UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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 11, 2023.

1. Plaintiff brought this action against Defendant under the Freedom of Information Act via Complaint on September 8, 2021, seeking to compel a response to nine FOIA requests Plaintiff filed:

- October 5, 2020 (FOIA Case No. 55201);
- November 3, 2020 (FOIA Case No. 55344);
- November 5, 2020 (FOIA Case No. 55351);
- December 18, 2020 (FOIA Case No. 55569) [appealed/remanded January 29, 2021];
- December 18, 2020 (FOIA Case No. 55570) [appealed/remanded on February 23 2021];
- March 25, 2021 (FOIA Case No. 56077);

- April 21, 2021 (FOIA Case No. 56212) [portal response only];
- April 29, 2021 (FOIA Case No. 56247)
- and May 11, 2021 (FOIA Case No. 56301).

2. As reported in the August 4, 2023 joint status report (ECF No. 27), Defendant had produced four 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 6,698 pages went out on March 6, 2023. These were productions with respect to requests 55570 and 56212.

3. The fourteenth production of 503 pages went out on June 12, 2024.

4. Productions will continue to be processed every succeeding month hereafter, on or about the 12th of each month, until complete.

5. Defendant will continue to make regularly scheduled productions each month pursuant to the Court's mandated processing rate set forth in the Court's August 11, 2023 Minute Order. There are approximately 10,460 pages reaming to be reviewed and processed.

6. Once Defendant releases all non-exempt records, the parties will confer and attempt to narrow or resolve any substantive issues of disagreement.

7. Pursuant to the Court's August 11, 2023 and June 20, 2024 Minute Orders, which require joint status reports to be filed every thirty days, the next joint status report is due on July 29, 2024 (July 27 being a Saturday). Defendant requests that joint status reports be filed every 90 days.

PLAINTIFF'S REPORT

8. Plaintiff is concerned by growing evidence that the NIH may not be complying with the Federal Records Act and the Freedom of Information Act in its responses to FOIA requests, and especially those related to the origin of COVID-19, which is at issue in this matter.

9. Plaintiff is concerned by evidence that NIH employees communicated about official NIH-related matters, especially those related to the origins of COVID-19 or EcoHealth Alliance, on personal email accounts to intentionally evade FOIA requests.

10. For example, on June 29, 2023, *The Intercept* released an email from David Morens, a senior advisor to the director of the National Institute of Allergy and Infectious Disease, to a group mostly comprised of scientists working on the origins of COVID-19. The email read: "As you know, I try to always communicate on my gmail because my NIH email is FOIA'd constantly." Jimmy Tobias, *Top NIH Official Advised Covid Scientists that He Uses Personal Email to Evade FOIA*, The Intercept (June 29, 2023), https://theintercept.com/2023/06/29/covid-nih-personal-email-foia/.

11. On May 22, 2024, the U.S. House of Representatives Select Subcommittee on the Coronavirus Pandemic Republican Staff released a memorandum containing emails of David Morens. One of his emails reads: "I forgot to clarify in my email yesterday that BOTH my gmail and phone calls are now safe. Text is NOT, as it can be FOIA'd, as can my govt email. So you and Peter and others should be able to email me on gmail only, with the caveat that no other govt. employee is copied at a govt address, as all govt emails are potentially FOIA'able." House Select Subcomm. on the Coronavirus Pandemic, 118th Cong., Staff Memorandum 5 (May 22, 2024), https://oversight.house.gov/wp-content/uploads/2024/05/SSCP-Staff-Memo_Morens-5.22.pdf. This email was addressed to Gerald Keusch, a professor emeritus at Boston University.

"Peter" here may refer to Peter Daszak, President of the EcoHealth Alliance which collaborated with the Wuhan Institute of Virology.

12. Another email from David Morens to Gerald Keusch read: "I ask you both that NOTHING gets sent to me except to my gmail, and make sure that what gets sent to my gmail doesn't have a cc to another government employee who could be FOIA'd." *Id.* at 7.

13. One email sent from David Morens on his gmail account to Gerald Keusch and Peter Daszak addressed the "new NIAID implementation plan" and contained an attachment that was marked "FOUO", or "For Official Use Only." *Id.* at 9–10.

14. In three separate emails released by the Select Subcommittee, David Morens referenced his use of private email addresses or a "'secret' back channel" to communicate with Anthony Fauci, former director of the National Institute of Allergy and Infectious Disease. *Id.* at 3–4.

