---------- Forwarded message ---------
From: **Yan, Hawyee (NIH/OD) [E]** <hawyee.yan@nih.gov>
Date: Tue, Oct 13, 2020 at 3:21 PM
Subject: RE: Status Update for Request #53794
To: Christopher Hickman <chris.hickman@buzzfeed.com>
Cc: Garcia-Malene, Gorka (NIH/OD) [E] <gorka.garcia-malene@nih.gov>, Lampe, Karen (NIH/OD) [E] <karen.lampe@nih.gov>

Good afternoon Mr. Hickman,

Thank you for your email. We are still pending to receive a response from HHS to our consultation. When that happens, the entire collection of records requires review from another stakeholder. Once that is completed, we will then be able to provide you with a final response.

Best regards,

Hawyee Yan I Government Information Specialist

National Institutes of Health I Freedom of Information Act Office

Phone: (301) 496-5633

From: Christopher Hickman <chris.hickman@buzzfeed.com>
Sent: Monday, October 12, 2020 1:42 PM
To: Yan, Hawyee (NIH/OD) [E] <hawyee.yan@nih.gov>
Subject: Fwd: Status Update for Request #53794

Good afternoon:

Per the instructions from Mr. Gorka's out of office email, I am forwarding this matter along to you for your awareness.

Regards,

Christopher Hickman

---------- Forwarded message ---------
From: **Christopher Hickman** <chris.hickman@buzzfeed.com>
Date: Mon, Oct 12, 2020 at 1:11 PM
Subject: Re: Status Update for Request #53794
To: Garcia-Malene, Gorka (NIH/OD) [E] <gorka.garcia-malene@nih.gov>
Cc: Dan Vergano <dan.vergano@buzzfeed.com>, Azeen Ghorayshi <azeen.ghorayshi@buzzfeed.com>

Thank you for your response. We intend to file suit on Monday, October 19 unless you have filed a determination before that time and provided us with the non-exempt records that, frankly, we should have already received.

Regards,

Christopher Hickman

On Wed, Oct 7, 2020 at 10:30 AM Garcia-Malene, Gorka (NIH/OD) [E] <gorka.garcia-malene@nih.gov> wrote:

> Good morning, Mr. Hickman –
>
> The stakeholder has not yet responded to our consultation. I'm not aware of their workflow and cannot tell when they will reply. However, I have emailed them again to try and prompt their response.
>
> Best regards.
>
> Gorka
>
> **From:** Christopher Hickman <chris.hickman@buzzfeed.com>
> **Sent:** Tuesday, October 6, 2020 10:36 PM
> **To:** Garcia-Malene, Gorka (NIH/OD) [E] <gorka.garcia-malene@nih.gov>
> **Cc:** Dan Vergano <dan.vergano@buzzfeed.com>; Azeen Ghorayshi <azeen.ghorayshi@buzzfeed.com>
> **Subject:** Re: Status Update for Request #53794
>
> Mr. Gorka:
>
> Can you provide a date on which the stakeholder review will be completed and when we can expect to have your final response?
>
> Thank you,

Chris Hickman

On Tue, Aug 18, 2020 at 4:15 PM Garcia-Malene, Gorka (NIH/OD) [E] <gorka.garcia-malene@nih.gov> wrote:

> Dear Mr. Vergano,
>
> Thank you for your email. Once HHS returns those records to NIH, there is one more stakeholder to review the entire collection. Once that is completed, we will provide you with our final response.
>
> Best regards.
>
> Gorka
>
> Gorka Garcia-Malene |FOIA Officer for National Institutes of Health | (301) 496-5633
>
> **From:** Dan Vergano <dan.vergano@buzzfeed.com>
> **Sent:** Tuesday, August 18, 2020 3:07 PM
> **To:** Garcia-Malene, Gorka (NIH/OD) [E] <gorka.garcia-malene@nih.gov>
> **Cc:** Christopher Hickman <chris.hickman@buzzfeed.com>; Azeen Ghorayshi <azeen.ghorayshi@buzzfeed.com>
> **Subject:** Re: Status Update for Request #53794
>
> Mr. Garcia-Malene.
>
> Thank you for your reply. Today I received a notice from HHS that they are looking at 4 pages from a 113 document response completed by NIH ready for return from my NIH request #5379 (notice attached). Please turn over the completed 109-page NIH response on a rolling basis, leaving those 4 pages for later release. Since the NIH process is completed per your parent agency, you have no basis to withhold these processed records. I was granted expedited processing of these records in April -- four months ago. Regardless of expedited processing, which has been granted, NIH should be turning over what isn't flagged on a rolling basis, which, in this case, means that we should get all but the 4 pages at issue.
>
> Thanks,
>
> Dan
>
> cc: Hickman, C. Ghorayshi, A.
>
> | *On CARES Act work sharing program through 2020*
> **Dan Vergano**

