

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

**AMERICAN BROADCASTING  
COMPANIES, INC.**

77 West 66th Street, 15th Floor  
New York, NY 10023

and

**BENJAMIN GITTLESON**

c/o American Broadcasting Companies, Inc.  
1717 Desales Street NW  
Washington, DC 20036

Plaintiffs,

v.

**DEPARTMENT OF HEALTH AND  
HUMAN SERVICES**

200 Independence Avenue SW,  
Washington, DC 20201

Defendant.

Civil Action No. \_\_\_\_\_

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs American Broadcasting Companies, Inc., (“ABC”), and Benjamin Gittleson (“Gittleson”) (collectively, “Plaintiffs”), by and through their undersigned counsel, hereby allege as follows:

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA” or the “Act”), for declaratory, injunctive, and other appropriate relief by Plaintiffs against the Department of Health and Human Services (“HHS” or “Defendant”). Defendant has unlawfully withheld agency records regarding the United States’ Strategic National Stockpile that were requested by Plaintiffs pursuant to FOIA. HHS’s refusal to release such records, which

Plaintiffs seek in order to inform the public about actions of the federal government in response to the ongoing COVID-19 pandemic, is a clear violation of its obligations under FOIA.

### **PARTIES**

2. Plaintiff American Broadcasting Companies, Inc., is a broad-based communications company. Doing business as ABC News, it regularly gathers and reports news to the public. ABC News produces the television programs *World News Tonight with David Muir*, *Good Morning America*, *Nightline*, *20/20*, and *This Week*, among others. ABC is an indirect, wholly-owned subsidiary of The Walt Disney Company, a publicly traded corporation. ABC is headquartered at 77 W. 66th Street, New York, NY 10023.

3. Plaintiff Benjamin Gittleson is a producer-reporter for ABC News in Washington, D.C. Mr. Gittleson resides in Washington, DC.

4. Defendant Department of Health and Human Services is an agency of the federal government within the meaning of 5 U.S.C. § 552(f) and 5 U.S.C. § 702 that has possession, custody, and/or control of the records that Plaintiffs seek. HHS is headquartered at 200 Independence Avenue SW, Washington, DC, 20201, and may be served at the same address. 45 C.F.R. § 4.1.

### **JURISDICTION AND VENUE**

5. This Court has subject matter jurisdiction over this matter and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331.

6. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

## **FACTUAL ALLEGATIONS**

### **Background**

7. On or about March 11, 2020, the World Health Organization (“WHO”) determined that a novel coronavirus disease, COVID-19, was present in more than one hundred countries around the world and satisfied the criteria for a pandemic.

8. As of May 27, 2020, according to Johns Hopkins University, there have been approximately 1,689,145 cases of COVID-19 confirmed in the United States, and approximately 99,674 deaths from the disease.

9. Since in or about March of 2020, healthcare providers in the United States have faced shortages of certain personal protective equipment (“PPE”) and other medical equipment needed to respond to the COVID-19 pandemic, as well as disagreements between the White House and governors of certain states regarding how to address such shortages.

10. Defendant HHS maintains the website for the United States Strategic National Stockpile.

11. The website for the United States Strategic National Stockpile is located at <https://www.phe.gov/about/sns/Pages/default.aspx> (hereinafter, the “SNS Website”).

12. On April 2, 2020, a press conference was held by President Donald Trump, Vice President Pence, and other members of the Coronavirus Task Force.

13. During that April 2, 2020 press conference, Jared Kushner, Senior Advisor to the President, stated that “the notion of the federal stockpile was it’s supposed to be our stockpile, it’s not supposed to be states’ stockpiles that they then use.” *See Ben Gittleson, After Kushner says ‘it’s our stockpile,’ HHS website changed to echo his comments on federal crisis role, ABC News* (Apr. 3, 2020), <https://abcn.ws/2wZY0SY>.

