

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NEAL D. BARNARD, M.D.,	)	
5500 Friendship Blvd., Apt 1112-N,	)	
Chevy Chase, MD 20815,	)	
	)	
Plaintiff,	)	Case No.:
	)	
v.	)	
	)	
DEPARTMENT OF HOMELAND SECURITY,	)	
Washington, DC 20528,	)	
	)	
Defendant.	)	

**COMPLAINT FOR INJUNCTIVE RELIEF**

This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, seeking a declaratory judgment that Defendant has violated FOIA, the Privacy Act, and the Administrative Procedure Act by failing to timely release records requested by Neal D. Barnard, M.D., and injunctive relief ordering Defendant to release such records.

**JURISDICTION AND VENUE**

1. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B), 552a(g)(1). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. This Court has the authority to grant declaratory relief pursuant to 28 U.S.C. § 2201. This Court has the authority to award costs and attorney fees under 5 U.S.C. §§ 552(a)(4)(E), 552a(g)(3)(B). Venue lies in this district under 5 U.S.C. §§ 552(a)(4)(B), 552a(g)(5).

**PARTIES**

2. Plaintiff Neal D. Barnard, M.D., is the president and founder of the Physicians Committee for Responsible Medicine, a 501(c)(3) public charity that advocates preventive health care through better nutrition and by promoting more effective, ethical, and compassionate scientific research. Dr. Barnard is the author of several dozen publications in scientific and medical journals as well as numerous nutrition books for lay readers, and he is frequently called on by news programs to discuss issues related to nutrition, research, and other areas of modern medicine. In 2005, Dr. Barnard filed a FOIA and Privacy Act request with U.S. Customs and Border Protection (“CBP”), in response to which he received a letter advising him to contact Immigrations and Customs Enforcement (“ICE”) for the requested records.

3. Defendant Department of Homeland Security (“DHS”) is a United States agency, of which ICE and CBP are components. ICE maintains a system of records containing information pertaining to Dr. Barnard and has possession and control of the records at issue in this Complaint. DHS and ICE are agencies within the meaning of 5 U.S.C. § 552(f)(1).

**STATEMENT OF FACTS**

4. On March 21, 2006, Dr. Barnard submitted a FOIA and Privacy Act request to ICE, seeking disclosure of certain records relating or referring to Dr. Barnard.

5. By letter dated May 1, 2006, more than 20 working days after Dr. Barnard submitted his request, ICE acknowledged receipt of Dr. Barnard’s request. The letter served solely as an acknowledgement of Dr. Barnard’s request; it did not provide a determination by ICE “whether to comply with such request.” *See* 5 U.S.C. § 552(a)(6)(A)(i).

6. On May 5, 2006, Mr. Gerald Crowley of ICE informed Dr. Barnard’s counsel by telephone that ICE might not be able to assign Dr. Barnard’s request to an official for processing

for several months and that ICE might then require an additional undetermined number of months to process the request.

7. On May 16, 2006, Dr. Barnard appealed ICE's denial, through inaction, of his request.

8. By letter dated June 28, 2006, more than 20 working days after Dr. Barnard's appeal, DHS denied Dr. Barnard's appeal and notified him of his right to seek judicial review.

9. Dr. Barnard has exhausted the applicable administrative remedies with respect to his records request. 5 U.S.C. §§ 552(a)(6), 552a(d), 552a(g)(1); 6 C.F.R. §§ 5.9, 5.25.

### **PLAINTIFF'S CLAIMS FOR RELIEF**

#### **CLAIM ONE**

#### **(Failure to grant fee waiver request)**

10. Dr. Barnard realleges and incorporates by reference all preceding paragraphs.

11. FOIA states that an agency shall "determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination." 5 U.S.C. § 552(a)(6)(A)(i). An agency may extend this statutory time limit by providing written notice of an extension to the person making the request. 5 U.S.C. § 552(a)(6)(B); 6 C.F.R. § 5.5(c)(1). *See also* 6 C.F.R. § 5.1(a)(1) (applying FOIA regulations to requests made under the Privacy Act).

12. Dr. Barnard properly requested records within ICE and DHS control.

13. Dr. Barnard is entitled by law to receive the requested records in a timely fashion.

14. Therefore, Defendant violated FOIA by not timely granting Dr. Barnard's records request.

**CLAIM TWO**  
**(Violation of the Administrative Procedure Act)**

15. Dr. Barnard realleges and incorporates by reference paragraphs 1–9.
16. Dr. Barnard properly requested records within ICE and DHS control.
17. Dr. Barnard is entitled by law to receive the requested records in a timely fashion.
18. Defendant’s failure to timely disclose records requested by Dr. Barnard

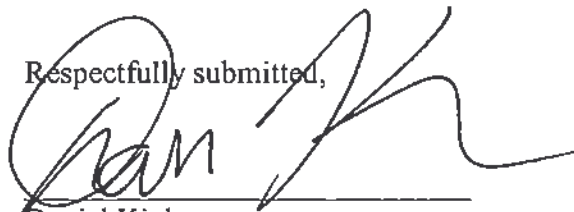
constitutes agency action unlawfully withheld in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706. Defendant’s failure in this matter is arbitrary, capricious, an abuse of discretion, not in accordance with the law, and without observance of procedure required by law, all in violation of the APA. *See id.* § 706(2)(A), (D).

**RELIEF REQUESTED**

WHEREFORE, Plaintiff respectfully requests that this Court:

- A. declare that Defendant has violated FOIA, the Privacy Act, and the APA by failing to grant Dr. Barnard’s records request;
- B. order Defendant to grant Dr. Barnard’s records request;
- C. award Dr. Barnard his reasonable attorneys fees and litigation costs incurred in this action, pursuant to 5 U.S.C. §§ 552(a)(4)(E), 552a(g)(3)(B); and
- D. grant such other relief as the Court may deem just and proper.

Respectfully submitted,



Daniel Kinburn  
PHYSICIANS COMMITTEE FOR  
RESPONSIBLE MEDICINE  
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Dated: \_\_\_\_\_

*8/4/06*