

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

FIRST LOOK INSTITUTE, INC., and
SHARON LERNER;

Plaintiffs,

-against-

NATIONAL INSTITUTES OF HEALTH,
Defendant.

Case No. 21 Civ. 4024

COMPLAINT

Plaintiffs First Look Institute, Inc. (“FLI”), publisher of *The Intercept*, and Sharon Lerner, an employee of FLI (collectively “The Intercept”), by and through their attorneys, Emery Celli Brinckerhoff Abady Ward & Maazel LLP, for their complaint alleges as follows:

PRELIMINARY STATEMENT

1. This is an action brought pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. §§ 552, et seq., by FLI—a non-profit American news organization that seeks to provide the public with original, independent journalism concerning the institutions and individuals responsible for shaping our world—and its reporter, Sharon Lerner. The Intercept brings this action for injunctive and other appropriate relief, seeking the release of agency records from the National Institutes of Health (NIH), an organization within the Department of Health and Human Services (“DHS”).

2. Through this action, The Intercept seeks to compel the NIH to disclose records demonstrative of funding it provided to virologist Dr. Peter Daszak to study the emergence of zoonotic diseases such as Sars-CoV-2, the virus responsible for the COVID-19 pandemic. This information is crucial to the public’s understanding of U.S. and international efforts to

conclusively determine the origins of SARS-CoV-2. Accurate information about how the virus acquired the ability to infect humans is crucial to understand the current pandemic as well as inform efforts to prevent future pandemics. The public has an indelible interest in both.

3. According to press reports, Dr. Daszak is the sole U.S. scientist on the World Health Organization (WHO) team investigating the origins of the virus. The panel's investigatory efforts have come under increasing scrutiny due to China's limited cooperation with the investigation and, importantly, conflicts of interest of many of the investigators, including Dr. Daszak.¹ Media reports indicate that Dr. Daszak has deep, longstanding ties to the Wuhan Institute of Virology (WIV), a Chinese research facility central to questions about the origin of the pandemic.

4. One theory of the virus' origin is that it originated from WIV, which the U.S. government accused of conducting controversial "gain of function" experiments that may have given bat coronaviruses the ability to infect humans.² U.S. officials have also alleged that WIV lacked adequate safety precautions and suffered an outbreak of COVID-19-like symptoms among its researchers in fall 2019, shortly before the world's first COVID-19 cases were

¹ See, e.g., *Wall Street Journal* Editorial Board, "Who Are the Covid Investigators?" (Feb. 15, 2021) <https://www.wsj.com/articles/who-are-the-covid-investigators-11613401955>; Colin D. Butler, et al., "Open Letter: Call for a Full and Unrestricted International Forensic Investigation into The Origins of COVID-19" (Mar. 4, 2021) [https://s.wsj.net/public/resources/documents/COVID%20OPEN%20LETTER%20FINAL%20030421%20\(1\).pdf](https://s.wsj.net/public/resources/documents/COVID%20OPEN%20LETTER%20FINAL%20030421%20(1).pdf).

² *Wall Street Journal* Editorial Board, *supra*, n. 1; U.S. State Department internal cables from Beijing Embassy to Washington, D.C., "China Opens First Bio Safety Level 4 Laboratory", (Jan. 19, 2018) available at: <https://context-cdn.washingtonpost.com/notes/prod/default/documents/109d57ba-42dd-4215-9f4e-39d068ceed31/note/4f90a905-2b3f-44e0-8cb5-2d9ea5dfc62a.#page=1>; Josh Rogin, "In 2018, Diplomats Warned of Risky Coronavirus Experiments in A Wuhan Lab. No One Listened." *Axios*, (Mar. 8, 2021) <https://www.politico.com/news/magazine/2021/03/08/josh-rogin-chaos-under-heaven-wuhan-lab-book-excerpt-474322>; Yuan Yang and Christian Shepherd, "WHO Investigators Probe Wuhan Virology Lab", *Financial Times*, (Feb. 3, 2021) <https://www.ft.com/content/8a28b91b-d98f-414d-a6c0-92f2346af1df>.

reported in Wuhan.³ The WHO investigation team is seeking to evaluate the veracity of these claims.⁴ Dr. Daszak's apparent conflicts of interest may inhibit the team's ability to do so.

5. Dr. Daszak's non-profit, EcoHealth Alliance, received a \$7.5 million grant from the NIH to study the process by which bat coronaviruses gain the ability to infect humans in partnership with WIV.⁵ Dr. Daszak also signed a public statement "strongly condemn[ing] the theory that the virus originated at WIV as a dangerous "conspiracy theor[y]" likely to "jeopardise [sic] our global fight against this virus."⁶ The public is entitled to know whether Dr. Daszak's deep, ongoing ties to WIV and stated views about the origins of COVID-19 create conflicts of interest that may cast doubt on Dr. Daszak's—and consequently, the WHO team's—ability to impartially investigate the outbreak.

6. NIH-funded research, in part, gives rise to the appearance of Dr. Daszak's conflicts of interest capable of impeding his ability to adequately investigate the origins of the pandemic. These apparent conflicts of interest engendered widely-reported criticism from the scientific community and U.S. government, who casted doubt on the accuracy and integrity of

³ Id.

⁴ Yang and Shepherd, *supra* n. 2.