14. As of April 2, 2020, the SNS Website stated, in part, that the:

Strategic National Stockpile is the nation's largest supply of life-saving pharmaceuticals and medical supplies for use in a public health emergency severe enough to cause local supplies to run out. When state, local, tribal, and territorial responders request federal assistance to support their response efforts, the stockpile ensures that the right medicines and supplies get to those who need them most during an emergency. Organized for scalable response to a variety of public health threats, this repository contains enough supplies to respond to multiple large-scale emergencies simultaneously.

15. At some point on April 3, 2020, this language on the SNS Website was changed to read as follows:

The Strategic National Stockpile's role is to supplement state and local supplies during public health emergencies. Many states have products stockpiled, as well. The supplies, medicines, and devices for life-saving care contained in the stockpile can be used as a short-term stopgap buffer when the immediate supply of adequate amounts of these materials may not be immediately available.

#### **Plaintiffs' FOIA Request**

16. On or about April 3, 2020, Plaintiffs submitted a FOIA request to HHS via its website (the "Request").

17. The Request sought "copies of all e-mail communication concerning the change of text on the webpage for the Strategic National Stockpile (<https://www.phe.gov/about/sns/Pages/default.aspx>), part of HHS's Public Health Emergency website, which took place on April 3, 2020[.]"

18. The Request set forth the relevant text of the SNS Website as of the morning of April 3, 2020, as well as the text it was changed to later that day, and requested "copies of all e-mail communication regarding that textual change, including but not limited to communication between senior HHS officials, officials overseeing the webpage, and White House officials."

19. The Request sought a fee waiver, stating that "[a]s a representative of the news media, I am gathering this information for the public interest because it will contribute

significantly to public understanding of government operations.”

20. The Request asked for the information to be provided electronically, via email.

21. On or about April 6, 2020, HHS transmitted a letter to Mr. Gittleson acknowledging receipt of the Request. A true and correct copy of that letter is attached hereto as Exhibit 1 (the “Acknowledgement Letter”).

22. HHS’s Acknowledgement Letter assigned the Request tracking number 2020-00864-FOIA-OS

23. HHS’s Acknowledgement Letter stated that HHS was invoking a “10 working day extension to process your request[.]”

24. HHS’s Acknowledgement Letter further invited Plaintiffs to submit a request for expedited processing if there was “a compelling need; i.e. [...] an urgency to inform the public concerning government activity (provided you are a member of the media)[.]”

25. On or about April 14, 2020, Mr. Gittleson faxed a statement of compelling need for expedited processing for the Request to HHS.

26. The statement of compelling need transmitted on or about April 14, 2020 for the Request stated:

1. I am a full time reporter for ABC News and made this request “as a person primarily engaged in disseminating information.” This request concerns a matter of “urgency to inform the public concerning actual or alleged Federal Government” activity.”
2. This request was prompted by an interest in understanding a textual change made on April 3, 2020 to the webpage description of the Strategic National Stockpile found at <https://www.phe.gov/about/sns/Pages/default.aspx>, and seeks copies of all e-mail communication regarding that textual change, including but not limited to communication between senior HHS officials, officials overseeing the webpage, and White House officials.
3. As a nation, we are facing an unprecedented time in which some states are struggling to avoid experiencing shortages in critical medical resources when facing high demands in treating seriously ill patients infected with

the COVID-19 virus. This request and the need to understand the position of the federal government regarding decisions it has made to meet its obligations for disseminating critical medical resources to states [ ]from the Strategic National Stockpile unquestionably satisfies the requirement that the request “concerns a matter of current exigency to the American public.”

4. The change in language to the webpage was widely reported on the date of the revision and demonstrates the enormous public interest on this topic. As surges in COVID-19 infections move in waves across the country and some communities find critical medical supplies in short supply, understanding the sources of any equipment shortfalls, in particular how states and the federal government have, or have not, worked together is of urgent importance to the American public. A delay in receiving the information that is the subject of this request will compromise the American public’s ability to stay informed about and understand the dissemination of these important resources.

