PROTECT the PUBLIC'S TRUST

VIA ELECTRONIC MAIL June 4, 2024

TO: Christi A. Grimm
Inspector General
U.S. Department of Health and Human Services
330 Independence Avenue, SW
Washington, D.C. 20201

Admiral Rachel L. Levine
Assistant Secretary for Health
Commission Corps of the U.S. Public Health Service
1101 Wootton Parkway
Rockville, MD 20852

Re: Apparent Wrongdoing by Employees of the National Institute of Health/National Institute of Allergy and Infectious Diseases

Dear Inspector General Grimm and Admiral Rachel Levine,

President James Madison once wrote to then-Lieutenant Governor of Kentucky, William T. Berry, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[1] Essentially, President Madison recognized that a knowledgeable and well-informed public is that which is best suited to govern itself in a liberal democracy.

In 1966, the United States Federal Government made its position on this sentiment clear by enacting the Freedom of Information Act ("FOIA"), which provides for the public's broad-scale access to records made and maintained by federal agencies.[2] Regrettably, however, it has become evident in recent days that certain actors within our government have failed to realize the fundamental importance of this prerequisite to functional government.

In apparent violation of federal law, employees of the National Institute of Health/National Institute of Allergy and Infectious Diseases ("NIH/NIAID") appear to have rejected these principles of transparency in favor of those of concealment, making concerted efforts to avoid their obligations under FOIA by, among other acts, deliberately routing official NIH/NIAID communications through personal

[1] Letter from James Madison to W.T. Berry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON (Gaillard Hunt ed.) (1910).

[2] 5 U.S.C. § 552.

email accounts and phones as well as purposefully misspelling words to shield such communications from disclosure under FOIA.[3]

Protect the Public's Trust ("PPT"), a nonpartisan organization dedicated to maintaining the public's trust in its governmental organizations, finds this disregard for the importance of transparency alarming. Accordingly, PPT requests that you investigate this apparently intentional pattern of evasion effectuated by NIH/NIAID employees.

I. Factual Background

Beginning in April 2020 and continuing until at least December 2021, NIH/NIAID employees seem to have engaged in a practice of using personal email accounts to disseminate communications between one another for the express purpose of avoiding their disclosure under FOIA.[4] Through the use of a "secret back channel," Dr. David Morens, a top advisor to Dr. Anothony Fauci at NIH, appears to have led efforts among his professional associates to prevent the ability of American citizens to access records of their government's activities.[5]

During the Spring of 2020, while millions of Americans were stuck in their homes and on the receiving end of "[c]onfusing, inconsistent public health messages about [the] pandemic[,]"[6] Dr. Morens and his colleagues seem to have gone to considerable lengths to exacerbate this confusion. According to emails published in a memorandum by Republican Members of the House Select Subcommittee on the COVID-19 Pandemic (the "House Memorandum"), Dr. Morens sent an email to his coworkers on April 26, 2020, stating, "This [email] is sent from my gmail account. Please send all replies here To [sic] gmail."[7] This practice expanded beyond the scope of that single email chain as, two days later, Dr. Morens began another email conversation from his personal Gmail account, this time sending inside information

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[3] Memorandum from House Select Subcomm. on the COVID-19 Pandemic Rep. Mems. to House Select Subcomm. Staff (May 22, 2024), available at: https://oversight.house.gov/wp-content/uploads/2024/05/SSCP-Staff-Memo_Morens-5.22.pdf.

[4] *Id.*

[5] Josh Christenson, *NIH Adviser David Morens Can't Recall If He Deleted COVID Records, Laughs off Fauci FOIA Evasions*, N.Y. POST (May 22, 2024), https://nypost.com/2024/05/22/us-news/explosive-emails-show-top-nih-adviser-deleted-records-used-secret-back-channels-to-help-fauci-ecohealth-evade-covid-transparency/.

[6] Jeffrey H. Toney & Stephanie Ishack, *A Pandemic of Confusion*, 108:6 AM. SCIENTIST 344 (2020) ("Since the beginning of the current pandemic, the news media and social media have highlighted a range of confusing, often contradictory messages about COVID-19.").

[7] The House Memorandum at 6.

regarding NIH/NIAID operations to Dr. Peter Daszak, President of Ecohealth.[8] Less than one month later, Dr. Morens confirmed that he wanted the use of his personal gmail account to become a regular practice, emailing—from his personal Gmail account—his colleagues stating, "Please try to send [emails] only to my gmail, as we were doing a couple weeks ago . . . [I] am going to try to strictly use only my gmail in these discussions,"[9] and, communicating with Dr. Gerald Keusch, "I ask you . . . that NOTHING gets sent to me except to my gmail . . . ."[10]

