

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

FIRST LOOK INSTITUTE, INC.
and SHARON LERNER,

Plaintiffs,

-against-

DEFENSE THREAT REDUCTION AGENCY,

Defendant.

Case No. 21 Civ. 9337

COMPLAINT

Plaintiffs Sharon Lerner and First Look Institute, Inc., publisher of *The Intercept*, by and through their attorneys, Emery Celli Brinckerhoff Abady Ward & Maazel LLP, for their complaint allege 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 Sharon Lerner and First Look Institute, Inc. (collectively “FLI”). First Look Institute, Inc. is 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. Ms. Lerner is an investigative reporter for *The Intercept*. She primarily covers science, health, and the environment.

2. This case concerns the Defense Threat Reduction Agency’s (“DTRA”) failure to timely respond to a Freedom of Information Act (“FOIA”) request Ms. Lerner filed on behalf of her employer, First Look Institute, Inc. (the “Request,” “Exhibit A”). The Request sought “copies of grant proposals, including continuations, for and any and all Progress Reports related to” six specific grants awarded by DTRA to EcoHealth Alliance, Inc. for the study of bat

coronaviruses and other pathogens (the “Grants”).¹ DTRA awarded these Grants through a program designed to “support the advancement of fundamental knowledge and understanding of the sciences with an emphasis on exploring new and innovative research for combating or countering Weapons of Mass Destruction (WMD).”²

3. The recipient of the Grants, EcoHealth Alliance, and its President, Dr. Peter Daszak, are the subject of an ongoing controversy over federal funding for dangerous virology research. EcoHealth Alliance engineered bat coronaviruses to make them capable of infecting humans using federal funding and, upon information and belief, may have misled federal funders about the risks of their work.³ At least some of EcoHealth Alliance’s research took place at the Wuhan Institute of Virology (“WIV”) in Wuhan, China, the location of the first known COVID-19 outbreak. This fueled accusations—including by members of Congress—that EcoHealth

¹ All Grants are titled “Understanding The Risk of Bat-Borne Zoonotic Disease Emergence in Western Asia” and bear the Federal Award Identification Number (“FAIN”) HDTRA11710064. Publications that acknowledge financial support provided by these Grants make clear that the Grants supported work on coronaviruses, including SARS-CoV-2, the virus that causes COVID-19. *See, e.g.*, Michael Letko, et al., “Bat-Borne Virus Diversity, Spillover, And Emergence,” 18 *Nature Revs. Microbiology* 461, 465-469 (2020), available at <https://www.nature.com/articles/s41579-020-0394-z.pdf>; Kevin J. Olival, et al., “Possibility for Reverse Zoonotic Transmission of SARS-CoV-2 to Free-Ranging Wildlife,” *PLoS Pathogens* (Sept. 3, 2020), <https://journals.plos.org/plospathogens/article?id=10.1371/journal.ppat.1008758>.

² [USASpending.gov](https://www.usaspending.gov), “Project Grant FAIN HDTRA11710064” (last accessed Nov. 1, 2021), https://www.usaspending.gov/award/ASST_NON_HDTRA11710064_9761.

³ *See, e.g.*, Sharon Lerner & Mara Hvistendahl, “New Details Emerge about Coronavirus Research at Chinese Lab,” *The Intercept* (Sept. 6, 2021), <https://theintercept.com/2021/09/06/new-details-emerge-about-coronavirus-research-at-chinese-lab/>; Sharon Lerner, et al., “NIH Documents Provide New Evidence U.S. Funded Gain-of-Function Research in Wuhan,” *The Intercept* (Sept. 9, 2021), <https://theintercept.com/2021/09/09/covid-origins-gain-of-function-research/>; Sharon Lerner & Maia Hibbett, “EcoHealth Alliance Conducted Risky Experiments on MERS Virus in China,” *The Intercept* (Oct. 21, 2021), <https://theintercept.com/2021/10/21/virus-mers-wuhan-experiments/>. *See also* Letter from Lawrence A. Tabek, Principal Deputy Director, NIH to James Comer, Ranking Member, Comm, on Oversight and Reform, U.S. House of Representatives, (Oct. 20, 2021) *in* Oversight Comm. Republicans (@GOPoversight), Twitter (Oct. 20, 2021), <https://twitter.com/GOPoversight/status/1450934193177903105>; Sharon Lerner & Mara Hvistendahl, “NIH Officials Worked with EcoHealth Alliance to Evade Restrictions on Coronavirus Experiments,” *The Intercept* (Nov. 3, 2021), <https://theintercept.com/2021/11/03/coronavirus-research-ecohealth-nih-emails/>.

