJ, one of the world's leading medical
15 journals, and global media coverage documenting how food and chemical corporations impact public
16 health and the environment. USRTK's staff has expertise in investigative journalism and advanced
17 research, especially as it concerns impacts on human health.

18 39. USRTK's investigation of the origins of COVID-19 has been featured in news outlets
19 around the world, including the Wall Street Journal, Washington Post, Science, BMJ, USA Today, New
20 Yorker, Vanity Fair, Fox News, The Intercept, Sky News Australia, Daily Mail, The Australian, Bulletin
21 of the Atomic Scientists, RAI 3's Presadiretta, Le Parisien, Le Point, CNET, Taiwan News, La Jornada,
22 The Sun, Daily Caller, New York Post and many others.

23 40. USRTK shares its findings with media outlets, public health and medical journals, and
24 through its own library of information, available online at: <<http://www.usrtk.org>>. Many of USRTK's
25 documents are available through the USRTK Agrichemical Collection of the University of California,
26 San Francisco's ("UCSF") Chemical Industry Documents Archive, available online at:
27 <<https://www.industrydocuments.ucsf.edu/chemical/collections/usrtk-agrichemical-collection/>>, and the
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1 USRTEK Food Industry Collection of the UCSF Food Industry Documents Archive, available online at:
2 <<https://www.industrydocuments.ucsf.edu/food/collections/usrtk-food-industry-collection/>>.

3 41. USRTEK did not receive any communications from NIH following its November 5, 2021,
4 submission of Request One. Consequently, on February 24, 2022, USRTEK sent an email to NIH's FOIA
5 Request email address, "nihfoia@mail.nih.gov." In its email, USRTEK requested that NIH provide an
6 official "determination" on the Request and provide an estimated completion date.

7 42. Roger Bordine, Program Support for the Freedom of Information Office at NIH,
8 responded on February 24, 2022. In that email, Mr. Bordine identified the NIH FOIA tracking number
9 for the Request, "57943 (Murray)," but stated that no estimated completion date could be provided.

10 43. Mr. Bordine's February 24, 2022, email did not apprise USRTEK of (1) NIH's
11 determination of whether or not to comply with Request One; (2) the reasons for its decision; and (3)
12 notice of USRTEK's right to appeal to the head of the agency. 5 U.S.C. § 552(a)(6)(A)(i).

13 44. On December 23, 2022, USRTEK wrote again to NIH. In a letter directed to Gorka Garcia-
14 Malene, the FOIA Officer for NIH, USRTEK formally requested, *inter alia*, that NIH provide an official
15 determination on whether it would comply with Request One, along with an estimated complete date for
16 the Request. USRTEK concluded its letter by noting that this was USRTEK's second request for a
17 determination and that more than a year had passed since the Request was filed with the agency. The
18 letter ended: "If NIH does not promptly provide an ECD and determination, we intend to proceed to
19 litigation."

20 45. To date, USRTEK has received no further communication from NIH about Request One.

21 46. To date, NIH has not provided USRTEK with an estimated date of completion for Request
22 One.

23 47. To date, NIH has not provided USRTEK with a timely and lawful "determination" that
24 informs USRTEK of (1) NIH's determination of whether or not to comply with Request One; (2) the
25 reasons for its decision; and (3) notice of USRTEK's right to appeal to the head of the agency. 5 U.S.C. §
26 552(a)(6)(A)(i).

27 48. At no time has NIH lawfully invoked the FOIA's "unusual circumstances" exception to
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1 the FOIA’s twenty-day determination deadline. 45 C.F.R. § 5.24(f).

2 49. NIH has not shown due diligence in responding to the Request One. 5 U.S.C.
3 § 552(a)(6)(C)(i).

4 50. To date, NIH has failed to issue a decision on USRTK’s request for a waiver of fees
5 associated with the processing of Request One.

6 51. To date, NIH has not produced a single record responsive to Request One.

7 52. USRTK has constructively exhausted all administrative remedies required by the FOIA. 5
8 U.S.C. § 552(a)(6)(A), (a)(6)(C).

9 53. USRTK has been forced to retain the services of counsel and to expend funds litigating
10 Defendant’s unlawful actions and omissions under the FOIA.

