

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO DISMISS

Plaintiff Children’s Health Defense hereby objects to Defendant’s Motion to Dismiss, for the reasons set forth in the accompanying memorandum of points and authorities.

Dated: June 30, 2023

Respectfully submitted,

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO DISMISS**

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INTRODUCTION

This lawsuit involves a Freedom of Information Act (FOIA) request Plaintiff Children’s Health Defense (“CHD”) submitted to Defendant National Institutes of Health (“NIH” or “Defendant”) in November 2022 that sought 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.” Defendant wrongly claims that it is entitled to dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, alleging that CHD has failed to state a claim upon which relief can be granted. NIH asserts that CHD’s FOIA request did not “reasonably describe” the records sought. *See* ECF No. 9 (Motion). In doing so, Defendant, relying on selected portions of just three paragraphs of CHD’s 29-paragraph complaint (*See* Motion, pp. 7-8 (citing to complaint paragraphs 15, 17, and 21)), ignores every fact that undercuts its arguments, as well as 25 pages of exhibits.¹

CHD presents the following facts, all of which must be accepted as true, and each of which weighs against dismissal:

- CHD’s FOIA request provided detailed information about the requested records, including the subject matter, the timeframe, the types of records sought, and the names of the ten NIH researchers whose communications with and about the affected individuals were the subject of the request. The request described the NIH researchers’ activities in connection with the affected individuals and included citations and links to two articles about the activities, one of which was written by the NIH researchers themselves. *See* ECF No. 2 (Complaint) ¶¶ 12-17; ECF No. 2-1 (Exhibits to Complaint), pp. 3-4.

¹ Citations to the Motion (ECF No. 9) and Exhibits (ECF No. 2-1) use page numbers from the Court’s pagination at the top of each document. Citations to the Complaint (ECF No. 2) use the paragraph numbers in the Complaint.

- After receiving the clarification from CHD, NIH did not indicate that the request was in any way still deficient, despite opportunity and—indeed—a specific request from CHD to do so.. *See* Complaint, ¶¶ 19-21; Exhibits, pp. 11, 14-17.
- Upon providing the requested information, CHD asked NIH to confirm that the information was sufficient. Additionally, on several occasions, CHD asked NIH to inform CHD if it needed additional information to process the request, and indicated a willingness to confer by telephone if further clarification was needed. *See* Complaint, ¶¶ 21-22; Exhibits, pp. 11, 17, 18, 24.
- After receiving the clarifications from CHD, NIH did not – despite opportunity and indeed a specific request from CHD to do so – indicate that the request was in any way still deficient. Instead, NIH confirmed that the information CHD had provided was sufficient and confirmed that the FOIA request was being processed. *See* Complaint, ¶¶ 22-23; Exhibits, pp. 19, 21.

Despite NIH’s unequivocal confirmation that it had enough information to process the request, Defendant now argues that this Court should find, as a matter of law, that the request did not sufficiently describe the records sought, and thus CHD’s complaint should be dismissed. The Motion to Dismiss should be denied on three, independent grounds: First, the complaint sufficiently alleges all elements of CHD’s claim that NIH improperly withheld agency records, since under NIH’s own FOIA regulations, CHD’s FOIA request was “perfected” and thus should have been processed, yet NIH has failed to provide responsive records. Second, even if the request was still deficient after CHD provided the additional information sought by NIH, NIH violated its own FOIA regulations by failing to ask CHD for further clarification, and thus is not entitled to dismissal. Third, CHD “reasonably described” the records sought.

FACTS

On November 10, 2022, CHD submitted a FOIA request to NIH seeking communications between ten named NIH researchers and individuals who contacted NIH in connection with health problems experienced after COVID-19 injection. *See* Complaint, ¶¶ 15-17; Exhibits, pp. 3-4. CHD identified by name the following ten NIH researchers: Avindra Nath, Anthony Fauci, Alkis Togias, Farinaz Safavi, Lindsey Gustafson, Brian Walitt, Tanya Lehky, Amanda Wiebold, Angelique Gavin, and Yair Mina. Exhibits, pp. 3-4.

