

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

JIMMY TOBIAS)
124 Washington Place,)
New York, NY 10003)

Plaintiff,)

v.)

U.S. DEPARTMENT OF HEALTH AND)
HUMAN SERVICES,)
200 Independence Ave., S.W.)
Washington, D.C. 20201)

NATIONAL INSTITUTES OF HEALTH,)
9000 Rockville Pike)
Bethesda, MD 20892)

Defendants.)

COMPLAINT

1. Plaintiff JIMMY TOBIAS brings this Freedom of Information Act suit to force Defendants U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (“HHS”) and its component NATIONAL INSTITUTES OF HEALTH (“NIH”) to produce records pertaining to Dr. Anthony Fauci’s communication with scientists Kristian weAndersen, a professor of immunology and microbiology at Scripps Research, and Jeremy Farrar, a British medical researcher and the director of the Wellcome Trust. In violation of FOIA, Defendants refused to release non-exempt information under Exemption 6 and Exemption 5.

PARTIES

2. Plaintiff JIMMY TOBIAS is an independent reporter with *The Guardian* and *The Nation*, among other media outlets, and made the FOIA requests at issue in this case.

3. Defendant DEPARTMENT OF HEALTH AND HUMAN SERVICES (“HHS”) is a federal agency subject to the Freedom of Information Act, 5 U.S.C. § 552.

4. Defendant NATIONAL INSTITUTES OF HEALTH (“NIH”) is a federal agency subject to the Freedom of Information Act, 5 U.S.C. § 552. NIH is a component of HHS.

JURISDICTION AND VENUE

5. This case is brought under 5 U.S.C. § 552(a)(4)(B) and presents a federal question conferring jurisdiction on this Court. *See* 28 U.S.C. § 1331.

6. Venue is proper under 5 U.S.C. § 552(a)(4)(B).

JUNE 1, 2021, FOIA REQUEST (FAUCI-ANDERSEN)

7. On June 1, 2021, TOBIAS submitted a FOIA request to a component of NIH, National Institute of Allergy and Infectious Diseases (“NIAID”), for “[a]ny and all written and electronic communications, including email attachments, between Anthony Fauci and Kristian Andersen, an associate professor at Scripps Research.” TOBIAS limited the timeframe of the search to between January 1, 2020, and the present. TOBIAS excluded “copies of organizational newsletters or other widely available materials of a similar sort” from the search. Exhibit 1.

8. On June 1, 2021, NIH acknowledged receipt of the request and assigned reference number 56403 to the matter. Exhibit 2.

9. On August 18, 2021, NIH issued a determination and produced 24 pages of records responsive to the request.¹ Exhibit 3.

10. Of the 24 pages of produced records, NIH withheld 17 pages in their entirety by citing Exemption 6 of FOIA. In the remaining 7 pages, NIH redacted large portions of the records by citing Exemption 6 of FOIA. Exhibit 4.

11. On August 20, 2021, TOBIAS appealed the withholdings and redactions made under Exemption 6. Exhibit 5.

¹ Although the letter is dated July 23, 2021, NIH released this letter to TOBIAS on August 18, 2021. Exhibit 1 at 3.

12. On August 24, 2021, HHS acknowledged receipt of the appeal assigned reference number 2021-00253-A-PHS to the appeal. Exhibit 6.

13. HHS never issued a response to TOBIAS' appeal.

14. Defendants have not demonstrated that the withheld and redacted records are exempt under Exemption 6.

15. As of the date of this filing, NIH and HHS have not complied with FOIA and have not produced all records responsive to the request.

JUNE 2, 2021, FOIA REQUEST (FAUCI-FARRAR)

16. On June 2, 2021, TOBIAS submitted a FOIA request to NIAID, a component of NIH, for “[a]ny and all written and electronic communications, including email attachments, between Anthony Fauci and Jeremy Farrar, the director of the Wellcome Trust.” TOBIAS limited the timeframe of the search to between January 1, 2020, and the present. TOBIAS excluded “copies of organizational newsletters or other widely available materials of a similar sort” from the search. Exhibit 7.

17. On June 2, 2021, NIH acknowledged receipt of the request and assigned reference number 56410 to the matter. Exhibit 8.

18. On August 25, 2021, NIH issued a determination. NIH stated that it located 174 pages responsive to the request. NIH withheld 30 pages in their entirety by citing Exemption 5 of FOIA. NIH redacted portions of the 144 pages of released records by citing Exemptions 4, 5, and 6 of FOIA. Exhibit 9.

19. On August 27, 2021, TOBIAS appealed the withholdings and redactions made under Exemption 5. Exhibit 10.

20. TOBIAS did not and does not dispute the redactions made under Exemptions 4 and 6.

21. On August 30, 2021, HHS acknowledged receipt of the appeal assigned reference number 2021-00257-A-PHS to the appeal. Exhibit 11.

22. HHS never issued a response to TOBIAS' appeal.

23. Defendants have not demonstrated that the withheld and redacted records are exempt under Exemption 5.

24. As of the date of this filing, NIH and HHS have not complied with FOIA and have not produced all records responsive to the request.

COUNT I – DEFENDANTS' FOIA VIOLATION (FAUCI-ANDERSEN)

25. The above paragraphs are incorporated herein.

26. The request seeks disclosure of agency records and were properly made.

27. HHS and NIH are federal agencies, subject to FOIA.

28. Included within the scope of the request are one or more records or portions of records that are not exempt under FOIA.

29. HHS and NIH have failed to produce all non-exempt records responsive to the request.

COUNT II – DEFENDANTS' FOIA VIOLATION (FAUCI-FARRAR)

30. The above paragraphs are incorporated herein.

31. The request seeks disclosure of agency records and were properly made.

32. HHS and NIH are federal agencies, subject to FOIA.

33. Included within the scope of the request are one or more records or portions of records that are not exempt under FOIA.

34. HHS and NIH have failed to produce all non-exempt records responsive to the request.

WHEREFORE, TOBIAS asks the Court to:

- i. declare that Defendants have violated FOIA;
- ii. order Defendants to produce all non-exempt records responsive to the request;
- iii. enjoin Defendants from withholding non-exempt public records under FOIA;
- iv. award Plaintiff attorneys' fees and costs; and
- v. award such other relief the Court considers appropriate.

Dated: October 22, 2021

RESPECTFULLY SUBMITTED,

/s/ Merrick Wayne

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