Dr. Morens appears to have taken this step specifically to avoid disclosure under FOIA. Beginning in February 2021, Dr. Morens expressed to his colleagues that he learned from NIH/NIAID's "foia lady" how to "make emails disappear after [he was] foia'd [sic] but before the search starts."[11] Dr. Morens appears to reveal the identity of the "foia lady" in another conversation, in which he states, "I learned the tricks last year from an old friend, Marg [Margaret] Moore, who heads our FOIA office and also hates FOIAs."[12] In his previously mentioned email conversation with Dr. Keusch, Dr. Morens repeatedly stated that "with the help of [his] IT folks . . . [his] gmail is now safe from FOIA."[13] In a follow-up message to Dr. Keusch, Dr. Morens clarified, "BOTH [his] gmail and phone calls [were] now safe. Text [was] NOT, as it can be FOIA'd [sic], as [could his] govt email."[14]

Furthermore, Dr. Morens seems to have destroyed material subject to disclosure under FOIA for the express purpose of avoiding the disclosure of such material. In June 2020, Dr. Morens stated, in an email to several of his colleagues and in the context of a discussion concerning FOIA disclosures, "We are all smart enough to know to never have smoking guns, and if we did we wouldn't put them in emails and if we found them we'd delete them."[15] This practice evidently continued well into 2021, as, in October of that year, Dr. Morens sent an email to Dr. Peter Daszak stating, again in the context of a discussion surrounding FOIA disclosures,

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[8] *Id.* at 9.

[9] *Id.* at 6.

[10] *Id.* at 7.

[11] *Id.*

[12] *Id.* at 8.

[13] *Id. at 7.*

[14] *Id.* at 5.

[15] *Id.* at 17.

"I deleted that email but I now learn that every email iever [sic] got since 1998 is captured and will be turned over, whether or not I instantly deleted it."[16]

Dr. Morens also does not seem to be the sole NIH/NIAID employee who participated in at least some of these practices. In April and May 2021, Dr. Morens emailed a collection of his associates stating his belief that he and his associates should communicate with "Tony" through his private email.[17]

In addition, NIAID employees also appear to have intentionally misspelled words to foil keyword searches conducted to identify records responsive to FOIA. Emails published in a letter by House Select Subcommittee on the Coronavirus Pandemic Rep. Brad Wenstrup (the "Chairman's Letter") reveal Dr. Fauci's former Chief of Staff Greg Folkers misspelling "Andersen" as "Anders$n" and "Eco-Health" as "Ec~Health" in apparent attempts to avoid keyword searches that might expose the emails.[18]

II. The Legal and Ethical Obligations of NIH/NIAID Employees

As employees of federal agencies, Dr. Morens and his coworkers are bound by distinct obligations under FOIA. Additionally, like all American citizens, NIH/NIAID employees are bound by federal criminal statutes. Apart from these, as employees of the Federal Executive Branch, Dr. Morens and others mentioned previously are subject to a strict code of ethical conduct.

5 U.S.C. § 552 Requires the Production of Public Information Upon Request

Under federal law, federal agencies are required to release all public information upon request, subject only to limited exemptions. 5 U.S.C. section 552(a) provides that agencies must make "available to the public information" relating to the administration of an agency's duties.[19] This requirement is mandatory, not permissive, as Congress explicitly demands of federal agencies that they "shall" make such information "promptly available to any person."[20]

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[16] *Id.*

[17] *Id.* at 3–4.

[18] Letter to the Honorable Monica M. Bertagnolli, M.D., from Chairman Wenstrup of the House Select Subcomm. on the COVID-19 Pandemic (May 28, 2024), available at: https://oversight.house.gov/wp-content/uploads/2024/05/2024.05.28-BRW-Letter-to-NIH-Re.-FOIA_Redacted.pdf.

[19] 5 U.S.C. § 552(a).

[20] *Id.*; *Id.* at § 552(a)(3)(A).

Importantly, the scope of the information that must be made available to any person extends to all "records."[21]

While FOIA does not explicitly define what constitutes a "record," the Office of Information Policy ("OIP") has stated that agencies should "use the definition of record found within the Privacy Act to guide their decisions as to what is a record for purposes of the FOIA."[22] Under the Privacy Act, a "record" is defined as "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph."[23] In the context of FOIA, OIP has taken this to mean that "each item, collection, or grouping of information on the topic of [a FOIA] request can be considered a distinct record."[24] (internal quotations omitted).

FOIA explicitly lists nine exemptions and three exclusions from FOIA coverage, each of which is largely tailored toward the protection of sensitive national security information, internal personnel rules, information specifically excluded by statute, trade secrets, intra- or inter-office memoranda, personnel and medical files, law enforcement information, financial regulation information, geological and geophysical information, or active law enforcement investigative or informant information.[25]

18 U.S.C. § 1519 Prohibits the Destruction of Records in an Effort to Impede the Administration of an Agency's Duties

Federal criminal law expressly criminalizes the practice of destroying or modifying records with the intent to hinder the function of a federal agency. Under 18 U.S.C. § 1519, it is criminal for any person to "knowingly alter, destroy, mutilate, conceal, cover up, falsify, or make[] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the . . . proper administration of any matter within the jurisdiction of any department or agency of the United States."[26] Whosoever does so knowingly impede the administration of an

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[21] *Id.* at § § 552(a)(3)(A).

