IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR FOOD SAFETY, 660 Pennsylvania Ave SE #402 Washington, DC 20003 *Plaintiff,* v. NATIONAL INSTITUTES OF HEALTH, 9000 Rockville Pike, Bethesda Bethesda, Maryland 20892 *Defendant.*	Case No. 1:21-cv-1188 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. The Center for Food Safety (CFS)—a nonprofit public interest and environmental advocacy organization working to protect public health and the environment—brings this civil action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, challenging Defendant National Institutes of Health's (NIH) failure and refusal to provide records to CFS in response to the request for records submitted on September 4, 2020, for which there are no applicable exemptions under FOIA.

2. Since its inception in 1997, CFS has closely monitored the federal government's decision-making process in regards to federal agencies' regulatory authority over genetically engineered (GE) organisms that could adversely affect human health, animal welfare, and the environment, including laboratory-generated potential pandemic pathogens. As part of this oversight and advocacy strategy, CFS has submitted requests for records to NIH regarding its approval and issuance of NIH contracts and grants to fund research projects involving controversial gain-of-function studies with dangerous enhanced potential pandemic pathogens under FOIA, 5 U.S.C. § 552(a)-(m). The goal of the request was to open the operations and activities of government to public scrutiny and contribute significantly to the public's understanding of the agency's actions.

3. CFS filed the disputed FOIA request with NIH to gain a better understanding of NIH's funding decisions on individual proposed research that is reasonably anticipated to create, transfer, or use enhanced potential pandemic pathogens for which additional review under the U.S. Department of Health and Human Services's (HHS) *Framework for Guiding Funding Decisions about Proposed Research Involving Enhanced Potential Pandemic Pathogens* (HHS P3CO Framework) is

required.[1] An enhanced potential pandemic pathogen results from the enhancement of a potential pandemic pathogen's transmissibility or virulence in humans. Gain-of-function studies, or research that improves the ability of a pathogen to cause disease, is a subset of life sciences research that most commonly involves the creation or use of enhanced potential pandemic pathogens.

4. Due to the biosafety and biosecurity risks associated with gain-of-function research, the U.S. government instituted a pause on funding any new studies that included gain-of-function experiments "that may be reasonably anticipated to confer attributes to influenza, MERS, or SARS viruses such that the virus would have enhanced pathogenicity and/or transmissibility in mammals via the respiratory route" in October 2014.[2] However, in December 2017, NIH announced that in accordance with the issuance of the HHS P3CO Framework, the agency was removing the funding pause on the new or continued funding of gain-of-function research projects.[3] As a result, NIH could be funding gain-of-function research projects with enhanced potential pandemic pathogens through NIH contracts and grants that were assessed under the HHS P3CO Framework. Without the requested records, CFS cannot determine if currently there are gain-of-function studies

[1] *See* HHS *Framework for Guiding Funding Decisions about Proposed Research Involving Enhanced Potential Pandemic Pathogens* (HHS P3CO Framework) (Dec. 2017), *available at* https://www.phe.gov/s3/dualuse/Documents/P3CO.pdf.

[2] *See* Off. of Sci. & Tech., Exec. Off. of the President, *Doing Diligence to Assess the Risks and Benefits of Life Sciences Gain-of-Function Research*, PRESIDENT OBAMA WHITEHOUSE BLOG (Oct. 17, 2014, 3:30 PM); *available at* https://obamawhitehouse.archives.gov/blog/2014/10/17/doing-diligence-assess-risks-and-benefits-life-sciences-gain-function-research; *see also* NIH, *Statement on Funding Pause on Certain Types of Gain-of-Function Research* (Oct. 16, 2014), *available at* https://www.nih.gov/about-nih/who-we-are/nih-director/statements/statement-funding-pause-certain-types-gain-function-research.

