

CDC FREEDOM OF INFORMATION ACT APPEAL

SUBMITTED VIA EMAIL

December 21, 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
FOIARequest@psc.hhs.gov

Re: Appeal of CDC Case Number 21-00597-FOIA (IR#0397)

Dear Sir or Madam:

This firm represents Informed Consent Action Network (“**ICAN**”). On behalf of our client, on February 2, 2021, we submitted a request for 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**”). On September 24, 2021, Roger Andoh, CDC/ATSDR FOIA Officer (the “**CDC Officer**”), issued a final response (the “**Final Response**”). ICAN writes now to appeal the Final Response.

A. The FOIA Request

On February 2, 2021, ICAN submitted the following request to the CDC (the “**FOIA Request**”):

On behalf of ICAN, please provide the following records dated between November 29, 2015 through present to foia@sirillp.com in electronic form:

- 1. Any communications sent or received by Amanda Cohn to or from representatives, directors, officers, or employees of GlaxoSmithKline (or Glaxo or GSK).**
- 2. Any communications sent or received by Amanda Cohn to or from representatives, directors, officers, or employees of Sanofi.**

3. **Any communications sent or received by Amanda Cohn to or from representatives, directors, officers, or employees of Merck & Co.**
4. **Any communications sent or received by Amanda Cohn to or from representatives, directors, officers, or employees of Pfizer.**

(Exhibit A.)¹

On February 4, 2021, CDC issued an acknowledgment and assigned FOIA request number 21-00597-FOIA to the FOIA Request. (Exhibit B.)

B. The Final Response

On September 24, 2021, the CDC Officer issued a final response to the FOIA Request and stated in relevant part:

We located 1999 pages of responsive records (1427 pages withheld in full, 199 pages disclosed in part, 367 pages released in full, 6 pages referred to HHS). After a careful review of these pages, some information was withheld from release pursuant to 5 U.S.C. §552 Exemption 4, 5, and 6.

(Exhibit C.)

C. Argument

CDC improperly withheld documents and information pursuant to exemptions 4, 5, and 6. For the reasons set forth below, ICAN appeals the Final Response.

Exemption 4

Redactions made and documents withheld pursuant to Exemption 4 are inappropriate because CDC has made no showing that the redacted and withheld 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 commercial analysis" 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, which casts doubt on the appropriateness of CDC's redactions. As one example, CDC produced an email from Rebecca Lewandowski to Mary M. Moran dated January 13, 2021 as well as Mary Moran's response to Rebecca Lewandowski. In the first email, the

¹ All "Exhibits" referenced herein are appended to this letter.

subject line “Pfizer 6th Dose Discussion-timeline/next steps follow-up” was not redacted. However, in the second email, the words “Pfizer 6th Dose” were redacted under Exemption 4.

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

Exemption 5

Redactions made and documents withheld pursuant to the deliberative process privilege are not appropriate. The deliberative process privilege is designed to prevent disclosure of inter-agency or intra-agency “documents reflecting advisory opinions, recommendations and deliberations comprising part of [the] process by which government decisions and policies are formulated.” *Nat’l Day Laborer Org. Network v. United States Immigration & Customs Enf’t*, 486 F. Supp. 3d 669, 690 (S.D.N.Y. 2020). Documents withheld pursuant to this privilege must be both “(1) pre[-]decisional, i.e., prepared in order to assist an agency decision[maker] in arriving at his decision, and (2) deliberative, i.e., actually related to the process by which policies are formulated.” *Id.*

In the FOIA Request, ICAN requested communications between a CDC employee and representatives, directors, officers, or employees of four pharmaceutical companies. The redacted and withheld documents are not inter- or intra-agency and cannot be predecisional or deliberative because pharmaceutical companies have a conflict of interest that prevent them from shaping government policy.

Even if the deliberative process privilege applies (which ICAN disputes), it “does not protect documents in their entirety; if the government can segregate and disclose non-privileged factual information within a document, it must.” *Nat’l Day Laborer Org. Network v. United States Immigration & Customs Enf’t*, 486 F. Supp. 3d 669, 689 (S.D.N.Y. 2020) (quoting *Loving v. Dep’t of Def.*, 550 F.3d 32, 38 (D.C. Cir. 2008)). To the extent the redacted documents include non-exempt information, including a signature block, date, or any other non-deliberative information, such information must be segregated and disclosed to ICAN.

Exemption 6

The CDC also failed to meet its burden of proving the applicability of Exemption 6. 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).

ICAN acknowledges that certain information, including patient names and other personally identifiable information, is subject to Exemption 6. Disclosure of information such as race and ethnicity, however, does not constitute “a clearly unwarranted invasion of personal privacy.” CDC has therefore failed to meet its burden to show the applicability of Exemption 6.

D. Appellate Request

Given the foregoing, ICAN hereby appeals and requests that the documents responsive to the FOIA Request be produced 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/ Aaron Siri

Aaron Siri, Esq.

Gabrielle G. Palmer, Esq.

