

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

INFORMED CONSENT ACTION NETWORK,

Plaintiff,

-against-

NATIONAL INSTITUTES OF HEALTH,

Defendant.

1:21-cv-915

COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff, as for its Complaint regarding a Freedom of Information Act request against the above-captioned Defendant, alleges as follows:

**INTRODUCTION**

1. A novel coronavirus, SARS-CoV-2, the first cases of which were reported in Wuhan, China, has resulted in federal government officials recommending numerous restrictions on everyday life in America. In response, all fifty states have implemented the recommended restrictions to varying degrees, many of which press deeply upon cherished fundamental constitutional rights.

2. The origin of SARS-CoV-2 has therefore received widespread media attention. While the origin of this virus remains in dispute, many scientists have argued that the virus leaked from the Wuhan Institute of Virology (the “**Wuhan Lab**”).<sup>1</sup>

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<sup>1</sup> See generally <https://abc7chicago.com/fauci-rand-paul-video-exchange-covid-wuhan-lab-senator-and-dr/10901142/> (embedded video discussing the origins of the SARS-CoV-2 pandemic and the lab-leak theory) (last visited 10/11/2021); <https://www.rollcall.com/2021/07/23/experts-weigh-in-on-risky-wuhan-study-that-fauci-paul-debated/> (noting that Senator Rand Paul is “a proponent of a theory that the coronavirus that caused the COVID-19 crisis escaped from the Wuhan lab”) (last visited 10/11/2021); <https://www.wbko.com/2021/07/22/sen-rand-paul-fauci-not-honest-about-wuhan-lab-funding-covid-19-origins/> (video of Senator Rand Paul discussing the lab-leak theory) (last visited 10/11/2021); <https://www.cnn.com/2021/07/20/if-anybody-is-lying-here-senator-it-is-you-fauci-tells-sen->

3. The National Institute of Allergy and Infectious Diseases (“**NIAID**”) is at the center of the federal government’s response to COVID-19. NIAID is an institute within the National Institutes of Health (“**Defendant**” or “**NIH**”), which is organized within the Department of Health and Human Services.

4. The NIH claims that one of its goals is “to exemplify and promote the highest level of scientific integrity, public accountability, and social responsibility in the conduct of science.”<sup>2</sup>

5. In 2014, the NIH funded research regarding bat coronaviruses in China through EcoHealth Alliance, Inc. (“**EcoHealth**”),<sup>3</sup> which describes itself as “an international nonprofit dedicated to a ‘One Health’ approach to protecting the health of people, animals and the environment from emerging infectious diseases.”<sup>4</sup>

6. Dr. Peter Daszak (“**Daszak**”) is the President of EcoHealth.

7. Plaintiff Informed Consent Action Network (“**Plaintiff**” or “**ICAN**”) is a non-profit organization that advocates for informed consent and disseminates information necessary for same with regard to all medical interventions.

8. In furtherance of its mission, and in an effort to obtain and disseminate information that may inform the public debate regarding the origin of SARS-CoV-2, ICAN issued two requests to the NIH pursuant to the Freedom of Information Act (5 U.S.C. § 552, as amended) (“**FOIA**”). The first was for: “**Copies of all FOIA requests submitted to the National Institutes of Health or any of its institutes on or after January 1, 2019 that include the word “EcoHealth” and**

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[paul-in-heated-exchange-at-senate-hearing.html](#) (“The World Health Organization led the first phase of an investigation into the origins of Covid-19 and the possibility it could have leaked from that lab.”).

<sup>2</sup> <https://www.nih.gov/about-nih/what-we-do/mission-goals> (last visited 10/11/2021).

<sup>3</sup> <https://reporter.nih.gov/project-details/8674931> (last visited 10/11/2021); <https://nypost.com/2021/05/25/fauci-admits-nih-funding-of-wuhan-lab-denies-gain-of-function/> (last visited 10/11/2021).

<sup>4</sup> <https://www.ecohealthalliance.org/about> (last visited 10/11/2021).

**any production made in response to each such FOIA request.”** The second request was identical except the search term was “Daszak” (both requests together, the “**FOIA Requests**”).

9. Hence, the FOIA Requests simply sought documents that the NIH has already produced in response to other FOIA requests. This means these documents have already been collected, reviewed, redacted, and produced in response to other FOIA requests. Nonetheless, despite the passage of over three months since these requests were made, the NIH has not only failed to produce these documents, it has failed to even respond with a determination as required by 5 U.S.C. § 552(a)(6). ICAN therefore brings this action to challenge NIH’s failure to timely produce documents or otherwise respond to the FOIA Requests.

