

FREEDOM OF INFORMATION ACT APPEAL

VIA ONLINE PORTAL

August 18, 2021

Deputy Agency Chief FOIA Officer
Office of the Assistant Secretary for Public Affairs
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, Suite 729H
Washington, D.C. 20201

Re: FOIA Appeal of 21-00172-FOIA (IR#0358)

Dear Sir or Madam:

This firm represents Informed Consent Action Network (“**ICAN**”). On behalf of ICAN, on November 2, 2020, we requested records from the files of the Centers for Disease Control and Prevention (“**CDC**”) pursuant to the Freedom of Information Act (5 U.S.C. § 552, as amended) (“**FOIA**”). The CDC assigned the request number 21-00172-FOIA (the “**FOIA Request**”). In a production dated May 20, 2021, Roger Andoh, CDC/ATSDR FOIA Officer (the “**CDC Officer**”), redacted portions of the responsive documents pursuant to 5 U.S.C. § 552 (b)(4), (b)(5), and (b)(6) (the “**Redacted Emails**”). ICAN writes now to appeal these redactions.

A. The FOIA Request

The FOIA Request dated November 2, 2020, sought the following documents:

Individual’s emails to be searched	Frank DeStefano
Date Range	October 1, 2010 through date of search
Search Terms to be run in the to, from, cc, or bcc fields	@gsk OR @sanofipasteur OR @merck OR @pfizer

(Exhibit A.)¹

On November 2, 2020, the CDC issued an acknowledgment and assigned the number 21-00172-FOIA to the FOIA Request. (Exhibit B.)

¹ All “Exhibits” referenced herein are appended to this letter.

On November 12, 2020, the CDC sent a letter to ICAN claiming that the FOIA Request was “unreasonably burdensome.” (**Exhibit C.**) ICAN therefore agreed to limit the date range from 10 years (October 1, 2010 through the date of the search) to 5 years (January 1, 2015 through the date of the search). (**Exhibit D.**)

B. The Final Response to the FOIA Request

On May 20, 2021, the CDC produced 1,660 pages and responded to the FOIA Request (the “**Final Response**”), in relevant part, as follows:

This letter is regarding your Centers for Disease Control and Prevention and Agency for Toxic Substances and Disease Registry (CDC/ATSDR) Freedom of Information Act (FOIA) request of November 2, 2020, assigned #21-00172-FOIA, for “see attached request.”

We located 1660 pages of responsive records (1660 pages released in full or part. After a careful review of these pages, some information was withheld from release pursuant to 5 U.S.C. §552 Exemptions 4, 5, and 6.

EXEMPTION 4

Exemption 4 protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential. The information withheld is commercial or financial information, such as draft manuscript, and we have determined that the individual/s to whom this information pertains have a substantial commercial or financial interest in withholding it.

EXEMPTION 5

Exemption 5 protects inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. Exemption 5 therefore incorporates the privileges that protect materials from discovery in litigation, including the deliberative process, attorney work-product, and attorney-client privileges. Information withheld under this exemption was protected under the deliberative process privilege. The deliberative process privilege protects the decision-making process of government agencies. The deliberative process privilege protects materials that are both predecisional and deliberative. The materials that have been withheld under the deliberative process privilege of Exemption 5 are both predecisional and deliberative, and do not contain or represent formal or informal agency policies or decisions. Examples of information withheld include internal deliberative discussions.

EXEMPTION 6

Exemption 6 protects information in personnel and medical files and similar files when disclosure would constitute a clearly unwarranted invasion of personal privacy. The information that has been withheld under Exemption 6 consists of personal information, such as personal email address. We have determined that the individual(s) to whom this information pertains has a substantial privacy interest in withholding it.

(Exhibit E.)

C. Argument

In *Ancient Coin Collectors Guild v. U.S. Dep't of State*, the D.C. Circuit Court stated, “an agency withholding responsive documents from a FOIA request bears the burden of proving the applicability of the claimed exemptions.” 395 U.S. App. D.C. 138, 143 (D.C. Cir. 2011) (citing *American Civil Liberties Union v. U.S. Dept. of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011)). Even if the agency meets its burden to show the applicability of a particular exemption, the agency is required to “take reasonable steps necessary to segregate and release nonexempt information.” 5 U.S.C. § 552(a)(8)(A)(ii)(II). As explained below, CDC has improperly withheld information pursuant to Exemptions 4, 5, and 6 without segregating and releasing nonexempt information.

1. CDC has improperly withheld information pursuant to Exemption 4

Redactions made pursuant to Exemption 4 are inappropriate because CDC has made no showing that the redacted information is commercial, financial, or confidential. CDC’s Final Response makes a conclusory remark stating that the information is “commercial or financial information, such as draft manuscript” without providing an adequate justification for withholding the information. CDC’s conclusory response, and in many cases, the redacted documents themselves, give no information by which ICAN can judge whether or not the redacted information is confidential in nature.