[3] NIH, *Notice Announcing the Removal of the Funding Pause for Gain-of-Function Research Projects* (Dec. 19, 2017), *available at* https://grants.nih.gov/grants/guide/notice-files/NOT-OD-17-071.html.

involving enhanced potential pandemic pathogens being funded by NIH that have undergone the HHS P3CO Framework's multidisciplinary, department-level pre-funding review and evaluation; and whether the P3CO review process of such proposed research complied with applicable laws meant to safeguard human health and the environment from biohazards associated with this work.

5. Although FOIA requires NIH to release responsive records "promptly," NIH failed to comply with FOIA's statutory deadlines with respect to CFS's request. Consequently, NIH has improperly withheld responsive records, depriving CFS of its statutory right to obtain records containing crucial information concerning NIH's approval and funding of new and continued gain-of-function studies that consist of creating, transferring, or using enhanced potential pandemic pathogens in U.S. laboratories, which if released from a laboratory accident could result in catastrophic consequences to the human environment.

6. NIH is also violating FOIA by failing to conduct an adequate search for responsive records, and by failing to provide CFS with both an initial determination as to the scope of the records to be produced or withheld, and an estimated date by which the agency's search will be complete.

7. NIH's unlawful withholding of public records undermines FOIA's basic purpose of government transparency. Because prompt access to these records is necessary to effectuate FOIA's purpose, CFS respectfully asks this Court to enjoin NIH from withholding requested records, order NIH to release improperly withheld records, and grant declaratory relief.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

9. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

10. Declaratory relief is appropriate under 28 U.S.C. § 2201.

11. Injunctive relief is appropriate under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 2202.

PARTIES

12. Plaintiff CFS is a national 501(c)(3) nonprofit public interest and environmental advocacy organization that empowers people, supports farmers, and protects the environment. CFS is a membership based nonprofit organization with over 970,000 members that works to address the impacts of the food system on public health, animal welfare, and the environment. CFS often uses information requests to challenge government abuses and corporate wrongdoing, advocate for policy change, and educate the public about the harms of industrial agriculture. Through nearly two decades of involvement in public interest and environmental litigation and policymaking as it relates to food, CFS has demonstrated its ability to take technical information provided by government agencies and distill it into a format that is accessible to the public. CFS employs science and policy experts who have analyzed FOIA, federal public health and environmental laws, and human health, environmental, and scientific reports for their entire careers. CFS puts out reports on a range of food and agriculture topics, including GE organisms—such as GE foods, crops, animals, insects, and viruses—as well as other topics that tend to be difficult for the layperson to understand without professional assistance. CFS has been engaged in ongoing efforts to educate our members and the public about the ongoing harms of GE organisms, including laboratory-generated potential pandemic pathogens, to human health, animal welfare,

and the environment. CFS and its members are harmed by NIH's violations of FOIA, as such violations preclude CFS from gaining a full understanding of the decision-making process regarding the underlying agency actions, and prevent CFS from disseminating information to the public concerning NIH's oversight and funding of gain-of-function studies with enhanced potential pandemic pathogens that could cause worldwide catastrophic harm to human and animal health and the environment if released, accidentally or intentionally, from a laboratory in the United States.

13. Defendant NIH is an agency of United States Government with the Department of Health and Human Services. NIH is in possession and control of the records that CFS seeks, and is an agency within the meaning of 5 U.S.C. § 552(f)(1). NIH is therefore subject to FOIA.

STATUTORY BACKGROUND

14. The basic purpose of FOIA is to promote government transparency and public oversight of agency action. *See, e.g., Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (noting that "disclosure, not secrecy is the dominant objective of the Act"). The statute effectuates this objective by establishing the public's right "to pierce the veil of administrative secrecy" and access all federal agency records, *id.*, unless such records may be withheld pursuant to one of nine, narrowly construed exemptions. *See* 5 U.S.C. § 552(b)(1)-(9).