The FOIA request described the context for the records being sought as follows: Around January 2021, NIH researchers began to hear from individuals who were experiencing severe, lasting health problems after COVID-19 injection, including neurological, cardiovascular, muscular, and other disorders. Exhibits, p. 3; Complaint, ¶¶ 12, 13. The NIH researchers sought to learn more, bringing some “affected people” to NIH headquarters for testing, and sometimes treatment. Exhibits, p. 3; Complaint, ¶¶ 12, 13.

The FOIA request cited and linked to an online article describing the NIH’s work with these affected individuals entitled “In rare cases, coronavirus vaccines may cause Long Covid-like symptoms.”² Exhibits, p. 3, n.5. The article includes comments by NIH scientist Avindra Nath, who—according to the article—was “leading the NIH efforts.” *Id.*

The FOIA request also cited and linked to an online article describing the research, “Neuropathic symptoms with SARS-CoV-2 vaccination,”³ authored by—among other people—

² Jennifer Couzin Frankel and Gretchen Vogel, *In rare cases, coronavirus vaccines may cause Long Covid-like symptoms*, SCIENCE.ORG (Jan. 20, 2023), available at <https://www.science.org/content/article/rare-cases-coronavirus-vaccines-may-cause-long-covid-symptoms> .

³ Farinaz Safavi, Lindsey Gustafson, Brian Walitt, Tanya Lehky, Sara Dehbashi, Amanda Wiebold, Yair Mina, Susan Shin, Baohan Pan, Michael Polydefkis, Anne Louise Oaklander, View ORCID Profile Avindra Nath, *Neuropathic symptoms with SARS-CoV-2 vaccination*, MEDRXIV.ORG (May 17, 2022), available at <https://doi.org/10.1101/2022.05.16.22274439>.

seven of the NIH scientists named in the request: Avindra Nath, Farinaz Safavi, Lindsey Gustafson, Brian Walitt, Tanya Lehky, Amanda Wiebold, and Yair Mina. *See* Exhibits, p. 3, n.2. The “Results” section of the NIH researchers’ article states, “In an observational study, we studied 23 patients (92% female; median age 40 years) reporting new neuropathic symptoms beginning within 1 month after SARS-CoV-2 vaccination.” *See id.* The “Methods” section of the NIH researchers’ article adds:

Twenty-three self-referred patients were evaluated between January to September 2021 for new onset of potential symptoms of polyneuropathy (sensory, motor, or autonomic) within 1 month of SARS-CoV-2 vaccination were enrolled after consent to an IRB approved study at the National Institutes of Health (protocol # 15-N-00125). All were evaluated by in-person (n=13) and/or televisit (n=10), and data was abstracted from their medical records. We excluded patients whose complaints were non-neurologic or limited to worsening or recrudescence of prior neurological symptoms and those with underlying conditions or risk factors for neuropathy and dysautonomia.

Id.

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

- For each [of the ten, named] NIH researcher[s], all emails sent to and received from an affected individual;
- All NIH call logs documenting communications with affected individuals; and
- All internal communications between NIH researchers regarding an affected individual, whether the communication is via email, Teams, or other internal communication system.

Exhibits, p. 4.

The request defined “affected individuals” as “any member of the public who experienced a health problem after COVID-19 vaccination, and who contacted NIH to report the problem, or to seek medical assistance or information in connection with the problem, or to inquire about or participate in research about COVID-19 vaccine reactions.” *Id.*

In a letter dated November 18, 2022, NIH acknowledged the request. Complaint, ¶ 19;

Exhibits, pp. 11-12. The letter indicated that the request was “overly broad” and “impossible to ascertain,” and the matter would be administratively closed unless CHD clarified the request.

Complaint, ¶ 19; Exhibits, p. 11.

