

FREEDOM OF INFORMATION ACT APPEAL

SUBMITTED VIA ONLINE PORTAL

October 19, 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** (21-01574-FOIA and 21-01584-FOIA) – Documents Concerning Cases of COVID-19 Vaccine Breakthrough Infections and Reinfections in California (IR#0532A, IR#0533A)

Dear Sir or Madam:

This firm represents Informed Consent Action Network (“**ICAN**”). On behalf of our client, on July 16, 2021 and July 19, 2021, we submitted two separate requests for records (the “**FOIA Requests**”) 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 8, 2021, Roger Andoh, CDC/ATSDR FOIA Officer (the “**CDC Officer**”), issued final responses to each request (the “**Final Responses**”). ICAN writes now to appeal the Final Responses.

A. The July 16, 2021 FOIA Request (IR#0532A)

On July 16, 2021, ICAN submitted the following request to the CDC (the “**First Request**”):

All de-identified documents received by the CDC from the California Department of Public Health, or from any other California entity, relating to cases of COVID-19 Vaccine breakthrough infections.¹

¹ The CDC defines the phrase “Vaccine Breakthrough Infection” as “the detection of SARS-CoV-2 RNA or antigen in a respiratory specimen collected from a person ≥ 14 days after they have completed all recommended doses of a U.S. Food and Drug Administration (FDA)-authorized COVID-19 vaccine.” <https://www.cdc.gov/vaccines/covid-19/health-departments/breakthrough-cases.html>.

(Exhibit A.)²

On July 23, 2021, CDC issued an acknowledgment and assigned FOIA request number 21-01574-FOIA to the First Request. **(Exhibit B.)**

On September 8, 2021, the CDC Officer issued a final response to the First Request and stated in relevant part:

The CDC Emergency Operations Center (EOC) relayed the following:

The CDC has a Data Use Agreement with California and other states. The agreement precludes CDC from providing state data that is voluntarily reported to CDC. If information exists regarding the subject of this request, we suggest you contact the California Department of Public Health directly using <https://www.cdph.ca.gov/>. To obtain other state data, you can use this link <https://www.cdc.gov/publichealthgateway/healthdirectories/healthdepartments.html> to access state public health websites.

(Exhibit C.)

The CDC did not produce any documents responsive to the First Request.

B. The July 19, 2021 FOIA Request (IR#0533A)

On July 19, 2021, ICAN submitted the following request to the CDC (the “**Second Request**”):

All de-identified documents received by the CDC from the California Department of Public Health, or from any other California entity, relating to cases of COVID-19 re-infections.

(Exhibit D.)

On July 23, 2021, CDC issued an acknowledgment and assigned FOIA request number 21-01584-FOIA to the Second Request. **(Exhibit E.)**

On September 8, 2021, the CDC Officer issued a final response to the Second Request (with the final response to the First Request, the “**Final Responses**”) and stated in relevant part:

The CDC Emergency Operations Center (EOC) relayed the following:

² All “Exhibits” referenced herein are appended to this letter.

The CDC has a Data Use Agreement with California and other states. The agreement precludes CDC from providing state data that is voluntarily reported to CDC. If information exists regarding the subject of this request, we suggest you contact the California Department of Public Health directly using <https://www.cdph.ca.gov/>. To obtain other state data, you can use this link <https://www.cdc.gov/publichealthgateway/healthdirectories/healthdepartments.html> to access state public health websites.

(Exhibit F.)

The CDC Officer did not produce any documents in response to the Second Request.

C. Argument

“FOIA is a far-reaching statute.” *N.Y. Times Co. v. United States DOJ*, 939 F.3d 479, 488 (2nd Cir. 2019). Under FOIA, the public may access “‘virtually every document generated by an agency,’ unless an exception applies.” *Id.* The statute sets forth 9 specific exemptions that may exempt material from disclosure under FOIA. 5 U.S.C. § 552(b). If the agency does not meet its burden of proving the applicability of one of these specific exemptions, the requested information must be disclosed. *See* 5 U.S.C. § 552(d); *Ancient Coin Collectors Guild v. U.S. Dep’t of State*, 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)).

In the Final Responses, CDC did not identify which specific statutory exemption it asserts prohibits disclosure of the documents requested in the FOIA Request. As such, CDC has failed to meet its burden of proving the applicability of any alleged exemption.