15. FOIA imposes stringent deadlines on federal agencies with regard to making initial determinations in response to FOIA requests. Within twenty working days of receiving a FOIA request, an agency must determine whether it will release the requested records, and must notify the requester of its determination, the reasons for its decision, and the requester's right to appeal an adverse decision to the head of the agency. *Id.* § 552(a)(6)(A).

16. Congress has specified certain limited instances in which federal agencies may extend this twenty-working-day deadline. First, an agency may toll the deadline to seek additional information or clarification from a requester, but that tolling period ends when the agency receives such information or clarification. *Id.* § 552(a)(6)(A)(ii). Second, in "unusual circumstances" an agency may extend the deadline no more than ten additional working days by providing written notice to the requester that sets forth the circumstances justifying the extension. *Id.* § 552(a)(6)(B)(i).

17. FOIA requires that an initial determination under 5 U.S.C. § 552(a)(6)(A) "must be more than just an initial statement that the agency will generally comply with a FOIA request and will produce non-exempt documents and claim exemptions in the future." *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n (CREW)*, 711 F.3d 180, 188 (D.C. Cir. 2013).

18. If an agency does not comply with "FOIA's explicit timelines [for making an initial determination], the penalty is that the agency cannot rely on the administrative exhaustion requirement to keep cases [out of] court." *Id.* at 190-91; *see also* 5 U.S.C. § 552(a)(6)(C)(i) (stating that if an agency fails to respond within the applicable time limits under FOIA, the requester "shall be deemed to have exhausted his administrative remedies."). The requester thus has "immediate recourse to the courts to compel the agency's response to [her] FOIA request[s]." *Oglesby v. Dep't of Army*, 920 F.2d 57, 64 (D.C. Cir. 1990).

19. For a determination to "trigger the administrative exhaustion requirement," the agency must complete "at least" three substantive requirements: "(1) gather and review the documents; (2) determine and communicate the scope of the documents it intends to produce and

withhold, and the reasons for withholding any documents; and (3) inform the requester that it can appeal whatever portion of the 'determination' is adverse." *CREW*, 711 F.3d at 188; *see also Oglesby*, 920 F.2d at 67 (finding that an agency's response did not trigger the exhaustion requirement because "merely inform[ing] [the requester] that he could call the agency for further information…did not qualify as notice of…right to appeal").

20. With regard to production of responsive records, "FOIA requires that the agency make the records 'promptly available,' which depending on the circumstances typically would mean within days or a few weeks of a 'determination,' not months or years." *CREW*, 711 F.3d at 188 (citing 5 U.S.C. § 552(a)(3)(A), (6)(C)(i)); *see also Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) (holding that "unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent these abuses.").

21. FOIA also requires that the agency provide requestors "information about the status of a request…including…an estimated date on which the agency will complete action on the request." 5 U.S.C. § 552(a)(7)(B)(ii).

22. In addition, FOIA provides a waiver for fees associated with the procurement of documents subject to FOIA requests. FOIA requires agencies to waive fees "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." *Id.* § 552(a)(4)(A)(iii).

23. FOIA further requires each agency to "make reasonable efforts to search for [responsive] records," *id.* § 552(a)(3)(C)-(D), in a manner that is "reasonably calculated to uncover

all relevant documents." *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (emphasis added); *see also Oglesby*, 920 F.2d at 68 (An "agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested.").

24. Similarly, "if an agency has reason to know that certain places may contain responsive documents," the agency is required to search those places. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999); *Pub. Emps. for Env't Resp. v. EPA*, 314 F. Supp. 3d 68, 75 (D.D.C. 2018) (holding that "if an agency has reason to know that certain places may contain responsive documents, it is obligated…to search" under FOIA).

25. An agency bears the burden to demonstrate with reasonable detail that the "search terms and type of search performed" was likely to uncover *all* responsive records. *Oglesby*, 920 F.2d at 68; *Steinberg v. DOJ*, 23 F.3d 548, 552 (D.C. Cir. 1994) (holding that an agency must provide affidavits explaining "what records were searched, by whom, and through what process" to satisfy the agency's burden); *Int'l Couns. Bureau v. DOD*, 101 F. Supp. 3d 48, 51 (D.D.C. 2015). ("Conclusory statements that the agency has reviewed relevant files are insufficient.")

