

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

INFORMED CONSENT ACTION NETWORK,
2025 Guadalupe Street, Suite 260
Austin, Texas 78705,

Plaintiff,

-against-

CENTERS FOR DISEASE CONTROL AND
PREVENTION,
200 Independence Avenue SW
Washington, DC 20201,

-and-

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
200 Independence Avenue SW
Washington, DC 20201,

Defendants.

Civil Action No. 1:23-cv-3673

COMPLAINT

Plaintiff Informed Consent Action Network (“**ICAN**” or “**Plaintiff**”) brings this action against Defendants Centers for Disease Control and Prevention (“**CDC**”) and U.S. Department of Health and Human Services (“**HHS**,” together with CDC, “**Defendants**”) 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 5 U.S.C. § 522(a)(4)(B).

PARTIES

3. Plaintiff ICAN is a not-for-profit organization with an office located at 2025 Guadalupe Street, Suite 260, Austin, Texas 78705. Plaintiff is in good standing with the Texas Secretary of State.

4. Defendant CDC is an agency within the Executive Branch of the United States Government, organized within HHS. CDC is an agency within the meaning of 5 U.S.C. § 552(f) and has possession, custody, and control of records to which Plaintiff seeks access.

5. Defendant HHS is an agency within the Executive Branch of the United States Government. HHS is an agency within the meaning of 5 U.S.C. § 552(f) and has possession, custody, and control of records to which Plaintiff seeks access.

STATEMENT OF FACTS

6. On April 19, 2023, Plaintiff sent a FOIA request to CDC seeking copies of the following records:

(1) Documents sufficient to identify: (1) drug product lot numbers for all Janssen COVID-19 vaccines manufactured; and (2) the total number of units and/or doses in each such lot.

(2) Documents sufficient to identify: (1) drug product lot numbers for all Janssen COVID-19 vaccines distributed/shipped; (2) the last known destinations of those distributions/shipments for each lot; (3) the dates of those distributions/shipments for each lot; and (4) the total number of distributed/shipped units and/or doses from each such lot.

(3) Documents sufficient to identify: (1) drug product lot numbers for all Janssen COVID-19 vaccines administered; (2) the dates of those administrations for each lot; (3) the location of those administrations; and (4) the total number of administrated units and/or doses from each such lot.

(Exhibit A)

7. On April 21, 2023, the CDC acknowledged the request and assigned number 23-

01030-FOIA to said request. In its acknowledgment letter, CDC advised that the estimated date for producing Plaintiff's request is August 11, 2023. **(Exhibit B)**

8. On August 22, 2023, CDC sent Plaintiff its final determination letter which stated in relevant part:

The CDC's National Center for Immunization and Respiratory Diseases (NCIRD) located an Excel spreadsheet containing information responsive to your request (one Excel spreadsheet withheld in part). After a careful review of these pages, some information was withheld from release pursuant to 5 U.S.C. §552 Exemption 4. . . .

Exemption 4 protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential. We have determined that the information withheld is customarily and actually kept private and confidential by the submitter of the information.

(Exhibit C).

9. Plaintiff appealed CDC's final determination letter on September 6, 2023, challenging redactions made under Exemption 4. **(Exhibit D)**

10. On September 11, 2023, HHS acknowledged receipt of Plaintiff's appeal and assigned it Case No. 2023-00257-A-PHS. In HHS' acknowledgment letter, it stated in relevant part:

Pursuant to 5 U.S.C. § 552(a)(6)(B)(i) and 5 U.S.C. § 552(a)(6)(B)(iii) of the FOIA and 45 C.F.R. § 5.24(f) of the HHS FOIA regulations, your appeal falls under "unusual circumstances" in that our office will need to consult with another office or agency that has substantial interest in the determination of the appeal. The actual processing time will depend on the complexity of the issues presented in the appeal and consultation with other U.S. Department of Health and Human Services (HHS) components involved.

(Exhibit E)

11. In violation of the time limits prescribed by 5 U.S.C. § 552(a)(6)(A)(ii) and 5

U.S.C. § 552(a)(6)(B)(i), as of the date of this Complaint, HHS has failed to make a determination with respect to Plaintiff's appeal.

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

12. Plaintiff realleges the previous paragraphs as if fully stated herein.

13. Defendants were required to make a final determination on Plaintiff's appeal no later than October 19, 2023.

14. Defendants failed to make a final determination on Plaintiff's appeal within the time limits set by FOIA; therefore, Plaintiff is deemed to have exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(A)(ii); 5 U.S.C. § 552(a)(6)(B)(i); and 5 U.S.C. § 552(a)(6)(C)(i).

15. Defendants are in violation of FOIA.

COUNT II
IMPROPER WITHHOLDING OF INFORMATION AND DATA
(VIOLATION OF FOIA, 5 U.S.C. § 552)

16. Plaintiff realleges the previous paragraphs as if fully stated herein.

17. For appeal Case No. 2023-00257-A-PHS, Defendants have failed to establish that they properly applied Exemption 4 redactions to Plaintiff's FOIA request.

18. Plaintiff continues to suffer irreparable harm until such time as it receives the information requested.

19. Plaintiff has no adequate remedy at law.

20. Defendants are in violation of FOIA.

REQUESTED RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

- a. Declare that Defendants' current and continued delay in processing Plaintiff's FOIA appeal is unlawful under FOIA;
- b. Order Defendants to conduct searches for any and all records responsive to Plaintiff's FOIA request and demonstrate that they employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request;
- c. Order Defendants 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 Defendants from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request;
- e. Maintain jurisdiction over this action until Defendants comply 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: December 10, 2023

SIRI & GLIMSTAD LLP

/s/ Elizabeth A. Brehm
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(*pro hac vice to be filed*)
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