Alliance and Daszak lied about their research to federal funders.⁴ The public cannot ascertain the veracity of these claims without access to the records sought by the Request.

4. The information sought by the Request is additionally important given that Daszak was involved in several prominent investigations into the origin of the pandemic, including World Health Organization's ("WHO") "Global Study of The Origin of SARS-CoV-2," on which he was the sole U.S. scientist. Because a leading theory of the pandemic's origin is that SARS-CoV-2 escaped from WIV into the community due to a laboratory accident, Daszak's research on coronaviruses at WIV creates an appearance of a glaring conflict of interest. Moreover, Daszak led efforts to discredit the so-called "lab-leak" hypothesis as a conspiracy theory, including by writing an influential letter published in *The Lancet* condemning the theories and convincing other top scientists to sign-on.⁵ Details of Daszak's research on coronaviruses—including that funded by DTRA—is crucial to understanding whether and how his conflicts of interest and efforts to suppress debate over the origin of the virus may have tainted international efforts to understand how the pandemic emerged.

5. Understanding the cause of the COVID-19 pandemic is crucial to preventing the next pandemic and to the American public's ability to hold government officials accountable for adopting policies capable of doing so. The public has the right to know whether taxpayer dollars are implicated in the origin of the pandemic so that they may decide for themselves whether the

⁴ See, e.g., Press Release, Foreign Affairs Comm. Republicans, "McCaul Renews Call for Peter Daszak to Be Subpoenaed," (Oct. 25, 2021), <https://gop-foreignaffairs.house.gov/press-release/mccaul-renews-call-for-peter-daszak-to-be-subpoenaed/>; Oversight Comm. Republicans (@GOPoversight), Twitter (Oct. 20, 2021), <https://twitter.com/GOPoversight/status/1450934193177903105>.

⁵ Ed Browne, "Wuhan Coronavirus Research Coverup Allegations Prompt NIH to Give EcoHealth An Ultimatum," *Newsweek* (Oct. 22, 2021), <https://www.newsweek.com/ecohealthalliance-reveal-wuhan-coronavirus-research-nih-mice-ace2-eha-1641603>; Sainath Suryanarayanan, "EcoHealth Alliance Orchestrated Key Scientists' Statement on 'Natural Origin' of SARS-CoV-2," U.S. Right to Know (Nov. 18, 2020), <https://usrtk.org/biohazards-blog/ecohealth-alliance-orchestrated-key-scientists-statement-on-natural-origin-of-sars-cov-2/>.

government should continue to fund high-risk virology experiments and if so, whether safeguards imposed by DTRA and other federal funders adequately protect public health. Underscoring the public's immense interest in understanding the nature of EcoHealth Alliance's government-funded coronavirus experiments, the editorial boards of major newspapers, including the *Wall Street Journal* and the *Washington Post*, have called on Congress to subpoena Daszak.⁶ Disclosure of the information sought by the Request therefore serves FOIA's purpose of informing the public about government action, which is "a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

PARTIES

6. Plaintiff First Look Institute, Inc. is a not-for-profit American news organization headquartered at 114 5th Avenue, New York, NY 10011. First Look Institute 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.

7. Plaintiff Sharon Lerner is a distinguished investigative reporter for *The Intercept*. She currently covers health, science, and the environment. 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. Ms. Lerner explicitly submitted the Request at issue "as an agent for and on behalf of First Look Institute, Inc.,

⁶ Editorial Board, "Where Are The Wuhan Subpoenas?" *Wall Street J.* (Oct. 27, 2021), <https://www.wsj.com/articles/where-are-the-wuhan-subpoenas-ecohealth-alliance-peter-daszak-nih-anthony-fauci-gain-of-function-coronavirus-11635343111>; Editorial Board, "One Person Who Might Know What Really Happened in Wuhan," *Wash. Post* (Oct. 25, 2021), <https://www.washingtonpost.com/opinions/2021/10/25/one-person-who-might-know-what-really-happened-wuhan/>.

publisher of *The Intercept*.” Ex. A. Accordingly, FLI and Ms. Lerner jointly bring this suit to obtain the records in question.

8. Defendant Defense Threat Reduction Agency (“DTRA”) is an organization within the U.S. Department of Defense (“DoD”), an agency of the federal government. DTRA has possession, custody, and/or control of the records that FLI seeks. DTRA is headquartered at 8725 John J. Kingman Road, Fort Belvoir, Virginia 22060.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action and personal jurisdiction over DTRA pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

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

11. FLI is deemed to have exhausted all its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C) because DTRA has failed to respond to within the statutorily mandated time limit. 5 U.S.C. §§ 552 (a)(6)(C)(i).

