

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

INFORMED CONSENT ACTION NETWORK,

Plaintiff,

-against-

NATIONAL INSTITUTES OF HEALTH,

Defendant.

Civil Action No. 1:22-cv-1143

COMPLAINT

Plaintiff Informed Consent Action Network (“**ICAN**” or “**Plaintiff**”) brings this action against Defendant National Institutes of Health (“**NIH**” or “**Defendant**”) to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (“**FOIA**”). As grounds therefor, Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391.

PARTIES

3. Plaintiff ICAN is a not-for-profit organization with an office located at 2025 Guadalupe Street, Suite 260, Austin, Texas 78705.
4. Defendant NIH is an agency within the Executive Branch of the United States Government, organized within the U.S. Department of Health and Human Services. NIH is an

agency within the meaning of 5 U.S.C. § 552(f). NIH has possession, custody, and control of records to which Plaintiff seeks access.

STATEMENT OF FACTS

5. On October 5, 2021, Plaintiff sent a FOIA request to NIH seeking copies of the following records:

Each and every email communication between October 1, 2019 and the date of search which includes Francis Collins and/or his email address on the “To”, “From”, “Cc” or “Bcc” line and also includes Peter Marks and/or his email address on the “To”, “From”, “Cc” or “Bcc” line.

(Exhibit 101.) (Footnote omitted)

6. That same day, Plaintiff received notice via email that its FOIA request was received by NIH and was assigned FOIA request #057145. **(Exhibit 102.)**

7. After eight months without further communication from Defendant regarding the status of Plaintiff’s FOIA request, Plaintiff emailed NIH pursuant 5 U.S.C. 552 (a)(7)(B)(ii) on July 16, 2022, and requested an estimated date on which the agency would complete its action on the request. **(Exhibit 103.)**

8. On July 18, 2022, NIH responded stating, “the records returned by this search are voluminous and NIH estimates a response within the next 14 months.” **(Exhibit 103.)**

9. As of the date of this Complaint, Defendant has failed to: (i) determine whether to comply with the request; (ii) notify Plaintiff of any such determination or the reasons therefor; (iii) advise Plaintiff of the right to appeal any adverse determination; or (iv) produce the requested records or otherwise demonstrate that the requested records are exempt from production.

COUNT I
FAILURE TO MAKE DETERMINATION BY REQUIRED DEADLINE
(VIOLATION OF FOIA, 5 U.S.C. § 552)

10. Plaintiff realleges paragraphs 1 through 9 as if fully stated herein.
11. Defendant is in violation of FOIA.
12. Defendant was required to make a final determination on Plaintiff's request by November 3, 2021. Because Defendant failed to make a final determination on Plaintiff's request within the time limits set by FOIA, Plaintiff is deemed to have exhausted its administrative appeal remedies.

REQUESTED RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

- a. Declare that Defendant's existing and continued delay in processing Plaintiff's FOIA Request is unlawful under FOIA;
- b. Order Defendant to conduct searches for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request;
- c. Order Defendant to produce, by a date certain, any and all non-exempt records responsive to Plaintiff's FOIA request and a *Vaughn* index of any responsive records withheld under any claimed exemption;
- d. Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request;
- e. Maintain jurisdiction over this action until Defendant complies with FOIA and all orders of this Court;

- f. Grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
- g. Grant Plaintiff such other relief as the Court deems just and proper.

Dated: November 4, 2022

SIRI & GLIMSTAD LLP

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