Further, ICAN notes that in some cases, the redactions made pursuant to Exemption 4 were applied inconsistently. For example, CDC redacted the body of an email dated October 31, 2014 from David Vaughn (david.w.vaughn@gsk.com), but produced the same email in unredacted form elsewhere in CDC’s production.

Therefore, CDC has failed to overturn the presumption of disclosure under FOIA, 5 U.S.C. § 552(a)(3)(A).

2. CDC has improperly withheld information pursuant to Exemption 5

The Second Circuit has set forth a three-prong test to determine if the deliberative process privilege applies to documents sought under FOIA. The exemption applies only if the document is: (1) an inter-agency or intra-agency document; (2) “predecisional”; and (3) deliberative. *Tigue v. United States DOJ*, 312 F.3d 70, 76 (2d Cir. 2002).

Concerning the first prong, if a document either originated from or was provided to an entity that is not a federal government agency, then the document is not an intra- or inter-agency document and does not fall under the protective purview of the exemption. *Sorin v. United States DOJ*, 280 F. Supp. 3d 550, 560 (S.D.N.Y. 2017). CDC redacted full pages without providing the detail necessary for ICAN to determine if the emails qualify as intra- or inter-agency.

Regarding the second prong, a document is predecisional when it is “prepared in order to assist an agency decisionmaker in arriving at his decision.” *Hopkins v. U.S. Dep’t of Hous. & Urban Dev.*, 929 F.2d 81, 84 (2d Cir. 1991) (internal quotation marks omitted). CDC redacted full pages without providing the detail necessary for ICAN to determine if the redacted pages were in fact predecisional.

Regarding the third prong, a document is deliberative when it is “actually . . . related to the process by which policies are formulated.” *Iraqi Refugee Assistance Project v. United States Dept. of Homeland Sec.*, 2017 U.S. Dist. LEXIS 44563, at *11-12 (S.D.N.Y. Mar. 27, 2017) (internal quotation marks omitted). This standard requires the agency to explain “(i) the nature of the specific deliberative process involved, (ii) “the function and significance of the documents in that process,” and (iii) “the nature of the decisionmaking authority vested in the document’s author and recipient.” *Brennan Ctr. For Justice at NY Univ. Sch. of Law v Dept. of Homeland Sec.*, 331 F. Supp. 3d 74, 93-94 (S.D.N.Y. 2018) (internal quotation marks omitted). HHS failed to carry its burden and has not provided any information to indicate how the redacted information is actually related to the process by which policies are formulated.

Furthermore, numerous emails referenced draft documents, and drafts of documents are not automatically covered by Exemption 5. *Judge Rotenberg Educ. Ctr., Inc.*, 376 F. Supp. 3d at 69 (stating that “[d]ocuments designated as “drafts” are not per se covered under the deliberative-process privilege, but rather must meet the same two criteria as any other record.”).

In all events, “[e]xemption 5 claims must be supported with specificity and [in] detail.” *Judge Rotenberg Educ. Ctr., Inc. v. United States FDA*, 376 F. Supp. 3d 47, 65 (D.D.C. 2019) (citations omitted). Here, CDC failed to provide any specificity or detail regarding redactions made pursuant to Exemption 5, merely stating that:

The materials that have been withheld under the deliberative process privilege of Exemption 5 are both predecisional and deliberative, and do not contain or represent formal or informal agency policies or decisions. Examples of information withheld include internal deliberative discussions.

This information is conclusory and is insufficient to overcome the presumption of disclosure. *See Wilderness Soc’y v. United States DOI*, 344 F. Supp. 2d 1 (D.D.C. 2004) (finding that agency’s conclusory allegations that the withheld information was predecisional was insufficient to substantiate agency’s invocation of Exemption 5). Furthermore, within the productions, there are entire pages redacted, suggesting that the CDC failed to segregate and release nonexempt

information as required by 5 U.S.C. § 552(a)(8)(A)(ii)(II). Therefore, the CDC has failed to meet its burden under FOIA and the responsive records must be produced in full.

Even if the redacted information qualifies for the deliberative process privilege in part, that privilege does not include purely factual material. *Hopkins*, 929 F.2d at 85. *See also, ACLU v. DOD*, 2017 U.S. Dist. LEXIS 159108, at *18-19 (S.D.N.Y. Sep. 27, 2017) (holding that documents consisting of factual material contained in deliberative memoranda and severable from its context would generally be available).

For the foregoing reasons, Exemption 5 is not applicable, and the redacted information must be produced.

