

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

INFORMED CONSENT ACTION NETWORK,

Plaintiff,

-against-

NATIONAL INSTITUTES OF HEALTH,

Defendant.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Plaintiff, as for its Complaint against the above-captioned Defendant, alleges as follows:

INTRODUCTION

1. A novel coronavirus, SARS-CoV-2, the first cases of which were reported in Wuhan, China, has resulted in federal government officials recommending numerous restrictions on everyday life in America. In response, all fifty states have implemented the recommended restrictions to varying degrees, many of which press deeply upon cherished fundamental constitutional rights.

2. The origin of SARS-CoV-2 is currently unknown. However, many experts question whether the virus leaked from the Wuhan Institute of Virology (the “**Wuhan Lab**”).¹

3. The National Institute of Allergy and Infectious Diseases (“**NIAID**”) is at the center of the federal government’s response to COVID-19. NIAID is an institute within the National Institutes of Health (“**Defendant**” or “**NIH**”). Dr. Anthony S. Fauci (“**Dr. Fauci**”) serves as NIAID’s Director.

4. The NIH claims that one of its goals is “to exemplify and promote the highest level of scientific integrity, public accountability, and social responsibility in the conduct of science.”²

¹ <https://www.vanityfair.com/news/2021/08/bidens-covid-19-origins-report-leaves-the-lab-leak-on-the-table> (last visited 8/30/2021); <https://www.cnn.com/2021/07/16/politics/biden-intel-review-covid-origins/index.html> (last visited 8/30/2021).

² <https://www.nih.gov/about-nih/what-we-do/mission-goals> (last visited 8/30/2021).

5. Senator Rand Paul (“**Senator Paul**”) and Dr. Fauci have publicly debated whether certain research at the Wuhan Lab that was funded by the NIH meets the definition of gain-of-function, which is “a type of research that modifies a biological agent so that it confers new or enhanced activity to that agent.”³

6. During a Senate hearing on July 20, 2021, Senator Paul accused Dr. Fauci of lying when he testified at a prior Congressional hearing that the NIH never funded gain-of-function research at the Wuhan lab.⁴ Senator Paul held up a paper titled “*A SARS-like cluster of circulating bat coronaviruses shows potential for human emergence*” (the “**2015 Paper**”)⁵ which he stated proved that NIH had funded gain-of-function research at the Wuhan lab. In response, Dr. Fauci claimed that the “paper that you are referring to was judged by qualified staff up and down the chain [at NIH] as not being gain-of-function.”

7. Plaintiff Informed Consent Action Network (“**Plaintiff**” or “**ICAN**”) is a non-profit organization that advocates for informed consent and disseminates information necessary for same with regard to all medical interventions.

8. In furtherance of its mission, and in an effort to ensure that NIH acts in furtherance of its goal of public accountability, Plaintiff made a request to NIH pursuant to the Freedom of Information Act (5 U.S.C. § 552, as amended) (“**FOIA**”) for “documents and communications identifying the ‘qualified staff’ who reviewed the 2015 Paper;” “communications from the referenced ‘qualified staff’ regarding each of their conclusions about whether or not the 2015

³ <https://www.nih.gov/news-events/gain-function-research-involving-potential-pandemic-pathogens> (last visited 8/30/2021).

⁴ The exchanges referred to above can be viewed at <https://www.c-span.org/video/?c4962333/senator-paul-dr-fauci-clash-research-funding-wuhan-lab> (May 11, 2021) (last visited 8/30/2021); and <https://www.youtube.com/watch?v=IqUOcVwRUtc> (July 20, 2021) (last visited 8/30/2021).

⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4797993/> (last visited 8/30/2021).

Paper’s subject matter is considered gain of function;” and “documents and communications in Dr. Fauci’s possession regarding the 2015 Paper” (the “**FOIA Request**”).

9. More than twenty business days have passed since ICAN submitted the FOIA Request. However, NIH has failed to provide ICAN with the information required by 5 U.S.C. § 552(a)(6), including a determination as to whether NIH intends to produce documents. Accordingly, ICAN brings this action to challenge NIH’s failure to respond to the FOIA Request and to seek an order compelling NIH to produce records responsive to the FOIA Request.

PARTIES

10. ICAN is a not-for-profit organization with an office located at 140 Broadway, 46th Floor, New York, New York 10005.

11. NIH is an agency within the Executive Branch of the United States Government, organized within the Department of Health and Human Services. NIH is an agency within the meaning of 5 U.S.C. § 552(f).

JURISDICTION AND VENUE

12. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. Venue is proper within this District pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391.