26. The agency must also demonstrate that the scope of the agency's search was adequate. When tailoring the scope of the search, "an agency also has a duty to construe a FOIA request liberally." *Nation Mag., Wash. Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). FOIA's requirement that "a request for disclosure specify 'identifiable records' calls for 'a reasonable description'" allowing agency personnel to locate the records sought, but cannot "be used as a method of withholding records." *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970); *Yagman v. Pompeo*, 868 F.3d 1075, 1079 (9th Cir. 2017) (holding that the scope of a request is clear if it provides "*some* reasonable description" of the requested records, such as times, dates,

locations, types of documents, or types of information) (emphasis in original); *see also Shapiro v. CIA*, 170 F. Supp. 3d 147, 155 (D.D.C. 2016) (holding that the "reasonable-description requirement" under FOIA, "does not doom requests that *precisely* describe the records sought, even if compliance might overwhelm an agency's response team") (emphasis in original).

27. After an agency identifies a responsive record, the agency must disclose the entire record "as a unit," unless a statutory exemption allows the agency "to redact specific information within [the record]." *Am. Immigr. Law. Ass'n v. Exec. Off. for Immigr. Rev.*, 830 F.3d 667, 677 (D.C. Cir. 2016); *see also* 5 U.S.C. § 552(a)(3)(A), (d). The agency may not "redact particular information within the responsive record on the basis that the information is non-responsive." *Am. Immigr. Law. Ass'n*, 830 F.3d at 678.

28. In certain limited instances, an agency may withhold records or portions of records pursuant to nine specific exemptions. 5 U.S.C. § 552(b). These exemptions "were explicitly made exclusive" and "must be narrowly construed" in keeping with FOIA's presumption in favor of disclosure. *Milner v. Dep't of Navy*, 562 U.S. 562, 566 (2011).

29. An agency can only withhold information in a responsive record "if the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in [FOIA]" or "disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A).

30. FOIA places the burden on the agency to prove that it may withhold responsive records or portions of records from a requester. *Id.* § 552(a)(4)(B). In order to satisfy this burden, the agency must submit affidavits that "describe the documents and the justifications for nondisclosure with reasonably specific detail," and "demonstrate that the information withheld logically falls within the claimed exemption." *Int'l Couns. Bureau v. U.S. Dep't of Def.*, 657 F. Supp.

2d 33, 38 (D.D.C. 2009). An agency fails to satisfy this burden if its affidavit is refuted "by contrary evidence in the record" or "by evidence of agency bad faith." *Id.*

31. Moreover, if information contained in a document falls within one of FOIA's enumerated exemptions, an agency may not simply withhold the entire document. *See Jud. Watch, Inc. v. HHS*, 27 F. Supp. 2d 240, 246 (D.D.C. 1998) (observing that courts must "make specific findings as to the extent to which nonexempt responsive material might be 'segregated' from exempt materials and released") (citing *Krikorian v. Dep't of State*, 984 F.2d 461, 466 (D.C. Cir. 1993)). An agency is required to take reasonable steps to segregate and disclose *all* reasonably segregable portions of a withheld document. *See Krikorian*, 984 F.2d at 466 (holding that "the 'segregability' requirement applies to all documents and all exemptions in the FOIA."); 5 U.S.C. § 552(a)(8)(A)(ii).

32. If an agency cannot adequately justify withholding records in full or in part, FOIA provides this Court jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

33. Finally, this Court also "has the authority to oversee and supervise the agency's progress in responding to the request." *Seavey v. DOJ*, 266 F. Supp. 3d 241, 244 (D.D.C. 2017) (citing *CREW*, 711 F.3d at 189); *see also Clemente v. FBI*, 71 F. Supp. 3d 262, 269 (D.D.C. 2014) (a court "may use its equitable powers to require the agency to process documents according to a court-imposed timeline.").