3. CDC has improperly withheld information pursuant to Exemption 6

The CDC also failed to meet its burden of proving the applicability of Exemption 6 to the redacted and/or withheld records. Exemption 6 applies to prevent disclosure of “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). When evaluating withholdings under Exemption 6, there is a “presumption in favor of disclosure [that] is as strong as can be found anywhere in the Act.” *Multi Ag Media LLC v. U.S. Dep’t of Agric.*, 515 F.3d 1224, 1227 (D.C. Cir. 2008) (quoting *Nat’l Ass’n of Homebuilders v. Norton*, 309 F.3d 26, *32 (D.C. Cir. 2002)). (internal quotation marks omitted). Therefore, an agency may withhold personal information only if “disclosure would compromise a substantial, as opposed to a *de minimis*, privacy interest.” *Nat’l Ass’n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989).

In many cases, the CDC redacted entire email addresses from the production. ICAN acknowledges that entire email addresses may be private information subject to redaction under Exemption 6 in certain circumstances. In this case, however, ICAN cannot even determine which organization, if any, the recipient is affiliated with. Any privacy interest that a person has in the domain name associated with their email address is *de minimus* in light of the purpose of FOIA, which is to contribute to “public understanding of the operations or activities of the government.” *N.Y. Times Co. v. FCC*, 457 F. Supp. 3d 266, 272 (S.D.N.Y. 2020) (quoting *Cook v. Nat’l Archives & Records Admin.*, 758 F.3d 168, 177 (2d Cir. 2014)).

D. Appellate Request

Given the foregoing, ICAN hereby appeals and requests that CDC produces the redacted materials within 20 days of this appeal. Thank you for your time and attention to this matter. If you require any additional information, please contact me at (212) 532-1091 or through email at foia@sirillp.com.

Very truly yours,

/s/ Gabrielle G. Palmer
Gabrielle G. Palmer, Esq.

Enclosures

Exhibit A

FREEDOM OF INFORMATION ACT REQUEST

VIA EMAIL

November 2, 2020

Roger Andoh
Freedom of Information Officer
Centers for Disease Control and Prevention
1600 Clifton Road, N.E., Building 57, Room MS D-54
Atlanta, Georgia 30333
Fax: (404) 235-1852
FOIARequests@cdc.gov

Re: Frank DeStefano Communications (IR#0358)

Dear Mr. Andoh:

This firm represents the Informed Consent Action Network ("ICAN"). On behalf of ICAN, please provide the following records to foia@sirillp.com in electronic form:

Individual's emails to be searched	Frank DeStefano
Date Range	October 1, 2010 through date of search
Search Terms to be run in the to, from, cc, or bcc fields	@gsk OR @sanofipasteur OR @merck OR @pfizer

We ask that you waive any and all fees or charges pursuant to 5 U.S.C. § 552 (a)(4)(A)(iii). ICAN is a not-for-profit 501(c)(3) organization whose mission is to raise public awareness about vaccine safety and to provide the public with information to give informed consent. As part of their mission, ICAN actively investigates and disseminates information regarding vaccine safety issues, including through their website, and through press events and releases. They are seeking the information in this FOIA request to allow them to contribute to the public understanding of the government's vaccine safety programs, including the government's efforts to promote vaccine safety. The information we are requesting will not contribute to any commercial activities.

Please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We therefore request that we be provided with all non-exempt portions which are reasonably segregable. We further request that you describe any deleted or withheld material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies. Please also separately

state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements may help to avoid unnecessary appeal and litigation. ICAN of course reserves all rights to appeal the withholding or deletion of any information.

Access to the requested records should be granted within twenty (20) business days from the date of your receipt of this letter. Failure to respond in a timely manner shall be viewed as a denial of this request and ICAN may immediately file an administrative appeal.

If you would like to discuss our requests or any issues raised in this letter, please feel free to contact me at (212) 532-1091 during normal business hours. Thank you for your time and attention to this matter.

Very truly yours,

/s/ Elizabeth A. Brehm
Elizabeth A. Brehm, Esq.

Exhibit B

S&G Information Request Staff

From: Centers for Disease Control and Prevention / Agency for Toxic Substances and Disease Registry <foiarequests@cdc.gov>
Sent: Monday, November 2, 2020 2:14 PM
To: S&G Information Request Staff
Subject: Request Acknowledgement by FOIA

Dear Elizabeth Brehm,

Case Number 21-00172-FOIA has been assigned to the request you submitted. In all future correspondence regarding this request please reference case number 21-00172-FOIA.

Regards,
FOIA

Exhibit C



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

Centers for Disease Control
and Prevention (CDC)
Atlanta GA 30333

November 12, 2020

Elizabeth Brehm
Siri & Glimstad
200 Park Ave
17th Floor
New York, NY 10166
Via email: foia@sirillp.com

Dear Ms. Brehm:

This letter is regarding to your Centers for Disease Control and Prevention and Agency for Toxic Substances and Disease Registry (CDC/ATSDR) Freedom of Information Act (FOIA) request of November 2, 2020, assigned #21-00172-FOIA, regarding your attached request.