11 *FOIA Request Two - #57707*

12 54. USRTK submitted a FOIA Request (“Request Two”) to NIH on January 21, 2022.
13 Request Two sought a waiver of all fees associated with processing the Request. A copy of Request Two
14 is attached hereto as **Exhibit B**.

15 55. Request Two seeks agency records concerning email correspondence to or from Dr.
16 David Morens, National Institute of Allergy and Infectious Diseases, with EcoHealth Alliance or any
17 email address domain of “@ecohealthalliance.org.” The date range for the Request is January 1, 2016, to
18 the present.

19 56. USRTK has no commercial interest or value in records responsive to the Request.

20 57. The records requested by USRTK are likely to contribute significantly to the public
21 understanding of the operations and activities of the government, especially as they pertain to the origins
22 of the SARS-CoV-2 virus and the COVID-19 pandemic in the United States.

23 58. USRTK incorporates and restates Para. 38-40, *supra*.

24 59. NIH acknowledged receipt of Request Two on January 31, 2022. In that
25 acknowledgment, NIH assigned Request Two tracking number “57707 (NIAID).”

26 60. Having received no further communications from NIH, USRTK wrote to Gorka Garcia-
27 Malene on December 23, 2022. In a letter, USRTK requested that NIH provide an official determination

1 on the FOIA request, or at the very least a date certain by which a determination would be forthcoming,
2 as required by the FOIA. USRTK also requested that NIH provide an estimated completion date and that
3 the agency respond to USRTK’s request for a fee waiver.

4 61. NIH did not respond to USRTK’s December 23, 2022, letter.

5 62. To date, USRTK has not received any further communication from NIH about Request
6 Two.

7 63. To date, NIH has not provided USRTK with an updated estimated date of completion.
8 The September 1, 2022, estimated completion date has expired with not a single record being produced.

9 64. To date, NIH has not provided USRTK with a timely and lawful “determination” that
10 informs USRTK of (1) NIH’s determination of whether or not to comply with the Request; (2) the
11 reasons for its decision; and (3) notice of USRTK’s right to appeal to the head of the agency. 5 U.S.C. §
12 552(a)(6)(A)(i).

13 65. At no time has NIH lawfully invoked the FOIA’s “unusual circumstances” exception to
14 the FOIA’s twenty-day determination deadline.

15 66. NIH has not shown due diligence in responding to the request. 5 U.S.C. § 552(a)(6)(C)(i).

16 67. To date, NIH has failed to issue a decision on USRTK’s request for a waiver of fees
17 associated with the processing of the Request.

18 68. To date, NIH has not produced a single record responsive to Request Two.

19 69. USRTK has constructively exhausted all administrative remedies required by the FOIA. 5
20 U.S.C. § 552(a)(6)(A), (a)(6)(C).

21 70. USRTK has been forced to retain the services of counsel and to expend funds litigating
22 Defendant’s unlawful actions and omissions under the FOIA.

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CAUSES OF ACTION

COUNT I

**VIOLATIONS OF THE FREEDOM OF INFORMATION ACT
AND HHS REGULATIONS:**

FAILURE TO PROVIDE TIMELY FINAL DETERMINATION

71. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

72. USRTK has a statutory right to have Defendant process its FOIA requests in a manner that complies with the FOIA. USRTK's rights in this regard were violated by NIH's failure to provide a timely and legally adequate final determination on Requests One and Two (collectively, the "FOIA Requests").

73. To date, USRTK has not received any written communication from NIH about whether the Agency will comply with the FOIA Requests, the Defendant's reasons for making that decision, and any right of USRTK to administratively appeal that decision. 5 U.S.C. § 552(a)(6)(A)(i); 45 C.F.R. Part 5.

74. Based on the nature of USRTK's organizational activities, USRTK will continue to employ FOIA's provisions to request information from Defendant in the foreseeable future. These activities will be adversely affected if Defendant is allowed to continue violating FOIA's response deadlines.

75. Unless enjoined and made subject to a declaration of USRTK's legal rights by this Court, NIH will continue to violate USRTK's rights to receive public records under the FOIA.

76. NIH's failure to make a final determination on the FOIA Requests within the statutory timeframe has prejudiced USRTK's ability to timely obtain public records.

COUNT II

**VIOLATION OF THE FREEDOM OF INFORMATION ACT:
UNLAWFUL WITHHOLDING OF NON-EXEMPT PUBLIC RECORDS**

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5 77. The allegations made in all preceding paragraphs are realleged and incorporated by
6 reference herein.