15. One email from David Morens to Peter Daszak read: "i forgot to say there is no worry about FOIAs. I can either send stuff to Tony [Fauci] on his private gmail, or hand it to him at work or at his house. He is too smart to let colleagues send him stuff that could cause trouble." *Id.* at 3.

16. Plaintiff is concerned by evidence that NIH employees may have intentionally deleted records related to the origins of COVID-19 or EcoHealth Alliance – in apparent violation of the Federal Records Act – to evade FOIA requests.

17. For example, in the same email referenced in paragraph three of the plaintiff's report David Morens wrote: "Don't worry, just send to any of my email addresses and I will delete anything that I don't want to see in the New York Times." Tobias, *Top NIH Official Advised Covid Scientists that He Uses Personal Email to Evade FOIA*, The Intercept.

18. Another email from David Morens released in the Select Subcommittee's May 22, 2024, memorandum read: "That email somehow fell into the hands of the Congressman, probably via a FOIA of someone who didn't delete it, as I did (delete all of Peter's emails and others relating to origin) when the shit started hitting the fan. […] Mine was erased long ago (I verified that today) and I feel pretty sure Tony's was too. The best way to avoid FOIA hassles is to delete all emails when you learn a subject is getting sensitive…" House Select Subcomm. on the Coronavirus Pandemic, Staff Memorandum 18, https://oversight.house.gov/wp-content/uploads/2024/05/SSCP-Staff-Memo_Morens-5.22.pdf.

19. Plaintiff is further concerned that NIH employees other than David Morens may have deleted, or assisted in the deletion of, federal records responsive to FOIA requests.

20. An email written by David Morens read: "We are all smart enough to know to never have smoking guns. And if we did we wouldn't put them in emails. And if we found them we would delete them." *Id.* at 17.

21. Another email from David Morens states: "I learned from our FOIA lady here how to make emails disappear after I am FOIA'd but before the search starts. So I think we are all safe. Plus I deleted most of those earlier emails after sending them to Gmail." *Id.* at 7.

22. Another email from David Morens to Gerald Keusch and Peter Daszak states: "But I learned the tricks from an old friend, Marg Moore, who heads our FOIA office and also hates FOIAs." The email discussed a FOIA request about records related to the Wuhan Institute of Virology. *Id.* at 8.

23. Plaintiff is further concerned that at least one NIH senior employee may have intentionally misspelled keywords related to the origins of COVID-19 or EcoHealth Alliance, apparently to evade FOIA requests.

24. For example, on May 28, 2024, Brad Wenstrup, Chairman of the U.S. House of Representatives Select Subcommittee on the Coronavirus Pandemic, released a letter to Monica Bertagnolli, Director of the National Institutes of Health, which contains emails from Greg Folkers, former chief of staff to Anthony Fauci, director of the National Institute of Allergy and Infectious Disease. One email written by Greg Folkers misspells "EcoHealth" as "Ec~Health" and another misspells virologist Kristian Andersen's name as "anders$n." House Select Subcomm. on the Coronavirus Pandemic, 118th Cong., Letter to Monica Bertagnolli, Director of NIH, 3–4 (May 28, 2024), https://oversight.house.gov/wp-content/uploads/2024/05/2024.05.28-BRW-Letter-to-NIH-Re.-FOIA_Redacted.pdf.

DEFENDANT'S STATEMENT

Defendant objects to Plaintiff's foregoing report in paragraphs 8-24. NIH, despite an extremely burdensome FOIA caseload, has been abiding by this Court's August 11, 2023 Minute Order and has been reviewing records and making monthly productions of records and information to Plaintiff in accordance with the requirements of the Freedom of Information Act and Plaintiff's requests, and will continue to do so. The NIH FOIA Officer overseeing this case is not aware of any of the alleged actions described in Plaintiff's foregoing report having any impact on this litigation and requests that the Court not take the report into consideration at this time.

Defendant also requests that, given the number of pages remaining to be reviewed and processed, the Court's August 11, 2023 and June 20, 2024 Minute Orders be amended to provide that joint status reports be filed every 90 days (rather than 30), and that the next joint status report be filed on September 27, 2024. That modification will diminish the administrative burdens on the Court and the parties. Defendant will continue to make monthly productions to Plaintiff. A proposed order is attached.

Dated: June 27, 2024

Respectfully Submitted,

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[PROPOSED] ORDER

Pursuant to the request made by Defendant in the Joint Status Report filed on June 27, 2024, the parties shall hereafter provide Joint Status Reports every 90 days. Within 30 days of the completion of production, the parties shall file another joint status report informing the court whether any disputes remain and recommending a path forward for resolution of this matter.

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TANYA S. CHUTKAN
United States District Judge