

January 6, 2022

**VIA EMAIL**

Kristina L. Morrison  
Assistant U.S. Attorney  
U.S. Attorney's Office  
40 North Central Avenue, Suite 1800  
Phoenix, Arizona 85004  
[Kristina.Morrison@usdoj.gov](mailto:Kristina.Morrison@usdoj.gov)

Re: *ICAN v. NIH*, No. 2:20-cv-01277-JJT

Dear Kristina:

I write on behalf of the Informed Consent Action Network (“**Plaintiff**”) regarding the above-referenced action and, specifically, FOIA Requests 53963 (IR#0269), 54106 (IR#279), and 54107 (IR#0280).

On December 15, 2021, NIH produced 292 pages of documents responsive to Request 54107 (IR#0280), 156 pages of documents responsive to Request 54106 (IR#0279), and 54 pages of documents responsive to Request 53963 (IR#269) (together, the “**December Productions**”). Plaintiff has attached to this letter a list of redactions to the December Productions that it intends to challenge. Where the Bates range indicated on the original attachment includes pages that did not include redactions, it is because the Bates range is for an entire email chain, only part of which was redacted.

Many of the redactions in the December Productions claim a (b)(5) exemption yet, “[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, the agency failed to provide any specificity or detail regarding redactions made pursuant to Exemption 5. *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). Even if some of the redacted information qualifies for the deliberative process privilege in part, that privilege does not include purely factual material. *Hopkins v. United States Dep’t of Housing & Urban Dev.*, 929 F.2d 81, 85 (2nd Cir. 1991). *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).

Further, many of the redactions claim a (b)(6) exemption, which 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). NIH must provide additional information to justify the withholding of information pursuant to Exemption 6.

Moreover, many of the redactions made pursuant to Exemption 4 are inappropriate because NIH has made no showing that the redacted information is commercial, financial, or confidential. *See* 5 U.S.C. § 552(b)(4) (Exemption 4 prevents disclosure of “trade secrets and commercial or financial information obtained from a person and privileged or confidential”).

For these reasons, NIH failed to meet its burden of proving the applicability of exemptions to the redacted information in the December Production.

As always, I am available to discuss on a telephonic meet and confer if need be.

Very truly yours,

/s/ Elizabeth A. Brehm  
Elizabeth A. Brehm, Esq.  
Gabrielle G. Palmer, Esq.

Encl.

**Challenged Redactions to December Production: Request 54107 (IR#0280)**

<b>Bates</b>	<b>Claimed Exemption</b>
NIH-001001 - NIH-001002	(b)(5)
NIH-000996 - NIH-000998	(b)(4), (b)(5), (b)(6)
NIH-000994 - NIH-000995	(b)(4), (b)(5)
NIH-000989 - NIH-000991	(b)(4), (b)(6)
NIH-000987 - NIH-000988	(b)(4)
NIH-000985 - NIH-000986	(b)(5)
NIH-000976 - NIH-000983	(b)(4), (b)(5)
NIH-000974	(b)(4)
NIH-000966 - NIH-000967	(b)(4)
NIH-000956 - NIH-000957	(b)(5)
NIH-000947 - NIH-000948	(b)(4), (b)(6)
NIH-000944 - NIH-000946	(b)(5)
NIH-000941 - NIH-000943	(b)(5)
NIH-000937 - NIH-000939	(b)(4), (b)(6)
NIH-000932 - NIH-000935	(b)(6)
NIH-000924 - NIH-000927	(b)(5)
NIH-000920 - NIH-000927	(b)(4), (b)(5)
NIH-000918 - NIH-000919	(b)(4)
NIH-000916 - NIH-000917	(b)(5)
NIH-000902 - NIH-000910	(b)(4), (b)(5)
NIH-000893 - NIH-000901	(b)(5)
NIH-000887 - NIH-000892	(b)(4)
NIH-000879 - NIH-000882	(b)(4)
NIH-000874 - NIH-000877	(b)(4)
NIH-000869 - NIH-000873	(b)(4), (b)(5)
NIH-000865	(b)(4), (b)(6)
NIH-000852 - NIH-000854	(b)(5)
NIH-000858 - NIH-000860	(b)(5)
NIH-000863 - NIH-000865	(b)(4)
NIH-000849 - NIH-000851	(b)(5)
NIH-000843 - NIH-000846	(b)(4)
NIH-000839 - NIH-000841	(b)(4), (b)(5)
NIH-000836 - NIH-000838	(b)(6)
NIH-000827 - NIH-000829	(b)(4)
NIH-000826	(b)(4)
NIH-000814 - NIH-000818	(b)(4), (b)(5)
NIH-000809 - NIH-000811	(b)(4), (b)(5)
NIH-000807 - NIH-000808	(b)(5), (b)(6)
NIH-000806	(b)(4), (b)(5)
NIH-000798 - NIH-000800	(b)(5)
NIH-000790 - NIH-000793	(b)(4), (b)(5), (b)(6)
NIH-000788	(b)(5)

