

# Exhibit D



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745 Fifth Ave, Suite 500, New York, NY 10151  
sirillp.com | P: (212) 532-1091 | F: (646) 417-5967

**CDC FREEDOM OF INFORMATION ACT APPEAL**

**SUBMITTED VIA EMAIL**

June 23, 2023

Deputy Agency Chief FOIA Officer  
Office of the Assistant Secretary for Public Affairs  
U.S. Department of Health and Human Services  
Hubert H. Humphrey Building  
200 Independence Avenue  
Suite 729H  
Washington, D.C. 20201  
[FOIARequest@psc.hhs.gov](mailto:FOIARequest@psc.hhs.gov)

Re: *Appeal of FOIA Request #23-01084-FOIA (IR#0980B)*

Dear Sir or Madam:

This firm represents Informed Consent Action Network (“**ICAN**”). On behalf of ICAN, on April 27, 2023, we submitted the following request for records (“**FOIA Request**”) from the files of the Centers for Disease Control and Prevention (“**Agency**”) pursuant to the Freedom of Information Act (5 U.S.C. § 552, as amended) (“**FOIA**”):

All data submitted to v-safe, from November 1, 2022 through the date of the search, concerning the smallpox and/or Mpox (monkeypox) vaccines in response to survey/health check-in questions with pre-populated response options.

**(Attachment 1.)**

The request was acknowledged and assigned FOIA Request #23-01084-FOIA on May 1, 2023. **(Attachment 2.)**

On May 11, 2023, the Agency responded to the FOIA Request (“**Final Response**”). The letter stated in relevant part:

A search of our records failed to reveal any documents pertaining to your request. Please note: the V-safe subject matter experts (SMEs) are currently working through the process to make relevant data available on the CDC data web site. The SMEs expect the data to be available at the end of June, 2023. [. . .]

(Attachment 3.)

ICAN writes now to appeal the Final Response.

**A. Argument**

**1. Legal Standard**

The Agency has failed to conduct an adequate search of the requested records. An agency's search is adequate only if it is "reasonably calculated to uncover all relevant documents." *Zemansky v. E.P.A.*, 767 F.2d 569, 571 (9th Cir. 1985) (quoting *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)) (internal quotation marks omitted). "An agency fulfills its obligations under FOIA if it can demonstrate *beyond material doubt* that its search was 'reasonably calculated to uncover all relevant documents.'" *Defs. of Wildlife v. United States Border Patrol*, 623 F. Supp. 2d 83, 91 (D.D.C. 2009) (quoting *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999)) (citation omitted) (emphasis added). To satisfy its FOIA obligations, an agency needs to adequately describe the scope and methods of its searches, which can reasonably be expected to uncover the records sought and demonstrate that the places most likely to contain responsive materials were searched. *Davidson v. E.P.A.*, 121 F. Supp. 2d 38, 39 (D.D.C. 2000). At a minimum, the agency must specify "what records were searched, by whom, and through what process." *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994).

Importantly, FOIA obligates agencies to conduct searches in good faith. *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548 at 551 (quoting *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). This means an agency must conduct "a reasonable search tailored to the nature of a particular request." *Campbell v. United States DOJ*, 164 F.3d 20, 28 (D.C. Cir. 1998). Agencies must perform more than "perfunctory searches" and "follow through on obvious leads to discover requested documents." *Valencia-Lucena*, 180 F.3d at 325. A court can conclude a search is inadequate when the facts reveal a "positive indication of overlooked materials." *Id.* at 326.

**2. Application of Legal Standard**

In this case, the Agency's search was inadequate for two reasons. First, the Agency's Final Response provided no information regarding the adequacy of its search. (Attachment 3.) Without specifying what records were searched, by whom, and through what process, ICAN cannot assume that the Agency's search was adequate. *Steinberg*, 23 F.3d at 552.