### **PARTIES**

10. ICAN is a not-for-profit organization with an office located at 2025 Guadalupe Street, Suite 260, Austin, Texas 78705.

11. The NIH is an agency within the Executive Branch of the United States Government, organized within the Department of Health and Human Services. The NIH is an agency within the meaning of 5 U.S.C. § 552(f).

### **JURISDICTION AND VENUE**

12. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. Venue is proper within this District pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391.

### **FACTS**

#### **A. The First FOIA Request**

13. On June 16, 2021, ICAN requested that the NIH produce the following documents (the “**First FOIA Request**”):

**Copies of all FOIA requests submitted to the National Institutes of Health or any of its institutes on or after January 1, 2019 that include the word “EcoHealth” and any production made in response to each such FOIA request.**

(Exhibit A.1.)<sup>5</sup>

14. Upon submitting the First FOIA Request, ICAN immediately received confirmation that the request was submitted successfully and that NIH had assigned Case Number 56545 to the request. (Exhibit A.2.)

15. To date, NIH has not provided ICAN with a determination of whether it intends to comply with the First FOIA Request, ICAN’s right to seek assistance from the FOIA Public Liaison, or ICAN’s right to appeal as required by 5 U.S.C. § 552(a)(6)(A).

**B. The Second FOIA Request**

16. On June 16, 2021, ICAN requested that the NIH produce the following documents (the “Second FOIA Request”):

**Copies of all FOIA requests submitted to the National Institutes of Health or any of its institutes on or after January 1, 2019 that include the word “Daszak” and any production made in response to each such FOIA request.**

(Exhibit B.1.)<sup>6</sup>

17. Upon submitting the Second FOIA Request, ICAN immediately received confirmation that the FOIA Request was submitted successfully and that NIH had assigned Case Number 56546 to the request. (Exhibit B.2.)

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<sup>5</sup> All “Exhibits” referenced herein are attached to this Complaint.

<sup>6</sup> All “Exhibits” referenced herein are attached to this Complaint.

18. To date, NIH has not provided ICAN with a determination of whether it intends to comply with the Second FOIA Request, ICAN's right to seek assistance from the FOIA Public Liaison, or ICAN's right to appeal as required by 5 U.S.C. § 552(a)(6)(A).

**C. Communications With NIH**

19. On September 16, 2021, counsel for ICAN sent an email to NIH and demanded production of all documents responsive to the FOIA Requests on or before September 23, 2021.

**(Exhibit C.1.)**

20. On September 17, 2021, Roger Bordine of NIH's Freedom of Information Office informed ICAN as follows:

**We are actively working on your cases.**

**Thank you for your ongoing patience.**

**(Exhibit C.2.)**

21. To date, ICAN has not received documents responsive to or any further communication from the NIH regarding the FOIA Requests.

**D. NIH Failed to Respond to ICAN**

22. Despite the passage of more than 20 business days since NIH received the FOIA Requests, it has failed to provide a statutorily required response, including failing to: seek a permitted extension; determine and communicate to ICAN the scope of any responsive records it intended to produce or withhold and the reasons for any withholdings; or inform ICAN of its right to appeal. *See* 5 U.S.C. § 552(a)(6). NIH has therefore failed to timely provide the responses required under FOIA for each of the FOIA Requests.

23. NIH also failed to produce responsive documents and has not sought any of the statutorily available extensions of time available under FOIA. *See ACLU of Wash. v. U.S. Dep't of Justice*, 2011 U.S. Dist. LEXIS 26047, at \*32-33 (W.D. Wash. March 10, 2011) (finding the

agency failed to act in a timely manner pursuant to § 552(a)(6)(C) where “[defendant] did not seek an administrative extension of time in which to produce documents . . . [n]or did [defendant] respond to plaintiff’s request for a fee waiver in a timely manner.”).

24. Furthermore, because NIH neither provided a final determination nor produced documents, NIH failed to provide ICAN with the information to allow it to effectively submit an appeal. *See* 5 U.S.C. § 552(a)(6)(A)(i)(II) and (III). *See also Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990) (“A response is sufficient for purposes of requiring an administrative appeal if it includes: the agency’s determination of whether or not to comply with the request; the reasons for its decision; and notice of the right of the requester to appeal to the head of the agency if the initial agency decision is adverse.”); *Shermco Indus. v Sec’y of U.S. Air Force*, 452 F.Supp. 306, 318 (N.D. Tex. 1978), *rev’d on other grounds*, 613 F.2d 1314 (5th Cir. 1980)) (plaintiffs were not required to exhaust their administrative remedies when defendant failed to provide plaintiffs with a complete determination because defendant’s response “does not include a list of the releasable and withheld documents, does not include a statement of the fees charged for the releasable documents, and does not include a statement of why the agency believes waiver or reduction of any fee charged is not in the public interest or does not benefit the general public. The plaintiffs could not effectively appeal the . . . adverse decision on their FOIA request without this information.”). ICAN is therefore deemed to have exhausted its administrative remedies. *See* 5 U.S.C. § 552(a)(6)(C)(i).