FACTS

A. The Origin of SARS-CoV-2

13. The origin of SARS-CoV-2 is unknown. However, long before the first case of SARS-CoV-2 was discovered, experts warned about risky research called “gain-of-function” being conducted in the Wuhan Lab.⁶

⁶ <https://www.politico.com/news/magazine/2021/03/08/josh-rogin-chaos-under-heaven-wuhan-lab-book-excerpt-474322> (last visited 8/30/2021).

14. According to the NIH, gain-of-function research is “a type of research that modifies a biological agent so that it confers new or enhanced activity to that agent.”⁷ In other words, gain-of-function is when “the virulence or transmissibility of dangerous pathogens is deliberately increased.”⁸

15. In 2014, the NIH funded research regarding bat coronaviruses in China through EcoHealth Alliance, Inc. (“**EcoHealth**”),⁹ which describes itself as “an international nonprofit dedicated to a ‘One Health’ approach to protecting the health of people, animals and the environment from emerging infectious diseases.”¹⁰

16. Dr. Fauci has publicly admitted that the NIH funded research in the Wuhan Lab through “a sub-grant from a larger grant to EcoHealth.”¹¹ However, Dr. Fauci denies that the NIH ever funded gain-of-function research at the Wuhan Lab.

B. The Senate Hearings

17. Senator Paul has publicly questioned Dr. Fauci about the NIH’s funding of gain-of-function research at the Wuhan Lab.

18. At a Senate hearing on May 11, 2021 (the “**May Hearing**”),¹² Senator Paul challenged Dr. Fauci’s claim that the NIH never funded gain-of-function research at the Wuhan Lab:

Dr. Fauci, we don’t know whether the pandemic started in a lab in Wuhan or evolved naturally, but we should want to know. Three million people have died from this pandemic and that should cause

⁷ <https://www.nih.gov/news-events/gain-function-research-involving-potential-pandemic-pathogens> (last visited 8/30/2021).

⁸ <https://www.politico.com/news/magazine/2021/03/08/josh-rogin-chaos-under-heaven-wuhan-lab-book-excerpt-474322> (last visited 8/30/2021).

⁹ <https://reporter.nih.gov/project-details/8674931> (last visited 8/30/2021).

¹⁰ <https://www.ecohealthalliance.org/about> (last visited 8/30/2021).

¹¹ <https://nypost.com/2021/05/25/fauci-admits-nih-funding-of-wuhan-lab-denies-gain-of-function/> (last visited 8/30/2021).

¹² The relevant portion of the May Hearing can be viewed at <https://www.c-span.org/video/?c4962333/senator-paul-dr-fauci-clash-research-funding-wuhan-lab> (last visited 8/30/2021).

us to explore all possibilities. Instead, government authorities, self-interested in continuing gain-of-function research, say there's nothing to see here. Gain of function research, as you know, is juicing up naturally occurring animal viruses to infect humans. To arrive at the truth, the US government should admit that the Wuhan Virology Institute was experimenting to enhance the coronavirus' ability to infect humans.

Juicing up super viruses is not new. Scientists in the U.S. have long known how to mutate animal viruses to infect humans. For years, Dr. Ralph Baric, a virologist in the U.S., has been collaborating with Dr. Shi Zhengli of the Wuhan Virology Institute, sharing his discoveries about how to create super viruses. This gain-of-function research has been funded by the NIH. The collaboration between the U.S. and the Wuhan Virology Institute continues. Drs. Barrack and Shi worked together to insert bat virus spike protein into the backbone of the deadly SARS virus, and then used this man-made super virus to infect human airway cells.

...

Do you still support funding of the NIH funding of the lab in Wuhan?

19. In response, Dr. Fauci stated that “the NIH has not ever and does not now fund gain-of-function research in the Wuhan Institute of Virology.”

20. At another Senate hearing on July 20, 2021 (the “**July Hearing**”),¹³ Dr. Fauci had another exchange with Senator Paul regarding the 2015 Paper.

21. In the Acknowledgments section of the 2015 Paper, the authors stated:

Research in this manuscript was supported by grants from the National Institute of Allergy & Infectious Disease and the National Institute of Aging of the US National Institutes of Health (NIH) under awards U19AI109761 (R.S.B.), U19AI107810 (R.S.B.), AI085524 (W.A.M.), F32AI102561 (V.D.M.) and K99AG049092 (V.D.M.)

¹³ <https://www.c-span.org/video/?c4970412/senator-rand-paul-accuses-dr-fauci-lying-gain-function-research-wuhan-lab> (last visited 8/30/2021).

