

CDC FREEDOM OF INFORMATION ACT APPEAL

SUBMITTED VIA EMAIL

August 17, 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** # 22-00096-FOIA (IR#0577)

Dear Sir or Madam:

This firm represents Informed Consent Action Network (“ICAN”). On behalf of ICAN, on October 15, 2021, we submitted a request for records (“**FOIA Request**”) 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 July 20, 2022, Roger Andoh, CDC/ATSDR FOIA Officer (“**CDC Officer**”) responded to the FOIA Request (“**Final Response**”). ICAN writes now to appeal the Final Response.

A. FOIA Request # 22-00096-FOIA (IR#0577)

On October 15, 2021, ICAN submitted a request to the CDC for the following documents:

An unredacted copy of the “Data Use Agreement” between the Centers for Disease Control and Prevention and the State of California referenced in the letter dated September 8, 2021 from Roger Andoh to Elizabeth Brehm, a copy of which is attached hereto as Exhibit A.

(Exhibit 1.)¹

¹ All “Exhibits” referenced herein are appended to this letter.

On October 15, 2021, CDC acknowledged the FOIA request and assigned it # 22-00096-FOIA. (Exhibit 2.)

B. CDC's Final Response

On July 20, 2022, CDC issued a final response letter. The letter stated in part,

A search of our records failed to reveal any documents pertaining to your request. The CDC Emergency Operations Center (EOC) does not have an official *Data Use Agreement* between the Centers for Disease Control and Prevention and the State of California on record.

(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).

In order to determine whether a search for responsive records was adequate, a court must first determine the scope of the documents the plaintiff requested. *Wallick v. Agric. Mktg. Serv.*, 281 F. Supp. 3d 56, 66 (D.D.C. 2017). It has been long established that an agency has a duty to construe FOIA requests liberally. *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985); *Conservation Force v. Ashe*, 979 F. Supp. 2d 90, 100-104 (D.D.C. 2013); *Rodriguez v. DOD*, 236 F. Supp. 3d 26, 36-38 (D.D.C. 2017). This means an agency is compelled to interpret requests broadly, even if a narrower reading is also reasonable. *Id.* An agency has a duty under the FOIA to select the interpretation that would likely yield the greatest number of responsive documents. *Conservation Force*, 979 F. Supp. 2d at 102; *Nat'l Sec. Counselors v. CIA*, 849 F. Supp. 2d 6, 12 (D.D.C. 2012). 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).

Finally, technical precision is not required in FOIA requests, and a request certainly should not fail where the agency knew or should have known what the requester was seeking all along. *Institute for Justice v. Internal Revenue Service*, 941 F.3d 567, 572 (D.C. Cir. 2019). The

reasonableness of an agency's search is 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). Defendant 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." *Kowalczyk v. DOJ*, 73 F.3d 386, 389 (D.C. Cir. 1996).

CDC's search was inadequate for four reasons. First, CDC failed to 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.

Second, there is a positive indication of overlooked materials because the very record CDC failed to find during its search is the same record the CDC cited to deny ICAN access to records for two different FOIA requests. In #21-01574-FOIA and #21-01584-FOIA, CDC denied responsive records on the basis that "[t]he CDC has a Data Use Agreement with California and other states.² The agreement precluded CDC from providing state data that is voluntarily responded to CDC." (Emphasis added). CDC's failure to find the record that it previously told ICAN it "has" – on two separate occasions – creates a positive indication of overlooked materials. *Valencia-Lucena*, 180 F.3d at 326.

Third, CDC appears to have failed to liberally construe ICAN's FOIA Request. Whereas ICAN's request sought,

An unredacted copy of the "Data Use Agreement" between the Centers for Disease Control and Prevention and the State of California referenced in the letter dated September 8, 2021 from Roger Andoh to Elizabeth Brehm, a copy of which is attached hereto as Exhibit A.

(Exhibit 1.)

CDC's final response stated,

A search of our records failed to reveal any documents pertaining to your request. The CDC Emergency Operations Center (EOC) does not have an official *Data Use Agreement* between the Centers for Disease Control and Prevention and the State of California on record.

(Exhibit 3.)

Simply because ICAN's request sought the "Data Use Agreement". . . referenced in the letter" that CDC sent on September 8, 2021, and the reference of the Data Use Agreement in the letter came from the CDC's Emergency Operation Center (EOC), should not limit responsive documents solely to those in the possession of the EOC. Furthermore, ICAN's request should not

² See Exhibit A referenced in Exhibit 1 of this Appeal. See also, Exhibit 4 of this Appeal.

be narrowly interpreted to only include “an official Data Use Agreement between the centers for Disease Control and Prevention and the state of California on record.” A request should not fail where the agency knew or should have known what the requester was seeking all along. *Institute for Justice*, 941 F.3d at 572. Thus, ICAN’s request for a copy of the “Data Use Agreement” should be liberally construed to include any records that the CDC was referring to when it used the term “Data Use Agreement.”