7 78. USRTK has a statutory right to have Defendant process its FOIA requests in a manner
8 that complies with FOIA. USRTK's rights in this regard were violated when NIH failed to promptly
9 provide public, non-exempt records to USRTK in response to the FOIA Requests, 5 U.S.C. §§
10 552(a)(3)(A) & (b), to provide a reasonable estimate of the volume of withheld records, 5 U.S.C. §
11 552(a)(6)(F), and to reasonably segregate all non-exempt portions of otherwise exempt material, 5
12 U.S.C. § 552(b).

13 79. NIH is unlawfully withholding public disclosure of information sought by USRTK,
14 information to which it is entitled and for which no valid disclosure exemption applies.

15 80. USRTK has constructively exhausted its administrative remedies with respect to this
16 claim for both Request One and Request Two.

17 81. USRTK is entitled to injunctive relief to compel production of all non-exempt,
18 responsive records.

19 82. Based on the nature of USRTK's organizational activities, USRTK will undoubtedly
20 continue to employ FOIA's provisions to request information from Defendant in the foreseeable future.

21 83. USRTK's organizational activities will be adversely affected if Defendant is allowed to
22 continue violating FOIA's response deadlines as it has in this case.

23 84. Unless enjoined and made subject to a declaration of USRTK's legal rights by this Court,
24 NIH will continue to violate the rights of USRTK to receive public records under the FOIA.

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COUNT III

VIOLATION OF THE FREEDOM OF INFORMATION ACT:

FAILURE TO PROVIDE ESTIMATED DATE OF COMPLETION

5 85. The allegations made in all preceding paragraphs are realleged and incorporated by
6 reference herein.

7 86. USRTK has a statutory right to have Defendant process its FOIA requests in a manner
8 that complies with FOIA. USRTK's rights in this regard were violated by NIH's unlawful failure to
9 provide an updated estimated date of completion for both Request One and Request Two, as required by
10 the FOIA, 5 U.S.C. § 552(a)(7)(B)(ii).

11 87. USRTK formally requested that NIH provide an estimated dates of completion for both
12 Request One and Request Two. No such dates were provided by NIH.

13 88. Based on the nature of USRTK's organizational activities, USRTK will continue to
14 employ FOIA's provisions to request information from NIH in the foreseeable future. These activities
15 will be adversely affected if NIH is allowed to continue violating the FOIA's requirements for providing
16 USRTK with an estimated date of completion on its FOIA requests.

17 89. Unless enjoined and made subject to a declaration of USRTK's legal rights by this Court,
18 Defendant will continue to violate the rights of USRTK to receive public records under the FOIA.

19 **REQUEST FOR RELIEF**

20 Wherefore, USRTK prays that this Court:

21 1. Order Defendant to promptly provide USRTK all of the information sought in this action
22 and to immediately disclose the requested records for Requests One and Two in unredacted format
23 unless an exemption is properly claimed and properly applies.

24 2. Declare Defendant's failure to provide USRTK with a final determination for Requests
25 One and Two as unlawful under the FOIA.

26 3. Declare Defendant's failure to promptly provide USRTK with all non-exempt records
27 responsive to Requests One and Two as unlawful under the FOIA.

28 4. Declare Defendant's failure to provide USRTK with an estimated date of completion, or

1 updated estimated date of completion, as required by 5 U.S.C. § 552(a)(7)(B)(ii), unlawful under the
2 FOIA.

3 5. Award USRTK its reasonable attorneys’ fees and costs pursuant to 5 U.S.C.
4 § 552(a)(4)(E) or 28 U.S.C. § 2412.

5 6. Grant such other and further relief to USRTK as the Court may deem just and proper.
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8 DATED: June 15, 2023
9

10 /s/ Rachel Doughty

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17 *Attorneys for Plaintiff US Right to Know*
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19 Under N.D. Cal. Local Rule 5-1(i)(3), in lieu of a signature, I attest that I obtained approval, on June 15,
20 2023, from Rachel S. Doughty and Daniel C. Snyder for the filing of this document.
21

22 /s/Lily Rivo

23 Lily Rivo
24 ATTORNEY FOR PLAINTIFFS
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27
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