22. Senator Paul claims that the 2015 Paper meets the definition of gain-of-function research, which is, according to the NIH, “a type of research that modifies a biological agent so that it confers new or enhanced activity to that agent.”¹⁴ Senator Paul explained that the 2015 Paper met this definition because it “took two bat coronavirus genes, spike genes, and combined them with a SARS related backbone . . . in the Wuhan lab to gain the function of infecting humans,” whereas prior to this lab manipulation these bat viruses could “only infect animals.”

23. At the July Hearing, Senator Paul held up the 2015 Paper and stated:

Dr. Fauci . . . do you wish to retract your statement of May 11 where you claimed that the NIH never funded gain-of-function research in Wuhan?

24. Dr. Fauci responded as follows:

Senator Paul, I have never lied before the Congress, and I do not retract that statement. This paper that you are referring to was judged by qualified staff up and down the chain as not being gain-of-function.

25. Dr. Fauci’s statements to Senator Paul at the May Hearing and the July Hearing regarding the Wuhan Lab and the 2015 Paper dominated the media¹⁵ in the weeks that followed.

C. The FOIA Request

26. In furtherance of ICAN’s mission to disseminate information to the public and increase governmental transparency, on July 29, 2021, ICAN submitted the FOIA Request to the NIH requesting the following records:

¹⁴ <https://www.nih.gov/news-events/gain-function-research-involving-potential-pandemic-pathogens> (last visited 8/30/2021).

¹⁵ See, e.g., <https://www.cnn.com/2021/07/20/politics/anthony-fauci-rand-paul-debate/index.html> (last visited 8/30/2021); <https://www.businessinsider.com/fauci-rand-paul-you-do-not-know-what-talking-about-2021-7> (last visited 8/30/2021); <https://www.nbcnews.com/politics/congress/fauci-blasts-rand-paul-s-wuhan-lab-funding-claim-you-n1274489> (last visited 8/30/2021); <https://news.yahoo.com/rand-paul-accuses-fauci-lying-152837337.html> (last visited 8/30/2021); <https://www.washingtonexaminer.com/opinion/bet-on-rand-paul-against-anthony-fauci> (last visited 8/30/2021); <https://www.newsweek.com/sen-rand-paul-dr-fauci-right-about-gain-function-research-funding-wuhan-1612371> (last visited 8/30/2021).

At a July 20, 2021 Senate hearing at which Dr. Fauci appeared and had an exchange with Senator Rand Paul, Dr. Fauci stated: “This paper that you are referring to was judge by qualified staff up and down the chain as not being gain-of-function.” Please provide:

(1) any and all documents and communications identifying the “qualified staff” who reviewed the 2015 Paper;

(2) all communications from the referenced “qualified staff” regarding each of their conclusions about whether or not the 2015 Paper’s subject matter is considered gain-of-function; and

(3) any other documentation or communications in Dr. Fauci’s possession regarding the 2015 Paper.

(Exhibit A.1.)¹⁶

27. Also on July 29, 2021, the NIH issued an acknowledgment and assigned the number 56796 to the FOIA Request. **(Exhibit A.2).**

ARGUMENT

28. Despite the passage of more than 20 business days since NIH acknowledged receipt of the FOIA Request, it has failed to provide a statutorily required response, including failing to: seek a permitted extension; determine and communicate to ICAN the scope of any responsive records it intended to produce or withhold and the reasons for any withholdings; or inform ICAN of its right to appeal. *See* 5 U.S.C. § 552(a)(6). NIH has therefore failed to timely provide the responses required under FOIA.

29. NIH also failed to produce responsive documents and has not sought any of the statutorily available extensions of time available under FOIA. *See ACLU of Wash. v. U.S. Dep’t of Justice*, 2011 U.S. Dist. LEXIS 26047, at *32-33 (W.D. Wash. March 10, 2011) (finding the agency failed to act in a timely manner “[p]ursuant to FOIA § 552(a)(6)(C)” where “[defendant]

¹⁶ All “Exhibits” referenced herein are attached to this Complaint.

did not seek an administrative extension of time in which to produce documents . . . [n]or did [defendant] respond to plaintiff's request for a fee waiver in a timely manner.”).

