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CDC FREEDOM OF INFORMATION ACT APPEAL

SUBMITTED VIA EMAIL September 26, 2022

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 FOIA Request #22-00518-FOIA (IR#0532A)*

Dear Sir or Madam:

This firm represents Informed Consent Action Network ("**ICAN**"). On behalf of ICAN, on October 19, 2021 we submitted an appeal challenging CDC's final determination of ICAN's Freedom of information Act ("**FOIA**") request #21-01574-FOIA. On December 9, 2021, Department of Health and Human Services concluded its review of the appeal and remanded the FOIA request back to CDC for further processing. The FOIA request was subsequently assigned #22-00518-FOIA ("**FOIA Request**"). On June 24, 2022, Roger Andoh, CDC/ATSDR FOIA Officer, responded to the FOIA Request ("**Final Response**"). ICAN writes now to appeal the Final Response.

A. FOIA Request #22-00518-FOIA (IR#0532A)

On December 9, 2021, HHS remanded to CDC the following FOIA 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**

(**Exhibit 1**.)[1]

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

On December 15, 2021, CDC acknowledged the FOIA Request and assigned #22-00518-FOIA. (**Exhibit 2**.)

B. CDC's Final Response

On June 24, 2022, CDC issued a final response letter. The letter stated in part,

> **We located 242 pages of responsive records (237 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 b(5) and b(6). The foreseeable harm standard was considered when applying these redactions . . . 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.**

(**Exhibit 3**.)

C. Argument

CDC has failed to conduct an adequate search of the requested records. An agency's search is adequate only if it is "reasonably calculated to uncover all relevant documents." *Zemansky v. E.P.A.*, 767 F.2d 569, 571 (9th Cir. 1985) (quoting *Weisberg v. U.S. Dep't. of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)) (internal quotation marks omitted). "An agency fulfills its obligations under FOIA if it can demonstrate *beyond material doubt* that its search was reasonably calculated to uncover all relevant documents." *Defs. of Wildlife v. United States Border Patrol,* 623 F. Supp. 2d 83, 91 (D.D.C. 2009) (quoting *Valencia-Lucena v. U.S. Coast Guard,* 180 F.3d 321, 325 (D.C. Cir. 1999)) (emphasis added). To satisfy its FOIA obligations, an agency needs to adequately describe the scope and methods of its searches, which can reasonably be expected to uncover the records sought and demonstrate that the places most likely to contain responsive materials were searched. *Davidson v. E.P.A*., 121 F. Supp. 2d 38, 39 (D.D.C. 2000). At minimum, the agency must specify "what records were searched, by whom, and through what process." *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994).

A court must evaluate the reasonableness of an agency's search based on what the agency knew at its conclusion rather than what the agency speculated at its inception. *Campbell v. United States DOJ*, 164 F.3d 20, 28 (D.C. Cir. 1998). An agency is required to "revise its assessment of what is reasonable . . . to account for leads that emerge during its inquiry." *Id*. An "agency may [not] ignore what it cannot help but know." *Kowalcyk v. DOJ*, 73 F.3d 386, 389 (D.C. Cir. 1996). A court can conclude a search is inadequate when the facts reveal a "positive indication of overlooked materials." *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999).

CDC's search was inadequate because it did not specify what records were searched, by whom, and through what process. *Steinberg*, 23 F.3d 552. Therefore, CDC did not fulfill its

obligations under FOIA of demonstrating beyond material doubt that its search was reasonably calculated to uncover all relevant documents. *Valencia-Lucena,* 180 F.3d at 325.

Furthermore, CDC's search was not adequate because there are positive indications of overlooked materials that the agency could not help but to know existed. *Valencia-Lucena*, 180 F.3d at 326*; Kowalcyk*, 73 F.3d at 389. For example, on pages 149-150 of the production, there is a document titled "COVID-19 Vaccine Breakthrough Cluster Evaluation." In this instance, the document is blank. However, on the bottom of the second page of the two-page document, instructions state:

> **Send [this form] back to the breakthrough team at eocevent531@cdc.gov and vaccine effectiveness team eocevent426@cdc.gov. For long-term care facility clusters, please also send to haicovid@cdc.gov**

Completed versions of this document would clearly be responsive to the FOIA Request, but the production did not include any completed forms. A reasonable search requires an agency to revise its search to account for leads that emerge during its inquiry. *Campbell*, 164 F.3d at 28. In this instance, it appears CDC failed to do so.