After receiving the November 18, 2022 letter, CHD made several unsuccessful efforts to communicate with the NIH FOIA office to clarify the request. On November 22, 2022, CHD detailed these efforts in an email to NIH, requesting that NIH provide a working telephone number to enable CHD to communicate with the FOIA officer who signed the November 18, 2022 letter. Complaint, ¶ 20; Exhibits, pp. 14-15.

On December 15, 2022, CHD clarified its original request in an email to NIH, 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.*⁴

Here are the search terms:

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

Complaint, ¶ 21; Exhibits, p. 14 (italics added).

⁴ Notably, Defendant’s presentation of CHD’s narrowing email does not include this paragraph. See Motion, p. 8.

On December 15, 2022, NIH emailed CHD asking which personnel CHD wanted searched. Exhibits, p. 16. The email added, “the NIH is not typically tasked with engaging with the public on adverse vaccine reactions as that function is primarily managed by the CDC and FDA, not the NIH.” *Id.*

On the same date, CHD responded as follows:

Our original FOIA request lists ten individuals by name; these are the NIH personnel whose emails are the subject of the request. *If the names are not sufficient to identify the relevant personnel, please let me know what other information is required.*

Regardless of whether NIH is officially tasked with engaging with vaccine-injured individuals, as indicated in our FOIA, we are requesting records in connection with communications that NIH has had with such affected individuals, and indeed, NIH has acknowledged having such communications. See, for example, this article: <https://www.science.org/content/article/rare-cases-coronavirus-vaccines-may-cause-long-covid-symptoms>.

If you need more information, or if a telephone conversation would help to clarify the request, please let me know.

Exhibits, p. 17 (italics added).

On December 16, 2022, CHD sent a follow-up email to confirm that CHD’s clarifications were sufficient, and that NIH now had enough information to process the request:

I’m writing to confirm that you received my email yesterday regarding the names of individuals whose emails are being sought, and that between this information, the information in the original request, and the additional search terms we provided by email on December 15, NIH has what it needs and the request is now being processed.

If NIH requires any additional information to process the request, would you please let me know?

Complaint, ¶ 22; Exhibits, p. 18 (italics added).

On December 16, 2022, NIH responded, “*Yes. Confirmed. We are processing this request and will let you know if any further clarifications are required.*” Complaint, ¶ 22; Exhibits, p. 19

(italics added).

On March 15, 2023, CHD inquired about the status of the request, noting that on the HHS portal, the status of the request was listed as “on hold, needs clarification,” despite the clarification having been completed three months earlier. Complaint, ¶ 23; Exhibits, p. 20.

NIH responded by thanking CHD for its status inquiry, and stating, “[y]our request is still being processed and the hold has been released, backdated to December 15, 2022.” Complaint, ¶ 22; Exhibits, p. 21.

After CHD inquired about an anticipated determination date, NIH responded on March 16, 2023, “It is difficult to assess an accurate estimated completion date as your request remains quite broad, even with the search terms you provided, so it is taking time to collect all responsive records. If you would like to limit the search further, that could reduce the time taken to process your request.” Complaint, ¶ 23; Exhibits, pp. 22-23.

On March 17, 2023, CHD again emailed NIH to inquire about the request status, because the NIH FOIA portal listed the request as “received,” rather than “Assigned for Processing,” or “In Process.” Complaint, ¶ 24. Additionally, CHD sought to determine what further information would expedite the processing of the request, writing,

As to the timeframe, as you know, we are far beyond FOIA limits. We would like to work with you to resolve this request. To that end, it would be helpful to know what sort of limitations would help to expedite the processing of this request. To that end, I would appreciate an opportunity to speak with the person processing the request to learn about what additional narrowing would result in a meaningful reduction in processing time. Would you kindly let me know whom I should speak to in order to work with you most effectively?

Exhibits, p. 24 (italics added).

NIH did not respond. Complaint, ¶ 24.