Second, the facts reveal a "positive indication of overlooked materials." *Valencia-Lucena*, 180 F.3d at 326. The Agency's Final Response is contradictory. It states there are no records responsive and then immediately states that, "V-safe subject matter experts (SMEs) are currently working through the process to make relevant data available on the CDC data web site." (Attachment 3.) That "relevant data" is what the FOIA request seeks; it is unclear how the Agency's search "failed to reveal any documents pertaining to [ICAN's] request" when the Agency then admits it exists and is being processed by personnel.

For these reasons, the Agency has not demonstrated beyond a material doubt that its search was reasonably calculated to uncover all relevant documents. *Defs. of Wildlife*, 623 F. Supp. 2d at 91. Therefore, ICAN requests that the Agency conduct an adequate search and promptly produce the requested records, regardless of whether any Agency experts are working with the data.

**B. Appellate Request**

Given the foregoing, ICAN hereby appeals and requests that the documents responsive to the FOIA Request be produced within 20 days of this appeal. Thank you for your time and attention to this matter. If you require any additional information, please contact us at (212) 532-1091 or through email at [foia@sirillp.com](mailto:foia@sirillp.com).

Very truly yours,

*/s/ Aaron Siri*

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Aaron Siri, Esq.

Enclosures

# Attachment 1



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## **CDC FREEDOM OF INFORMATION ACT REQUEST**

**VIA ONLINE PORTAL**

April 27, 2023

Roger Andoh  
Freedom of Information Officer  
Centers for Disease Control and Prevention  
1600 Clifton Road, N.E., Building 57, Room MS D-54  
Atlanta, Georgia 30333

*Re: V-safe Mpox Vaccine Data (IR#0980B)*

Dear Sir or Madam:

This firm represents Informed Consent Action Network (“ICAN”). On behalf of ICAN, please provide the following records to [foia@sirillp.com](mailto:foia@sirillp.com) in electronic form:

**All data submitted to v-safe,<sup>1</sup> from November 1, 2022 through the date of the search, concerning the smallpox and/or Mpox (monkeypox) vaccines in response to survey/health check-in questions with pre-populated response options.**

**Information helpful to fulfilling the request: CDC’s response may exclude the names, phone numbers, and email addresses that users provided to register for v-safe. ICAN seeks only the “pre-populated” data and not any free-text data received by v-safe.**

We ask that you waive any and all fees or charges pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). ICAN is a not-for-profit news media organization whose mission is to raise public awareness about vaccine safety and other medical treatments, and to provide the public with information to give informed consent. (**Attachment A.**) As part of its mission, ICAN actively investigates and disseminates scientifically based health information regarding the safety of vaccines and other medical treatments, for free through its website,<sup>2</sup> a weekly health news and talk show,<sup>3</sup> and through press events and releases. ICAN is seeking the information in this FOIA request to allow

<sup>1</sup> <https://www.cdc.gov/vaccinesafety/ensuringsafety/monitoring/v-safe/index.html>.

<sup>2</sup> <https://www.icandecide.org/>.

<sup>3</sup> <https://thehighwire.com/>.

it to contribute to the public understanding of the government's vaccine safety programs, including the government's efforts to promote vaccine safety. The information ICAN is requesting will not contribute to any commercial activities. Therefore, ICAN should be properly categorized as a media requester, and it is entitled to the search and processing privileges associated with such a category designation. Accordingly, ICAN will be forced to challenge any agency decision that categorizes it as any other category of requester.

Please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We therefore request that we be provided with all non-exempt portions which are reasonably segregable. We further request that you describe any deleted or withheld material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies. Please also separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements may help to avoid unnecessary appeal and litigation. ICAN reserves all rights to appeal the withholding or deletion of any information.

Access to the requested records should be granted within twenty (20) business days from the date of your receipt of this letter. Failure to respond in a timely manner shall be viewed as a denial of this request and ICAN may immediately take further administrative or legal action.

Furthermore, we specifically request that the agency provide us with an estimated date of completion for this request.

