

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

PROTECT THE PUBLIC’S TRUST )  
712 H Street, N.E. )  
Suite 1682 )  
Washington, D.C. 20002, )

Plaintiff, )

v. )

Civil Case No. 1:22-cv-00866

NATIONAL INSTITUTES OF HEALTH )  
9000 Rockville Pike )  
Bethesda, MD 20892, )

Defendant. )

\_\_\_\_\_ )

**COMPLAINT**

1. Plaintiff Protect the Public’s Trust brings this action against the National Institutes of Health under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the Declaratory Judgement Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

**JURISDICTION AND VENUE**

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.
3. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

**PARTIES**

4. Plaintiff Protect the Public’s Trust (“PPT”) is an unincorporated association of retired and former public servants and concerned citizens that is dedicated to restoring public trust in government by promoting the fair and equal application of the rules and standards of

ethical conduct to all public servants. *See* D.C. Code § 29–1102(5). Consistent with Justice Brandeis’s aphorism that “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman,” PPT seeks to promote transparency and broadly disseminate information so that the American people can evaluate the integrity and ethical conduct of those who act in their name. Louis Brandeis, *OTHER PEOPLE’S MONEY AND HOW BANKERS USE IT* (1914), <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v>.

5. Defendant National Institutes of Health (“NIH” or “the Agency”) is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1). The Agency has possession, custody, and control of records responsive to Plaintiff’s FOIA request.

#### **STATEMENT OF FACTS**

6. On October 27, 2021, PPT submitted a FOIA request (attached as Exhibit A) via email to the Agency seeking the following records:
  1. Meeting Requests: All records for meeting requests, meeting memos, briefing documents, schedules, communications, and any other records related to preparation, dissemination, and press scheduling related to the press release on August 6, 2021 titled, “New CDC Study: Vaccination Offers Higher Protection than Previous COVID-19 Infection,”<sup>1</sup> and any and all of the same documents regarding NIH Director Francis Collins’ subsequent statements made to the media on the study titled “Reduced Risk of Reinfection with SARS-CoV-2 After COVID-19 Vaccination — Kentucky, May–June 2021”<sup>2</sup> (“Kentucky study”) highlighted in the release. This also includes meetings discussing, planning, briefing, or scheduling any media appearances or media communications regarding the topic of this study by any employee within the Department of Health and Human Services (HHS), CDC, and NIH, including each division’s respective communications and ethics departments.
  2. Internal and External Communications: Any and all internal communications, documents, or other records related to the CDC press release on August 6, 2021, titled, “New CDC Study: Vaccination Offers Higher Protection than Previous COVID-19 Infection,” the Kentucky study, and related to any subsequent statements and press appearances

made by NIH Director Francis Collins. This includes all communications, documents, briefing materials, and other records to, from or between any party within HHS, the CDC, and NIH. External communication includes any and all communications, documents, and other records to, from, or between a party within the CDC, NIH, Office of the Secretary, Office of the Assistant Secretary for Public Affairs, Office of the Assistant Secretary for Health and the White House. This includes any documents from the Department's communication staff, and any and all communications between government employees and external media organizations and any other external parties and entities on this subject. The search should include all such communications dating back to June 1 until the date the search begins.

3. Communications pertaining to an article appearing in the Louisville Courier Journal on August 9, 2021, by Deborah Yetter titled "CDC study of Kentuckians disputes Rand Paul, Thomas Massie claims about Covid-19 immunity."<sup>3</sup> The search should include all HHS communications and external affairs offices that may have communicated with or had outreach with Ms. Yetter, her editors, the Louisville Courier Journal, Kevin Kavanagh, or other employees of the organization Health Watch USA prior to prior to publication of the article. For individuals within those offices, search terms should include "Rand Paul" "Thomas Massie" "natural immunity" "Israeli Health Ministry" or related terms.

(footnotes omitted).

7. PPT received no response or acknowledgement of its FOIA request. As a result, on December 21, 2021, PPT resubmitted its FOIA request via the NIH FOIA portal.
8. As Attorney General Garland has made clear, FOIA is "a vital tool for ensuring transparency, accessibility, and accountability in government" whose "basic purpose . . . is to ensure an informed citizenry, which is 'vital to the functioning of a democratic society [and] needed to check against corruption and to hold the governors accountable to the governed.'" Merrick Garland, *Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines* 1 (Mar. 15, 2022), <https://www.justice.gov/ag/page/file/1483516/download> (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)) ("Garland Memo").