⁵ Helen Branswell, "NIH Awards \$7.5 Million Grant to EcoHealth Alliance, Months After Uproar over Political Interference", *StatNews* (Aug. 27, 2020) <https://www.statnews.com/2020/08/27/nih-awards-grant-to-ecohealth-alliance-months-after-uproar-over-political-interference/>; Nidhi Subbaraman, "'Heinous!': Coronavirus Researcher Shut Down for Wuhan-lab Link Slams New Funding Restrictions", *Nature* (Aug. 21, 2020) <https://www.nature.com/articles/d41586-020-02473-4>.

⁶ Charles Calisher, et al., "Statement in Support of The Scientists, Public Health Professionals, and Medical Professionals of China Combatting COVID-19," *The Lancet* (Feb. 18, 2020) [https://www.thelancet.com/action/showPdf?pii=S0140-6736\(20\)30418-9](https://www.thelancet.com/action/showPdf?pii=S0140-6736(20)30418-9).

the WHO investigation.⁷ In part due to this backlash, WHO abandoned efforts to release an interim report on its findings thus far.⁸

7. COVID-19 has plunged the global economy into recession and sickened 150 million people worldwide, more than 3 million of whom passed away.⁹ The devastation wrought by COVID-19 underscores the need to understand the origins of the virus so that the U.S. and other governments and private institutions can most effectively prevent the next pandemic. For example, it will shed light on whether government spending on high-level biosafety labs money is well spent, or if it would be better spent on other pandemic-prevention efforts.¹⁰

8. The public has a strong interest in understanding the origins of the outbreak and how NIH funding decisions may impede their access to such information. Likewise, the public has an interest in learning what, if anything, the NIH knew about Dr. Daszak's involvement with WIV activities that may have contributed to the pandemic.

9. On September 3, 2020, *The Intercept* reporter Sharon Lerner submitted a FOIA request ("the Request") to the NIH that went to the heart of the public health matters described above. The NIH did not substantively respond to the request until December 18, 2020, when the agency denied it in full. The Intercept filed an administrative appeal challenging this denial on December 26, 2020. NIH failed to respond to The Intercept's administrative appeal within the

⁷ Betsy McKay, et al., "WHO Investigators to Scrap Plans for Interim Report on Probe of Covid-19 Origins", (Mar. 5, 2021) https://www.wsj.com/articles/who-investigators-to-scrap-interim-report-on-probe-of-covid-19-origins-11614865067?mod=hp_lead_pos5.

⁸ Id.

⁹ Coronavirus World Map: Tracking the Global Outbreak, *N.Y. Times*, last updated April 29, 2021 <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html>.

¹⁰ Fabian Koh, "Budget Debate: \$90 to Be Spent on Singapore's First Top-Level Biosafety Lab, to Be Operational by 2025", *The Straights Times*, (Mar. 1, 2021) <https://www.straitstimes.com/singapore/politics/90-million-to-be-spent-on-singapores-first-top-level-biosafety-lab-to-be>.

statutory 20 business-day time limit for an agency to respond to an administrative appeal. With this case, The Intercept seeks to vindicate their rights and the public's rights to government transparency under FOIA.

PARTIES

10. Plaintiff First Look Institute, Inc. ("FLI") is a not-for-profit American news organization headquartered at 114 5th Avenue, New York, NY 10011. FLI owns and operates several journalistic outlets, including *The Intercept*, an award-winning, nationally recognized news organization with a reputation for holding power to account. The Intercept's in-depth investigations focus on politics, war, surveillance, corruption, the environment, science, technology, criminal justice, and the media.

11. Plaintiff Sharon Lerner is a distinguished investigative reporter for *The Intercept* currently covering the environment and health. Her work has also appeared in other publications, including the *New York Times*, *The Nation*, and the *Washington Post*. She has won numerous awards for her journalism, including from the Newswoman's Club of New York, the Society for Environmental Journalism, and the American Public Health Association. She submitted the Request on behalf of and an agent for FLI in her capacity as a staff investigative reporter. FLI and Lerner (together, The Intercept) accordingly jointly bring this suit to obtain the records in question.

12. Defendant NIH is an agency of the federal government that has possession, custody, and/or control of the records that The Intercept seeks. NIH is headquartered at 9000 Rockville Pike, Bethesda, Maryland, 20892. "NIH is the steward of medical and behavioral

research for the nation.”¹¹ It invests roughly \$41.7 billion in medical research each year.¹² As of 2018, NIH was the world’s largest funder of medical research.¹³

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction over this action and personal jurisdiction over the Department of Commerce pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

14. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

15. Plaintiffs are deemed to have exhausted all its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C) because the NIH has failed to respond to within the statutorily mandated time limit of twenty working days after receipt of an administrative appeal. 5 U.S.C. §§ 552(a)(6)(C)(i).

FACTS

16. FOIA “focuses on the citizens’ right to be informed about ‘what their government is up to,’” by fostering the release of “[o]fficial information that sheds light on an agency’s performance of its statutory duties.” *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 750, 773 (1989) (citation omitted). “[D]isclosure, not secrecy, is the dominant objective” of FOIA. *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001) (internal quotation marks and citations omitted).