On March 30, 2023, CHD emailed NIH again about the matter, writing, “I’m writing to

follow up on the email sent two weeks ago regarding FOIA 59265. As of today, the NIH portal still lists the FOIA as "received," rather than in process, despite the fact that we clarified and significantly narrowed this request more than three months ago." Complaint, ¶ 24; Exhibits, p. 25. Again, NIH did not respond. Complaint, ¶ 24. As of April 10, 2023, NIH's FOIA portal still listed the request as "received," and NIH had not provided a determination on the request. Complaint, ¶ 25.

NIH now claims the request does not meet FOIA's threshold requirements because it does not reasonably describe the records sought, and therefore the complaint should be dismissed. ECF No. 9, p. 1 (Motion).

LEGAL STANDARD

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim need not be more likely to succeed than to fail but must merely "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

When ruling on a 12(b)(6) motion, a court must "treat the complaint's factual allegations as true and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Elec. Privacy Info. Ctr. v. IRS*, 261 F.Supp.3d 1, 5 (D.D.C. 2017). The Court may consider the complaint along with "any documents either attached to or incorporated in the complaint and matters of which [the Court] may take judicial notice." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997); *see also Middle E. F. v. United States Dep't of Treasury*, 317 F. Supp. 3d 257, 262 (D.D.C. 2018).

Here, CHD exceeded the standard required to survive a motion to dismiss and thus the Court must deny NIH's motion in its entirety.

ARGUMENT

The Freedom of Information Act (FOIA) requires an agency to provide non-exempt records responsive to a properly submitted request that “reasonably describes” the records sought. *See* 5 U.S.C. § 552(a)(3)(A). FOIA entitles a plaintiff to judicial relief when the plaintiff can show that an agency has (1) improperly; (2) withheld; (3) agency records. *See Kissinger v. Reps. Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980).

Here, Defendant does not dispute that CHD's complaint plausibly alleges two elements of a FOIA claim: namely, that the NIH has withheld records that are properly considered agency records. Rather, by arguing that the withheld records have not been “reasonably described,” Defendant appears to challenge the sufficiency of allegations that the withholding was “improper.” *See* Motion, pp. 1, 10.

In support of its Motion to Dismiss, Defendant cites only selected portions of CHD's complaint, and ignores every fact that undercuts its arguments. *See* Motion, pp. 7-8 (citing to complaint paragraphs 15, 17, and 21). But a review of the complaint in its entirety, as is required—coupled with the Exhibits that were also ignored by Defendant—makes it clear that Plaintiff has sufficiently described documents sought. Thus, Defendant is not entitled to a dismissal and the Court must rule in CHD's favor.

I. The complaint plausibly alleges that the Defendant improperly withheld agency records.

Under the Department of Health and Human Service (HHS) FOIA regulations to which Defendant is subject, when a FOIA request complies with procedural requirements and

“reasonably describes” the records sought, the request is considered to be “perfected,” and the statutory time-limit for agency response begins to run. *See* 45 C.F.R. § 5.24(b).

Here, NIH itself informed CHD that the agency had sufficient information to process the request and was in fact processing the request, thus indicating that CHD’s FOIA request was “perfected” under HHS regulations. Accordingly, the complaint plausibly alleges that the NIH’s failure to respond to the request was improper under FOIA.

As alleged in the complaint, CHD’s original FOIA request provided detailed information about the requested records, including the context, the subject matter, the timeframe, the types of records sought, the names of individual custodians who participated in the NIH activities that gave rise to the records, and two articles describing the NIH activities underlying the records. *See* Complaint, ¶¶ 12-17; Exhibits, pp. 3-4. Additionally, on the two occasions when NIH requested additional information (in the initial acknowledgment letter, and in a December 15 email), CHD promptly responded, providing the additional information in two clarifying emails sent to NIH on December 15. *See* Complaint, ¶¶ 19-21; Exhibits, pp. 11, 14-17.