NIH-000785 – NIH-000786	(b)(4), (b)(5)
NIH-000769 – NIH-000778	(b)(5)
NIH-000767 – NIH-000768	(b)(4)
NIH-000765 – NIH-000766	(b)(6)
NIH-000761 - NIH-000764	(b)(4)
NIH-000751 – NIH-000757	(b)(4), (b)(6)
NIH-000748 – NIH-000749	(b)(4)
NIH-000736 – NIH-000743	(b)(4), (b)(5)
NIH-000736 – NIH-000743	(b)(4), (b)(5)
NIH-000729 - NIH-000730	(b)(4), (b)(5)
NIH-000720 - NIH-000724	(b)(5)
NIH-000713 – NIH-000719	(b)(5), (b)(6)
NIH-000711 – NIH-000712	(b)(4)
NIH-000708 – NIH-000710	(b)(4), (b)(6)

**Challenged Redactions to December Productions: Request 53963 (IR#0269)**

<b>Bates</b>	<b>Claimed Exemption</b>
NIH-000126 – NIH-000130	(b)(4), (b)(5)
NIH-000124 – NIH-000125	(b)(4), (b)(5)

**Challenged Redactions to December Productions: Request 54106 (IR#0279)**

<b>Bates</b>	<b>Claimed Exemption</b>
Email chain dated April 27, 2020 from document produced by NIH labeled "NIH FOIA 54106 09.17.2020 Part 1 Returned Consults Redacted" <sup>1</sup>	(b)(6)
NIH-000340 - NIH-000342	(b)(5), (b)(6)
NIH-000520 – NIH-000526	(b)(5)
NIH-000334 – NIH-000337	(b)(5)
NIH-001055 – NIH-001056	(b)(5)
NIH-001148 – NIH-001132	(b)(5)
NIH-001148 – NIH-001151	(b)(5)
NIH-001252	(b)(5)
NIH-001261 – NIH-001265	(b)(5)
NIH-001436 – NIH-001438	(b)(5)
NIH-001691 - NIH-001692	(b)(5)
NIH-001752 - NIH-001755	(b)(5)
NIH-001730 - NIH-001734	(b)(5)
NIH-001876 - NIH-001877	(b)(5), (b)(6)
NIH-001876 - NIH-001877	(b)(5), (b)(6)
NIH-001885 - NIH-001886	(b)(5)
NIH-001976 - NIH-001979	(b)(5)
NIH-002214 - NIH-002190	(b)(5)
NIH-002214 - NIH-002217	(b)(5)
NIH-002227 - NIH-002327	(b)(5), (b)(6)
NIH-002227 - NIH-002230	(b)(5)
NIH-002234 - NIH-002236	(b)(5)
NIH-002311 - NIH-002312	(b)(5), (b)(6)

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<sup>1</sup> This email was not Bates labeled by NIH, but is attached hereto.

**From:** Fauci, Anthony (NIH/NIAID) [E]  
**Sent:** Mon, 27 Apr 2020 17:06:55 +0000  
**To:** Auchincloss, Hugh (NIH/NIAID) [C] (b) (6)  
**Subject:** FW: Seeking information re Wuhan Institute of Virology

Please handle this.

Anthony S. Fauci, MD  
Director  
National Institute of Allergy and Infectious Diseases  
Building 31, Room 7A-03  
31 Center Drive, MSC 2520  
National Institutes of Health  
Bethesda, MD 20892-2520  
Phone: (b) (6)  
FAX: (301) 496-4409  
E-mail (b) (6)

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-----Original Message-----

**From:** (b) (6) (b) (6)  
**Sent:** Monday, April 27, 2020 12:42 PM  
**To:** Fauci, Anthony (NIH/NIAID) [E] (b) (6)>  
**Cc:** Auchincloss, Hugh (NIH/NIAID) [E] (b) (6)>  
**Subject:** Seeking information re Wuhan Institute of Virology

Dear Dr. Fauci,

First of all, thank you for your great service to our country during the coronavirus crisis.

I am conducting a research on China's bio safety issue for Secretary Pompeo. We understand that the Wuhan Institute of Virology has a joint research project with the NIH on "Cytomegalovirus Gene Function in Virulence and Replication." I assume this is with NIAID.

I would appreciate that you or your office could help us with the following:

- observations, exchanges and agreements with the WIV on the issue of bio safety;
- Bio safety enforcement and inspection mechanisms at WIV or at any other Chinese high BSL labs your institutes have interacted with.
- The extent to which the U.S. has been involved in building the Chinese labs and helping enforce the safety standard and inspections.

To clarify, this is not an investigation, it's only an effort to gather relevant basic facts for the Secretary. I truly appreciate your help, knowing how busy you are these days.

Very respectfully

(b) (6)

Dr. (b) (6)  
Policy Planning Staff  
Office of the Secretary  
U.S. Department of State  
(b) (6)  
(b) (6)(mobile)