This letter is to notify you that you have submitted an unreasonably burdensome request, because the agency would have to commit an unreasonable amount of time and resources to respond to your request, as written. You can assist the agency conduct a reasonable search for records if you agree to:

*Reduce the date range from October 1, 2010 through date of search terms to the last three calendar years.

Please email your response to me at hur7@cdc.gov, no later than December 2, 2020. If you fail to submit a reasonable request by that date, we will consider your request withdrawn.

Sincerely,

LaShonda Schofield

LaShonda Schofield
CDC/ATSDR FOIA Office
Office of the Chief Operating Officer
(770) 488-6399
Fax: (404) 235-1852

21-00172-FOIA

Exhibit D

S&G Information Request Staff

From: S&G Information Request Staff
Sent: Monday, December 14, 2020 11:37 AM
To: Centers for Disease Control and Prevention / Agency for Toxic Substances and Disease Registry
Subject: RE: Status Update for Request #21-00172-FOIA

Good afternoon,

After discussing this with attorney Elizabeth Brehm and our client, we have agreed to limit the search to 5 years, January 1, 2015-date of search, rather than the originally requested 10 years. Please confirm receipt of this updated request.

Thank you,
Ashley

From: Centers for Disease Control and Prevention / Agency for Toxic Substances and Disease Registry
<foiarequests@cdc.gov>
Sent: Thursday, November 12, 2020 1:57 PM
To: S&G Information Request Staff <foia@sirillp.com>
Subject: Status Update for Request #21-00172-FOIA

Dear Elizabeth Brehm,

The status of your FOIA request #21-00172-FOIA has been updated to the following status 'On Hold - Other'. To log into the CDC FOIA Public Access Link click on the Application URL below.

<https://foia.cdc.gov/>

Sincerely,
FOIA

Exhibit E



Centers for Disease Control
and Prevention (CDC)
Atlanta GA 30333
May 20, 2021

Elizabeth Brehm
Siri & Glimstad
200 Park Avenue
17th Floor
New York, NY 10166
Via email: foia@sirillp.com

Dear Ms. Brehm:

This letter is regarding your Centers for Disease Control and Prevention and Agency for Toxic Substances and Disease Registry (CDC/ATSDR) Freedom of Information Act (FOIA) request of November 2, 2020, assigned #21-00172-FOIA, for "see attached request."

We located 1660 pages of responsive records (1660 pages released in full or part. After a careful review of these pages, some information was withheld from release pursuant to 5 U.S.C. §552 Exemptions 4, 5, and 6.

EXEMPTION 4

Exemption 4 protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential. The information withheld is commercial or financial information, such as draft manuscript, and we have determined that the individual/s to whom this information pertains have a substantial commercial or financial interest in withholding it.

EXEMPTION 5

Exemption 5 protects inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. Exemption 5 therefore incorporates the privileges that protect materials from discovery in litigation, including the deliberative process, attorney work-product, and attorney-client privileges. Information withheld under this exemption was protected under the deliberative process privilege. The deliberative process privilege protects the decision-making process of government agencies. The deliberative process privilege protects materials that are both predecisional and deliberative. The materials that have been withheld under the deliberative process privilege of Exemption 5 are both predecisional and deliberative, and do not contain or represent formal or informal agency policies or decisions. Examples of information withheld include internal deliberative discussions.

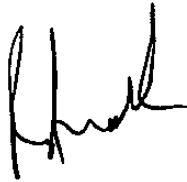
EXEMPTION 6

Exemption 6 protects information in personnel and medical files and similar files when disclosure would constitute a clearly unwarranted invasion of personal privacy. The information that has been withheld under Exemption 6 consists of personal information, such as personal email address. We have determined that the individual(s) to whom this information pertains has a substantial privacy interest in withholding it.

You may contact our FOIA Public Liaison at 770-488-6277 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with the response to this request, you may administratively appeal by writing to the Deputy Agency Chief FOIA Officer, Office of the Assistant Secretary for Public Affairs, U.S. Department of Health and Human Services, Hubert H. Humphrey Building, 200 Independence Avenue, Suite 729H, Washington, D.C. 20201. You may also transmit your appeal via email to FOIARequest@psc.hhs.gov. Please mark both your appeal letter and envelope "FOIA Appeal." Your appeal must be postmarked or electronically transmitted by August 18, 2021.

Sincerely,

A handwritten signature in black ink, appearing to read 'Roger Andoh', with a stylized, cursive script.

Roger Andoh
CDC/ATSDR FOIA Officer
Office of the Chief Operating Officer
(770) 488-6399
Fax: (404) 235-1852

Enclosures

21-00172-FOIA