

1 KENNETH D. MURPHY, Esq. NH Bar. 1843
Rainboth, Murphy & Lown, P.A.
2 439 Middle St.
Portsmouth, NH 04801
3 Tel: 603-431-1993

4 *Attorneys for Plaintiffs*

5
6 UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

7
8 MICHAEL CONNETT,)
)
9 Plaintiff,)
vs.) Civil Action No.
10 NATIONAL INSTITUTES OF HEALTH,) **COMPLAINT**
)
11 Defendants.)
)
12)

13 **INTRODUCTION**

14
15 1. This is an action filed under the U.S. Freedom of Information Act (“FOIA”), 5 U.S.C. §
16 552, *et. seq.* Plaintiff Michael Connett seeks an order compelling the disclosure and release of agency
17 records improperly withheld by the National Institutes of Health.

18 **THE PARTIES**

19 2. Mr. Connett (“Plaintiff”) is a lawyer who currently resides in Exeter, New Hampshire.¹
20 Mr. Connett made the FOIA request at issue in this case.

21 3. Defendant NATIONAL INSTITUTES OF HEALTH (“NIH”) is a component entity of the
22 Department of the Health and Human Services, a federal agency. The NIH is subject to the Freedom of
23 Information Act, 5 U.S.C. § 552.

24 **JURISDICTION AND VENUE**

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

27
28 ¹ Mr. Connett’s law firm is based in El Segundo, California, but his personal residence is in Exeter, New Hampshire.

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

2 **FACTUAL BACKGROUND**

3 6. The National Toxicology Program (“NTP”) is a federal government entity, headquartered
4 within the NIH’s National Institute of Environmental Health Sciences (NIEHS), that conducts
5 toxicological testing and state-of-the-art systematic reviews on the hazards of environmental toxicants.

6 7. One of the systematic reviews that the NTP is currently working on is a review of published
7 scientific research on fluoride: with a focus on studies that have investigated fluoride’s
8 neurodevelopmental impacts. The scientific literature on fluoride’s neurodevelopmental effects includes
9 four high-quality “birth cohort” studies recently funded by the NIH² which have found significant
10 associations between early-life fluoride exposure and cognitive impairment in children.

11 8. Approximately 200 million Americans consume fluoride in their water through the practice
12 of community water fluoridation. In light of the widespread reach of fluoridation in the U.S., fluoride’s
13 potential to adversely affect neurodevelopment is a matter of substantial public interest.

14 9. The findings and conclusions of the NTP’s systematic review are widely anticipated to
15 influence federal recommendations and safety standards on fluoride. As a reflection of the influence the
16 NTP’s report is expected to have on fluoride safety standards, the Hon. Edward Chen from the Northern
17 District of California recently stayed a case (*Food & Water Watch, et al. v. EPA*, 17-cv-02162) that is
18 addressing fluoride’s neurodevelopmental risks to permit consideration of the NTP’s final conclusions.
19 Judge Chen issued this stay after overseeing a 7-day trial in which many experts, including the principal
20 investigators of the aforementioned NIH-funded studies, testified about the current science.

21 10. The NTP has not yet published a finalized version of the systematic review. It has, however,
22 released two drafts. The first draft was released in the fall of 2019, and a revised draft was released in the

23 ² Till C, et al. Fluoride exposure from infant formula and child IQ in a Canadian birth cohort.
24 2020 *Environ Int.* 134:4–11.

25 Green R, et al. Association between maternal fluoride exposure during pregnancy and IQ
26 scores in offspring in Canada. *JAMA Pediatr.* 2019, 173:940–948.

27 Bashash M, et al: Prenatal fluoride exposure and attention deficit hyperactivity disorder
(ADHD) symptoms in children at 6-12years of age in Mexico City. *Environ Int* 2018, 121(Pt 1):658-666.

28 Bashash M, et al: Prenatal fluoride exposure and cognitive outcomes in children at 4 and
6-12 years of age in Mexico. *Environ Health Perspect* 2017, 125(9):097017.

1 fall of 2020. Following release of the revised draft in 2020, the National Academy of Sciences,
2 Engineering & Medicine (NASEM) conducted a peer review of the NTP report. NASEM released the
3 findings of its peer review in February 2021.

4 11. As described below, Plaintiff submitted a FOIA request in February 2021 seeking certain
5 documents related to the NTP's systematic review.

6 PLAINTIFF'S FOIA REQUEST

7 12. On February 26, 2021, Plaintiff submitted a FOIA request to the NIH which sought written
8 communications to, or from, Dr. Lawrence Tabak, the then Principal Deputy Director of the NIH.³

9 13. Plaintiff's request for Dr. Tabak's communications were limited to those communications
10 "from September 1, 2020 to the Present" which (A) include the words fluoride or fluoridation; (B) address
11 the revised draft of NTP's systematic review; and/or (C) address the NAS's peer review of the NTP's
12 revised draft. These requested communications to/from Dr. Tabak included communications with persons
13 outside of the federal government.

14 14. On February 26, 2021, the day that the FOIA request was submitted, an NIH Program
15 Support Officer emailed Plaintiff stating that the request had been received and had been assigned the case
16 number 55981. **Exhibit A.** The Program Support Officer, Roger Bordine, noted that "This request will be
17 processed by the OD [Office of Director] FOIA Office here at NIH." *Id.*

18 15. Subsequent to the initial emails from Roger Bordine on February 26, 2021, Plaintiff has
19 received no further communications from NIH regarding his request. The NIH has not provided a
20 determination, has not provided responsive records, has not sought to expand the time permitted for its
21 response, has not claimed there are exceptional or unusual circumstances at issue, and has not sought any
22 clarification or limitation to the scope of Plaintiff's request.