¹¹ National Institutes of Health, “About the NIH” (Jul. 7, 2015), <https://www.nih.gov/about-nih/what-we-do/nih-almanac/about-nih#:~:text=NIH%20is%20the%20steward%20of,and%20reduce%20illness%20and%20disability.>

¹² National Institutes of Health, “Budget” (Jun. 29, 2020), <https://www.nih.gov/about-nih/what-we-do/budget.>

¹³ Robin Seaton Jefferson, “How The Largest Funder of Biomedical Research in The World Spends Your Money,” *Forbes*, (Dec. 21, 2018), [https://www.forbes.com/sites/robinseatonjefferson/2018/12/21/how-the-largest-public-funder-of-biomedical-research-in-the-world-spends-your-money/?sh=1b59c07827b9.](https://www.forbes.com/sites/robinseatonjefferson/2018/12/21/how-the-largest-public-funder-of-biomedical-research-in-the-world-spends-your-money/?sh=1b59c07827b9)

17. The Intercept, like other news organizations, plays a critical role in providing information to citizens about “what their government is up to.” Indeed, the First Amendment’s guarantee of freedom of the press is meant to enable journalists to play an “essential role in our democracy,” to “bare the secrets of government and inform the people.” *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

18. Through the FOIA request at issue in this case, The Intercept seeks to fulfill its journalistic function and shine a public light on NIH funding that creates an apparent conflict of interest for the sole U.S. researcher on the WHO team assembled to investigate the origins of COVID-19.

I. The Request

19. On September 3, 2020, *The Intercept*’s investigative reporter Sharon Lerner submitted the Request to the NIH by email via iFOIA.org. A true and correct copy of this request is attached hereto as Exhibit A. The Request was for “access to and copies of proposals for and all written communications relating to” 32 specifically enumerated grants to Dr. Daszak and Ecohealth Alliance, Inc. to study zoonotic diseases. A full list of the grants appears in the Request, attached as Exhibit A.

20. Gorka Garcia-Malene, a Freedom of Information Officer for the NIH, acknowledged Ms. Lerner’s request and denied her request for expedited processing on September 17, 2020. A true and correct copy of this letter is attached as Exhibit B. The letter summarily concluded that Ms. Lerner’s request, did “not meet the standards of ‘compelling need,’” despite that Ms. Lerner is “a person primarily engage in disseminating information” and the ongoing pandemic generated “urgency to inform the public concerning actual or alleged Federal Government activity[,]” a “compelling need” standard set forth by the D.C. Circuit and quoted in the NIH’s response letter. Ex. B p. 3.

21. The NIH’s expedited processing denial letter promised to “do everything possible to comply with [The Intercept’s] request in a timely manner.” Ex. B.

22. FOIA requires the NIH to respond in 20 working days — not “in a timely manner.” 5 U.S.C. § 552 (a)(6)(A)(i).

23. No provision of the statute gives an agencies carte blanche to set its own amorphous, vague deadlines designed to give itself latitude to respond to requests at its convenience.

24. The NIH never notified The Intercept that “unusual circumstances” warranted delay past the ordinary 20-day deadline.

25. NIH did not ask Ms. Lerner to narrow her request—nor would it have been reasonable to do so. Ms. Lerner’s request articulated the exact grant and related communications she sought, including the agency, year, name, grant recipient, and for most items, size of the grant in dollars. This level of detail tailored the Request to target a limited number of documents, directing NIH to the exact documents sought.

II. The Denial

26. NIH provided no determination—intermediate or final—on this request, nor any indication of when it would do so, until First Look’s counsel made several follow-ups attempts on December 15 and 17, more than 100 days after Ms. Lerner filed the request.

27. On December 18, NIH FOIA Officer Goroka Garcia-Malene sent Ms. Lerner a letter denying her request in full pursuant to Title 5 U.S.C. § 552 (b)(7)(A) (“Exemption 7A”) and 45 C.F.R. § 5.31 (g)(1), both of which authorize agencies to withhold “records or information compiled for law enforcement purposes” that “[c]ould reasonably be expected to interfere with enforcement proceedings[.]” A true and correct copy of this letter is attached hereto as Exhibit C.

28. In its letter, the NIH summarily claimed that this exemption applied because the requested records “involve pending investigations.” Ex. C. The denial letter never claimed that the requested documents were compiled for law enforcement purposes. To the contrary, common-sense would dictate that the grant proposals were created pursuant to the process of funding scientific research, rather than pursuant to a law enforcement investigation. Moreover, the Request sought individual records, not any investigatory file that may exist. Exemption 7A therefore does not apply to the requested records.

29. In the denial letter, the NIH did not claim that or explain why “disclosure would harm an interest protected by an exemption” as required by 5 U.S.C. § 552 (a)(8)(A). Because the NIH did not articulate specific reasons why disclosure would result in harm to an investigation, Exemption 7A does not apply.

III. The Appeal

30. Plaintiff, by and through the counsel, filed an administrative appeal of NIH’s denial on December 26, 2020. A true and correct copy of this appeal letter is attached hereto as Exhibit D. The appeal argued that the requested records were not shielded from disclosure by Exemption 7A, and thus must be produced.

31. FOIA required Defendant Agency to respond within 20 working-days. 5 U.S.C. § 552 (a)(6)(A)(ii). This appeal was due on or about January 28, 2021. The NIH did not respond to the appeal by this date, and, as a result, constructively denied it. This exhausted FLI’s administrative remedies, rendering this civil complaint ripe for review. 5 U.S.C. § 552 (a)(6)(C)(i).

32. To date, NIH has not responded to the appeal.

FIRST CAUSE OF ACTION

(Violation of FOIA for failure to release responsive records)

33. Plaintiffs repeat, reallege, and incorporate the allegations in the foregoing paragraphs as though fully set forth herein.