Science Desk (DC)
(202) 629-4563
BuzzFeed News
111 E. 18th St., 13th Floor
NY, NY 10003

Send secure tips -- contact.buzzfeed.com

On Mon, Aug 17, 2020 at 11:35 AM Garcia-Malene, Gorka (NIH/OD) [E] <gorka.garcia-malene@nih.gov> wrote:

> Good morning, Mr. Hickman –
>
> We continue to process Mr. Vergano's request. Specifically, NIH has completed its review, and the records are being reviewed by various stakeholders.
>
> Please note that appeals must be filed with the department. I have forwarded your below communications to the department.
>
> Let me know if there are any questions.
>
> Gorka
>
> **From:** Christopher Hickman <chris.hickman@buzzfeed.com>
> **Sent:** Monday, August 17, 2020 10:59 AM
> **To:** Garcia-Malene, Gorka (NIH/OD) [E] <gorka.garcia-malene@nih.gov>
> **Cc:** Azeen Ghorayshi <azeen.ghorayshi@buzzfeed.com>; Dan Vergano <dan.vergano@buzzfeed.com>
> **Subject:** Re: Status Update for Request #53794
>
> Good morning:
>
> We have not received any further correspondence on this matter after my email of July 30. We view this failure to clarify the response time to Mr. Vergano's request as a constructive denial. We appeal.
>
> Regards,
>
> Christopher Hickman
>
> On Thu, Jul 30, 2020 at 11:03 AM Christopher Hickman <chris.hickman@buzzfeed.com> wrote:

Good morning:

My name is Christopher Hickman; I am senior counsel at BuzzFeed and I write in response to recent correspondence with BuzzFeed reporter Dan Vergano. (Mr. Vergano's request ID: FOIA Case #53794.) Mr. Vergano made a request on March 24, 2020, for "all communications, memos, or other records, including instant messages, to and from both Kim J. Hasenkrug, PhD., and Ken Pekoc of the NIAID/RML facility from December 31, 2019 to the present date, March 24, 2020, regarding:

- The use of "humanized" mice in Dr. Hasenkrug's lab to research the novel coronavirus reported by China to the WHO on the first day of this request, first called novel coronavirus (2019-nCoV) and later SARS-CoV-2 by WHO.

- Any requests from news outlets for comment on his lab's research in connection with the novel coronavirus, and responses involving these requests." (*See* attached correspondence of March 24, 2020 for reference.)

On April 27, 2020, **34 days** after Mr. Vergano made his request for records, he received a message informing him that the status of his request was being updated to "the following status 'In Process'." **126 days** after Mr. Vergano made his request, on July 28, 2020, having heard nothing from the NIH, Mr. Vergano reached out to Gorka Garcia-Malene, FOIA Officer for NIH, inquiring about the "expected delivery timing, or an estimated date of completion, of FOIA 53794 … which I was informed received expedited processing approval several months ago." That same day, Mr. Garcia-Malene wrote Mr. Vergano, stating, "We have concluded our review of the records responsive to this request. Our review showed that there are other stakeholder equities involved. Consequently, the files are being sent to those equities for review, noting that your request benefits from expedited processing…Once we have their comments, we will provide you with all of the releasable information."

FOIA provides direction concerning the time and manner in which agencies must respond to requests.

Specifically, 5 USC § 552 (a)(6)(A)(i)(I) states in relevant part that:

"Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection shall --- determine within **20 days** (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making the request of such determination and the reasons therefor" and further provides that, "[u]pon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request." Id. § 552(a)(6)(C)(i) (emphasis added). The agency has complied with neither of these requirements here.

First, a "determination" response under 5 U.S.C. § 552(a)(6)(A)(i) must include, among other things: "(1) a statement of what the agency will release and will not release, including a list of the documents that are releasable and withheld; (2) a statement of the reasons for not releasing the withheld records; and (3) a statement notifying the requester of her right to appeal to the head of the agency or seek judicial review of any adverse determination." *Shermco Industries v. Secretary of the United States Air Force*, 452 F. Supp. 306, 317 (N.D.Tex.1978); *Oglesby v. United States Dep't of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990). Your response of April 27, 2020, does not fulfill these criteria, but simply states that the status of his request has been updated to "In Process."

A boundary-less promise to deliver an unspecified selection of documents at an undetermined time in the future is not what the statute anticipates; rather, your responses read as a constructive denial of Mr. Vergano's request. I write to request a clarification of the time frame for delivery of these requested records. Failing that, we intend to fully exercise our statutory rights to challenge this determination through litigation.

Regards,

Christopher Hickman

Christopher Hickman | **BuzzFeed** | Senior Counsel, Media and Intellectual Property| 917.721.9534
111 E. 18th Street, New York NY 10003