Enclosures

Exhibit A

Siri | Glimstad

200 Park Avenue, Seventeenth Floor, New York, NY 10166
sirillp.com | P: (212) 532-1091 | F: (646) 417-5967

FREEDOM OF INFORMATION ACT REQUEST

VIA EMAIL

February 2, 2021

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: Amanda Cohn Communications (IR#0397)

Dear Mr. Andoh:

This firm represents the Informed Consent Action Network (“ICAN”). On behalf of ICAN, please provide the following records dated between November 29, 2015 through present to foia@sirillp.com in electronic form:

- 1. Any communications sent or received by Amanda Cohn to or from representatives, directors, officers, or employees of GlaxoSmithKline (or Glaxo or GSK).**
- 2. Any communications sent or received by Amanda Cohn to or from representatives, directors, officers, or employees of Sanofi.**
- 3. Any communications sent or received by Amanda Cohn to or from representatives, directors, officers, or employees of Merck & Co.**
- 4. Any communications sent or received by Amanda Cohn to or from representatives, directors, officers, or employees of 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



February 4, 2021

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

Dear Ms. Brehm:

The Centers for Disease Control and Prevention and Agency for Toxic Substances and Disease Registry (CDC/ATSDR) received your Freedom of Information Act (FOIA) request dated February 2, 2021. Your request assigned number is 21-00597-FOIA, and it has been placed in our complex processing queue.

Extension of Time

In unusual circumstances, an agency can extend the twenty-working-day limit to respond to a FOIA request.

We will require more than thirty working days to respond to your request because:

- We reasonably expect that two or more CDC centers, institutes, and offices (C/I/Os) may have responsive records.
- We reasonably expect to receive and review voluminous records in response to your request.
- We reasonably expect to consult with two or more C/I/O/s, or another HHS operating division or another federal agency about your request.

To process your request promptly, please consider narrowing the scope of your request to limit the number of responsive records. If you have any questions or wish to discuss reformulation or an alternative time frame for the processing of your request, you may contact the analyst handling your request LaShonda Schofield at 770-488-6241 or our FOIA Public Liaison, Roger Andoh at 770-488-6277. Additionally, you may contact the Office of Government Services (OGIS) 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.

Fees and Fee Waivers

You requested that we waive fees associated with processing your request, your request is denied because it doesn't meet the following criteria:

- You have failed to demonstrate that you disseminate information to the public.
- You have failed to provide enough information to warrant a waiver of fees.

Fee Category (Choose only applicable fee category)

Because you are considered a “Commercial requester,” you will be charged search, review and duplication fees. Duplication fees will be charged only if you choose to receive any responsive records in hard copy. (10 cents/page)

Because you are considered a “News Media requester,” you will not be charged fees unless you choose to receive responsive records in hard copy. (10 cents/page)

Because you are considered an “Educational requester,” you will not be charged fees unless you choose to receive any responsive records in hard copy (10 cents/page).

Because you are considered a “Non-Commercial Scientific requester,” you will not be charged fees unless you choose to receive any responsive records in hard copy (10 cents/page).

Because you are considered an “Other requester” you are entitled to two hours of free search time, and up to 100 pages of duplication (or the cost equivalent of other media) without charge, and you will not be charged for review time. We may charge for search time beyond the first two hours and for duplication beyond the first 100 pages. (10 cents/page).

Cut-off-date

If you don’t provide us with a date range for your request, the cut-off date for your request will be the date the search for responsive records starts.

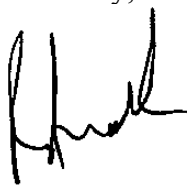
Appeal Rights

You have the right to appeal the agency’s expedited processing and/or fee waiver response to your request. You may mail your appeal 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. Your appeal must be postmarked or electronically transmitted by May 4, 2021.

You may check on the status of your case on our FOIA webpage <https://foia.cdc.gov/app/Home.aspx> and entering your assigned request number. If you have any questions regarding your request, please contact me at 770-488-6241 or via email at hur7@cdc.gov.

Sincerely,



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

Exhibit C



Centers for Disease Control
and Prevention (CDC)
Atlanta GA 30333
September 24, 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 February 2, 2021, assigned #21-00597-FOIA, for (see attached (see attached request)).

We located 1999 pages of responsive records (1427 pages withheld in full, 199 pages disclosed in part, 367 pages released in full, 6 pages referred to HHS). After a careful review of these pages, some information was withheld from release pursuant to 5 U.S.C. §552 Exemption 4, 5, and 6.

<https://centersfordiseasecontrol.sharefile.com/d-sfd017a0b81a3454a8a0d03813bdae350> (link expires in 180 days)

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 commercial analysis, 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 preliminary data.

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 cell phone number and conference call information. We have determined that the individual(s) to whom this information pertains has a substantial privacy interest in withholding it.

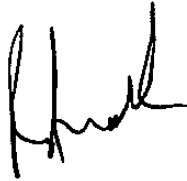
Page 2 – Elizabeth Brehm

We are referring 6 pages to the Department of Health and Human Services, Freedom of Information Act Office for further processing and direct reply to you since these records fall under their jurisdiction.

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 to the Deputy Agency Chief FOIA Officer, Office of the Assistant Secretary for Public Affairs, U.S. Department of Health and Human Services, via the online portal at <https://requests.publiclink.hhs.gov/App/Index.aspx>. Your appeal must be electronically transmitted by December 24, 2021.

Sincerely,

A handwritten signature in black ink, appearing to read 'Roger Andoh', written in a cursive style.

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

Enclosures

21-00597-FOIA