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8
9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**

11 Informed Consent Action Network,
12 Plaintiff,
13 v.
14 National Institutes of Health,
15 Defendant.

CV-20-01277-JJT

JOINT PROPOSED CASE
MANAGEMENT PLAN

16
17 Pursuant to the Order filed on August 17, 2020 (Dkt. 12), Plaintiff and Defendant
18 submit their Joint Case Management Plan in advance of the telephonic Scheduling
19 Conference set for October 1, 2020 at 9:00 a.m.

20 **1. NATURE OF THE CASE**

21 Plaintiff has brought this action for injunctive and declarative relief under the
22 Freedom of Information Act, 5 U.S.C. § 552 (FOIA), pertaining to 13 FOIA requests it
23 submitted to the National Institutes of Health (NIH). As of the date of this filing, NIH has
24 fully responded to five of the requests; the remaining eight requests are in process.
25 Although the parties are attempting to narrow the issues for this Court's review, the parties
26 currently seek to brief the issue of whether the agency adequately searched for and properly
27 withheld documents in its response(s) to one of the five FOIA requests for which the NIH
28 issued a final response. In addition, if the parties are unable to agree on a plan for

1 processing documents related to the eight remaining requests, they will seek to brief this
2 issue with the Court as well.

3 **2. ELEMENTS OF PROOF**

4 Once the parties identify any outstanding issues for briefing, the defending agency
5 will have the burden of showing that its search was adequate and/or that any withheld
6 documents fall within an exemption to the FOIA. *Hardy v. U.S. Dep't of Defense*, 2001
7 WL 34354945 (D. Ariz. Aug. 27, 2001) (citing *Carney v. U.S. Dep't of Justice*, 19 F.3d
8 807, 812 (2d Cir. 1994)).

9 **3. FACTUAL AND LEGAL ISSUES IN DISPUTE**

10 Due to the unique procedural posture of this FOIA case, all of the ultimate issues to
11 be decided by the Court are not yet fully identified. At this time, Plaintiff will challenge
12 NIH's adequacy of search and withholding of documents with respect to FOIA request
13 number 54464.

14 Since the filing of the lawsuit, counsel have been working to develop a plan to
15 narrow the scope of the remaining requests and to agree on a processing timeline for them.

16 **4. JURISDICTIONAL BASIS**

17 The Court has jurisdiction pursuant to 5 U.S.C. § 552 (FOIA).

18 **5. SERVICE**

19 As of the date of this filing, service has been perfected.

20 **6. PARTIES NOT SUBJECT TO THE COURT'S JURISDICTION**

21 None.

22 **7. DISPOSITIVE MOTIONS**

23 For FOIA request 54464, the parties respectfully submit the following summary
24 judgment briefing schedule:

25
26 Government's Motion for Summary Judgment: October 30, 2020
27 Plaintiff's Opposition and Cross-motion: November 13, 2020
28 Government's Opposition and Reply: December 4, 2020
Plaintiff's Reply: December 18, 2020

1 As discussed above, the parties intend to resolve any outstanding issues concerning
2 the remaining requests through summary judgment if necessary.

3 **8. REFERENCE TO MAGISTRATE JUDGE OR SPECIAL MASTER**

4 The parties do not seek referral to a magistrate judge or special master.

5 **9. RELATED CASES**

6 None.

7 **10. INITIAL DISCLOSURES**

8 Pursuant to LRCV 16.2(b)(1)(A), this case is assigned to the Expedited Case
9 Management Track. This Court's review of the agency's actions in responding to
10 Plaintiff's FOIA requests will be based upon the administrative record. Thus, for this case,
11 the parties agree that initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1)(B) will not be
12 exchanged.

13 **11. PROPOSED DEADLINES**

14 The parties intend to continue meeting and conferring and, to the extent that the
15 parties cannot agree on a pace of processing the remaining eight requests, the parties will
16 seek input from the Court.

17 **12. SCOPE OF DISCOVERY**

18 *Government's position:* The Government does not anticipate discovery being
19 conducted in this case. Discovery is not typically a part of FOIA cases. *Lane v. Dep't of*
20 *Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008) (citing *Weiner v. FBI*, 943 F.2d 972, 977 (9th
21 Cir. 1191); *Broadrick v. Exec. Office of the President*, 139 F. Supp. 2d 55, 63 (D.D.C.
22 2001)). "As a general rule, all FOIA determinations should be resolved on summary
23 judgment." *Lawyers' Comm. for Civil Rights of San Francisco Bay Area v. U.S. Dep't of*
24 *the Treasury*, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008) (citing *Nat'l Wildlife Fed'n v.*
25 *U.S. Forest Service*, 861 F.2d 1114 (9th Cir. 1988)).

26 *Plaintiff's position:* Even though discovery is not required at this time, Plaintiff
27 wishes to reserve its right to seek discovery following the government's submission of any
28 summary judgment motion(s). "A district court has wide latitude in

1 controlling discovery.” *Lane v. Dep’t of Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008). In
2 the Ninth Circuit, “it is indisputable that discovery is permissible in a FOIA case...After a
3 government defendant has moved for summary judgment in a FOIA case and submitted its
4 supporting affidavits, some courts have permitted...certain discovery relating to the
5 exemption(s) claimed and/or the adequacy of the search when the plaintiff impugns the
6 government affidavits with evidence of bad faith or when some other deficiency renders
7 the affidavits insufficient.” *Lion Raisins, Inc. v. U.S. Dep’t of Agric.*, No. 1:08-CV-00358-
8 OWW-SMS, U.S. Dist. LEXIS 6979, at 6* (E.D. Cal. 2009) (citing *Carney v. U.S. Dept.*
9 *of Justice*, 19 F3d 807, 812 (2d Cir 1994)) (holding that even in the absence of bad faith,
10 the plaintiff was still entitled to discovery). Typically, courts make the determination
11 regarding whether discovery is appropriate in FOIA matters after the government submits
12 its affidavit in support of its summary judgment motion. *Id.* Therefore, Plaintiff
13 respectfully seeks to preserve the right to seek discovery at a later date if it believes
14 discovery is necessary and appropriate.

15 **13. LENGTH OF TRIAL**

16 The parties anticipate this case being resolved on summary judgment, if not through
17 negotiated settlement.

18 **14. JURY TRIAL**

19 No jury trial has been requested.

20 **15. SETTLEMENT PROSPECTS**

21 The parties have been in frequent communication since the initiation of this
22 litigation, and will continue to work towards further narrowing the issues for this Court’s
23 review. In the event the parties are able to fully resolve the matter, they will file a notice
24 of settlement with the Court.

25 **16. CLASS ACTIONS**

26 Not applicable.

27 **17. COMPLEX ISSUES**

28 None.

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18. OTHER MATTERS

None.

Respectfully submitted this 23rd day of September 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2020, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant(s):

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