

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELYSIAN LABS, INC.
3131 Madeline Street
Oakland, CA 94602

Plaintiff,

v.

U.S. DEPARTMENT OF THE ARMY
114 Army Pentagon
Washington, DC 20310

Defendant.

Civil Action No. _____

COMPLAINT FOR INJUNCTIVE RELIEF

ELYSIAN LABS, INC. (“Elysian”) brings this action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, against the United States Department of the Army (the “Army” or the “U.S. Army”) seeking the expedited release of records requested pursuant to a FOIA request made almost a year ago, in August 2020. The documents relate to an algorithm developed by Elysian to assist the remote diagnosis of various health conditions, including the COVID-19 disease. The Army has failed and continues failing to respond to the request without any justification. The Army’s failure to timely respond to the request has caused and continues causing damages to Elysian. As grounds therefore, Plaintiff, through its counsel, alleges as follows.

JURISDICTION AND VENUE

1. Jurisdiction over this action is conferred by FOIA subsection (a)(4)(B) and 28 U.S.C. § 1331.
2. Venue is proper under FOIA subsection (a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff Elysian is a small biotechnology company located in Berkley, California. Elysian, through its counsel, submitted the FOIA requests at issue in this matter.

4. Defendant the U.S. Army is an agency of the United States government within the meaning of 5 U.S.C. § 552(f)(1). Upon information and belief, the Army has possession, custody, and control over the records sought from the Army. It is headquartered in Arlington, Virginia.

STATEMENT OF FACTS

A. Events Leading Up to the FOIA Request

5. Elysian is a company with extensive experience in technology, data analysis, and the development of artificial intelligence and machine learning algorithms.

6. Elysian has worked closely with the Army and with other branches of the United States Armed Forces, offering its technological innovations in ways that could provide added protection to our fighting men and women.

7. Elysian developed CHIRP, a technology that allows early detection of variations in health conditions through the real-time analysis of information from sensors attached to human body and provides warnings if some of the parameters do not fit established patterns.

8. Elysian filed a patent application covering CHIRP technology, and the U.S. Patent and Trademark Office allowed Elysian's patent claims.

9. Following the spread of the COVID-19 disease, Elysian decided to adopt CHIRP to use in the early, 30-40 hours before the presence of symptoms, detection of the disease, which would provide the opportunity to isolate potentially sick individuals to reduce the risk of further contagion and to improve treatment outcomes.

10. The primary advantage of CHIRP is that it can be used with existing off-the-shelf sensors, which significantly reduces the timing and costs of the deployment.

11. After successfully testing the COVID-19 application of CHIRP with front-line healthcare providers, in or about April 2020, at the height of the COVID-19 pandemic, Elysian reach out to the U.S. Army to discuss the potential use of CHIRP to reduce soldier deaths and injuries due to COVID-19.

12. Initially, the Army expressed great interest in the development of CHIRP technology. The senior leadership of the Army's Close Combat Lethality Task Force (the "CCLTF") immediately labeled CHIRP technology as "cleared hot to execute" and requested that Elysian provide a proposal to supply 5,000 units.

13. The Army also requested additional information about CHIRP, which Elysian provided.

14. However, following the expression of initial interest, Elysian's primary contact at CCLTF ceased responding.

15. One week later, on May 1, 2020, the Army arranged for the Medical Technology Enterprise Consortium ("MTEC"), a non-profit organization coordinating collaboration between the U.S. Army and private sector, to issue its Request for Project Proposal Solicitation Number: MTEC-20-12-COVID-19_Diagnostics "Wearable Diagnostic for Detection of COVID-19 Infection" (the "RPP"), requesting "white papers" from interested parties on or before May 13, 2020.

16. Elysian was not even informed that the RPP had issued, although Commander Christopher Steele of the Army's Military Operational Medicine Research Program ("MOMRP"),

who had been heavily engaged in the prior discussions, advised Elysian's primary contacts at the Army that the RPP was already out on May 4, 2020 "should Elysian wish to propose."

17. In the meantime, Lieutenant Colonel Joseph Miller ("LTC Miller"), one of Elysian's key contacts in this process, submitted a proposal to his superiors which referred to the use of "next generation algorithms to interpret biometric data received during Squad activities and engagements." The description used by LTC Miller was substantially similar to the description of CHIRP, although neither CHIRP nor Elysian was mentioned. The proposal was presented as entirely LTC Miller's idea. At the time, Elysian was unaware of the LTC Miller's proposal.

