PROTECT the PUBLIC'S TRUST

VIA ELECTRONIC MAIL October 27, 2021

Freedom of Information Act Request

Department of Health and Human Services
Brandon Gaylord, Freedom of Information Officer
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Center for Disease Control
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National Institute of Health
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Re: Records relating to Potential Scientific Integrity Violations Following HHS' Public Statements Concerning Natural Immunity from COVID-19

Dear FOIA Officer,

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (FOIA), from Protect the Public's Trust (PPT), a non-profit organization dedicated to promoting ethics in government and restoring the public's trust in government officials.

Records Requested

PPT requests the following records relating to both the Center for Disease and Control (CDC) and National Institute of Health's (NIH) publicized statements by senior leadership on a scientific study purported to demonstrate vaccination offers higher protection than previous infection with COVID-19.

1. Meeting Requests: All records for meeting requests, meeting memos, briefing documents, schedules, communications, and any other records related to preparation, dissemination, and press scheduling related to the press release on August 6, 2021 titled, "New CDC Study: Vaccination Offers Higher Protection than Previous COVID-19 Infection,"[1] and any and all of the same documents regarding NIH Director Francis Collins' subsequent statements made to the media on the study titled "Reduced Risk of Reinfection with SARS-CoV-2 After COVID-19 Vaccination — Kentucky, May–June 2021"[2] ("Kentucky study") highlighted in the release. This also includes meetings discussing, planning, briefing, or scheduling any media appearances or media communications regarding the topic of this study by any employee within the Department of Health and Human Services (HHS), CDC, and NIH, including each division's respective communications and ethics departments.
2. Internal and External Communications: Any and all internal communications, documents, or other records related to the CDC press release on August 6, 2021, titled, "New CDC Study: Vaccination Offers Higher Protection than Previous COVID-19 Infection," the Kentucky study, and related to any subsequent statements and press appearances made by NIH Director Francis Collins. This includes all communications, documents, briefing materials, and other records to, from or between any party within HHS, the CDC, and NIH. External communication includes any and all communications, documents, and other records to, from, or between a party within the CDC, NIH, Office of the Secretary, Office of the Assistant Secretary for Public Affairs, Office of the Assistant Secretary for Health and the White House. This includes any documents from the Department's communication staff, and any and all communications between government employees and external media organizations and any other external parties and entities on this subject. The search should include all such communications dating back to June 1 until the date the search begins.
3. Communications pertaining to an article appearing in the Louisville Courier Journal on August 9, 2021, by Deborah Yetter titled "CDC study of Kentuckians disputes Rand Paul, Thomas Massie claims about Covid-19 immunity."[3] The search should include all HHS communications and external affairs offices that

[1] https://www.cdc.gov/media/releases/2021/s0806-vaccination-protection.html
[2] https://www.cdc.gov/mmwr/volumes/70/wr/mm7032e1.htm?s_cid=mm7032e1_w
[3] https://www.courier-journal.com/story/news/politics/2021/08/09/cdc-study-disputes-rand-paul-thomas-massie-covid-immunity-claims/5536638001/

may have communicated with or had outreach with Ms. Yetter, her editors, the Louisville Courier Journal, Kevin Kavanagh, or other employees of the organization Health Watch USA prior to prior to publication of the article. For individuals within those offices, search terms should include "Rand Paul" "Thomas Massie" "natural immunity" "Israeli Health Ministry" or related terms.

For this request, the term "all records" refers to, but is not limited to, any and all documents, correspondence, emails, text messages, letters, notes, telephone records, telephone notes, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, telephone logs, digital logs such as those produced by Microsoft Teams, papers published and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in draft or final form.

This request is not meant to exclude any other request that, although not specifically requested, are reasonably related to the subject matter of this request. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under the FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and

2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

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PPT is willing to receive records on a rolling basis.

These communications could be very relevant to ensure that HHS, specifically its operational divisions CDC and NIH, are adhering to agency guidelines on scientific integrity and not misrepresenting the results or conclusions of a scientific study.

In order to most efficiently facilitate our request, we request that the FOIA office use the agency's enterprise records database to search and process this request.

Finally, FOIA's "frequently requested record" provision was enacted as part of the 1996 Electronic Freedom of Information Act Amendments, and requires all federal agencies to give "reading room" treatment to any FOIA-processed records that, "because of the nature of their subject matter, the agency determines have become the subject of subsequent requests for substantially the same records." 5 U.S.C. § 552(a)(2)(D)(ii)(I). Also, enacted as part of the 2016 FOIA Improvement Act, FOIA's Rule of 3 requires all federal agencies to proactively "make available for public inspection in an electronic format" "copies of records, regardless of form or format ... that have been released to any person … and … that have been requested 3 or more times." 5 U.S.C. § 552(a)(2)(D)(ii)(I). Therefore, we respectfully request that you make available online any records that the agency determines will become the subject of subsequent requests for substantially the same records, and records that have been requested three or more times.

Format of Requested Records

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested. See, e.g., 5 U.S.C. § 552(a)(3)(B) ("In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format."). "Readily accessible" means text-searchable and OCR-formatted. See 5 U.S.C. § 552(a)(3)(B). We ask that you please provide all records in an electronic format. Additionally, please provide the records either in (1) load-ready format with a CSV file index or Excel spreadsheet, or; (2) for files that are in .PDF format, without any "portfolios" or "embedded files." Portfolios and embedded files within files are not readily accessible. Please do not provide the records in a single, or "batched," .PDF file. We appreciate the inclusion of an index.