Finally, CDC failed to follow leads that emerged during its inquiry. *Campbell*, 164 F.3d at 28. On two separate occasions CDC stated that, “[t]he CDC has a Data Use Agreement with California and other states.” Because CDC is the agency that cited the Data Use Agreement, it may not ignore that it cannot help but know about the Data Use Agreement. *Kowalczyk*, 73 F.3d at 389.

Although the EOC may not have “an official Data Use Agreement between the centers for Disease Control and Prevention and the state of California on record,” a reasonable search should not have ended there. The absence of records at the EOC should have reasonably led the agency to look elsewhere for records it has twice acknowledged that it had. The reasonableness of an agency’s search is based on what the agency knew at its conclusion rather than what the agency speculated at its inception. *Campbell*, 164 F.3d at 28.

For all the reasons detailed above, CDC has failed to demonstrate beyond a material doubt that its search was reasonably calculated to uncover all relevant documents. *Valencia-Lucena*, 180 F.3d at 325; *Campbell*, 164 F.3d at 28. Therefore, assuming CDC’s representations in #21-01574-FOIA and #21-01584-FOIA were accurate, its search was not adequate.

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

FREEDOM OF INFORMATION ACT REQUEST

SUBMITTED VIA ONLINE PORTAL

October 15, 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
FOIARequests@cdc.gov

Re: Data Use Agreement with the State of California (IR#0577)

Dear Sir or Madam:

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:

An unredacted copy of the “Data Use Agreement” between the Centers for Disease Control and Prevention and the State of California referenced in the letter dated September 8, 2021 from Roger Andoh to Elizabeth Brehm, a copy of which is attached hereto as Exhibit A.

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 its mission, ICAN actively investigates and disseminates information regarding vaccine safety issues, including through its 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 ICAN is 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/ Gabrielle G. Palmer
Gabrielle G. Palmer, Esq.

Enclosure: as stated.

Exhibit A



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.”

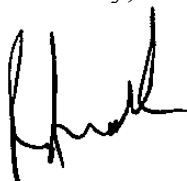
The CDC Emergency Operations Center (EOC) relayed the following:

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 2

Annalise Beube

From: Centers for Disease Control and Prevention / Agency for Toxic Substances and Disease Registry
<foiarequests@cdc.gov>
Sent: Friday, October 15, 2021 10:33 AM
To: S&G Information Request Staff
Subject: Request Acknowledgement by FOIA

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Elizabeth Brehm,

Case Number 22-00096-FOIA has been assigned to the request you submitted. In all future correspondence regarding this request please reference case number 22-00096-FOIA.

Regards,
FOIA

Exhibit 3

**SENT VIA EMAIL**

July 20, 2022

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

2nd Letter Subject: Final Response Letter

Dear Mr. Siri:

The Centers for Disease Control and Prevention and Agency for Toxic Substances and Disease Registry (CDC/ATSDR) received your October 15, 2021, Freedom of Information Act (FOIA) request on October 15, 2021, seeking:

“An unredacted copy of the “Data Use Agreement” between the Centers for Disease Control and Prevention and the State of California referenced in the letter dated September 8, 2021 from Roger Andoh to Elizabeth Brehm, a copy of which is attached hereto as Exhibit A.”

A search of our records failed to reveal any documents pertaining to your request. The CDC Emergency Operations Center (EOC) does not have an official *Data Use Agreement between the Centers for Disease Control and Prevention and the State of California* on record.

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, via the online portal at <https://requests.publiclink.hhs.gov/app/index.aspx?aspxerrorpath=/App/Index.aspx>. or via e-mail at FOIARequest@psc.hhs.gov or via mail at Hubert H. Humphrey Building, 200 Independence Avenue, Suite 729H, Washington, D.C. 20201. Please mark both your appeal letter and envelope “FOIA Appeal.” Your appeal must be postmarked or electronically transmitted by October 18, 2022.

Sincerely,

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

Exhibit 4



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 19, 2021, Freedom of Information Act (FOIA) request on July 19, 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 re-infections.”

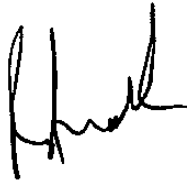
The CDC Emergency Operations Center (EOC) relayed the following:

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

#21-01584-FOIA