Further, CDC cannot circumvent the purpose of FOIA by relying on an alleged “Data Use Agreement” to avoid disclosure of the documents ICAN seeks. *See, e.g., Pharm. Mfrs. Assn. v. Weinberger*, 411 F. Supp. 576, 579 (D. D.C. 1976) (“promises of confidentiality do not transcend the disclosure principals of the FOIA.”); *Petkas v. Staats*, 163 U.S. App. D.C. 327, 501 F.2d 887, 889-90 (1974) (“Nor can a promise of confidentiality in and of itself defeat the right of disclosure.”); *Robles v. Env’tl. Prot. Agency*, 484 F.2d 843, 846 (4th Cir. 1973) (“it is not enough to defeat the right of disclosure that the agency ‘received the file under a pledge of confidentiality to the one who supplied it. Undertakings of that nature cannot, in and of themselves, override the Act.’”) (quoting *Ackerly v. Ley*, 420 F.2d 1336, 1339-40 n.3 (1969) (D.C. Ct. App. 1969)). *See also Legal Aid Soc’y v. Shultz*, 349 F. Supp. 771, 776 (N.D. Cal. 1972) (“administrative promises of confidentiality cannot extend the command of the Freedom of Information Act that only matters ‘specifically exempted from disclosure by statute’ are protected under § 552(b) (3)”); *Save the Dolphins v. United States Dep’t of Commerce*, 404 F. Supp. 407, 408-409, 411 (N.D. Cal. 1975) ((b)(4) exemption did not apply to a film made by the National Marine Fisheries Service under a promise that the film would not be made publicly available).

Given the foregoing, ICAN hereby appeals and requests that the documents responsive to the FOIA Requests 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/ Gabrielle G. Palmer
Gabrielle G. Palmer, Esq.

Enclosures

Exhibit A

FREEDOM OF INFORMATION ACT REQUEST
EXPEDITED PROCESSING REQUESTED

VIA ONLINE PORTAL

July 16, 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
Email: FOIARequests@cdc.gov

Re: Documents Concerning Cases of COVID-19 Vaccine Breakthrough Infections in California (IR#0532)

Dear Mr. Andoh:

This firm represents the Informed Consent Action Network (“ICAN”). On behalf of ICAN, we are requesting records pursuant to the Freedom of Information Act (5 U.S.C. § 552, as amended) (“FOIA”). Please provide the records in your possession via email to foia@sirillp.com:

All de-identified documents received by the CDC from the California Department of Public Health, or from any other California entity, relating to cases of COVID-19 Vaccine breakthrough infections.¹

Request For Expedited Processing

ICAN requests expedited processing for this request. ICAN is “primarily engaged in disseminating information to the general public” and there is an “urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II).

ICAN’s mission is to raise public awareness about public health safety and to provide the public with information to give informed consent regarding related health interventions. The

¹ The CDC defines the phrase “Vaccine Breakthrough Infection” as “the detection of SARS-CoV-2 RNA or antigen in a respiratory specimen collected from a person ≥14 days after they have completed all recommended doses of a U.S. Food and Drug Administration (FDA)-authorized COVID-19 vaccine.” <https://www.cdc.gov/vaccines/covid-19/health-departments/breakthrough-cases.html>

SARS-CoV-2, also known as COVID-19, pandemic has affected myriad aspects of every American's life.

After one year of the pandemic, three major vaccines are being widely used across the country pursuant to Emergency Use Authorizations granted by the FDA. Many employers, now mandating that their employees be fully vaccinated to retain their employment. Similarly, many schools and universities are mandating that pupils be vaccinated to attend in-person classes. These mandates come in light of the highly publicized protection rates of the vaccines. Yet, COVID-19 breakthrough cases are being reported in large numbers. Further, the CDC and the FDA appear to recognize immunity from the virus only when it is vaccine-induced and not through natural-infection. Therefore, there is urgent need for ICAN to gather and disseminate additional information regarding CDC's actions in investigating the causes and impacts of the breakthrough infection cases.

ICAN certifies that the information in the request is true and correct to the best of ICAN's knowledge and belief.

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 vaccine safety and provide the public with information to give informed consent. As part of its mission, ICAN investigates and disseminates information regarding vaccine safety, 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 the public understanding of the government's vaccine safety programs, including the government's efforts to promote vaccine safety. 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,

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

Exhibit B



July 23, 2021

SENT VIA EMAIL

Elizabeth Brehm
Attorney
Siri & Glimstad
200 Park Avenue, 17th Floor
New York, New York 10166
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 clarified July 16, 2021, Freedom of Information Act (FOIA) request on July 16, 2021, seeking:

“All de-identified documents received by the CDC from the California Department of Public Health, or from any other California entity, relating to cases of COVID-19 Vaccine breakthrough infections.”