In addition to ignoring CHD’s December 15, 2022 queries as to whether the additional information was sufficient, Defendant’s motion also fails to mention *all* of the substantial communications between the parties *after* the December 15, 2022 clarifying emails, characterizing the timeline as follows: “[a]fter Plaintiff did not receive a response from NIH, it filed the instant lawsuit on April 12, 2023.” *See* Motion, p. 8. This characterization suggests that CHD did nothing after sending NIH the clarifying emails, but that is indisputably not the case.

On December 16, 2022, CHD asked NIH to confirm that it had the information necessary to process the FOIA request. *See* Complaint, ¶¶ 21-22; Exhibits, pp. 11, 17, 18, 24. CHD again asked NIH to inform CHD if NIH required additional information to process the FOIA request.

See Id. CHD also indicated a willingness to confer by telephone if further clarification was needed, and in March, again sought to work with NIH to narrow the request, if narrowing would help to move the processing forward. *See Id.* In sum, CHD attempted in good faith to work with NIH, and to provide NIH with the information needed to process the request.

If, as NIH now claims, CHD’s FOIA request together with the December 15 clarifying emails *still* did not reasonably describe the records sought, then under HHS regulations, NIH could and should have sought further clarification. *See* 45 C.F.R. § 5.24(b) & (c) (describing steps the agency takes when a request does not reasonably provide records sought, including contacting the requester for more information).

Not only did NIH fail to seek further clarification, indeed, as alleged in the complaint, on December 16, 2022, NIH responded affirmatively to CHD’s question about whether NIH had enough information to process the request: “Yes. Confirmed. We are processing this request and will let you know if any further clarifications are required.” Complaint, ¶ 22; Exhibits, p. 19. On March 15, 2023, after CHD inquired about the status of the request because the HHS FOIA portal listed the request as “on hold, needs clarification” (Complaint, ¶ 23; Exhibits, p. 20), NIH wrote “[y]our request is still being processed and the hold has been released, backdated to December 15, 2022.” Complaint, ¶ 22; Exhibits, p. 21.

Read in the light most favorable to the Plaintiff – as it must be under Rule 12(b)(6) standards – and coupled with the other material in the complaint and exhibits, these statements from NIH confirm that CHD’s FOIA request was “perfected” under HHS regulations, and NIH thus had an obligation to respond to the request. Accordingly, the complaint plausibly alleges that the NIH’s failure to timely act on the request was improper under FOIA.

II. Even if the request was in any respect deficient, NIH violated its own regulations by failing to seek further clarification, and thus, dismissal is inappropriate.

HHS regulations require NIH to seek clarification of a FOIA request if the request is unclear or overbroad. *See* 45 C.F.R. § 5.24(b) & (c). Of particular note, the regulations state, “Requests must reasonably describe the records sought and contain sufficient information to enable the FOIA office to contact you and transmit records to you. *If we determine that a request does not meet these requirements, we will attempt to contact you if possible.*” 45 C.F.R. § 5.24(b)(2) (italics added).

This Court has consistently held that when an agency violates these regulations by failing to seek clarification of a request at the administrative level, it may not then obtain dismissal of a FOIA complaint based on an argument that the request is overbroad or unduly burdensome. *See, e.g., Wright v. U.S. Dep’t of Health & Hum. Servs.*, No. CV 22-1378 (RC), 2022 WL 18024624, at *4 (D.D.C. Dec. 30, 2022) (“HHS’s failure to follow its own regulation is fatal to its motion to dismiss”); *Charles v. United States*, No. 21-1983, 2022 WL 951242, at *4-6 (D.D.C. Mar. 30, 2022) (Howell, C.J.) (where agency fails to confer with a requester regarding a confusing request, courts have been “disinclined to side with the agency on a claim that the request is unclear or overly broad”); *see also Anand v. U.S. Dep’t of Health & Hum. Servs.*, No. CV 21-1635 (CKK), 2023 WL 2646815, at *12, 13–14 (D.D.C. Mar. 27, 2023) (denying summary judgment even though request did not reasonably describe records sought, where agency did not follow proper protocol to notify plaintiff of the deficiency).

