

**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. 1:24-cv-799

COMPLAINT

Plaintiff Informed Consent Action Network (“**ICAN**” or “**Plaintiff**”) brings this action against defendants Centers for Disease Control and Prevention (“**CDC**”) and the United States 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 5 U.S.C. § 522(a)(4)(B) and 28 U.S.C. § 1331.

PARTIES

3. Plaintiff ICAN is a not-for-profit organization formed and existing under the laws of the state of Texas with its principal 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 March 3, 2023, Plaintiff sent a FOIA request to CDC seeking copies of the following records:

All emails¹ sent or received by Brooke Aspinwall and/or Carol Crawford, from February 1, 2020 through the date of the search, that include any of the following search terms: “Meta”, “Facebook”, “Instagram”, “Google” or “Twitter”.

(Exhibit 1.)

7. Plaintiff requested the fee category of “media requestor.” *Id.*

8. Defendant CDC acknowledged Plaintiff’s FOIA request on March 9, 2023, and the request was assigned 23-00828-FOIA. **(Exhibit 2.)**

9. Defendants placed Plaintiff in the fee category of “[o]ther requestor.” *Id.*

¹ Including email attachments.

10. On May 1, 2023, Plaintiff agreed to narrow the FOIA request to exclude the following:

Requests for leave or scheduling conflicts; draft talking points (as long as finals are produced); subscription newsletters and notices; and records that are clearly SPAM (unsolicited and unwanted junk email sent out in bulk to an indiscriminate recipient list).

(Exhibit 3.)

11. On June 1, 2023, Plaintiff agreed to narrow the timeframe of the FOIA request to February 1, 2020 through February 1, 2021. **(Exhibit 4.)**

12. On September 26, 2023, Plaintiff agreed to further narrow the scope of the FOIA request to exclude attachments. **(Exhibit 5.)** On the same day, Defendant CDC requested Plaintiff further narrow the scope of the FOIA Request. The letter stated in relevant part:

Using the amended search criteria rendered over 9,000 multifarious documents. We estimate each document to contain between 5 and 10 pages each. To enable our office to conduct a more focused search, it is necessary to fu[r]ther scope the request.

(Exhibit 6.)

ICAN declined to narrow the scope further. *(Id.)*

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

By email dated September 26, 2023, you advised your client is unwilling to further scope the request or provide context information to assist the agency to conduct a reasonable search for responsive records. As a result, we have administratively closed your request for the following reason:

X The agency has not received the additional information necessary to proceed with processing the request.

(Exhibit 7.)

14. Plaintiff submitted its appeal to CDC's final determination on January 6, 2024, challenging the CDC's administrative closure. (**Exhibit 8.**)

15. On January 11, 2024, the appeal was received and assigned case number 2024-00084-A-PHS. (**Exhibit 9.**)

16. On February 9, 2024, Plaintiff requested a date of final determination of the appeal. (**Exhibit 10.**)

17. On February 20, 2024, Defendant HHS provided an estimated answer date of the end of the calendar year. (*Id.*)

18. As of the date of this Complaint, Defendants have failed to: (i) notify Plaintiff of the determination of its appeal; or (ii) 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)

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

20. Defendants were required to make a final determination on Plaintiff's appeal no later than twenty (20) business days from acknowledgement of the appeal. Because Defendants 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.

21. Plaintiff is being irreparably harmed by reason of Defendants' violation of FOIA and Plaintiff will continue to be irreparably harmed unless Defendants are compelled to comply with the law.

22. Defendants are in violation of FOIA.

23. Plaintiff has no adequate remedy at law.

COUNT II
FAILURE TO ESTABLISH AN ADEQUATE SEARCH
(VIOLATION OF FOIA, 5 U.S.C. § 552)

1. Plaintiff realleges the previous paragraphs as if fully stated herein.
2. Plaintiff's request was reasonably described to enable Defendants to determine precisely what records were being requested.
3. Defendants have failed to establish that they adequately searched for responsive records despite Plaintiff's challenge to same in Plaintiff's appeal.
4. Defendants are in violation of FOIA.

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

1. Plaintiff realleges the previous paragraphs as if fully stated herein.
2. Plaintiff's request was reasonably described to enable Defendants to determine precisely what records were being requested.
3. Defendants have failed to provide a Final Response justifying its administrative closure that includes the agency determination, the reasons for its decision, and notice of the right to appeal.
4. Defendants failed to establish that the withheld information and data were protected by an adequately applied exemption.
5. Defendants are in violation of FOIA.

COUNT IV
ENTITLEMENT TO WAIVER OF SEARCH FEES

6. Plaintiff realleges the previous paragraphs as if fully stated herein.
7. Plaintiff sought a waiver of fees.

8. Defendants placed Plaintiff in the “[o]ther requestor” fee category and not the “media requester” fee category.

9. Plaintiff is entitled to a waiver of fees pursuant to 5 U.S.C. § 552(a)(4)(A)(viii).

10. Defendants failed, within 20 days, to produce the requested records and otherwise failed to comply with the statutory requirements of 5 U.S.C. § 522 within the time limits set forth therein.

11. 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 Request 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);

g. Order Defendants to place Plaintiff in the “media requestor” fee category.

- h. Grant Plaintiff a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(viii); and
- i. Grant Plaintiff such other relief as the Court deems just and proper.

Dated: March 19, 2024

SIRI & GLIMSTAD LLP

/s/ Elizabeth A. Brehm
Elizabeth A. Brehm, DC Bar No. NY0532

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