UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant, the National Institutes of Health, respectfully moves for dismissal of this case. As set forth in the accompanying memorandum of points and authorities, Plaintiff's Freedom of Information Act ("FOIA") request fails to "reasonably describe" the records sought under 5 U.S.C. § 552. Accordingly, the Court should dismiss this matter as failing to satisfy the threshold requirements of FOIA. A proposed order is attached.

* * *

Dated: June 16, 2023
Washington, DC

Respectfully submitted,

MATTHEW M. GRAVES, D.C. Bar #481052
United States Attorney

BRIAN P. HUDAK
Chief, Civil Division

By: /s/ Dedra S. Curteman
DEDRA S. CURTEMAN, IL Bar #6279766
Assistant United States Attorney
601 D Street, NW
Washington, DC 20530
(202) 252-2550

Attorneys for the United States of America

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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Plaintiff brought the present lawsuit under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to force the National Institutes of Health ("NIH") to comply with its November 10, 2022, FOIA request. ECF No. 2 ("Compl"). Plaintiff's FOIA request, however, fails to reasonably describe the records sought, and as such, is an impermissible FOIA request.

Plaintiff's FOIA request seeks communications between ten specific NIH researchers and "affected individuals"—"the individuals who contacted NIH in connection with health problems experienced after [sic] COVID-19 injection." Compl., Ex. 1, Plaintiff's FOIA Request. Plaintiff does not name the affected individuals, but instead, requests that NIH determine which individuals were "affected." FOIA does not, however, require an agency to research whether any individuals reacted to the COVID-19 vaccination and contacted NIH regarding any adverse reactions. Presentation of a legally proper FOIA request to an agency is required to state a claim under FOIA. As such, these defects warrant dismissal Plaintiff's complaint.

BACKGROUND

Plaintiff made its FOIA request on November 10, 2022. *See* Compl. ¶ 15. It requested records from November 1, 2020, through the date of the request, November 10, 2022, "[f]or each NIH researcher, all emails sent to and received from an affected individual; [a]ll NIH call logs documenting communications with affected individuals; and [a]ll internal communications between NIH researchers regarding an affected individual, whether the communication is via email, Teams, or other internal communication system." *Id*. ¶ 17. "Affected individual," according to Plaintiff, was not identified by the name of each individual; rather, Plaintiff defined "affected individual" to mean "any member of the public who experienced a health problem after [sic] 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." Compl., Ex. 1, at 2. Plaintiff identified ten NIH personnel, including Anthony Fauci, Alkis Togias, Avindra Nath, Farinaz Safavi, Lindsey Gustafson, Brian Walitt, Tanya Lehky, Amanda Wiebold, Angelique Gavin, and Yair Mina, as NIH "researchers," from whom Plaintiff sought records. Id. at 1-2.

On December 15, 2022, Plaintiff clarified its request, stating:

> [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 (1) following some of the terms indicates that what I've provided is a root, and we seek all variants of the root . . . .
>
> Here are the search terms:
>
> - vaccin!
> - adverse
> - neurol!
> - autoimmune!
> - clot!
> - suici!
> - vertigo
> - heart
> - paresthesia
> - lymph!

Compl. ¶ 21.

After Plaintiff did not receive a response from NIH, it filed the instant lawsuit on April 12, 2023. *See* Compl. Plaintiff alleges one claim, a violation of FOIA, and as relief, requests that the Court provide for expeditious proceedings in the action; declare NIH's failure to timely comply with FOIA as unlawful; order NIH to immediately conduct a search for any and all records responsive to Plaintiff's request and demonstrate that it employed search methods reasonably likely to lead to the discovery of responsive records; order NIH to produce all non-exempt records responsive to her request no later than 20 days from the Court's ruling, along with a *Vaughn* index

of any responsive records withheld; enjoin NIH from continuing to withhold non-exempt responsive records; and award attorney's fees. *See* Compl. at "Prayer for Relief."