34. The NIH is an agency subject to FOIA, 5 U.S.C. § 552(f), and therefore had an obligation to release responsive records not subject to a specific exemption.

35. The NIH's denial of The Intercept's entire FOIA request in reliance on a plainly inapplicable exemption, 5 U.S.C. § 552 (b)(7)(A), demonstrates that the Defendant agency violated FOIA, 5 U.S.C. § 552(a)(3), by failing to disclose all responsive records in its possession at the time of the Request without providing a lawful reason for withholding any records as to which it is claimed an exemption.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- a. Declare that the records sought by the Request, as more particularly described above and in Exhibit A, are public records pursuant to 5 U.S.C. § 552, that the NIH improperly withheld the documents pursuant to 5 U.S.C. § 552(b)(7)(A), that Exemption 7A does not apply, and that the records must be disclosed;
- b. Order the NIH to provide those records to Plaintiffs, including electronic copies of records stored in electronic format, within 20 business days of the Court's order;
- c. Award Plaintiffs the costs of this proceeding, including reasonable attorneys' fees, as authorized by FOIA; and
- d. Grant Plaintiffs such other and further relief as this Court deems just and proper.

Dated: New York, New York
May 5, 2021

EMERY CELLI BRINCKERHOFF ABADY
WARD & MAAZEL LLP

By: /s/Debra Greenberger

Andrew G. Celli, Jr.
Debra L. Greenberger
600 Fifth Avenue, 10th Floor
New York, New York 10020
(212) 763-5000

FIRST LOOK INSTITUTE, INC.
David S. Bralow
Victoria J. Noble*
114 5th Ave
New York, NY 10011-5604

Attorneys for Plaintiffs

* *Application for pro hac vice admission to be submitted.*

Exhibit A

September 3, 2020

Sharon Lerner
The Intercept
114 5th Ave
NY NY 10011

Robin Schofield
FOIA Officer
Department of Health and Human Services
National Institute of Health
5601 Fishers Lane
Room 6G51
Rockville, MD 20892
301-451-5109
foia@niaid.nih.gov

September 03, 2020

FOIA REQUEST

Fee waiver requested

Dear FOIA Officer:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of proposals for and all written communications relating to the following grants:

NIH 2020 Understanding Risk of Zoonotic Virus Emergence in EID Hotspots of Southeast Asia Daszak, Peter / Ecohealth Alliance, Inc.

NIH 2019 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc.

NIH 2018 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc.

NIH 2017 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc.
\$597,112

NIH 2016 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc.

NIH 2015 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc.
\$630,445

NIH 2014 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc.
\$666,442

NIH 2012 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc. \$518,980

NIH 2012 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc.

NIH 2012 Comparative Spillover Dynamics of Avian Influenza in Endemic Countries Daszak, Peter / Ecohealth Alliance, Inc. \$300,000

NIH 2010 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc. \$480,423 October, 2012 Daszak, Peter / Ecohealth Alliance inc. \$22,890

NIH 2012 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$6,982

NIH 2011 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc. \$510,005

NIH 2011 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$494,455

NIH 2011 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$266,919

NIH 2010 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$499,998

NIH 2010 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$199,992

NIH 2010 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc.

NIH 2009 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$499,975

NIH 2009 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc. \$535,156

NIH 2003 Anthropogenic change & emerging zoonotic paramyxoviruses Daszak, Peter / Wildlife Trust \$358,606

NIH 2002 Anthropogenic change & emerging zoonotic paramyxoviruses Daszak, Peter / Wildlife Trust \$358,102

NIH 2009 R01 TW The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$204,688

NIH 2009 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$199,698

NIH 2009 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$51,225

NIH 2009 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$46,399

NIH 2008 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc.

NIH 2008 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$502,356

NIH 2008 R01 TW The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$150,000

NIH 2008 R01 TW The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$45,000

I would like to receive the information in electronic form, preferably emailed to me.

I agree to pay reasonable fees for the processing of this request up to \$. Please notify me before incurring any expenses in excess of that amount.

Fee Categorization

For fee categorization purposes, I am a representative of the news media. Through this request, I am gathering information for my journalistic work with The Intercept. The Intercept is an award-winning news organization dedicated to holding the powerful accountable through fearless, adversarial journalism. Its in-depth investigations and unflinching analysis focus on politics, war, surveillance, corruption, the environment, technology, criminal justice, the media, and more. Accordingly, I am only required to pay for the direct cost of duplication after the first 100 pages. 5 U.S.C. § 552(a)(4)(A)(ii)(II); id. § 552(a)(4)(A)(iv)(II).

Request for Fee Waiver

Please waive any applicable fees. Release of the information is not primarily in my commercial interest and will contribute significantly to public understanding of government operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii). All the information I seek is for reporting that will enhance the public understanding of funding for emerging viral diseases.

Request for Expedited Processing

Please provide expedited processing of this request which concerns a matter of urgency. As a Investigative Reporter, I am primarily engaged in disseminating information. The public has an urgent need for information about the historic funding of research on emerging infectious diseases and coronaviruses because it is a critical piece of understanding the scientific work around the emergence of coronaviruses such as the Sar-CoV2. I certify that my statements concerning the need for expedited processing are true and correct to the best of my knowledge and belief.

