

Exhibit 4



NEW YORK | MIAMI | LOS ANGELES | PHOENIX
DETROIT | AUSTIN | MINNEAPOLIS | WASHINGTON D.C.

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

NIH FREEDOM OF INFORMATION ACT APPEAL

SUBMITTED VIA EMAIL

December 12, 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

Re: *Appeal of FOIA Request #57907 (IR#0709A)*

Dear Sir or Madam:

This firm represents Informed Consent Action Network (“**ICAN**”). On behalf of ICAN, on February 17, 2022, we submitted the following request for records (“**FOIA Request**”) from the files of the National Institutes of Health (the “**Agency**”) pursuant to the Freedom of Information Act (5 U.S.C. § 552, as amended) (“**FOIA**”):

All records concerning any meeting held regarding whether natural COVID-19 infections, or natural immunity, should count, qualify, or suffice in situations where the COVID-19 vaccine is mandated and where the meeting was attended by at least the following people: Vivek Murthy (U.S. Surgeon General), Francis Collins (Former Director of the National Institutes of Health), Anthony Fauci (Chief Medical Advisor to the President, Director of the National Institute of Allergy and Infectious Diseases), Rochelle Walensky (Director of the Centers for Disease Control and Prevention), and Paul Offit (Director of the Vaccine Education Center at Children’s Hospital of Philadelphia).

- a. Records sought include, but should not be limited to, any recordings, transcripts, minutes, and notes taken during the meeting, as well as any reports or records used or shared with meeting participants prior to or during the meeting.

- b. The timeframe of this request is for records created, modified, sent, received, or shared between January 1, 2021, and December 19, 2021.

(Attachment 1.)

The request was acknowledged and assigned FOIA Request #57907 on February 17, 2022.
(Attachment 2.)

On November 15, 2023, the Agency responded to the FOIA Request (“**Final Response**”).
The letter stated in relevant part:

NIAID searched their files and located 234 pages responsive to your request, of which 112 pages are enclosed and 122 pages contain equities belonging to other offices. Because NIH does not have jurisdiction over these records, we are referring these 122 pages for their review and direct response to you. . . .

(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.’” *Def. 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).

A court must evaluate the reasonableness of an agency’s search based on what the agency knew at its conclusion rather than what the agency speculated at its inception. *Campbell v. DOJ*, 164 F.3d 20, 28 (D.C. Cir. 1998). An agency is required to “revise its assessment of what is reasonable . . . to account for leads that emerge during its inquiry.” *Id.* An “agency may [not] ignore what it cannot help but know.” *Kowalcyk v. DOJ*, 73 F.3d 386, 389 (D.C. Cir. 1996). A court can conclude a search is inadequate when the facts reveal a “positive indication of overlooked materials.” *Valencia-Lucena*, 180 F.3d at 326.

2. Application of Legal Standard

The Agency's search was inadequate for two reasons. First, beyond stating that "NIAID searched their files" 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. On page 74 of the production there is an email titled embedded link titled "Material on POTUS COVID Plan." The email contains an attachment titled "JZ Tough QA 9.9.21 1PM.docx." This attachment was not produced. The absence of this attachment leaves doubt that the Agency conducted an adequate search.

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

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.

Very truly yours,

/s/ Aaron Siri

Aaron Siri, Esq.

Enclosures

Attachment 1



NEW YORK | LOS ANGELES | MIAMI
PHOENIX | DETROIT | DENVER

200 Park Avenue, 17th Floor, New York, NY 10166
sirillp.com | P: (212) 532-1091 | F: (646) 417-5967

NIH FREEDOM OF INFORMATION ACT REQUEST

VIA ONLINE PORTAL

February 17, 2022

Gorka Garcia-Malene
Freedom of Information Act Officer
National Institutes of Health
Building 31 Room 5B35
9000 Rockville Pike
Bethesda, Maryland 20892

Re: Meeting Records Regarding Qualifying Natural Immunity for Federal Vaccine Mandates (IR#0709A)

Dear Sir or Madam:

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

All records concerning any meeting held regarding whether natural COVID-19 infections, or natural immunity, should count, qualify, or suffice in situations where the COVID-19 vaccine is mandated and where the meeting was attended by at least the following people: Vivek Murthy (U.S. Surgeon General), Francis Collins (Former Director of the National Institutes of Health), Anthony Fauci (Chief Medical Advisor to the President, Director of the National Institute of Allergy and Infectious Diseases), Rochelle Walensky (Director of the Centers for Disease Control and Prevention), and Paul Offit (Director of the Vaccine Education Center at Children’s Hospital of Philadelphia).

- a. Records sought include, but should not be limited to, any recordings, transcripts, minutes, and notes taken during the meeting, as well as any reports or records used or shared with meeting participants prior to or during the meeting.**
- b. The timeframe of this request is for records created, modified, sent, received, or shared between January 1, 2021, and December 19, 2021.**

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 to provide the public with information to give informed consent. As part of its mission, ICAN actively investigates and disseminates information regarding vaccine safety issues for free, including through its website,¹ a weekly health news and talk show,² and through press events and releases. ICAN is seeking the information in this FOIA request to allow 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.