This Court addressed a similar situation only a few months ago in *Wright*, cited above. In *Wright*, HHS sought dismissal, arguing that a FOIA request did not “reasonably describe” the records sought, because it contained the “overbroad” phrase “refer or relate, in any way,” it lacked adequate search limits, and it imposed an “unreasonable burden” on the agency. 2022 WL

18024624, at *4. The plaintiff objected, arguing that “despite his good-faith efforts to communicate with the agency, HHS violated its own FOIA regulations by never informing him at the administrative level about its concerns with the scope of his request.” *Id.* at *3.

The *Wright* court denied HHS’s motion, reasoning:

If HHS believes [plaintiff’s] requests are overbroad or burdensome, it is required by its own regulation to specify these deficiencies to [plaintiff]. By neglecting its own procedure and challenging the reasonableness of [plaintiff’s] request for the first time in Court, HHS has deprived -[plaintiff] of an opportunity to cooperate with the agency to narrow the scope of his request without judicial intervention. . . FOIA procedures exist precisely to streamline this process.”

Id. at *4; accord Memorandum for Heads of Executive Departments and Agencies, *Freedom of Information Act Guidelines*, Office of the Attorney General, JUSTICE.GOV (Mar. 15, 2022)⁵ at 3 (“Agency FOIA professionals should continue to work with FOIA requesters in a spirit of cooperation”).

Like the plaintiff in *Wright*, CHD sought in good faith to work with the agency to provide the agency with the information needed to process the FOIA request: CHD clarified the request when clarification was sought and offered to provide additional information upon request. *See* Complaint, ¶¶ 19-22; Exhibits, pp. 11, 14-18, 24.

Like the defendant agency in *Wright*, NIH failed to inform CHD at the administrative level about any lingering concerns with the scope of the request. In particular, NIH never informed CHD that the term “affected individual” was problematic or required additional refinement. Nor did NIH inform CHD that the clarified request was overbroad or overly burdensome. Instead, NIH confirmed that the information CHD provided was enough, and stated, “we are processing this request and will let you know if any further clarifications are required.” Complaint, ¶ 22; Exhibits, p. 19.

⁵ Available at <https://www.justice.gov/ag/page/file/1483516/download>.

Like the *Wright* Court, this Court should hold that dismissal is not an option, where—in violation of its own regulations—NIH did not attempt to work with CHD to address any lingering deficiencies in the request.

III. CHD has reasonably described the records sought.

As discussed above, this court should deny the Defendant’s motion since (1) NIH unambiguously told CHD that threshold FOIA requirements were satisfied, rendering NIH’s withholding of responsive records improper; and (2) even if the request was not sufficiently clear, NIH failed to share its concerns with CHD at the administrative level. However the most compelling reason to deny Defendant's motion is that in order to grant the motion, the Court would have to find as a matter of law that CHD failed to reasonably describe the records sought, despite clear evidence and case law to the contrary.

A description “would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.” *Dale v. I.R.S.*, 238 F. Supp. 2d 99, 104 (D.D.C. 2002) (citation omitted). “The linchpin inquiry is whether the agency is able to determine precisely what records are being requested” *Id.* (internal quotation and citations omitted). Whether a particular FOIA request ‘reasonably describes’ the records sought is a “highly context-specific inquiry.” *Nat’l Sec. Couns. v. CIA*, 898 F. Supp. 2d 233, 278 (D.D.C. 2012), *aff’d*, 969 F.3d 406 (D.C. Cir. 2020).

Here, the information in the FOIA request, coupled with CHD’s December 15, 2022 clarifying emails, is sufficient to allow a professional agency employee “familiar with the subject area” to locate the records with a reasonable amount of effort. The “subject area” covered by the FOIA request is announced in the subject line of the request, which states: “Re: Freedom of Information Act request regarding NIH engagement with members of the public who

experienced adverse health events after receiving a COVID-19 injection.” *See Exhibits*, p. 3. The subject area is further refined in the body of the request, which lists the types of symptoms complained of; describes the activities engaged in by the NIH researchers (“bringing some affected people to NIH headquarters for testing, and sometimes treatment”); and identifies by name ten NIH researchers involved with the activities. *See id.* at pp. 3-4.