FACTUAL BACKGROUND

34. CFS, through its GE Campaign, works to protect human health, animal welfare, and the environment from the adverse impacts associated with the creation and use of GE organisms, including laboratory-engineered potential pandemic pathogens that are often created, transferred, or used in gain-of-function studies on influenza, MERS, and SARS.

35. On September 4, 2020, CFS submitted a FOIA request to NIH, seeking "[a]ny and all documents, from January 1, 2017 to present, related to the approval of applications for National Institutes of Health (NIH) contracts or grants to fund gain-of-function studies and/or experiments related to potential pandemic pathogens (PPPs)." Agency FOIA Case Number 55084 (September 4, 2020 FOIA Request). CFS explained that release of the requested records was in the public's best interest because disclosure would significantly contribute to public understanding of the operations or activities of government, and because obtaining the information was of no commercial interest to CFS.

36. An initial determination on the September 4, 2020 FOIA Request was due by October 5, 2020, twenty working days after the date CFS submitted the request.

37. On September 11, 2020, NIH sent an email acknowledging the receipt of CFS's FOIA Request, and assigned the request FOIA Case Number 55084. An interim letter attached to the September 11, 2020 email stated that the letter "acknowledges [CFS's] September 4, 2020, [FOIA] request which was addressed to…[NIH's] National Institute of Allergy and Infectious Diseases (NIAID), and received in this office on September 8, 2020." NIH's letter also informed CFS of the following:

> [NIH is] searching the files of the Division of Microbiology and Infectious Diseases, NIAID for records responsive to [CFS's] request. If any documents responsive to

> [CFS's] request are located, they will be reviewed for releasability, and all releasable information will be sent to [CFS]. [NIH is] asking the grantee to advise this office if release of the material you requested will adversely affect any patent rights or reveal other confidential commercial or financial information. Subsequent to receipt of such advice this office will make a decision regarding releasability. …
>
> [NIH] will do everything possible to comply with your request in a timely manner. …
>
> Because [NIH is] uncertain that any applicable fees will exceed [NIH's] minimum charge ($25.00), [NIH is] not addressing [CFS's] request for a fee waiver at this time. However, if [NIH] determine[s] there will be fees associated with processing [CFS's] requests, [NIH] will contact [CFS] at that time.

38. On March 1, 2021, CFS emailed NIH requesting that the agency provide CFS with an update status regarding CFS's September 4, 2020 FOIA Request, including an estimated completion date for NIH to produce responsive records to the request. That same day, CFS sent NIH another email, requesting that the agency narrow the scope of the FOIA request to search only for NIH contracts and grants that were evaluated and approved under the HHS P3CO Framework to help NIH to identify and produce "the exact documents" CFS is in search of more quickly, and "to limit the number of potentially responsive documents [NIH] would need to review before producing." Specifically, CFS requested that NIH narrow the September 4, 2020 FOIA Request to "[a]ny and all documents, from January 1, 2017 to present, related to NIH contracts and/or grants to fund gain-of-function research of concern studies and/or experiments with potential pandemic pathogens (PPPs) approved under the HHS P3CO Framework."

39. On March 3, 2021, NIH responded agreeing to CFS's March 1, 2021 request to narrow the scope of the September 4, 2020 FOIA Request, stating that "the narrow scope will definitely help with the time it takes to review the records that have been provided to [NIH]," and that the agency "will amend [CFS's] request accordingly." NIH advised CFS that NIH "may have to

conduct pre-disclosure notification on some of the records though which will also take some time." Additionally, NIH informed CFS that NIH "[u]nfortunately at this time…cannot provide an estimated completion date because there are several requests ahead of [CFS's] in [NIH's] queue."