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 of course 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 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 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.

¹ <https://www.icandecide.org/>.

² <https://thehighwire.com/>.

Attachment 2

From: FOIA_noreply@nih.gov
To: [S&G Information Request Staff](#)
Subject: Request Acknowledgement by NIH
Date: Thursday, February 17, 2022 4:07:14 PM

Dear Aaron Siri,

Case Number 57907 has been assigned to the request you submitted. In all future correspondence regarding this request please reference case number 57907.

Regards,
NIH

Attachment 3



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

National Institutes of Health
Freedom of Information Office
Building 31, Room 5B-35
31 Center Drive, MSC 2107
Bethesda, Maryland 20892-2107
phone: (301) 496-5633
fax: (301) 402-4541

Via Email: foia@sirillp.com

November 15, 2023

Aaron Siri
Siri & Glimstad LLP
745 Fifth Ave., Suite 500
New York, New York 10151

Re: FOI Case No. 57907

Dear Mr. Siri:

This is the final response to your February 17, 2022, Freedom of Information Act (FOIA) request addressed to the National Institute of Allergy and Infectious Diseases (NIAID) FOIA office which was received on the same day. Department of Health and Human Services' (HHS) policy calls for the fullest possible disclosure provided by the FOIA, 5 U.S.C. §552, consistent with the protections contained therein. The implementing HHS Regulations establish the criteria pursuant to which the FOIA is administered, *see* 45 C.F.R. Part 5. Copies of the FOIA and the HHS FOIA Regulations are located at: <http://www.nih.gov/icd/od/foia/efoia.htm> and <http://www.nih.gov/icd/od/foia/cfr45.htm>.

You requested:

All records concerning any meeting held regarding whether natural COVID-19 infections, or natural immunity, should count, qualify, or suffice in situations where the COVID-19 vaccine is mandated and where the meeting was attended by at least the following people: Vivek Murthy (U.S. Surgeon General), Francis Collins (Former Director of the National Institutes of Health), Anthony Fauci (Chief Medical Advisor to the President, Director of the National Institute of Allergy and Infectious Diseases), Rochelle Walensky (Director of the Centers for Disease Control and Prevention), and Paul Offit (Director of the Vaccine Education Center at Children's Hospital of Philadelphia).

- Records sought include, but should not be limited to, any recordings, transcripts, minutes, and notes taken during the meeting, as well as any reports or records used or shared with meeting participants prior to or during the meeting.
- The timeframe of this request is for records created, modified, sent, received, or shared between January 1, 2021, and December 19, 2021."

NIAID searched their files and located 234 pages responsive to your request, of which 112 pages are enclosed and 122 pages contain equities belonging to other offices. Because NIH does not

Page 2 – Mr. Siri (57907)

have jurisdiction over these records, **we are referring these 122 pages for their review and direct response to you.** Should you wish to contact the offices, please direct your inquiry to FOIARequest@hhs.gov

I have determined to withhold portions of the released pages pursuant to FOIA exemptions 6 of the FOIA, 5 U.S.C. 552(b)(6), and section 5.67 of the HHS FOIA Regulations, 45 C.F.R. Part 5. Exemption 6 exempts from disclosure records the release of which would cause a clearly unwarranted invasion of personal privacy.

You have the right to appeal this determination to deny you access to information in the Agency's possession. Should you wish to do so, your appeal must be sent within ninety (90) days of the date of this letter, following the procedures outlined in Subpart F of the HHS FOIA Regulations (<https://www.federalregister.gov/documents/2016/10/28/2016-25684/freedom-of-information-regulations>) to the Assistant Secretary for Public Affairs at <https://requests.publiclink.hhs.gov/App/Index.aspx>. Clearly mark the communication, "Freedom of Information Act Appeal."

If you are not satisfied with the processing and handling of this request, you may contact the NIH FOIA Public Liaison and/or the Office of Government Information Services (OGIS):

NIH FOIA Public Liaison

Denean Standing-Ojo
Office of Communications and
Public Liaison
Building 31, 5B52S
31 Center Drive
Bethesda, MD 20892
301-496-5077 (phone)
nihfoia@mail.nih.gov (email)

OGIS

National Archives and Records Admin.
8601 Adelphi Rd – OGIS
College Park, MD 20740-6001
202-741-5770 (phone)
1-877-684-6448 (toll-free)
202-741-5769 (fax)
ogis@nara.gov (email)

In certain circumstances, provisions of the FOIA and HHS FOIA Regulations allow us to recover part of the cost of responding to your request. Because no unusual circumstances apply to the processing of your request, there is no charge associated with our response.

If you have any questions about this response, please call 301-496-5633.

Sincerely,



Gorika Garcia-Malene
Freedom of Information Officer, NIH

Enclosures: One pdf file (total 112 pages)