Conclusion

If my request is denied in whole or part, please justify all withholdings by reference to specific exemptions and statutes, as applicable. For each withholding please also explain why your agency “reasonably foresees that disclosure would harm an interest protected by an exemption” or why “disclosure is prohibited by law[.]” 5 U.S.C. § 552(a)(8)(A)(i).

I would appreciate your communicating with me by email or telephone, rather than by mail.

I look forward to your determination regarding my request for expedited processing within 10 calendar days, as the statute requires.

Thank you in advance for your assistance.

Sincerely,

Sharon Lerner

Investigative Reporter, The Intercept

, sharon.lerner@theintercept.com

Exhibit B



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

National Institutes of Health
Freedom of Information Office
Building 31, Room 5B-35
31 Center Drive, MSC 2107
Bethesda, Maryland 20892-2107
phone: (301) 496-5633
fax: (301) 402-4541

Via email: sharon.lerner@theintercept.com

September 17, 2020

Sharon Lerner
The Intercept
114 5th Ave
New York, NY 10011

Re: FOI Case No. 55058

Dear Ms. Lerner:

This acknowledges your September 3, 2020, Freedom of Information Act (FOIA) request addressed to National Institute of Allergy and Infectious Diseases (NIAID) FOIA Office, which was received in this office the same day. You requested copies of the following grants:

NIH 2020 Understanding Risk of Zoonotic Virus Emergence in EID Hotspots of Southeast Asia Daszak, Peter / Ecohealth Alliance, Inc.

NIH 2019 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc.

NIH 2018 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc.

NIH 2017 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc.
\$597,112

NIH 2016 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc.

NIH 2015 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc.
\$630,445

NIH 2014 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc.
\$666,442

NIH 2012 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc. \$518,980

NIH 2012 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter /Ecohealth Alliance, Inc.

NIH 2012 Comparative Spillover Dynamics of Avian Influenza in Endemic Countries Daszak, Peter /Ecohealth Alliance, Inc. \$300,000

NIH 2010 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc. \$480,423 October, 2012 Daszak, Peter / Ecohealth Alliance inc. \$22,890

NIH 2012 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$6,982

NIH 2011 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc. \$510,005

NIH 2011 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$494,455

NIH 2011 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$266,919

NIH 2010 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$499,998

NIH 2010 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$199,992

NIH 2010 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc.

NIH 2009 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$499,975

NIH 2009 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc. \$535,156

NIH 2003 Anthropogenic change &emerging zoonotic paramyxoviruses Daszak, Peter / Wildlife Trust \$358,606

NIH 2002 Anthropogenic change &emerging zoonotic paramyxoviruses Daszak, Peter / Wildlife Trust \$358,102

Page 3 – Ms. Lerner (55058)

NIH 2009 R01 TW The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$204,688

NIH 2009 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$199,698

NIH 2009 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$51,225

NIH 2009 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$46,399

NIH 2008 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc.

NIH 2008 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$502,356

NIH 2008 R01 TW The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$150,000

NIH 2008 R01 TW The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$45,000

NIH 2005 Anthropogenic change & emerging zoonotic paramyxoviruses Daszak, Peter / Ecohealth Alliance, Inc. \$662,576

NIH 2004 Anthropogenic change & emerging zoonotic paramyxoviruses Daszak, Peter / Wildlife Trust \$359,654.

You also requested expedited processing.

The FOIA, 5 U.S.C. §552(a)(6)(E), requires agencies to consider requests for expedited processing and grant them whenever a “compelling need” is shown and in other cases as determined by the agency. The term “compelling need” is defined as (1) involving “an imminent threat to the life or physical safety of an individual,” or (2) in the case of a request made by “a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.” The compelling need standard is “intended to be narrowly applied.” *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001).

Your request does not meet the standards of “compelling need,” therefore, I am denying your request for expedited processing.

We are searching the files of the NIAID for records responsive to your request. If any documents responsive to your request are located, they will be reviewed for releasability, and all releasable information will be sent to you. We will do everything possible to comply with your

Page 4 – Ms. Lerner (55058)

request in a timely manner. Please contact the NIAID FOIA Office at foia@niaid.nih.gov or 301-451-5109 for additional information or to inquire about the status of your request.

Provisions of the FOIA allow us to recover part of the cost of complying with your request. We shall charge you for records in accordance with the Department of Health and Human Services (HHS) FOIA Regulations as they apply to news media requesters; i.e., you will be charged for duplication at 10-cents per page although the first 100 pages are free; there is no charge for search or review time. Please be advised that the HHS FOIA Regulations allow us to charge for search time even if we do not locate any responsive records or if we determine that some or all of the responsive records are exempt under one of the FOIA's nine exemptions. Because we are uncertain that applicable fees will exceed our minimum charge (\$25.00), we are not addressing your request for a fee waiver at this time. However, if it is determined that there will be fees associated with processing your request, we will contact you at that time

If you are not satisfied with the processing and handling of this request, you may contact the NIH FOIA Public Liaison and/or the Office of Government Information Services (OGIS):

NIH FOIA Public Liaison

Stephanie Clipper
Public Affairs Specialist
Office of Communications and Public Liaison
Building 31, Room 5B35
31 Center Drive
Bethesda, MD 20814
301-496-1828 (phone)
301-496-0818 (fax)
nihfoia@mail.nih.gov (email)

OGIS

National Archives and Records Admin.
8601 Adelphi Rd - OGIS
College Park, MD 20740-6001
202-741-5770 (phone)
1-877-684-6448 (toll-free)
202-741-5769 (fax)
ogis@nara.gov (email)