If you would like to discuss our request or any issues raised in this letter, please feel free to contact us at (212) 532-1091 or [foia@sirillp.com](mailto:foia@sirillp.com) during normal business hours. Thank you for your time and attention to this matter.

Very truly yours,

/s/ Aaron Siri

Aaron Siri, Esq.

Elizabeth A. Brehm, Esq.

Colin M. Farnsworth Esq.

# Attachment A



DECLARATION OF CATHARINE LAYTON

STATE OF TEXAS

COUNTY OF Hays

I, Catharine Layton, being duly sworn on oath do say:

1. I am the Chief Operating Officer of the Informed Consent Action Network (ICAN), a not-for-profit 501(c)(3) organization whose mission is to disseminate scientific health information to the public.

2. I have been an officer of ICAN since its founding in 2016. I oversee all day-to-day operations of the organization and all ICAN's programs. Together with our CEO and Board, I ensure that all efforts are focused on our mission statement and ensure that ICAN stays in compliance with all required rules and regulations.

3. In pursuit of its mission, ICAN relies primarily on its own investigative reporting. ICAN is both instrumental in orchestrating cutting edge investigations into the safety of various medical products, as well as widely disseminating its findings through various media channels. Most notably, ICAN's popular website hosts the organization's largest education program, The HighWire with Del Bigtree. Utilizing its media teams' 40+ years of experience in TV production and investigative journalism, The HighWire provides hours of new video content to the public each week for free.

4. The HighWire website has approximately 3.4 million weekly visitors. On Twitter, The HighWire has approximately 140,000 followers and 1 to 2.5 million impressions in a 28-day period. Between Rumble and Bitchute, The HighWire has approximately 60,000 followers and growing. Additionally, ICAN has 29,000 text subscribers and 194,245 email subscribers.

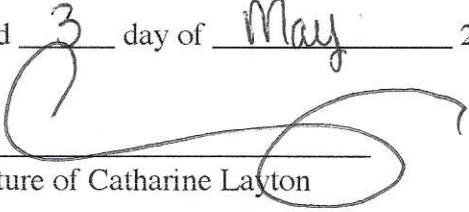
5. The size of ICAN's audience and subscribers continues to grow and is illustrative of the wide public interest in the subject of health and medical safety. Moreover, critical to ICAN's mission is its proven ability to find and review critical scientific and governmental records and meaningfully report about their social impacts.

6. One of the tools ICAN uses to gather the raw material it uses in its popular investigative reporting is the Freedom of Information Act (FOIA).

7. ICAN uses records it obtains from its FOIA requests to carry out its public mission and support its role as a non-profit news-media organization in the field of health and medical safety, but as a non-profit, ICAN does not have a commercial interest in the records it seeks through FOIA.

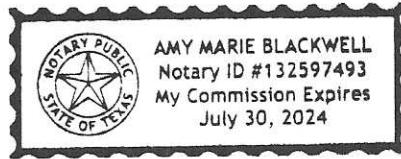
8. Based on what I know as the Chief Operating Officer, as well what has been demonstrated by ICAN's past and current investigative reporting, for purposes of FOIA's Fee Waiver provisions, ICAN certainly qualifies as a "representative of the news media."

Signed 3 day of May 2022

  
Signature of Catharine Layton

I, Amy Blackwell Notary public for the state of Texas witnessed  
said Catharine Layton sign the above statement this 3 day of May, 2022  
(month)

Notary Public for 



# Attachment 2



Centers for Disease Control  
and Prevention (CDC)  
Atlanta GA 30333

May 1, 2023

Aaron Siri  
Siri & Glimstad LLP  
745 Fifth Ave.  
Suite 500  
New York, NY 10151  
Via email: foia@sirillp.com

Dear Mr. Siri:

The Centers for Disease Control and Prevention and Agency for Toxic Substances and Disease Registry (CDC/ATSDR) received your attached Freedom of Information Act (FOIA) request dated April 27, 2023. Your request assigned number is 23-01084-FOIA, and it has been placed in our complex processing queue.