5. As this request concerns changes to a government webpage, it unquestionably concerns federal government activity and satisfies the final requirement of this statutory provision.

27. Mr. Gittleston certified that the statement of compelling need was true and correct to the best of his knowledge and belief.

28. On or about April 14, 2020, Mr. Gittleston sent an email to the HHS FOIA email (FOIARequest@hhs.gov), notifying the agency that he had submitted a request for expedited processing for the Request and re-attaching it.

29. On or about April 15, 2020, Elizabeth Webb, a Government Information Specialist with HHS, emailed Mr. Gittleston confirming that HHS had received the request for expedited processing for the Request.

30. On or about May 18, 2020, HHS sent a letter to Mr. Gittleston denying expedited processing for the Request.

31. HHS’s May 18, 2020 letter further stated that the Request would be processed under the “News Media” category for purposes of fee assessment.

32. As of the filing of this Complaint, it has been approximately 35 working days

since the Request was submitted.

33. Plaintiffs have received no further communication from HHS regarding the Request.

34. Plaintiffs have not received any records or portions thereof from HHS in response to the Request.

35. HHS has not cited any basis for refusing to release records responsive to Plaintiffs' Request.

### **CAUSES OF ACTION**

#### **Count I: Violation of FOIA for Failure to Comply with Statutory Deadlines**

36. Plaintiffs repeat and re-allege paragraphs 1–35.

37. Defendant is an agency subject to FOIA.

38. By the Request, Plaintiffs properly asked for records within the possession, custody and/or control of Defendant.

39. The Request complied with all applicable regulations regarding the submission of FOIA requests.

40. Defendant failed to make a determination with respect to the Request within the statutory deadlines as required by FOIA. 5 U.S.C. § 552(a)(6)(A).

41. Defendant's failure to make a determination with respect to the Request within FOIA's statutory deadlines violates Defendant's obligations under FOIA. *Id.*

42. Plaintiffs have and/or are deemed to have exhausted applicable administrative remedies with respect to the Request. 5 U.S.C. § 552(a)(6)(C)(i).

#### **Count II: Violation of FOIA for Improper Withholding of Agency Records**

43. Plaintiffs repeats and re-allege paragraphs 1–35.

44. Defendant is an agency subject to FOIA.

45. Through the Request, Plaintiffs properly asked for records within the possession, custody and/or control of Defendant.

46. The Request complied with all applicable regulations regarding the submission of FOIA requests.

47. Defendant has not released any records or portions thereof in response to the Request.

48. Defendant has not cited any exemptions to withhold records or portions thereof that are responsive to the Request.

49. Defendant has not identified whether or how disclosure of each of the records or portions thereof sought by the Request would foreseeably harm an interest protected by a FOIA exemption and/or why disclosure is prohibited by law. 5 U.S.C. § 552(a)(8)(A).

50. Defendant has improperly withheld records responsive to the Request in violation of FOIA. 5 U.S.C. § 552(a)(3)(A).

51. Plaintiffs have and/or are deemed to have exhausted applicable administrative remedies with respect to the Request. 5 U.S.C. § 552(a)(6)(C)(i).

### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs respectfully requests that the Court:

- 1) order Defendant to immediately process the Request;
- 2) order Defendant to conduct searches to identify all records responsive to the Request;
- 3) issue a declaration that Defendants are in violation of FOIA for failing to comply with its deadlines;
- 4) issue a declaration that Plaintiffs are entitled to disclosure of the records sought by



- the Request;
- 5) enjoin Defendant from withholding all records or portions thereof responsive to the Request that are not specifically exempt from disclosure under FOIA;
  - 6) award Plaintiffs reasonable attorney's fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and
  - 7) grant all such other relief as the Court may deem just and proper.

Dated: May 27, 2020

Respectfully submitted,

/s/ Katie Townsend  
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