The presence of this form, and the emails provided in its instructions, provided CDC with ample leads to discover records that are clearly responsive to the FOIA Request. However, due to CDC's inadequate description of its search, it's unclear whether it: (1) searched for completed versions of this form, (2) searched the email accounts listed on the form's instructions, and/or (3) searched other records or databases that would have compiled the information provided by these forms.

Therefore, for all the reasons above, CDC's search was not adequate because it was not reasonably calculated to uncover all relevant documents. *Zemansky*, 767 F.2d at 571.

D. Appellate Request

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 us at **(212) 532-1091** or through email at **foia@sirillp.com**.

Very truly yours,

/s/ Aaron Siri
Aaron Siri, Esq.
Elizabeth A. Brehm, Esq.
Colin Farnsworth, Esq.

Enclosures

Exhibit 1

MEMORANDUM

DATE: December 9, 2021

TO: FILE

FROM: Director, FOIA Appeals and Litigation, FOIA/PA Division

SUBJECT: Administrative Closure – Palmer 2022-00014-A-PHS and 2022-00017-A-PHS

SUMMARY:

This memo will administratively close the subject appeals dated October 19, 2021.

BACKGROUND:

On July 16, 2021, the Informed Consent Action Network (ICAN), through counsel Elizabeth Brehm at Siri and Glimstad LLP, submitted a FOIA request to the Centers for Disease Control and Prevention (CDC), 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.

CDC assigned the request tracking number 21-01574-FOIA.

On July 19, 2021, ICAN submitted another request to the CDC, asking for:

> 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.

CDC assigned the second request tracking number 21-01584-FOIA.

On September 8, 2021, CDC FOIA Officer responded to both requests (in separate letters), citing a Data Use Agreement with California as the basis for denying the requests in full. The requesters (via counsel Gabrielle Palmer of Siri and Glimstad) appealed both responses with a single letter of appeal dated October 19, 2021. They challenged CDC's withholding of records without citation to a specific FOIA exemption.

After receiving the combined letter of appeal, this office assigned two appeal tracking numbers, to align them with the CDCs two request tracking numbers. Appeal number 2021-00014-A-PHS was assigned to request 21-01574-FOIA, and 2021-00017-A-PHS was assigned to 21-01584-

FOIA. (For administrative purposes, CDC assigned the appeals their own tracking numbers: 22-00011-APP and 22-00012-APP, respectively.)

On December 9, 2021, CDC FOIA Office requested that we remand both appeals to them for further processing.

CONCLUSION:

The subject appeals are hereby administratively closed, and requests 21-01574-FOIA and 21-01584-FOIA are hereby remanded to CDC FOIA Office for appropriate action.

Alesia Y. Williams
Director, FOIA Appeals and Litigation
FOI/Privacy Acts Division

Copies to:
CDC FOIA Office
Appellant

Exhibit 2

Subject: Request Acknowledgement by FOIA
Date: Wednesday, December 15, 2021 at 1:00:24 AM Pacific Standard Time
From: Centers for Disease Control and Prevention / Agency for Toxic Substances and Disease Registry
To: S&G Information Request Staff

Dear Aaron Siri,

Your request has been received by the FOIA. The request has been assigned tracking # 22-00518-FOIA, please log into your account and review your submission.

The application address is https://foia.cdc.gov/.

Thank you,
FOIA

Exhibit 3

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

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

June 24, 2022

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

Dear Mr. Siri:

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 December 13, 2021, assigned #22-00518-FOIA.

We located 242 pages of responsive records (237 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 b(5) and b(6). The foreseeable harm standard was considered when applying these redactions. The responsive records are available to download at the link below:
https://centersfordiseasecontrol.sharefile.com/d-s43d3f728747e4211bc5c7b44176cb8e4

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.

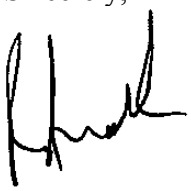
Exemption 6 protects information in personnel and medical files and similar files when disclosure would constitute a clearly unwarranted invasion of personal privacy. The information that has been withheld under Exemption 6 consists of personally identifiable medical and contact information. We have determined that the individuals to whom this information pertains has a substantial privacy interest in withholding it.

Five (5) pages of responsive records have been referred to the Department of Defense for their review and direct response to you. You may inquire about the status of these records at the following email address: usarmy.detrick.medcom-usamrmc.mbx.foia@mail.mil

You may contact our FOIA Public Liaison at 770-488-6246 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 November 4, 2022.

Sincerely,



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

Enclosures

22-00518-FOIA