The FOIA request cites and links to two articles about the subject area. The first article identifies by name the NIH researcher, Avindra Nath, who was “leading the NIH efforts.” *See id.* at p. 3, note 1. The second article, written by seven of the NIH researchers named in the request, describes in detail the activities that are the subject of the request, and describes how twenty-three “self-referred” patients were evaluated by the NIH researchers between January to September 2021, while other patients were excluded from the study for various medical reasons. *See id.*, note 2. Surely, Avindra Nath and at least one of the other six NIH researchers who worked on the article are familiar with the “subject area” of the request.

In addition to providing ample information about the subject area and the NIH personnel involved, the FOIA request identifies a timeframe (November 1, 2020, to the date of the request) and the types of records sought (emails, call logs, and internal communications, all limited to those involving “affected individuals”). *See Exhibits*, pp. 3-4. Additionally, CHD’s December 15 email clarified the request by suggesting specific search terms for the emails. *See Exhibits*, p. 14. Taken together, the information in the FOIA request and the clarifying email provides a “reasonable description” of the records sought. *Cf. Judicial Watch Inc. v. Department of Health and Human Services*, No. CV 22-3153 (JEB), 2023 WL 315588, *3 (D.D.C. Jan. 19, 2023) (records were sufficiently described, precluding dismissal, where requester identified particular

types of documents sought on a defined subject matter, and listed set of ten specific individuals from whom it sought communications on the topic).

Defendant complains that CHD's request is deficient because it "fails to identify the affected individuals," and further, "[e]ven were this information lurking in some corner of the internet, FOIA does not require agencies to become requesters' investigative agents." Motion, p. 12. But CHD's FOIA request does not ask NIH to engage in such an activity. Although it is unlikely that such information lurks "in some corner of the internet," there is one place the information is quite likely to be found: namely, in the records and memories of Avindra Nath and the other NIH researchers named in CHD's FOIA request, *who worked directly with those individuals*. Cf. 93d Congress, 2d Session, Senate Report No. 93-854, *Amending the Freedom of Information Act* (May 16, 1974)⁶ at p. 162 (An agency should keep in mind that its "superior knowledge" of the contents of its files should be used to *further* the philosophy of the FOIA, by facilitating, rather than hindering, the handling of FOIA requests). Indeed, this court has recognized that "a FOIA request is not deficient just because it does not provide the name or email address of every individual whose communications are sought—the request's description need only be "reasonable" to implicate the agency's obligations under the statute." *Gun Owners of America, Inc. v. Federal Bureau of Investigation*, 594 F. Supp. 3d 37, 46 (D.D.C. 2022).

In light of FOIA's pro-disclosure purpose, an agency has "a duty to construe a FOIA request liberally." *Nation Magazine, Wash. Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). Here, Defendant has done just the opposite. Similar to the way it ignored all of the allegations and exhibits that undercut its Motion to Dismiss, Defendant has relied on the alleged overbreadth of a single term in the FOIA request to justify its motion, while ignoring the

⁶ Available at [https://nsarchive2.gwu.edu/nsa/foialeghistory/S.%20Rep.%20No.%2093-854%20\(May%2016,%201974\).pdf](https://nsarchive2.gwu.edu/nsa/foialeghistory/S.%20Rep.%20No.%2093-854%20(May%2016,%201974).pdf).

rest of CHD's description of the "records sought." A full and fair reading of the FOIA request and clarifying emails shows that those records are reasonably described. This court should reject the Defendant's invitation to find as a matter of law that they are not.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny in full Defendant's Motion to Dismiss.

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Respectfully submitted,

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