LEGAL STANDARD

Under Federal Rule of Civil Procedure ("Rule") 12(b)(6), a court may dismiss a complaint where a plaintiff fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, "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)). When resolving a motion to dismiss pursuant to Rule 12(b)(6), the pleadings are construed broadly so that all facts pleaded therein are accepted as true, and all inferences are viewed in a light most favorable to the plaintiff. *See Iqbal*, 556 U.S. at 678. However, a court is not required to accept conclusory allegations or unwarranted factual deductions as true. *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. Likewise, a court need not "accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Ultimately, the focus is on the language in the complaint and whether that sets forth sufficient factual allegations to support a plaintiff's claims for relief.

ARGUMENT

Plaintiff's request does not meet the requirements of FOIA because it fails to reasonably describe the records sought. FOIA states that "each agency, upon any request for records which (1) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). As relevant here, the regulations of the Department of Health and Human Services (under which NIH is a component) require that a request provides "sufficient detail to enable [Agency] staff to locate them with a reasonable amount

of effort." 45 C.F.R. § 5.22(a). The agency's obligation to produce records under FOIA "begins only upon receipt of a valid request." *Dale v. IRS*, 238 F. Supp. 2d 99, 103 (D.D.C. 2002).

Thus, "[a] FOIA plaintiff states a claim where it properly alleges that an agency has (1) improperly (2) withheld (3) agency records [.]" *Cause of Action Inst. v. IRS*, 390 F. Supp. 3d 84, 92 (D.D.C. 2019). On the other hand, a plaintiff has failed to state a FOIA claim where its FOIA request fails to reasonably describe the records sought. *See Evans v. Bureau of Prisons*, 951 F.3d 578, 583 (D.C. Cir. 2020) (quoting 5 U.S.C. § 552(a)(3)(A)) ("[u]nder FOIA, an agency is only obligated to release nonexempt records if it receives a request that 'reasonably describes such records'"); *Citizens for Resp. & Ethics in Wash. v. FEC*, 711 F.3d 180, 185 n.3 (D.C. Cir. 2013) ("duties that FOIA imposes on agencies . . . apply only once an agency has received a proper FOIA request.").

As to FOIA's obligation that a requestor "reasonably describe" the records it seeks, a brief overview of the history of 5 U.S.C. § 552(a)(3)(A) provides insight on the meaning of "reasonably describes" as used in FOIA. The counterpart to § 552(a)(3)(A) that existed in the 1967 enactment of FOIA stated: "Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person." Pub. L. No. 90-23, 81 Stat. 54 (1967). The D.C. Circuit explained in *Irons v. Schuyler*, 465 F.2d 608 (D.C. Cir. 1972), that the "identifiable records" requirement "calls for a reasonable description enabling the Government employee to locate the requested records." *Id.* at 612 (quoting *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970)). Accordingly, it held that a request—for "all unpublished manuscript decisions of the Patent Office, together with such indices as are available"—was not a request for

"identifiable records" because "the contours of the records . . . described are so broad in the context of the Patent office files as not to come within a reasonable interpretation of 'identifiable records[.]'" *Id*. at 610, 613.

Congress inserted the term "reasonably describes" "in 1974 in replacement of the words 'request for identifiable records,' the terminology of Section 3 [of FOIA] as originally enacted in 1967." *Truitt v. Dep't of State*, 897 F.2d 540, 544 (D.C. Cir. 1990). The House Judiciary Committee explained that the change in language was "designed to ensure that a requirement for a specific title or file number cannot be the only requirement of an agency for the identification of documents." H. Rep. No. 93-876 at 125. "A 'description' of a requested document 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." *Id*. at 125-26.

The Attorney General's Memorandum on the 1974 Amendments to FOIA promulgated by Attorney General Edward H. Levi (the "Attorney General's Memorandum") in 1975[1] contains the Executive Branch's contemporaneous interpretation of the 1974 amendments to FOIA, which the Supreme Court and the D.C. Circuit have viewed as "a reliable guide in interpreting FOIA." *Chiquita Brands Int'l, Inc. v. SEC*, 805 F.3d 289, 295-96 (D.C. Cir. 2015) (quoting *FCC v. AT&T Inc*., 562 U.S. 397, 409 (2011)). The Attorney General's Memorandum explains the change from "identifiable" to "reasonably describes" as "serv[ing] basically to clarify rather than to alter the law as it has been understood by several courts and many agencies." Attorney General's Mem. at 22. "It is not enough that the request provide enough data to locate the record; it must enable it to be located in a manner which does not involve an unreasonable amount of effort." *Id*. at 23.