23 16. In July 2021, Plaintiff called the NIH's Office of the Director ("OD") FOIA Office at the
24 telephone number (301-435-4671) listed on the NIH website. Plaintiff left a voicemail asking for someone
25

26 ³ In the FOIA request, Plaintiff incorrectly identified Mr. Tabak as the Principal Deputy Director of
27 the NIEHS, which is an institute within NIH. Roger Bordine, an NIH Program Support Officer, spotted the
28 mistake and promptly informed Plaintiff that the request would be processed through the NIH's Office of
Director ("OD"), rather than through NIEHS. **Exhibit A.** Mr. Bordine told Plaintiff that there was "no need
to submit another request," as "we have already switched th[e] request from NIEHS to NIH." *Id.*

1 in the office to provide an update on the status of his FOIA request. The NIH did not respond to this verbal
2 request, either by writing or by phone.

3 17. On July 30, 2021, having received no response to his telephonic request, Plaintiff emailed
4 the NIH's OD FOIA Office. **Exhibit B.** In his email, Plaintiff again asked for an update on the status of
5 his FOIA request. *Id.* As with the earlier voicemail, the NIH did not respond.

6 18. On August 11, 2021, Plaintiff sent another email to NIH's OD FOIA Office. **Exhibit C.** In
7 his email, Plaintiff wrote, in part:

8 The FOIA statute commands that federal agencies make a determination regarding a FOIA
9 request within 20 days of receiving the request. 5 U.S.C. § 552(a)(6)(A)(i). If no such
10 determination is provided within this time period, the requester has the right to seek redress
11 in federal court. See Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n,
12 711 F.3d 180, 186-190 (D.C. Cir. 2013).

11 It has been nearly six months since I submitted my request, and I have yet to receive any
12 response, let alone a determination, from the OD FOIA office. To the extent that a response
13 (including production of responsive documents) is not provided within 21 days of this letter
14 (Sept 1, 2021), please be advised that I may be seeking redress in federal court under the
15 authority set forth in Citizens for Resp. Ethics in Washington, 711 F.3d at 186-190.

14 19. The NIH never responded to Plaintiff's August 11, 2021 letter.

15 20. As of the present date, the NIH has still not provided any response to Plaintiff's FOIA
16 request.

17 21. On NIH's website, the NIH continues to list the "status" of Plaintiff's FOIA request as
18 "Assigned for Processing." This is the same status that Plaintiff's request has had for the past 11 months.

19 22. According to NIH's website, "Assigned for Processing" means that the "request has been
20 assigned to a FOIA Specialist for processing." Other status categories that NIH assigns to FOIA requests
21 include "In Process," which refers to requests that are "actively being processed by the FOIA Office."
22 Plaintiff's request has never been listed as "In Process," despite being submitted over 11 months ago.

23 23. To put the above conduct in perspective, Plaintiff filed a separate FOIA request in February
24 2021 to a separate office within the NIH (i.e., the NIEHS FOIA Office) seeking different documents
25 related to the NTP report. Unlike the OD office at issue here, the NIEHS Office provided a timely response
26 to the request and produced responsive communications related to both the NTP report and the NAS peer
27 review. While the NIEHS Office redacted certain, limited portions of these communications, the
28 overwhelming bulk of the communications were disclosed.

CLAIM FOR RELIEF

(Violation of the Freedom of Information Act
5 U.S.C. § 552)

24. Plaintiff incorporates every allegation set forth above.

25. The Freedom of Information Act mandates that agencies receiving requests under the Act respond to those requests within 20 business days by notifying the requesting party of the agency’s determination of the request, its reasons for that determination, and the party’s right to appeal. *See* 5 U.S.C. § 552(a)(6)(A)(i). An agency may extend this deadline for no more than ten days to provide the requesting party with an opportunity to limit the scope of the request. *Id.* § 552(a)(6)(A)(i)-(ii). FOIA does not provide federal agencies with the option to respond to FOIA requests at some indefinite point in the future, or when it is merely convenient or preferable to the agency to do so.

26. When, as in this case, an agency fails to respond within the statutory time frame, the requester will be deemed to have exhausted his administrative remedies and may seek relief in federal court. 5 U.S.C. § 552(a)(6)(A)(i); *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 186-190 (D.C. Cir. 2013).

27. As of the date of this Complaint, the NIH has not yet made any determination regarding Plaintiff’s FOIA request and has failed to produce any documents responsive to the request. This failure to act is a violation of the statutory deadlines set forth in the FOIA.

REQUESTED RELIEF

WHEREFORE, Plaintiff prays that this Court:

- A. Issue an order finding that the NIH has violated the FOIA;
- B. Order the NIH to search for and release all records responsive to Plaintiff’s requests immediately, as authorized by 5 U.S.C. § 552(a)(4)(B);
- C. Award Plaintiff’s attorneys’ fees and costs as authorized by 5 U.S.C. § 552(a)(4)(E); and
- D. Grant such other relief as justice may require or that the Court may deem appropriate.

February 3, 2022

Respectfully submitted,

/s/ Kenneth D. Murphy

KENNETH D. MURPHY, Esq. NH Bar. 1843
Rainboth, Murphy & Lown, P.A.
439 Middle St.
Portsmouth, NH 04801
Tel: 603-431-1993

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28