Your FOIA request number is #21-01574-FOIA, and it has been placed in our complex processing queue.

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 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, Carolyn Okpewho, at 770-488-6332 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.

You requested that we expedite processing your request. Your request is denied because:

- You have failed to show that there is an imminent threat to the life or physical safety of an individual.
- You have not demonstrated that you are a person primarily engaged in disseminating information.

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

- The disclosure of the records will not contribute significantly to public understanding of the operations or activities of the government.
- 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.

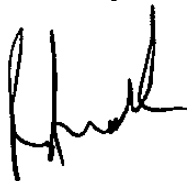
Because Informed Consent Action Network (ICAN) is considered an "All Other requester" you are entitled to two hours of free search time, and up to 100 pages of duplication (or the cost equivalent of other media) without charge, and you will not be charged for review time. We may charge for search time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

Since you did not 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.

You have the right to appeal the agency's 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 December 03, 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.

Sincerely,



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

Exhibit C



September 08, 2021

SENT VIA EMAIL

Elizabeth Brehm
Attorney
Siri & Glimstad
200 Park Avenue, 17th Floor
New York, New York 10166
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 clarified July 16, 2021, Freedom of Information Act (FOIA) request on July 16, 2021, seeking:

“All de-identified documents received by the CDC from the California Department of Public Health, or from any other California entity, relating to cases of COVID-19 Vaccine breakthrough infections.”

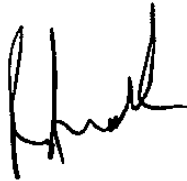
The CDC Emergency Operations Center (EOC) relayed the following:

The CDC has a Data Use Agreement with California and other states. The agreement precludes CDC from providing state data that is voluntarily reported to CDC. If information exists regarding the subject of this request, we suggest you contact the California Department of Public Health directly using <https://www.cdph.ca.gov/>. To obtain other state data, you can use this link <https://www.cdc.gov/publichealthgateway/healthdirectories/healthdepartments.html> to access state public health websites.

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 December 07, 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
Phone: (770) 488-6399
Fax: (404) 235-1852

#21-01574-FOIA

Exhibit D

FREEDOM OF INFORMATION ACT REQUEST **EXPEDITED PROCESSING REQUESTED**

VIA ONLINE PORTAL

July 19, 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
Email: FOIARequests@cdc.gov

Re: Documents Concerning Cases of COVID-19 Re-infections in California (IR#0533)

Dear Mr. Andoh:

This firm represents the Informed Consent Action Network (“ICAN”). On behalf of ICAN, we are requesting records pursuant to the Freedom of Information Act (5 U.S.C. § 552, as amended) (“FOIA”). Please provide the records in your possession via email to foia@sirillp.com:

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After one year of the pandemic, three major vaccines are being widely used across the country pursuant to Emergency Use Authorizations granted by the FDA. Many employers, now mandating that their employees be fully vaccinated to retain their employment. Similarly, many schools and universities are mandating that pupils be vaccinated to attend in-person classes. These mandates come in light of the highly publicized protection rates of the vaccines. Yet, COVID-19

breakthrough cases are being reported in large numbers. Further, the CDC and the FDA appear to recognize immunity from the virus only when it is vaccine-induced and not through natural-infection. Therefore, there is urgent need for ICAN to gather and disseminate additional information regarding CDC's actions in investigating the causes and impacts of the re-infection cases.

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Very truly yours,

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

Exhibit E



July 23, 2021

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

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Your FOIA request number is #21-01584-FOIA, and it has been placed in our complex processing queue.

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:

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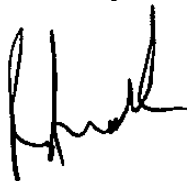
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Roger Andoh
CDC/ATSDR FOIA Officer
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Phone: (770) 488-6399
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Exhibit F



September 08, 2021

SENT VIA EMAIL

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

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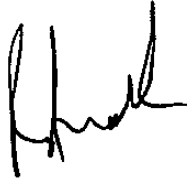
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Sincerely,

A handwritten signature in black ink, appearing to read 'Roger Andoh', written over a white background.

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

#21-01584-FOIA