### **Extension of Time**

In unusual circumstances, an agency can extend the twenty-working-day limit to respond to a FOIA request.

We will require more than thirty working days to respond to your request because:

- We reasonably expect to receive and review voluminous records in response to your request.

To process your request promptly, please consider narrowing the scope of your request to limit the number of responsive records. If you have any questions or wish to discuss reformulation or an alternative time frame for the processing of your request, you may contact the analyst handling your request Yuliya Scott at [tkz7@cdc.gov](mailto:tkz7@cdc.gov) or our FOIA Public Liaison, Roger Andoh at 770-488-6277. Additionally, you may contact the Office of Government Services (OGIS) to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services; National Archives and Records Administration; 8601 Adelphi Road-OGIS; College Park, Maryland 20740-6001; e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

### **Fee Category**

Because you are considered a “News Media requester,” you will not be charged fees unless you choose to receive responsive records in hard copy. (10 cents/page)

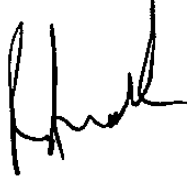
### **Cut-off-date**

If you don’t provide us with a date range for your request, the cut-off date for your request will be the date the search for responsive records starts.

You may check on the status of your case on our FOIA webpage <https://foia.cdc.gov/app/Home.aspx> and entering your assigned request number. If you have any questions regarding your request, please contact Yuliya Scott at [tkz7@cdc.gov](mailto:tkz7@cdc.gov).

We reasonably anticipate that you should receive documents by August 28, 2023. Please know that this date roughly estimates how long it will take the Agency to close requests ahead of your request in the queue and complete work on your request. The actual date of completion might be before or after this estimated date.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Andoh', with a stylized flourish at the end.

Roger Andoh  
CDC/ATSDR FOIA Officer  
Office of the Chief Operating Officer  
(770) 488-6399  
Fax: (404) 235-1852

23-01084-FOIA

# Attachment 3



Centers for Disease Control  
and Prevention (CDC)  
Atlanta GA 30333  
May 11, 2023

Mr. Aaron Siri  
Attorney  
Siri & Glimstad LLP  
745 Fifth Ave.  
Suite 500  
New York, 10151  
Via email: foia@sirillp.com

Dear Mr. Siri:

This letter is in response to your Centers for Disease Control and Prevention and Agency for Toxic Substances and Disease Registry (CDC/ATSDR) Freedom of Information Act (FOIA) request of April 27, 2023, number 23-01084-FOIA.

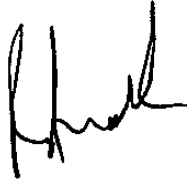
A search of our records failed to reveal any documents pertaining to your request. Please note: the V-safe subject matter experts (SMEs) are currently working through the process to make relevant data available on the CDC data web site. The SMEs expect the data to be available at the end of June, 2023. It will be accessible at the link below:

[v-safe | Data | Centers for Disease Control and Prevention \(cdc.gov\)](#) or  
<https://data.cdc.gov/Public-Health-Surveillance/v-safe/dqgu-gg5d>

You may contact our FOIA Public Liaison at 770-488-6246 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with the response to this request, you may administratively appeal to the Deputy Agency Chief FOIA Officer, Office of the Assistant Secretary for Public Affairs, U.S. Department of Health and Human Services, via the online portal at <https://requests.publiclink.hhs.gov/App/Index.aspx>. Please mark both your appeal letter and envelope "FOIA Appeal." Your appeal must be electronically transmitted by September 20, 2023.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Andoh', with a stylized flourish at the end.

Roger Andoh  
CDC/ATSDR FOIA Officer  
Office of the Chief Operating Officer  
(770) 488-6399  
Fax: (404) 235-1852

#23-01084-FOIA