

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC HEALTH REFORM
ALLIANCE,
c/o Binnall Law Group
717 King Street, Suite 200
Alexandria, Virginia 22314

Plaintiff,

v.

U.S. DEPARTMENT OF HEALTH
AND HUMAN SERVICES,
c/o General Counsel
200 Independence Avenue, S.W.,
Washington, D.C. 20201,

Defendant.

Case No.: _____

COMPLAINT

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), seeking the release of records requested by Public Health Reform Alliance (“PHRA”) from the United States Department of Health and Human Services (“HHS”).

PARTIES

2. Plaintiff Public Health Reform Alliance is a nonpartisan organization that educates the public on the public health system and promotes government transparency and accountability in public health agencies. In furtherance of its public education mission, PHRA regularly issues FOIA requests.

3. Defendant United States Department of Health and Human Services is an agency within the meaning of 5 U.S.C. § 552(f)(1). Multiple agency components within HHS have possession, custody, and control of records to which PHRA seeks access and which are the subject of this Complaint, including but not limited to the National Institutes of Health (“NIH”) and the National Institute of Allergy and Infectious Diseases (“NIAID”).

JURISDICTION AND VENUE

4. This Court has personal and subject matter jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 552(a)(6)(C)(i), and 28 U.S.C. § 1331, because this action arises under FOIA and PHRA is deemed to have exhausted its administrative remedies.

5. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

STATEMENT OF FACTS

6. On June 30, 2024, pursuant to FOIA, PHRA sent to NIH and NIAID, components of Defendant, five separate FOIA requests concerning records relating to “gain of opportunity” research (collectively, the “Requests”). The Requests included:

- a) PHRA requests records of communications to, from, and including the listed officials using the search term “gain of opportunity” from June 1, 2021, to the date the search begins. Exhibit A. The listed officials were:
 - i. Dr. Anthony Fauci, Former Director;
 - ii. Jeanne Marrazzo, Director;

- iii. Kimberly M. Barasch, Staff Assistant to the Acting Director;
- iv. Patricia L. Conrad, Special Assistant to the Acting Director;
- v. Sherri L. DePollar, Staff Assistant to the Acting Director;
- vi. David Morens, Senior Scientific Advisor;
- vii. Emily Erbeling, Director of Division of Microbiology and Infectious Diseases (“DMID”);
- viii. Jane Knisely, Pandemic Preparedness Strategy Coordinator for DMID;
- ix. Michael Ison, Chief of Respiratory Diseases Branch (“RDB”);
- x. Courtney Billet, Director of Office of Communications and Government Relations (“OCGR”);
- xi. Cynthia Fabry, Deputy Director of OCGR;
- xii. Melinda Haskins, Chief of Legislative Affairs of OCGR;
- xiii. Catherine Bullis, Chief of Communications Services of OCGR;
- xiv. Joyelle Dominique, Director of Office of Global Research;
- xv. Ted C. Pierson, Director of Vaccine Research Center (“VRC”);
and
- xvi. Karin Bok, Director of Pandemic Preparedness and Emergency Response of VRC.

b) PHRA requests records of communications to, from, and including the listed officials using the search term “gain of opportunity” from June 1, 2021, to the date the search begins. Exhibit B. The listed officials were:

- i. Monica M. Bertagnolli, Director;
- ii. Lawrence A. Tabak, Deputy Director;
- iii. Nina F. Shor, Deputy Director for Intramural Research;
- iv. Michael S. Lauer, Deputy Director for Extramural Research;
- v. John T. Burklow, Chief of Staff;
- vi. Peter Kilmarx, Associate Director for International Research;
- vii. Katherine Klimczak, Associate Director for Legislative Policy and Analysis;
- viii. Renate H. Myles, Associate Director for Communications and Public Liaison;
- ix. Colleen A. McGowan, Associate Director for Research Services; and
- x. Daniel G. Wheeland, Associate Director for Research Facilities.

7. Having not heard a response from Defendant, not even an acknowledgement letter or tracking numbers, on September 11, 2024, PHRA sent an email to Defendant, inquiring as to the status of the Requests. Exhibit C.

8. Defendant did not respond to PHRA's inquiry.

9. To date, Defendant has not issued a final response to the Requests and is in violation of FOIA's timeliness requirements.

10. Defendant continues to improperly withhold the requested information from PHRA.

CAUSES OF ACTION

COUNT I

(Violation of FOIA: Failure to Comply with Statutory Deadlines)

11. PHRA incorporates by reference the above paragraphs as though set forth fully herein.

12. FOIA provides a cause of action for a complainant from whom a federal agency has withheld requested records. 5 U.S.C. § 552(a)(4)(B).

13. On June 30, 2024, PHRA properly issued the Requests.

14. PHRA has a legal right under FOIA to obtain the agency records described in the Requests in a timely manner and in accordance with the requirements set forth in FOIA. Because Defendant is an “agency” subject to FOIA, it must release all non-exempt records and provide legitimate reasons for withholding any records.

15. FOIA requires agencies to respond to requests within twenty (20) business days or, in “unusual circumstances,” within thirty (30) business days. 5 U.S.C. §§ 552(a)(6)(A)–(B). If an agency requires additional time, FOIA mandates that the agency provide requesters “an opportunity to arrange with the agency an alternative time frame for processing the request[.]” 5 U.S.C. § 552(a)(6)(B)(ii).

16. The twenty (20) business day time limit has expired for Requests. Defendant accordingly has improperly denied PHRA’s access to agency records by failing to issue final determinations on the aforementioned Requests filed on June 30, 2024, within the statutory time limit set forth in 5 U.S.C. § 552(a)(6).

17. Defendant has further failed to comply with FOIA, insofar as it has not “arrange[d] . . . an alternative time frame” for responding to these Requests. *Id.* Defendant has not even acknowledged the Requests and has certainly not provided an estimated date of completion nor an invitation to contact the agency for the purposes of negotiating an “alternative” response date. PHRA does not believe it has the ability to arrange for an alternative time frame for Defendant’s final responses.

18. PHRA has exhausted any and all administrative remedies under 5 U.S.C. § 552(a)(6)(C).

19. PHRA has been and is currently being irreparably harmed by Defendant's unlawful withholding of the requested agency information, and PHRA will continue to be irreparably harmed until Defendant is compelled to conform their conduct to the requirements of FOIA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff PHRA respectfully requests that the Court enter judgment against Defendant, and provide PHRA with the following relief:

- a. An order declaring that Defendant's actions violated PHRA’s statutory rights under 5 U.S.C. § 552;
- b. An Order that Defendant issue a determination, and that Defendant shall conduct a diligent search for any and all records responsive to the Requests and demonstrate that it employed reasonable search methods most technologically likely to lead to the discovery of records responsive

to the Requests, selected from among those methods available to Defendant;

- c. An Order that Defendant produce, by a date certain, any and all non-exempt records responsive to the Requests and a Vaughn index of any responsive records withheld under claim of exemption;
- d. An Order awarding to PHRA its reasonable attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and,
- e. An Order granting to PHRA all further relief to which PHRA may be entitled.

Dated: December 10, 2024

PUBLIC HEALTH REFORM ALLIANCE
By Counsel

Respectfully submitted,

/s/ Jesse R. Binnall

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