Sincerely,

Gorka Garcia-Malene
Freedom of Information Officer, NIH

Exhibit C



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

National Institutes of Health
Freedom of Information Office
Building 31, Room 5B-35
31 Center Drive, MSC 2107
Bethesda, Maryland 20892-2107
phone: (301) 496-5633
fax: (301) 402-4541

Via email: Sharon.lerner@theintercept.com

December 18, 2020

Sharon Lerner
The Intercept
114 5th Ave
New York, NY 10011

Re: FOI Case No. 55058

Dear Ms. Lerner:

This is the final response to your September 3, 2020, Freedom of Information Act (FOIA) request addressed to National Institute of Allergy and Infectious Diseases (NIAID) FOIA Office, which was received in the National Institutes of Health (NIH) FOIA office on the same day. You requested copies of proposals for and all written communications relating to the following grants:

- NIH 2020 Understanding Risk of Zoonotic Virus Emergence in EID Hotspots of Southeast Asia Daszak, Peter / Ecohealth Alliance, Inc.
- NIH 2019 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc.
- NIH 2018 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc.
- NIH 2017 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc. \$597,112
- NIH 2016 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc.
- NIH 2015 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc. \$630,445
- NIH 2014 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc. \$666,442
- NIH 2012 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc. \$518,980
- NIH 2012 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc.

- NIH 2012 Comparative Spillover Dynamics of Avian Influenza in Endemic Countries Daszak, Peter / Ecohealth Alliance, Inc. \$300,000
- NIH 2010 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc. \$480,423 October, 2012 Daszak, Peter / Ecohealth Alliance inc. \$22,890
- NIH 2012 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$6,982
- NIH 2011 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc. \$510,005
- NIH 2011 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$494,455
- NIH 2011 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$266,919
- NIH 2010 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$499,998
- NIH 2010 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$199,992
- NIH 2010 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc.
- NIH 2009 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$499,975
- NIH 2009 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc. \$535,156
- NIH 2003 Anthropogenic change & emerging zoonotic paramyxoviruses Daszak, Peter / Wildlife Trust \$358,606
- NIH 2002 Anthropogenic change & emerging zoonotic paramyxoviruses Daszak, Peter / Wildlife Trust \$358,102
- NIH 2009 R01 TW The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$204,688
- NIH 2009 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$199,698
- NIH 2009 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$51,225
- NIH 2009 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$46,399
- NIH 2008 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc.
- NIH 2008 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$502,356
- NIH 2008 R01 TW The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$150,000
- NIH 2008 R01 TW The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$45,000
- NIH 2005 Anthropogenic change & emerging zoonotic paramyxoviruses Daszak, Peter / Ecohealth Alliance, Inc. \$662,576 NIH 2004 Anthropogenic change & emerging zoonotic paramyxoviruses Daszak, Peter / Wildlife Trust \$359,654.

Page 3 – Ms. Lerner (55058)

We queried NIAID for records responsive to your request. The records you requested involve pending investigations. I have determined to withhold those records pursuant to Exemption 7(A), 5 U.S.C. § 552, and section 5.31 (g)(1) of the HHS FOIA Regulations, 45 CFR Part 5. Exemption 7(A) permits the withholding of investigatory records compiled for law enforcement purposes when disclosure could reasonably be expected to interfere with enforcement proceedings.

You have the right to appeal this determination to deny you access to information in the Agency's possession. Should you wish to do so, your appeal must be sent within ninety (90) days of the date of this letter, following the procedures outlined in Subpart F of the HHS FOIA Regulations (<https://www.federalregister.gov/documents/2016/10/28/2016-25684/freedom-of-information-regulations>) to:

Assistant Secretary for Public Affairs
Agency Chief FOIA Officer
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Public Affairs, Room 729H
200 Independence Avenue, S.W.
Washington, DC 20201

Clearly mark both the envelope and your letter "Freedom of Information Act Appeal."

If you are not satisfied with the processing and handling of this request, you may contact the NIH FOIA Public Liaison and/or the Office of Government Information Services (OGIS):

NIH FOIA Public Liaison

Stephanie Clipper
Public Affairs Specialist
Office of Communications and Public Liaison
Building 31, Room 5B35
31 Center Drive
Bethesda, MD 20814
301-496-5633 (phone)
301-496-0818 (fax)
nihfoia@od.nih.gov (email)

OGIS

National Archives and Records Admin.
8601 Adelphi Rd - OGIS
College Park, MD 20740-6001
202-741-5770 (phone)
1-877-684-6448 (toll-free)
202-741-5769 (fax)
ogis@nara.gov (email)

Sincerely,

Gorka Garcia-Malene
Freedom of Information Officer, NIH

Exhibit D

The Intercept

Assistant Secretary for Public Affairs
Agency Chief FOIA Officer
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Public Affairs, Room 729H
200 Independence Avenue, S.W.
Washington, D.C. 20201

December 26, 2020

Re: Appeal of Denial of FOIA Request 55058

Dear FOIA Appeals Officer:

As the First Amendment Counsel at First Look Institute, I write to appeal NIH's December 18, 2020 denial of Freedom of Information Act request 55058, filed on September 3, 2020 by Sharon Lerner. Ms. Lerner is an investigative reporter for *The Intercept*, a publication of First Look Institute. I appeal the decision to entirely withhold all requested records pursuant to 5 U.S.C. § 552 (b)(7)(A), a plainly inapplicable exception.