40. CFS emailed NIH again on March 31, 2021, to request an update regarding CFS's September 4, 2020 FOIA Request, FOIA Case Number 55084. CFS notified NIH that more than twenty working days had passed since CFS sent the March 1, 2021 email narrowing the scope of its September 4, 2020 FOIA Request to only documents, from January 1, 2017 to present, related to a very small subset of NIH contracts and grants to fund gain-of-function studies and experiments with potential pandemic pathogens approved under the HHS P3CO Framework—a subset that already would have been included within the scope of the broader search language. CFS continued by informing NIH that it had yet to receive an initial determination or estimated completion date. In a good faith effort to work with NIH and to help speed up the record production process, CFS asked if NIH would be willing to discuss a rolling production schedule. Lastly, CFS requested NIH provide it with "any other recommendations to help expedite the production of responsive records to this request."

41. On April 1, 2021, NIH responded to CFS's March 31, 2021 inquiry stating that NIH is collecting records to the September 4, 2020 Request, FOIA Case Number 55084, but that the agency has been "inundated with requests over the past year due to the Coronavirus pandemic." The agency advised that CFS's September 4, 2020 FOIA Request is in NIH's complex queue with twenty-eight FOIA requests ahead of its request, and an additional four FOIA requests in the expedited queue ahead of those other twenty-eight requests. NIH also stated that the agency "[u]nfortunately…[is] unable to do a rolling production of the documents because [NIH] will have

to conduct pre-disclosure notification on records that originated from outside the National Institute of Allergy and Infectious Diseases," and then "[t]he records will also have to be reviewed by [HHS] once [NIH is] done with [its] part because of the HHS emails within the documents." NIH concluded stating that the agency "hope[s] to have a response to [CFS] by the end of September but again it is difficult to provide an estimated completion date at this time."

42. Seven months, twenty-six days has passed since CFS submitted its September 4, 2020 FOIA Request to NIH, and the agency has not provided an initial determination in response to the September 4, 2020 FOIA Request, supplied an estimated date of completion, or produced any responsive records. NIH has failed to provide a determination describing the scope of the records it intends to produce or withhold, the reasons for withholding any records, or informed CFS that it may appeal any specific adverse determination within the relevant time period in 5 U.S.C. § 552(a)(6)(A)(i) or 5 U.S.C. § 552(a)(6)(B).

43. CFS is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

44. As of the date of this complaint, CFS has received no further communications from NIH.

45. None of FOIA's nine exemptions to the statute's disclosure mandate apply to the records that are responsive to the September 4, 2020 FOIA Request.

46. CFS has been required to expend resources to prosecute this action.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF:

VIOLATION OF THE FREEDOM OF INFORMATION ACT

Failure to Comply with FOIA's Mandatory Determination Deadline for CFS's FOIA Request

47. Plaintiff realleges and incorporates by reference the allegations made in all preceding paragraphs.

48. NIH violated FOIA by failing to make a determination on CFS's September 4, 2020 FOIA Request, FOIA Case Number 55084. 5 U.S.C. § 552(a)(6).

49. CFS has a statutory right to receive a determination within the congressionally mandated deadline of twenty working days. *Id.*

50. Nearly eight months has passed since CFS filed the September 4, 2020 FOIA Request. To date, NIH has not provided a determination, notwithstanding the requirement of 5 U.S.C. § 552(a)(6)(A) of an agency response within twenty working days detailing the scope of the records the agency intends to produce and withhold, the reasons for making that determination, and an explanation of the process by which a requester can administratively appeal that determination.

51. Even accounting for a ten-working-day extension, NIH has still failed to meet the deadline by which an initial determination is required.

52. NIH's failure to make an initial determination with regard to the September 4, 2020 FOIA Request, thus unlawfully delaying its response beyond the deadline that FOIA mandates, has prejudiced CFS's ability to timely obtain public records. *Id.* § 552(a)(6)(A)(i).