25. For these reasons, NIH has failed to abide by the requirements of FOIA and has forced ICAN to come before this Court to seek an order directing NIH to expeditiously produce all documents responsive to its FOIA requests. The information ICAN seeks is simply too

important to the current public discourse regarding the COVID-19 pandemic to allow NIH to withhold such information from public scrutiny.

**Requested Relief**

WHEREFORE, Plaintiff prays that this Court:

- a. Provide for expeditious proceedings in this action;
- b. Enter an order directing the NIH to produce all documents responsive to the FOIA Requests within 10 days from the date of any such order;
- c. Award Plaintiff its costs and reasonable attorneys' fees incurred in this action as provided by 5 U.S.C. § 552(a)(4)(E); and
- d. Grant such other and further relief as the Court may deem just and proper.

Dated: October 12, 2021

SIRI & GLIMSTAD LLP



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Aaron Siri, NY Bar No. 4321790  
Ursula Smith, Texas Bar No. 24120532 (*pro hac vice* to be filed)  
Gabrielle G. Palmer (*pro hac vice* to be filed)  
200 Park Avenue  
17th Floor  
New York, New York 10166  
Tel: (212) 532-1091  
[aaron@sirillp.com](mailto:aaron@sirillp.com)  
[usmith@sirillp.com](mailto:usmith@sirillp.com)  
[gpalmer@sirillp.com](mailto:gpalmer@sirillp.com)

*Attorneys for Plaintiff*

# Exhibit A.1



# Siri | Glimstad

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200 Park Avenue, Seventeenth Floor, New York, NY 10166  
sirillp.com | P: (212) 532-1091 | F: (646) 417-5967

## **FREEDOM OF INFORMATION ACT REQUEST**

VIA NIH FOIA PORTAL

June 16, 2021

Gorka Garcia-Malene  
Freedom of Information Act Officer  
National Institutes of Health  
Building 31 Room 5B35  
9000 Rockville Pike  
Bethesda, Maryland 20892  
Email: [nihfoia@mail.nih.gov](mailto:.nihfoia@mail.nih.gov)

Re: *FOIAs to NIH concerning Eco Health (IR#0000)*

Dear Mr. Garcia-Malene:

This firm represents the Informed Consent Action Network (“ICAN”). On behalf of ICAN, we are requesting records pursuant to the Freedom of Information Act (5 U.S.C. § 552, as amended) (“FOIA”).

By this letter, please provide the following records in your possession via email to [foia@sirillp.com](mailto:foia@sirillp.com):

**Copies of all FOIA requests submitted to the National Institutes of Health or any of its institutes on or after January 1, 2019 that include the word “EcoHealth” and any production made in response to each such FOIA request.**

Fees and charges for this search are to be waived pursuant to 5 U.S.C. § 552 (a)(4)(A)(iii) since ICAN is a not-for-profit 501(c)(3) organization and its mission is to raise public awareness about vaccine safety and provide the public with information to give informed consent. As part of its mission, ICAN investigates and disseminates information regarding vaccine safety, including through their 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 requested in this FOIA request 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 or via email at [foia@sirillp.com](mailto:foia@sirillp.com) during normal business hours. Thank you for your time and attention to this matter.

Very truly yours,

/s/ Aaron Siri

Aaron Siri, Esq.

Elizabeth A. Brehm, Esq.

# Exhibit A.2

## S&G Information Request Staff

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**From:** FOIA\_noreply@nih.gov  
**Sent:** Wednesday, June 16, 2021 11:41 AM  
**To:** S&G Information Request Staff  
**Subject:** Request Acknowledgement by NIH

Dear Aaron Siri,

Case Number 56545 has been assigned to the request you submitted. In all future correspondence regarding this request please reference case number 56545.