18. On or about May 12, 2020, Elysian submitted its white paper to the MTEC in response to the RPP (the "White Paper"). Upon information and belief, the MTEC transmitted the White Paper to the Army for evaluation.

19. On or about June 2, 2020, Elysian received an email from the MTEC, stating that Elysian's white paper "ha[d] been removed from consideration and will not be evaluated." The email explained: "The government [sic] ... determined that your submission did not meet the minimum acceptable qualifications stated in the RPP." No further explanation was provided.

20. Upon information and belief, two days after the Army advised Elysian that its White Paper "did not meet the minimum acceptable qualifications," on or about June 4, 2020, LTC Miller wrote an email to a colleague stating in pertinent part: "We have scaled up the Elysium (sic) labs idea with [Military Operational Medicine Research Program] money . . ." (the "Scale Up Email").

21. Upon information and belief, the Scale Up Email also informed that the Elysian CHIRP technology would be rolled out as part of a study involving an infantry battalion of the

Army's 10th Mountain Division "to get an early warning COVID capability," as those soldiers were being sent to Afghanistan.

22. Upon information and belief, despite the Army's clear interest in CHIRP as expressed in the Scale Up Email, on or about June 25, 2020, the Army informed Elysian that it was no longer interested in working the company.

23. However, subsequently, the MTEC's website announced that the MTEC was proceeding to work with "award recipients [who] were selected from the Offerors who responded to MTEC's [RPP]."

24. Upon information and belief, the Army continued to "scale up" Elysian's CHIRP technology with others without Elysian's consent and contrary to the terms of the RPP and the White Paper.

25. In fact, the Army has published announcements relevant to the development of a biomonitoring technology that was substantially identical to CHIRP, including, for example, a September 2020 update informing that the Army's Optimizing Human Weapon System office would be evaluating soldiers' "susceptibility to illness, including the COVID-19 virus [using] . . . commercially available sensors to monitor Soldier health [and] assess[ing] a susceptibility-to-illness predictive algorithm for detection of pre-symptomatic or asymptomatic signatures of infection and illness," using soldiers from the 10th Mountain Division, consistently with the LTC Miller's "Scale Up Email."

B. The FOIA Request

26. On or about August 6, 2020, Elysian, through its counsel, submitted a request pursuant to FOIA subsection (a)(3) (the "FOIA Request"), seeking ten categories of documents (each category of the documents is referred to herein as Requests 1 through 10) in order to determine whether the Army infringed upon Elysian's rights in the CHIRP technology.

27. The FOIA Request sought information from the Army concerning its handling of the White Paper, its decision to proceed with the RPP without Elysian, and the design of the studies that the Army was pursuing to evaluate “the Elysi[an] labs idea” including through a study involving soldiers in the 10th Mountain Division.

28. Pursuant to FOIA subsection (a)(6), a response to Plaintiff’s request was due in 20 working days.

29. Following the expiration of the 20-day statutory deadline, on or about September 10, 2021, counsel for Elysian contacted the Army’s FOIA Office to request information about the status of the request.

30. On the same, the FOIA Office responded, advising that the request was assigned a tracking number FA-20-3487/FP-20-026951.

31. The Army then went silent. In the absence of any further response, on or about January 13, 2021, Elysian filed a request for assistance with the Office of Government Information Service (“OGIS”), which serves as a mediator between FOIA requesters and Federal agencies.

32. Only after Elysian requested assistance from the OGIS, on or about January 13, 2021, the Army’s FOIA Office sent to Elysian’s counsel a letter advising that the ten requests were referred to four Army offices (the Army calls them “activities”) in accordance with the Army Regulation 25–55. However, the letter failed to specify which request was referred to which activity.

33. The email enclosing the January 13, 2021 letter stated that it was the “final response to your FOIA request.”

Requests Nos. 1 and 2

34. On or about January 25, 2021, Elysian's counsel received an email acknowledging the receipt of Requests Nos. 1 and 2 by the U.S. Army Combat Capabilities Development Command Soldier Center and assigning the requests file number SC FOIA FA-21-0001.

35. On or about March 3, 2021, Elysian's counsel received an email responding to Requests Nos. 1 and 2 and referencing SC FOIA FA-21-0003.

36. The March 3, 2021 email attached two documents and stated that the request was now closed.

37. The first document appears to be a six-page PowerPoint presentation relating to the Army's developing a system for monitoring for symptoms relating to COVID-19. The second document appears to be a slide relating to certain personnel physical performance tests results.