9. The release of these documents is in the public interest because they will give the public greater insight into whether and how the Agency followed its own scientific integrity standards with respect to public statements concerning natural immunity from Covid-19. Today, more than half of Americans polled self-report that they have contracted Covid-19. Aaron Blake, *A Milestone: Majority Say They've Had Covid – Even More in GOP*, Wash. Post (Mar. 28, 2022), <https://www.washingtonpost.com/politics/2022/03/28/majority-americans-covid-republicans/>. At the same time, the Food and Drug Administration recently authorized a fourth Covid-19 shot for people 50 and older. See Carolyn Y. Johnson and Lena H. Sun, *FDA Authorizes Second Coronavirus Booster Shot for People 50 and Older*, Wash. Post (Mar. 29, 2022), <https://www.washingtonpost.com/health/2022/03/29/fda-authorizes-second-booster-shot/>. Accordingly, the question of how well natural immunity protects against Covid-19 relative to vaccination remains a highly salient question of public interest. Moreover, addressing the broader question of whether and how the Agency is following its own scientific integrity standards is in the public interest because these standards are essential to ensuring science, and thus health policies, is not unduly influenced by industry, political individuals, or other conflicting influences.
10. On December 21, 2021, the Agency informed PPT that the status of its request, referred to as “request #57539,” had been updated to “received.”
11. Plaintiff reached out regarding the status of this request at least four times, including on December 20, 2021, December 30, 2021, February 18, 2022, and March 8, 2022.
12. On January 7, 2022, the Agency informed PPT that it had updated the status of request #57539 to “Assigned for Processing.”

13. Plaintiff has not received an update from the Agency since then.
14. As the Garland Memo makes clear, “Timely disclosure of records is also essential to the core purpose of FOIA.” Garland Memo at 3. As of today, Plaintiff’s request already has been pending for more than 150 days – well beyond the statutory period for federal agencies to make a determination with respect to a FOIA request. 5 U.S.C. § 552(a)(6)(A)-(B). This can hardly be said to be a “timely” response, particularly where, as here, the information requested relates to an ongoing issue of tremendous public interest.
15. At this time, the Agency has not made a determination of whether it will comply with Plaintiff’s request. *See Citizens for Responsibility and Ethics in Washington v. FEC*, 711 F.3d 180 (D.C. Cir. 2013). The Agency has not produced responsive documents to the Plaintiff, has not provided an estimate of when it will produce responsive documents, has not communicated to the Plaintiff the scope of the documents it intends to produce and withhold, along with the reasons for such withholding, and has not informed Plaintiff of its ability to appeal any adverse portion of its determination.
16. Given these facts, the Agency has not and does not intend to meet its statutory obligations to provide the requested records.
17. Through the Agency’s failure to make a determination within the time period required by law, PPT has constructively exhausted its administrative remedies and seeks immediate judicial review.

**COUNT I**

**Violation of FOIA, 5 U.S.C. § 552**  
**Wrongful Withholding of Non-Exempt Responsive Records**

18. PPT repeats and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
19. PPT properly requested records within the possession, custody, and control of the Agency.
20. The Agency is an agency subject to FOIA, and therefore has an obligation to release any non-exempt records and provide a lawful reason for withholding any materials in response to a proper FOIA request.
21. The Agency is wrongfully withholding non-exempt agency records requested by PPT by failing to produce non-exempt records responsive to its request.
22. The Agency is wrongfully withholding non-exempt agency records requested by PPT by failing to segregate exempt information in otherwise non-exempt records responsive to the PPT FOIA request.
23. The Agency's failure to provide all non-exempt responsive records violates FOIA.
24. Plaintiff PPT is therefore entitled to declaratory and injunctive relief requiring Defendant to promptly produce all non-exempt records responsive to its FOIA request and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

**REQUESTED RELIEF**

Protect the Public's Trust respectfully requests this Court:

- (1) Assume jurisdiction in this matter, and maintain jurisdiction until the Defendant complies with the requirements of FOIA and any and all orders of this Court.

- (2) Order Defendant to produce, within ten days of the Court's order, or by other such date as the Court deems appropriate, any and all non-exempt records responsive to PPT's FOIA request and indexes justifying the withholding of all or part of any responsive records withheld under claim of exemption.
- (3) Enjoin the Defendant from continuing to withhold any and all non-exempt responsive records.
- (4) Award PPT the costs of this proceeding, including reasonable attorney's fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E).
- (5) Grant PPT other such relief as the Court deems just and proper.

Dated: March 31, 2022

Respectfully submitted,

PROTECT THE PUBLIC'S TRUST  
By Counsel:

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