

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
CHILDREN’S HEALTH DEFENSE,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Civil Action No. 23-1016 (TJK)
)	
NATIONAL INSTITUTES OF HEALTH,)	
)	
<i>Defendant.</i>)	
_____)	

JOINT STATUS REPORT

Pursuant to this Court’s Minute Order dated September 5, 2023, Plaintiff, Children’s Health Defense (“CHD”) and Defendant, the National Institutes of Health (“NIH”) (collectively, the “Parties”), through their undersigned counsel, respectfully submit this Joint Status Report.

BACKGROUND

1. This lawsuit involves a Freedom of Information Act (“FOIA”) request CHD submitted to NIH on November 10, 2022, seeking records relating to communications between NIH researchers and members of the public who experienced health problems after COVID-19 injections—referred to in the FOIA request as “affected individuals” (“Request”). See ECF No. 2 (“Compl.”).

2. The Request sought the following records for the time period from November 1, 2020 to the date of the request:

Part 1: For each of ten, named NIH researchers, all emails sent to and received from an affected individual;

Part 2: All NIH call logs documenting communications with affected individuals; and

Part 3: All internal communications between NIH researchers regarding an affected individual, whether the communication is via email, Teams, or other internal communication system.

Compl., Ex., at 4.

3. After receiving the Request, NIH indicated by letter that the request was “overly broad” and would be administratively closed unless CHD clarified the request. *Id.* ¶ 19.

4. On December 15, 2022, CHD clarified the request as follows:

[A]t this point we would like to narrow our request by limiting the emails sought in our request to those that contain any of the search terms listed below. The exclamation point (!) following some of the terms indicates that what I've provided is a root, and we seek all variants of the root.

Please let me know whether this information is sufficient to process our request. If it is not, kindly let me know what other information would assist in processing the request. Additionally, would you please provide a telephone number where I can reach out to you if further discussion is necessary.

Here are the search terms:

- vaccin!
- adverse
- neurol!
- autoimmun!
- clot!
- suici!
- vertigo
- heart
- paresthesia
- lymph!

Id. ¶ 21; Ex., at 14.

5. On December 16, 2022, CHD sent a follow-up email to confirm that CHD’s clarifications were sufficient, and that NIH had enough information to process the Request. *Id.* ¶ 22. On the same date, NIH responded, “Yes. Confirmed. We are processing this request and will let you know if any further clarifications are required.” *Id.* ¶ 22; Ex., at 19.

6. After additional communications between NIH and CHD (*see* ECF No. 10, PI’s

Opp. to Mot. to Dismiss, at 7-8), CHD filed the instant lawsuit on April 12, 2023. *See* Compl. NIH sought a sixty-day extension for responding to the complaint (*see* ECF No. 8, Def's Consent Mot.), and on June 16, 2023, filed a Motion to Dismiss (*see* ECF No. 9, Def's Mot. to Dismiss). After CHD opposed the Motion to Dismiss (*see* ECF No. 10), NIH sought to withdraw the motion (*see* ECF No. 11, Def's Mot. to Withdraw), and on August 4, 2023, NIH answered the complaint (*see* ECF No. 12, Answer).

DEFENDANT'S REPORT

7. NIH has conducted searches for Parts 1, 2, and 3 of the Request. NIH did not locate any records responsive to Part 2 of the Request as a very initial estimate, approximates that there are potentially 7,500 pages of potentially responsive records to Parts 1 and 3 of the Request.

8. On July 28, 2023, NIH indicated in a letter to CHD that the responsive records could not be released because they contain sensitive personal information that if released, would constitute an unwarranted invasion of personal privacy. However, NIH subsequently agreed to review the records for segregability and responsiveness.

9. Since the Parties' last Joint Status Report, NIH continued to process records and has completed its responsiveness analysis. NIH is continuing to process potentially responsive records by conducting a segregability analysis and has initiated its review for exemptions.