38. Upon information and belief and based on the content of the two produced documents, the Army is in control and possession of other documents that relate to the subject matter of the disclosed documents.

39. However, the Army failed to make a full and complete production of responsive documents and failed to set forth specific exemptions as required by FOIA subsection (b) that would justify its failure to produce documents.

Request No. 8

40. Request No. 8 sought email correspondence involving three specified officers, including LTC Miller, relating to the Army's handling of CHIRP-related information.

41. On or about March 15, 2021, Elysian's counsel received an email from HQ Department of the Army, Office of the Deputy Chief of Staff G3-5-7 ("CIV USARMY DCS G-3-5-7") responding to Request No. 8 and assigning it FOIA case number FA-21-0007.

42. The CIV USARMY DCS G-3-5-7 March 15, 2021 email also requested an email address of the officers involved in the requested communication and stated that “FOIA office will send a request to the Defense Information Systems Agency (DISA) asking that a search of the Defense Enterprise E-mail . . . be conducted for responsive documents.”

43. The requested information was promptly provided to the Army, followed by additional information clarifying the search.

44. On or about April 26, 2021, the Army provided an email response stating that “DAMO-OD does not have responsive records” relating to LTC Miller. The email also stated that the file was now deemed “closed.”

45. The April 26, 2021 response is inadequate because the Army failed to provide any response concerning correspondence involving two of the officers and failed to provide results from the DISA search concerning LTC Miller that the FOIA officer represented would be conducted per her March 15, 2021 email.

46. The Army also failed to refer the request to the appropriate activities as required by the Army Regulation 25–55.

Request Nos. 3, 5, 6, 7, 9, and 10

47. Following the January 13, 2021 letter, the Army failed to provide any responses to Requests Nos. 3, 5, 6, 7, 9, and 10 whatsoever.

Request for Administrative Appeal

48. On or about May 28, 2021, counsel for Elysian submitted a letter to the Army’s FOIA office requesting the Army to respond to Requests Nos. 3, 5, 6, 7, 9, and 10 and provide full and complete responses to Requests Nos. 1, 2, and 8.

49. The May 28, 2021 letter also requested directions for the administrative appeal if the Army fails to provide full and complete responses.

50. As of the date of this Complaint, the Army has not responded to the May 28, 2021 letter.

The Need for Expedited Disclosure

51. The Army's failure to provide timely responses to the FOIA Request caused and continue causing Elysian damages, including, but not limited to the following:

- a. The Army and the parties to whom the Army disclosed the White Paper could be infringing on Elysian's intellectual property;
- b. Elysian is losing the "first mover" advantage in the market of the wearable early COVID-19 detectors;
- c. Elysian was denied the opportunity to collect a vast amount of data for product development;
- d. Elysian was denied the opportunity to capitalize on the technology that Elysian developed specifically for COVID-19;
- e. Elysian is losing the opportunity to raise funding due to the potential infringement and lack of large-scale implementation; and
- f. Elysian lost customers who elected to work with technology adopted by the Army.

52. Given that the Army failed to provide full and complete response to the FOIA Request for almost a year, Elysian requires an expedited disclosure to mitigate damages.

CLAIMS FOR RELIEF

COUNT I

53. Elysian realleges the foregoing paragraphs as if stated herein.

54. Elysian submitted a proper FOIA Request to the Army.

55. Upon information and belief, the FOIA Request seeks information within the custody and control of the Army.

56. The Army did not provide a final response or complete responsive records to the FOIA Request within the time prescribed by FOIA subsection (a)(6).

57. Plaintiff constructively exhausted its administrative remedies due to the Army's failure to comply with proper FOIA Request in a timely fashion.

58. There is no legal basis for the Army's failure to disclose responsive records within the deadline established by the FOIA.

REQUESTED RELIEF

A. Order the Army to produce, within 20 days of the Court's order and at no cost, all non-exempt responsive records and Vaughn indexes of any responsive records withheld under a claim of exemption;

B. Enjoin the Army from continuing to withhold responsive records;

C. Award Elysian its reasonable costs, litigation expenses, and attorneys' fees incurred in prosecuting this civil action under the FOIA, 5 U.S.C. § 552(a)(4)(E); and

D. Grant such other relief as the Court deems just and proper.

Dated: July 20, 2021

By: /s/ Gene M. Burd

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