[1] The Attorney General's Memorandum was reprinted in the House Committee on Government Operations and Senate Committee on the Judiciary, *Freedom of Information Act and Amendments of 1974 (P.L. 93-502)*, 94th Cong., 1st Sess., 507, 518-19 (Jt. Comm. Print 1975).

The professional-employee test is an objective test, and courts are equipped to make this determination by resort to the FOIA request alone. *See Dale*, 238 F. Supp. 2d at 105 (noting that document request was deficient "on its face"). In other words, agencies need not introduce evidence showing that, based on a particular document request, their professionals are incapable of locating the requested records with a reasonable amount of effort. *See Borden v. FBI*, Civ. A. No. 94-1029, 1994 WL 283729, at *1-2 (1st Cir. 1994) ("[T]he request which plaintiff allegedly presented . . . does not reasonably describe the records sought. Since the complaint shows on its face that the plaintiff did not present a proper request, we need not consider defendant's remaining arguments." (citations omitted)).

I. Plaintiff's Request Is Too Vague and Overbroad.

Plaintiff's FOIA request seeks "emails sent to and received from an affected individual"; "call logs documenting communications with affected individuals"; and "internal communications . . . regarding an affected individual." Compl. ¶ 17, Ex A. Plaintiff, however, does not identify the "affected individuals" for whom it seeks responsive records. Simply put, this is not a proper FOIA request for three reasons.

First, Plaintiff fails to reasonably describe the records sought because the request fails to identify the affected individuals. Even were this information lurking in some corner of the internet, FOIA does not require agencies to become requesters' investigative agents. *Assassination Archives & Rsch. Ctr. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989) ("FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters[.]"), *aff'd in relevant part*, No. 89-5414, 1990 WL 123924 (D.C. Cir. Aug. 13, 1990). Nor does FOIA require NIH to answer questions, which in this case, would require NIH to determine who is and who is not an "affected individual." *Judicial Watch, Inc. v. Department of State*, 177 F. Supp. 3d 450 (D.D.C. 2016) is instructive. There, the plaintiff requested "records that identified the number and names

of all current and former" state Department officials "who used email addresses other than their assigned 'state.gov' email addresses to conduct official State Department business," a request that the court determined ultimately was a question that asked "who at the State Department used private e-mail for conducting official business?" *Id*. at 455–56.

Taylor v. IRS, Civ. A. No. 18-2666 (TSC), 2020 WL 13156288, at *6 (D.D.C. Oct. 22, 2020), is also instructive. There, plaintiff requested the full names, position titles, business addresses, and telephone numbers of IRS employees whose names or signatures appeared on correspondence Plaintiff received. The court rejected the request as a valid FOIA request because "FOIA only requires that an agency turn over records, not that it provide a requestor with specific information or answer questions." *Id*. (quoting *Powell v. IRS*, 255 F. Supp. 3d 33, 43(D.D.C. 2017) (internal quotations omitted). The court found that as such, "Plaintiff's request [did] not ask for a readily identifiable agency record; rather, it asks the IRS to compile information from its records, which calls upon the IRS to perform functions FOIA does not require. *Id*.

Similarly, Plaintiff's request requires NIH to determine "who" amongst the many emails NIH receives, is an "affected individual" as defined by Plaintiff. Plaintiff's definition of an "affected individual," however, would require NIH to determine what individuals met a variety of criteria, including whether (1) a member of the public experienced a health problem after receiving a COVID-19 vaccination and (2) then contacted NIH to report the problem or (3) sought medical assistance or information in connection with the problem or (4) inquired about or participated in research about COVID-19 vaccine reactions. *See* Compl., Ex. 1, at 2. At a minimum, Plaintiff's request would require NIH to engage in an investigation as to whether responsive, non-exempt records met four minimum criteria after applying Plaintiff's search terms. Further, Plaintiff's use of the term "health problem," without any definition of the term, requiring NIH to further

determine whether an individual had a "health problem" amongst the many records it would ultimately review. In all, Plaintiff's request would require NIH to engage in a multi-level investigation of records and would require it to answer multiple sets of questions, but NIH is "not obligated to respond to questions [or] requests for research." *Jimenez v. Exec. Off. for U.S. Att'ys*, 764 F. Supp. 2d 174, 182 (D.D.C. 2011).