53. As such, CFS has exhausted the applicable administrative remedies with respect to the September 4, 2020 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

54. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to NIH in the foreseeable future.

55. CFS's organizational activities will be adversely affected if NIH continues to violate FOIA by failing to disclose responsive records as it has in this case.

56. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, NIH will continue to violate CFS's rights to receive public records under FOIA.

57. CFS is entitled to reasonable costs of litigation, including attorney fees, pursuant to FOIA. *Id.* § 552(a)(4)(E).

SECOND CLAIM FOR RELIEF:

VIOLATION OF THE FREEDOM OF INFORMATION ACT

Failure to Conduct an Adequate Search for Responsive Records to CFS's FOIA Request

58. Plaintiff realleges and incorporates by reference the allegations made in all preceding paragraphs.

59. NIH violated FOIA by failing to conduct an adequate search for responsive records pursuant to 5 U.S.C. § 552(a)(3)(C)-(D).

60. CFS has a statutory right to have NIH process its September 4, 2020 FOIA Request, FOIA Case Number 55084, in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3)(C)-(D).

61. NIH violated CFS's right when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to the September 4, 2020 FOIA Request, thus prejudicing CFS's ability to timely obtain public records.

62. CFS has exhausted the applicable administrative remedies with respect to the September 4, 2020 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

63. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to NIH in the foreseeable future.

64. CFS's organizational activities will be adversely affected if NIH continues to violate FOIA by failing to disclose responsive records as it has in this case.

65. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, NIH will continue to violate CFS's rights to receive public records under FOIA.

66. CFS is entitled to reasonable costs of litigation, including attorney fees, pursuant to FOIA. *Id.* § 552(a)(4)(E).

THIRD CLAIM FOR RELIEF:

VIOLATION OF THE FREEDOM OF INFORMATION ACT

Failure to Disclose All Responsive Records to CFS's FOIA Request

67. Plaintiff realleges and incorporates by reference the allegations made in all preceding paragraphs.

68. NIH violated FOIA by failing to promptly disclose records that are responsive to CFS's September 4, 2020 FOIA Request, FOIA Case Number 55084. 5 U.S.C. § 552(a)(4)(B).

69. CFS has a statutory right to the records it seeks, and there are no applicable exemptions under FOIA that provide a legal basis for NIH to withhold these records from CFS. *See id.* § 552(b)(1)-(9).

70. To date, NIH has not provided any records requested by CFS in the September 4, 2020 FOIA Request, notwithstanding the requirement of 5 U.S.C. § 552(a)(3)(A) and 5 U.S.C. § 552(a)(6)(C) to make agency records "promptly available."

71. As such, NIH is wrongfully withholding disclosure of information sought by CFS, information to which it is entitled and for which no valid disclosure exemption has been claimed. NIH's unlawful withholding prejudices CFS's ability to timely obtain public records.

72. CFS has exhausted the applicable administrative remedies with respect to the September 4, 2020 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

73. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to NIH in the foreseeable future.

74. CFS's organizational activities will be adversely affected if NIH continues to violate FOIA by failing to disclose responsive records as it has in this case.

75. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, NIH will continue to violate CFS's rights to receive public records under FOIA.

76. CFS is entitled to reasonable costs of litigation, including attorney fees, pursuant to FOIA. *Id.* § 552(a)(4)(E).

FOURTH CLAIM FOR RELIEF:

VIOLATION OF THE FREEDOM OF INFORMATION ACT

Failure to Provide Reasonably Segregable Portions of Any Lawfully Exempt Records to CFS's FOIA Request

77. Plaintiff realleges and incorporates by reference the allegations made in all preceding paragraphs.

78. NIH violated FOIA by failing to take reasonable steps to segregate and release nonexempt portions of lawfully exempt records in response to the September 4, 2020 FOIA Request, FOIA Case Number 55084. 5 U.S.C. § 552(a)(8)(A)(ii)(II).