10. Despite NIH's ongoing process of Plaintiff's FOIA request, NIH has received legal complaints for constructive denial on broad FOIA requests for records relating primarily to the pandemic, but also increasingly on additional topics. In these cases, plaintiffs routinely seek their requests to be processed before requests submitted earlier, effectively pulling agency resources from those requesters that have been patiently waiting in the queue to those requesters that seek to jump the line.

11. Litigation invariably places additional burdens on NIH's FOIA program, decreasing the speed at which it can reach other, earlier requests. However, litigation in the context of the COVID-19 pandemic continues to prove particularly demanding because NIH is being sued in short succession and on broad requests, each of which would take years to complete. We are actively negotiating with the requesters through counsel in an effort to reduce the scope of voluminous requests. Other motivated requesters have many and more voluminous requests for documents related to COVID-19 that are pending and ripe for litigation.

12. The broad searches, automated processing that encumbers staff computers for days at a time, iterative negotiations through counsel, drafting court filings and abiding by rigid production schedules is extremely time-consuming for the NIH FOIA program and prevents NIH from responding to the large number of requests which were filed long before Plaintiff's.

13. Cumulatively, this increase in litigation requires the agency's FOIA program to dedicate the majority of its energy to processing litigations, to the detriment of all other requesters and the program's overall efficiency. For context, prior to the pandemic, NIH typically litigated about three FOIA suits per year. However, NIH is now sued about once every month under the FOIA. At this moment, NIH is in the midst of 55 active FOIA lawsuits, which is unprecedented. In addition, program officials who are custodians of the records in question increasingly turn their attention from furthering medical science and helping Americans avoid the effects of the pandemic to run searches and review voluminous collections of requested records with short turn-around times to keep up with strict FOIA litigation production timelines.

14. NIH is simply unable to process potentially responsive records at a rate greater than 300 pages per month. Processing potentially responsive records at a rate greater than 300 pages per month would cripple NIH's ability to meet agreed-upon and court-imposed deadlines in other

FOIA litigation cases and would hamper the ability to respond to new requests. It bears noting that NIH has typically produced 300 pages in all of its FOIA litigations, including those before the pandemic. NIH continues to endeavor to produce at this rate in good faith, even though its resources are severely strained by the onslaught of pandemic related requests and litigations like those of Plaintiff.

15. Specifically, NIH has dedicated five of its most efficient staff to meet its obligations in ongoing FOIA lawsuits. If NIH had to process more pages per a month, NIH would likely have to transfer its remaining senior staff to this litigation (due to the complexity and sensitivity of the records involved in this request, e.g., records akin to medical records, containing significant personal and medical information) and they would have to be seasoned staff.

16. At the same time, the NIH Office of the Director, responsible for requests in litigation, is handling 577 pending requests (inclusive of those in litigation) and 543 backlogged requests. Three additional staff members process requests not in litigation.

17. NIH reports that because of the foregoing it is able to process these records at a rate of 300 pages per month with the first production of any nonexempt responsive material on December 21, 2023.

PLAINTIFF'S REPORT

18. NIH received CHD's FOIA request in November 2022. The request sought expedited processing, and included a detailed argument about the urgent need to inform the public about how the federal government has addressed COVID-19 vaccine adverse events through the NIH's engagement with vaccine-injured individuals. *See* ECF 1-2, Exhibits, pp. 6-8.

19. Although the NIH denied expedited processing, the need for the records has only grown in the year since CHD filed its request, during which a multitude of vaccine adverse events

have been reported.

20. In July 2023, after withdrawing its Motion to Dismiss CHD's complaint, NIH located approximately 7500 potentially responsive records. Nothing has been produced in the three months that NIH has had since then to process the records.

21. CHD respectfully requests that this Court either

- a. Order NIH to begin producing records at a rate of at least 500 pages per month, starting on or before December 1, 2023, and order the parties to provide regular Joint Status Reports about the status of the production, with the first status report due on December 8, 2023; or
- b. Schedule a conference to discuss a production schedule.

* * *

Dated: October 27, 2023

Respectfully submitted,

/s/ Ray L. Flores II, Esq.

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