30. Further, because NIH neither provided a final determination nor produced documents, NIH failed to provide ICAN with the information to allow it to effectively submit an appeal. *See* 5 U.S.C. § 552(a)(6)(A)(i)(II) and (III). *See also* *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990) (“A response is sufficient for purposes of requiring an administrative appeal if it includes: the agency’s determination of whether or not to comply with the request; the reasons for its decision; and notice of the right of the requester to appeal to the head of the agency if the initial agency decision is adverse.”); *Shermco Indus. v Sec’y of U.S. Air Force*, 452 F.Supp. 306, 318 (N.D. Tex. 1978), *rev’d on other grounds*, 613 F.2d 1314 (5th Cir. 1980) (plaintiffs were not required to exhaust their administrative remedies when defendant failed to provide plaintiffs with a complete determination because defendant’s response “does not include a list of the releasable and withheld documents, does not include a statement of the fees charged for the releasable documents, and does not include a statement of why the agency believes waiver or reduction of any fee charged is not in the public interest or does not benefit the general public. The plaintiffs could not effectively appeal the . . . adverse decision on their FOIA request without this information.”). ICAN is therefore deemed to have exhausted its administrative remedies. *See* 5 U.S.C. § 552(a)(6)(C)(i).

31. For these reasons, NIH has failed to abide by the requirements of FOIA, and ICAN seeks an order directing NIH to expeditiously produce all documents responsive to the FOIA Request. The information ICAN seeks is simply too important to the current public discourse regarding the COVID-19 pandemic to allow NIH to withhold or delay disclosure of such information from the public.

Requested Relief

WHEREFORE, Plaintiff prays that this Court:

- a. Provide for expeditious proceedings in this action;
- b. Enter an Order directing the NIH, within 10 days, to produce all documents responsive to the FOIA Request;
- c. Award Plaintiff its costs and reasonable attorneys' fees incurred in this action as provided by 5 U.S.C. § 552(a)(4)(E); and
- d. Grant such other and further relief as the Court may deem just and proper.

Dated: August 30, 2021

SIRI & GLIMSTAD LLP



Aaron Siri
Elizabeth Brehm
Gabrielle Palmer (*pro hac vice* to be filed)
200 Park Avenue
17th Floor
New York, New York 10166
Tel: (212) 532-1091
aaron@sirillp.com
ebrehm@sirillp.com
gpalmer@sirillp.com

Attorneys for Plaintiff

Exhibit A.1

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

July 29, 2021

Gorka Garcia-Malene
Freedom of Information Act Officer
National Institutes of Health
Building 31 Room 5B35
9000 Rockville Pike
Bethesda, Maryland 20892
Email: nihfoia@mail.nih.gov

Re: *Anthony Fauci Documents and Communications Regarding the 2015 Paper (IR#0536)*

Dear Mr. Garcia-Malene:

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:

At a July 20, 2021 Senate hearing at which Dr. Fauci appeared and had an exchange with Senator Rand Paul,¹ Dr. Fauci stated: “This paper that you are referring to was judge by qualified staff up and down the chain as not being gain-of-function.”² Please provide:

- (1) any and all documents and communications identifying the “qualified staff” who reviewed the 2015 Paper;**
- (2) all communications from the referenced “qualified staff” regarding each of their conclusions about whether or not the 2015 Paper’s subject matter is considered gain-of-function; and**

¹ The exchange referred to above can be viewed at <https://www.youtube.com/watch?v=IqUOcVwRUtc> (last visited 7/28/2021).

² A copy of the paper referred to above and titled “*A SARS-like cluster of circulating bat coronaviruses shows potential for human emergence*” (“the 2015 Paper”) can be viewed here <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4797993/> (last visited 7/28/2021).

(3) any other documentation or communications in Dr. Fauci's possession regarding the 2015 Paper.

Fees and charges for this search are to be waived pursuant to 5 U.S.C. § 552 (a)(4)(A)(iii) since ICAN is a not-for-profit 501(c)(3) organization and its mission is to raise public awareness about public health safety and provide the public with information to give informed consent regarding related health interventions. As part of its mission, ICAN investigates and disseminates information regarding public health safety issues, including through their website, and through press events and releases. ICAN is seeking the information in this FOIA request to allow it to contribute to its mission. The information requested in this FOIA request 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 or via email at foia@sirillp.com during normal business hours. Thank you for your time and attention to this matter.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'ASiri', written over a horizontal line.

Aaron Siri, Esq.

Exhibit A.2

S&G Information Request Staff

From: FOIA_noreply@nih.gov
Sent: Thursday, July 29, 2021 10:29 AM
To: S&G Information Request Staff
Subject: Request Acknowledgement by NIH

Dear Aaron Siri,

Case Number 56796 has been assigned to the request you submitted. In all future correspondence regarding this request please reference case number 56796.

Regards,
NIH