Please note, for the purpose of this appeal I am being assisted by Victoria J. Noble, who is the First Amendment Fellow at First Look Institute (not yet admitted to practice).

The request sought copies of proposals for and written communications regarding the following 32 grants to Dr. Peter Daszak and his organization, Ecohealth Alliance, LLC:

- NIH 2020 Understanding Risk of Zoonotic Virus Emergence in EID Hotspots of Southeast Asia Daszak, Peter / Ecohealth Alliance, Inc.
- NIH 2019 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc.
- NIH 2018 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc.
- NIH 2017 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc. \$597,112
- NIH 2016 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc.

The Intercept

- NIH 2015 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc. \$630,445
- NIH 2014 Understanding the Risk of Bat Coronavirus Emergence Daszak, Peter / Ecohealth Alliance, Inc. \$666,442
- NIH 2012 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc. \$518,980
- NIH 2012 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc.
- NIH 2012 Comparative Spillover Dynamics of Avian Influenza in Endemic Countries Daszak, Peter / Ecohealth Alliance, Inc. \$300,000
- NIH 2010 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc. \$480,423 October, 2012 Daszak, Peter / Ecohealth Alliance inc. \$22,890
- NIH 2012 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$6,982
- NIH 2011 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc. \$510,005
- NIH 2011 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$494,455
- NIH 2011 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$266,919
- NIH 2010 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$499,998
- NIH 2010 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter /Ecohealth Alliance, Inc. \$199,992
- NIH 2010 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter /Ecohealth Alliance, Inc.
- NIH 2009 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$499,975
- NIH 2009 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc. \$535,156
- NIH 2003 Anthropogenic change &emerging zoonotic paramyxoviruses Daszak, Peter / Wildlife Trust \$358,606
- NIH 2002 Anthropogenic change &emerging zoonotic paramyxoviruses Daszak, Peter / Wildlife Trust\$358,102
- NIH 2009 R01 TW The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$204,688
- NIH 2009 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter /Ecohealth Alliance, Inc. \$199,698

The Intercept

- NIH 2009 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$51,225
- NIH 2009 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$46,399
- NIH 2008 Risk of Viral Emergence from Bats Daszak, Peter / Ecohealth Alliance, Inc.
- NIH 2008 The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$502,356
- NIH 2008 R01 TW The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$150,000
- NIH 2008 R01 TW The Ecology, Emergence and Pandemic Potential of Nipah virus in Bangladesh Daszak, Peter / Ecohealth Alliance, Inc. \$45,000
- NIH 2005 Anthropogenic change & emerging zoonotic paramyxoviruses Daszak, Peter / Ecohealth Alliance, Inc. \$662,576
- NIH 2004 Anthropogenic change & emerging zoonotic paramyxoviruses Daszak, Peter / Wildlife Trust \$359,654.

NIH provided no determination — intermediate or final — on this request, nor any indication of when it would do so, until First Look’s counsel made several follow-ups attempts on December 15 and 17. On December 18, NIH FOIA Officer Gorka Garcia-Malene sent Ms. Lerner a letter denying her request in full pursuant to Title 5 U.S.C. § 552 (b)(7)(A) (“Exemption 7”) and 45 C.F.R. § 5.31 (g)(1). Both laws authorize the agency to withhold “records or information compiled for law enforcement purposes” that “[c]ould reasonably be expected to interfere with enforcement proceedings[.]” The agency justified its decision to withhold the requested records under this exception on the grounds that the records “involve pending investigations.”

The U.S. Supreme Court held in *FBI v. Abramson* that records must satisfy two criteria in order to fall within the ambit of Exemption 7: (i) it must have been compiled for law enforcement purposes; and (ii) it must cause one of six harms enumerated in parts (A-F) of the statute. 456 U.S. 615, 622 (1982). Because the NIH withheld the requested records pursuant to Exemption 7(A), their disclosure must be reasonably likely to impede enforcement proceedings, such as a civil or criminal prosecution. *Id.*

Under the first prong, Exemption 7 only applies if, considering “how and under what circumstances the requested records were compiled,” the records “relate to anything that can fairly be characterized as an enforcement proceeding.” *Jefferson v. DOJ*, 284 F.3d 172, 176-77 (D.C. Cir. 2002) (internal citations and quotation marks omitted). To show that the records were compiled for law enforcement purposes, an agency must demonstrate that the investigatory files focus on “specific and potentially unlawful

The Intercept

activity” or security risks and an identifiable individual or incident. *Stern v. FBI*, 737 F.2d 84, 89 (D.C. Cir. 1984); *Ctr. for Nat’l Sec. Studies v. U.S. DOJ*, 331 F.3d 918, 926 (D.C. Cir. 2003).

Because NIH is not primarily a law enforcement agency, its claim that the requested records were compiled for law enforcement purposes “must” be “scrutinize[d] with some skepticism” to prevent “the excessive withholding of agency records which Congress denounced and sought to avoid[.]” *Pratt v. Webster*, 673 F.2d 408, 418 (D.C. Cir. 1982).