79. CFS has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. *Id.*

80. To date, NIH has failed to disclose any records to CFS, including nonexempt information that could be reasonably segregated and released in response to the September 4, 2020 FOIA Request, thus prejudicing CFS's ability to timely obtain public records.

81. CFS has exhausted the applicable administrative remedies with respect to the September 4, 2020 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

82. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to NIH in the foreseeable future.

83. CFS's organizational activities will be adversely affected if NIH continues to violate FOIA by failing to disclose responsive records as it has in this case.

84. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, NIH will continue to violate CFS's rights to receive public records under FOIA.

85. CFS is entitled to reasonable costs of litigation, including attorney fees, pursuant to FOIA. *Id.* § 552(a)(4)(E).

FIFTH CLAIM FOR RELIEF:

VIOLATION OF THE FREEDOM OF INFORMATION ACT

Failure to Provide an Estimated Date of Completion as Required by FOIA for CFS's FOIA Request

86. Plaintiff realleges and incorporates by reference the allegations made in all preceding paragraphs.

87. NIH violated FOIA by failing to provide CFS with an estimated date of completion as required by 5 U.S.C. § 552(a)(7)(A)-(B).

88. CFS has a statutory right to have NIH process its September 4, 2020 FOIA Request, FOIA Case Number 55084, in a manner which complies with FOIA. NIH has violated Plaintiff's rights in this regard by its failure to provide an adequate estimated completion date for its response to the September 4, 2020 FOIA Request as required by FOIA. 5 U.S.C. § 552(a)(7)(A)-(B).

89. NIH's failure to inform CFS of an estimated completion date for the September 4, 2020 FOIA Request has prejudiced CFS's ability to timely obtain public records.

90. CFS has exhausted the applicable administrative remedies with respect to the September 4, 2020 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

91. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to NIH in the foreseeable future.

92. CFS's organizational activities will be adversely affected if NIH continues to violate FOIA by failing to disclose responsive records as it has in this case.

93. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, NIH will continue to violate CFS's rights to receive public records under FOIA.

94. CFS is entitled to reasonable costs of litigation, including attorney fees, pursuant to FOIA. *Id.* § 552(a)(4)(E).

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests this Court:

1. Declare that Defendant violated the Freedom of Information Act by failing to lawfully satisfy Plaintiff's September 4, 2020 FOIA Request;

2. Declare that Defendant failed to make and communicate an initial determination regarding Plaintiff's September 4, 2020 FOIA Request;

3. Declare that Defendant failed to conduct an adequate search for agency records responsive to Plaintiff's September 4, 2020 FOIA Request;

4. Declare that Defendant unduly delayed actual production of records responsive to Plaintiff's September 4, 2020 FOIA Request;

5. Declare that Defendant unlawfully failed to provide reasonably segregable portions of records which may be lawfully subject to a FOIA exemption to Plaintiff's September 4, 2020 FOIA Request;

6. Declare that Defendant unlawfully failed to provide Plaintiff with an estimated date of completion as to the search and production of Plaintiff's September 4, 2020 FOIA Request;

7. Order Defendant to provide a lawful initial determination on Plaintiff's September 4, 2020 FOIA Request;

8. Order Defendant to conduct searches that are reasonably calculated to locate all records responsive to Plaintiff's September 4, 2020 FOIA Request using search methods reasonably likely to lead to discovery of all responsive records;

9. Order Defendant to produce, by a date certain, any and all nonexempt responsive records or segregable portion of the records and a *Vaughn* index of any responsive records or portion of responsive records withheld under a claim of exemption, at no cost to Plaintiff;

10. Enjoin Defendant from continuing to withhold any and all nonexempt responsive records or segregable portion of the records;

11. Retain jurisdiction of this action to ensure the processing of Plaintiff's FOIA request and that no agency records or portion of the records are improperly withheld;

12. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412; and

13. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted this 30th day of April, 2021.

CENTER FOR FOOD SAFETY,

/s/ Victoria A. Yundt

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