Regards,  
NIH

# Exhibit B.1

# Siri | Glimstad

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200 Park Avenue, Seventeenth Floor, New York, NY 10166  
sirillp.com | P: (212) 532-1091 | F: (646) 417-5967

## **FREEDOM OF INFORMATION ACT REQUEST**

VIA NIH FOIA PORTAL

June 16, 2021

Gorka Garcia-Malene  
Freedom of Information Act Officer  
National Institutes of Health  
Building 31 Room 5B35  
9000 Rockville Pike  
Bethesda, Maryland 20892  
Email: [nihfoia@mail.nih.gov](mailto:.nihfoia@mail.nih.gov)

Re: *FOIAs Concerning Daszak (IR#0507)*

Dear Mr. Garcia-Malene:

This firm represents the Informed Consent Action Network (“ICAN”). On behalf of ICAN, we are requesting records pursuant to the Freedom of Information Act (5 U.S.C. § 552, as amended) (“FOIA”).

By this letter, please provide the following records in your possession via email to [foia@sirillp.com](mailto:foia@sirillp.com):

**Copies of all FOIA requests submitted to the National Institutes of Health or any of its institutes on or after January 1, 2019 that include the word “Daszak” and any production made in response to each such FOIA request.**

Fees and charges for this search are to be waived pursuant to 5 U.S.C. § 552 (a)(4)(A)(iii) since ICAN is a not-for-profit 501(c)(3) organization and its mission is to raise public awareness about vaccine safety and provide the public with information to give informed consent. As part of its mission, ICAN investigates and disseminates information regarding vaccine safety, including through their 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 requested in this FOIA request 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.

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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 or via email at [foia@sirillp.com](mailto:foia@sirillp.com) during normal business hours. Thank you for your time and attention to this matter.

Very truly yours,

/s/ Aaron Siri

Aaron Siri, Esq.

Elizabeth A. Brehm, Esq.

# Exhibit B.2



## S&G Information Request Staff

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**From:** FOIA\_noreply@nih.gov  
**Sent:** Wednesday, June 16, 2021 11:45 AM  
**To:** S&G Information Request Staff  
**Subject:** Request Acknowledgement by NIH

Dear Aaron Siri,

Case Number 56546 has been assigned to the request you submitted. In all future correspondence regarding this request please reference case number 56546.

Regards,  
NIH

# Exhibit C.1

**Annalise Beube**

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**From:** Gabrielle Palmer  
**Sent:** Thursday, September 16, 2021 8:25 PM  
**To:** nihfoia@od.nih.gov  
**Cc:** S&G Information Request Staff; Annalise Beube  
**Subject:** Case Numbers 56545 and 56546 (IR#0506, 0507)

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Dear Sir or Madam,

On June 16, 2021, we issued two separate FOIA requests to the NIH. On the same date, the NIH acknowledged both requests and assigned the requests Case Number 56545 and 56546, respectively. We have received no communications or production on these requests since they were acknowledged on June 16, 2021. To avoid litigation, please produce all responsive documents no later than September 23, 2021.

Sincerely,

Gabrielle G. Palmer, Attorney

**Siri | Glimstad**

200 Park Avenue  
Seventeenth Floor  
New York, NY 10166  
Main: 212-532-1091  
Facsimile: 646-417-5967  
[www.sirillp.com](http://www.sirillp.com)

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# Exhibit C.2

## Annalise Beube

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**From:** NIH FOIA <nihfoia@od.nih.gov>  
**Sent:** Friday, September 17, 2021 8:49 AM  
**To:** Gabrielle Palmer; NIH FOIA  
**Cc:** S&G Information Request Staff; Annalise Beube  
**Subject:** RE: Case Numbers 56545 and 56546 (IR#0506, 0507)

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Good Morning,

We are actively working on your cases.

Thank you for your ongoing patience.

### Roger Bordine

Program Support  
Freedom of Information Office  
National Institutes of Health  
Building 31, Room 5B35  
31 Center Drive  
Bethesda, MD 20892

Phone: 301-496-5633

Fax: 301-402-4541

[Roger.bordine@nih.gov](mailto:Roger.bordine@nih.gov)



---

**From:** Gabrielle Palmer <gpalmer@sirillp.com>  
**Sent:** Thursday, September 16, 2021 11:25 PM  
**To:** NIH FOIA <nihfoia@od.nih.gov>  
**Cc:** S&G Information Request Staff <foia@sirillp.com>; Annalise Beube <abeube@sirillp.com>  
**Subject:** Case Numbers 56545 and 56546 (IR#0506, 0507)

Dear Sir or Madam,

On June 16, 2021, we issued two separate FOIA requests to the NIH. On the same date, the NIH acknowledged both requests and assigned the requests Case Number 56545 and 56546, respectively. We have received no communications or production on these requests since they were acknowledged on June 16, 2021. To avoid litigation, please produce all responsive documents no later than September 23, 2021.

Sincerely,

Gabrielle G. Palmer, Attorney

Siri | Glimstad

200 Park Avenue

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Facsimile: 646-417-5967

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