If you should seek to withhold or redact any responsive records, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption. 5 U.S.C. § 552(b). Please correlate any redactions with specific exemptions under FOIA.

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Fee Waiver Request

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as PPT access to government records without the payment of fees. Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and non-profit public interest groups." *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information ...." 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

I. PPT Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). The HHS FOIA regulations at 45 CFR § 5.54(b) establish the same standard.

Thus, HHS must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns "the operations or activities of the Federal government," (2) whether the disclosure is "likely to contribute" to an understanding of government operations or activities, (3) whether the disclosure "will contribute to public understanding" of a reasonably broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. 45 CFR § 5.54(b) establish the same standard. As shown below, PPT meets each of these factors.

A. The Subject of This Request Concerns "The Operations and Activities of the Government."

The subject matter of this request concerns the operations and activities of HHS, specifically within their operational divisions, CDC and NIH, in their role in disseminating information to the American public within their standard of scientific integrity. This request asks for: Information pertaining to the CDC's press release on August 6, 2021 titled, "New CDC Study: Vaccination Offers Higher Protection than Previous COVID-19 Infection," and subsequent public statements on the Kentucky study made by NIH Director Francis Collins and other CDC and NIH officials. Information provided will help to understand if the CDC and NIH complied with their own internal scientific integrity codes in the creation and publication of this press release and statements to media.

B. Disclosure is "Likely to Contribute" to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

Disclosure of the requested records will allow PPT to convey to the public information about how the CDC and NIH are upholding their agency standard on scientific integrity in disseminating information. Specifically, what procedures and oversight are performed to ensure senior officials at the CDC and NIH are fulfilling their duties in conveying scientific findings to the American public within the agency standards in intellectual honesty as required.

Thus, the requested records are likely to contribute to an understanding of HHS operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding of the Safeguards Utilized to Ensure that the American Public Receives Unbiased Scientific Information from These Agencies.

The role of these two agencies is to conduct, review, formulate, and disseminate scientific research with intellectual honesty. The requested records will contribute to public understanding of the agencies' procedures established to ensure that the reporting of scientifically honest communications with the public is, in fact, being upheld. The importance of the scientific integrity guidelines as a safety mechanism cannot be overstated. The scientific integrity guidelines created for the CDC and NIH are essential in ensuring science, and thus health policies, is not unduly influenced by industry, political individuals, or other conflicting influences. These records will greatly contribute to the public understanding of this topic. *See W. Watersheds Proj. v. Brown*, 318

F.Supp.2d 1036, 1040 (D. Idaho 2004) ("... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.").

Through PPT's synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), cert. denied, 513 U.S. 823 (1994) (applying "public" to require a sufficient "breadth of benefit" beyond the requester's own interests); *Cmty. Legal Servs. v. Dep't of Hous. & Urban Dev.*, 405 F.Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester's "work by its nature is unlikely to reach a very general audience," "there is a segment of the public that is interested in its work").

Indeed, the public does not currently have an ability to easily evaluate the requested records. We also are unaware of these records having been released to date. See *Cmty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records "clarify important facts" about agency policy, "the CLS request would likely shed light on information that is new to the interested public."). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), "[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations...."

Disclosure of these records is not only "likely to contribute," but is certain to contribute, to public understanding of how officials within agencies are conducting themselves particularly in matters touching on scientific integrity. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about whether these duties and obligations are being upheld.

D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

PPT is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public's understanding regarding the integrity of the scientific research presented in national media, and the internal protocols both agencies use to ensure that their individual scientific integrity guidelines are upheld in every communication without undue influence from internal or external sources. The consequences of these scientific integrity standards being violated in the reporting of scientific research can be grave, and there can be no doubt these records will certainly expand public understanding on these agencies' compliance with

those standards. Such public oversight of agency action is vital to our democratic system, specifically here with public health policy determinations, and clearly envisioned by the drafters of the FOIA. Thus, PPT meets this factor as well.

II. PPT has the Ability to Disseminate the Requested Information Broadly.

PPT operates as a non-profit organization that informs, educates, and counsels the public about the importance of government officials acting consistently with their ethics obligations. A key component of being able to fulfill this mission and educate the public about these duties is access to information that articulates what obligations exist for senior government officials. PPT intends to publish information from requested records on its website, distribute the records and expert analysis to its followers through social media channels including Twitter, Facebook, and other similar platforms. PPT also has a robust network of reporters, bloggers, and media publications interested in its content and that have durable relationships with the organization. PPT intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Through these means, PPT will ensure: (1) that the information requested contributes significantly to the public's understanding of the government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that PPT possesses the expertise to explain the requested information to the public; (4) that PPT possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes PPT as a reliable source in the field of government ethics and conduct.

Public oversight and enhanced understanding of HHS's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). PPT need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for PPT to show how it distributes information to the public generally. *Id.*

III. Obtaining the Requested Records is of No Commercial Interest to PPT.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to PPT's role of educating the general public. PPT operates as a nonprofit organization with supporters and members of the public who seek a transparent, ethical and impartial government that makes decisions in the best interests of all Americans, not former employers and special interests. PPT has no commercial interest and will realize no commercial benefit from the release of the requested records.

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IV. Conclusion

For all of the foregoing reasons, PPT qualifies for a full fee waiver. We hope that the Department will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

If you have any questions, please contact me at foia@protectpublicstrust.org. All records and any related correspondence should be sent to my attention at the address below.

Sincerely,

Morgan Yardis
Research and Publication Associate
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