Second, courts have routinely found requests that amount to "fishing expeditions"—i.e., those that indiscriminately seek large swaths of communications or records—are improper under FOIA. Indeed, this case parallels the request the Ninth Circuit found to be improper in *Marks v. United States*, 578 F.2d 261 (9th Cir. 1978). In *Marks*, the requester asked the FBI to produce all records "maintained under his name." The Ninth Circuit held this request was improper. *Id.* at 262. Specifically, it held that "broad, sweeping requests lacking specificity are not permissible," finding that "FOIA does not mandate that the FBI comply" with plaintiff's request for it to conduct "an all-encompassing search of the records of every field office of the FBI[.]" *Id.* at 263. Again, Plaintiff's request requires NIH to scour thousands of emails to determine "who," if anyone, is an "affected individual" within Plaintiff's meaning of those terms." And Plaintiff's request is even more broad than the one in *Marks* as Plaintiff seeks not only every scrap of paper for one person but every communication for an "affected individual" exchanged between ten NIH researchers. This "fishing expedition" is plainly improper under FOIA. *See Freedom Watch, Inc. v. Dep't of State*, 925 F. Supp. 2d 55, 61-62 (D.D.C. 2013) (finding "requests failed to identify the documents sought with any modicum of specificity," including portion that sought all communications, regardless of subject matter, sent to or from the offices of the Secretaries of State and Treasury); *Am. Fed'n of Gov't Emps. ("AFGE") v. Dep't of Com.*, 632 F. Supp. 1272, 1278 (D.D.C. 1986) (noting "broad, sweeping requests lacking specificity are not permissible[,]" and finding that

request for all "chronological files" from a host of agency offices was not reasonably described; "[t]he Bureau would have been doing little else for days but waiting on plaintiff's documentary repast had it acceded to the request"), *aff'd*, 907 F.2d 203 (D.C. Cir. 1990).

Third, even were the first request reasonably described (which it is not), its shocking breadth would impose undue and unreasonable burdens on the NIH, which is inconsistent with FOIA. "Even where a request 'identif[ies] the documents requested with sufficient precision to enable the agency to identify them,' the request may still fail to 'reasonably describe[ ]" the records sought if it is "so broad as to impose an unreasonable burden upon the agency.'" *Nat'l Sec. Couns. v. CIA*, 960 F. Supp. 2d 101, 163 (D.D.C. 2013) (quoting *Am. Fed'n of Gov't Emps., Local 2782 v. Dep't of Com.*, 907 F.2d 203, 209 (D.C. Cir. 1990) ("An agency need not honor a request that requires 'an unreasonably burdensome search.'") (quoting *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978))). Plaintiff's request seeks every email, every letter, every call log, every Teams communication, or other internal communications exchanged between ten top-level NIH researchers and anyone who had a health problem after receiving the COVID-19 vaccination and who contacted NIH to report the problem or to seek medical assistance or to inquire about or participate in research about COVID-19 vaccine reactions. An "affected individual" is unbounded by subject matter or mentions of specific terms. Every email from a member of the public would be covered. Every email concerning the COVID-19 vaccination would be included. The breadth of the request is only limited by one's understanding of a "health problem" and one's understanding that the "health problem" occurred after a member of the public received a COVID-19 vaccination. Congress through FOIA did not foist this impossible and undue burden on agencies.

Because it does not reasonably describe the records sought and in essence propounds an interrogatory and requires NIH to first conduct research, the Court should dismiss Plaintiff's claim.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court dismiss Plaintiff's complaint.

Dated: June 16, 2023
Washington, DC

Respectfully submitted,

MATTHEW M. GRAVES, D.C. Bar #481052
United States Attorney

BRIAN P. HUDAK
Chief, Civil Division

By: /s/ Dedra S. Curteman
DEDRA S. CURTEMAN, IL Bar #6279766
Assistant United States Attorney
601 D Street, NW
Washington, DC 20530
(202) 252-2550

Attorneys for the United States of America