The records at issue consist of scientific research grant proposals and related communications. The NIH did not compile these records pursuant to any investigation or other law enforcement purpose—nor does it claim to have done so. Rather, the NIH likely created and compiled these records for the purpose of awarding research grant money. The NIH provided no facts suggesting that the requested documents arose “out of investigations which focus directly on specifically alleged illegal acts...which could, if proved, result in civil or criminal sanctions.” *Bartko v. U.S. DOJ*, 898 F.3d 51, 64 (D.C. Cir. 2018) (internal citations and quotation marks omitted). The agency’s bare assertion that every responsive record concerning the grant proposals somehow “involve[s] pending investigations[.]” is simply insufficient to exempt the documents from disclosure under Exemption 7.

Assuming that the NIH recompiled the requested records pursuant to an investigation—a hypothetical that the vague assertions in NIH’s denial letter are insufficient to support—only the resultant investigatory file would satisfy Exemption 7’s threshold requirement. *Gould, Inc. v. General Services Admin.*, 688 F. Supp. 689, 698 (D.C.C. 1988). “[T]he component, derivative parts of a criminal [or civil] investigatory file, when considered independently and without reference to the remainder of the materials in the investigatory file, may not be covered by any exemption from FOIA[.]” *Id.* Ms. Lerner did not request an investigatory file. She requested “copies of and all written communications relating to” 32 discrete research grants, which she listed individually in her initial FOIA request. That these grants may now be the subject of or otherwise implicated in an NIH investigation is irrelevant.

Even if the requested records were created for law enforcement purposes, Exception 7(A) authorizes their non-disclosure “only to the extent that the production of such records would...interfere with enforcement proceedings.” *Abramson*, 456 U.S. at 622 (internal citations and quotation marks omitted)). Withholding the documents is only appropriate when “it could be reasonably expected” that disclosure would harm the proceedings. *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 928 (internal citations and quotation

marks omitted). The NIH provided absolutely no explanation as to how disclosing the requested information could lead to harm. The requested documents concern research grants that have or are likely to result in published articles made available to the public.¹ In light of the nature of the requested materials, disclosure is highly unlikely to interfere with any potential law enforcement proceedings. *Compare Ctr. for Nat'l Sec. Studies* (holding that the government reasonably predicted that disclosing the names of suspects detained pursuant to a global counterterrorism investigation would enable al Qaeda to stymie the investigation). 331 F.3d at 928.

Release of this information is in the public interest because it will significantly contribute to the public understanding of government operations and activities concerning government funding of into dangerous zoonotic diseases. These records relate to several NIH grants to virologist Dr. Peter Daszak to study the emergence of zoonotic diseases such as Sars-CoV-2, the virus responsible for the COVID-19 pandemic. Research demonstrates that a better understanding of zoonotic diseases transmitted from bats to humans—including Sars-CoV-2, MERS, and Ebola—is crucial for efforts to prevent the next global pandemic.² The immense damage caused by the COVID-19 pandemic—which shrank the global economy by a projected 4.9 percent and resulted in more than 1.6 million lives lost by the end of 2020—renders government-funded research that may help prevent the next pandemic a matter of indelible public concern.³

NIH wrongfully withheld records concerning funding for this vital research. This senseless secrecy continues to prevent Ms. Lerner from educating the public about efforts to understand and combat dangerous zoonotic diseases. Even if NIH believes that some of the information in these records is exempt, we request that they be released as a matter

¹ *NIH Federal RePORTER*, “Project Information: The Ecology, Emergence and Pandemic Potential of Nipah Virus in Bangladesh” (last accessed Dec. 21, 2020) <https://federalreporter.nih.gov/Projects/Details/?projectId=35972&Navigation=false>; *NIH Federal RePORTER*, “Project Information: Understanding The Risk Of Bat Coronavirus Emergence,” (last updated March 5, 2020).

<https://federalreporter.nih.gov/Projects/Details/?projectId=1174521&ItemNum=9&totalItems=7825&searchId=23624dc072b243d7808669a7b0f1cd93&searchMode=Smart&resultType=projects&page=1&pageSize=100&sortField=&sortOrder=&filters=&navigation=True#results>.

² Alice Latinne, et al., “Origin And Cross-Species Transmission of Bat Coronaviruses in China,” 11 *Nature Communications* 4235 (2020). Available at: <https://www.nature.com/articles/s41467-017-00923-8>; Christina Larson, et al., “Scientists Focus on Bats for Clues to Prevent The Next Pandemic,” *The Associated Press*, Dec. 14, 2020, <https://apnews.com/article/pandemics-brazil-rio-de-janeiro-animals-forests-5a7dff4d7ad18209edf4e35e62607087>.

³ International Monetary Fund, “World Economic Outlook Update, June 2020,” <https://www.imf.org/en/Publications/WEO/Issues/2020/06/24/WEOUpdateJune2020>; Johns Hopkins, “COV-19 Dashboard by The Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU),” last updated Dec. 14, 2020, <https://coronavirus.jhu.edu/map.html>.

The Intercept

of discretion, given the compelling public interest in increasing public knowledge of government funding for research into zoonotic diseases.

For these reasons, we request that the NIH release all improperly withheld records germane to Ms. Lerner's FOIA request. The failure to do so would be incompatible with the purpose of FOIA to promote openness in government and ensure an informed citizenry.

Please do not hesitate to contact us if you have any questions about this appeal. We can be reached by phone by calling Victoria Noble at (248) 303-8977 or by email at Victoria.Noble@TheIntercept.com. We look forward to resolving this matter promptly.

Yours truly,

/s/

David Bralow
Senior Vice President, Law
First Look Institute
david.bralow@theintercept.com
646-784-3287