FACTS

12. 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). “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). “[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).

13. FLI publication *The Intercept*, like other news outlets, 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.” *N.Y. Times Co. v. U.S.*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

14. Through the FOIA Request at issue in this case, FLI seeks to fulfill its journalistic function and shine a public light on DTRA policy and practices.

15. On September 24, 2021, Plaintiff Sharon Lerner, a reporter for *The Intercept*, made a FOIA Request to DTRA. Ex. A. The Request sought: copies of six specific grant proposals and all Progress Reports related to a DTRA grant, FAIN HDTRA11710064, titled “Understanding the Risk of Bat-Borne Zoonotic Disease Emergence in Western Asia.” *Id.*

16. DTRA acknowledged receipt of the Request on October 2, 2021 (the “Acknowledgement,” “Exhibit B”). The Acknowledgement stated that the “request was perfected on September 30, 2021[.]” Ex. B.

17. FOIA confers an affirmative “right to receive information on government activity in a timely manner” and embodies Congress’ recognition that “delay in complying with FOIA requests may be ‘tantamount to denial.’” *ACLU v. DoD*, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004) (quoting H. Rep. No. 876, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News, 6267, 6271). Courts therefore interpret FOIA “[a]gainst the backdrop of the anti-delay policy of FOIA[.]” *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep’t of State*, 300 F. Supp. 3d 540, 550 (2018).

18. Absent “unusual circumstances” not present here,⁷ FOIA requires federal agencies to determine “whether to comply” with a request and apprise the requestor of that determination within 20 working days after receipt of the request. 5 U.S.C. § 552 (a)(6)(A)(i). As such, FOIA required DTRA to respond to the Request on or before November 1, 2021.

19. DTRA did not respond to the Request by the applicable deadline. To date, DTRA has not responded to the Request.

20. Its failure to do so exhausted The Intercept’s administrative remedies, rendering this civil complaint ripe for review. 5 U.S.C. § 552 (a)(6)(C)(i); *N.Y. Legal Assistance Grp. v. Bd. of Immigration Appeals*, 987 F.3d 207, 226 (2d Cir. 2021).

21. In its October 14, 2021 letter denying FLI’s requests for a fee waiver and expedited processing (the “Expedited Processing Denial,” “Exhibit C”), DTRA claimed that “[y]our request has been placed in our processing queue and it will be worked in the order the request was received....As a matter of information, the current workload is 141 FOIA Requests.” Ex. C.

22. DTRA’s “current workload” does not justify its failure to respond to the Request in a timely manner. *See Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. Dep’t of State*, 300 F. Supp. 3d 540, 549 (S.D.N.Y. 2018) (backlog of 130 requests did not justify failure to timely produce non-exempt records); *Reyes v. U.S. Nat’l Archives & Records Admin.*, 356 F. Supp. 3d 155, 168 (D.D.C. 2018) (FOIA’s “purpose would not be served if it were reasonable for agencies to withhold documents for indeterminant periods of time because they have too many FOIA

⁷ Federal agencies may extend the deadline to respond to a FOIA request by up to 10 working days by giving “written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched.” 5 U.S.C. § 552 (a)(6)(B)(i). DTRA did not provide written notice extending the deadline under § 552 (a)(6)(B)(i).

requests and too few FOIA staff members.”); *Elec. Privacy Info. Ctr. v. DHS*, 811 F. Supp. 2d 216, 236 (D.D.C. 2011) (agency’s “administrative delay and a generic claim of a FOIA backlog” did not justify failure to disclose records prior to litigation).

23. By failing to issue a substantive response to the Request or produce any non-exempt responsive records to FLI within 20 working days, DTRA violated FLI’s rights under FOIA.

24. FOIA requires that DTRA promptly release all non-exempt responsive records to FLI. 5 U.S.C. § 552 (a)(3)(A).

FIRST CAUSE OF ACTION

(Violation of FOIA for Failure to Timely Release Responsive Records)

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

26. The DTRA is an entity of the federal government subject to FOIA, 5 U.S.C. § 552(f), and therefore had an obligation to timely disclose all responsive records not subject to a specific exemption.

27. The DTRA’s failure to make available non-exempt responsive records within the applicable time limit demonstrates that the Defendant agency constructively denied the Request in full, in violation of FOIA, 5 U.S.C. § 552(a)(3).

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 and that the records must be disclosed;

- b. Order the DTRA 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
November 11, 2021

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* *application for pro hac vice admission to be submitted*