[22] Office of Information Policy, *Defining a "Record" Under the FOIA*, OIP Guidance (last updated July 23, 2021), https://www.justice.gov/oip/oip-guidance/defining_a_record_under_the_foia.

[23] 5 U.S.C. § 552a(a)(4).

[24] *See* Office of Information Policy *supra* note 20.

[25] *See* 5 U.S.C. § 552(b)–(c).

[26] 18 U.S.C. § 1519.

agency's function "shall be fined under [Title 18], imprisoned not more than 20 years, or both."[27]

18 U.S.C. § 371 Criminalizes Conspiracies to Defraud the United States or its Agencies

Federal law prohibits any conspiracy designed to commit any offense against or to defraud the United States. 18 U.S.C.§ 371 provides, "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under [Title 18] or imprisoned not more than five years, or both."[28] The Department of Justice has interpreted section 371 broadly to criminalize any conspiracy to impair or impede the lawful functions of the government of the United States.[29]

18 U.S.C. § 1001 Prohibits the Falsification, Concealment, or Misrepresentation of Material Facts in Government Proceedings

Under 18 U.S.C. 1001, an individual is subject to a fine or five years imprisonment, or both, if he or she "falsifies, conceals, or covers up . . . any material fact" or "makes any materially false, fictitious, or fraudulent statement or representation" or "makes or uses any false writing or document" to conceal a material fact "in any matter within the jurisdiction of [the federal] Government of the United States."[30]

Employees of the Federal Government's Executive Branch are Subject to Significant Ethical Obligations

Employees of the U.S. Federal Government's Executive Branch (the "Executive Branch") are subject to a distinct code of ethics.[31] Additionally, NIH employees are subject to further ethical regulations promulgated by the U.S. Department of Health and Human Services ("HHS").[32]

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[27] *Id.*

[28] 18 U.S.C. § 371.

[29] *See United States v. Klein,* 247 F.2d 908, 921 (2d Cir. 1957); Criminal Resource Manual 500-999, Section 923. 18 U.S.C. § 371—Conspiracy to Defraud the United States, U.S. Dept. of Justice, https://www.justice.gov/archives/jm/criminal-resource-manual-923-18-usc-371-conspiracy-defraud-us.

[30] 18 U.S.C. § 1001.

[31] *See* 5 C.F.R. § 2635 *et seq.*

[32] *See Id.* at § 5501.101(a); 45 C.F.R. § 73 *et seq.*

The regulations applicable to employees of the Executive Branch set forth a "basic obligation of public service" whereby each of the Executive Branch's employees "has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain."[33] In fulfilling this responsibility, such employees "shall protect and conserve Federal property."[34] "Property" includes "[g]overnment mail[]" and "[g]overnment records."[35] Under the expanded ethical regulations set out by HHS, NIH employees are under a similar ethical duty to refrain from the "mutilat[ion], destr[uction], or conceal[ment] of public records."[36]

III. Employees of NIH/NIAID Appear to Have Violated Their Legal and Ethical Obligations

There is reason to investigate whether Dr. Morens, Ms. Moore, and Mr. Folkers, in addition to other NIH/NIAID employees, violated their legal and ethical obligations to preserve federal records, impaired or impeded the government's obligations to respond to FOIA requests, and conspired with each other and others to do the same.

The optics of these employees' behavior regarding their obligations under FOIA are troubling. Dr. Morens took it upon himself to reach out to NIH/NIAID's FOIA contacts and apparently devised methods for effectively shielding his communications from disclosure under FOIA. If that were not enough, it appears as though Dr. Morens sought to rope others into his scheme, establishing a "secret back channel" through which he and his colleagues could communicate for the explicit purpose of making their communications fall outside the scope of what is traditionally subject to disclosure under FOIA.[37] Dr. Morens appears to implicate Ms. Moore in this conspiracy, and Mr. Folkers's seemingly intentional misspellings appear designed to evade his obligations. By engaging in these and similar acts, NIH/NIAID employees seemingly worked in concert to avoid their legal obligations, violating several criminal statutes in the process.

The evidence published in the House Memorandum and Chairman's Letter makes it probable that Dr. Morens conspired with NIH/NIAID IT and legal staff to design a communications network isolated from what is typically searched in a traditional FOIA request. Dr. Morens made multiple references to how the use of

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[33] *See supra* n.31 at § 2635.101(a).

[34] *Id.* at §2635.101(b)(9).

[35] *See Id.* at § 2635.704(b)(1).

[36] 45 C.F.R. § 73, Appx. A, B.6.

[37] *See supra* p. 2.

private Gmail was important because it prevented such communications from being found during a usual FOIA inquiry,[38] impairing and impeding the agency's lawful function of responding to FOIA requests. He furthermore seems to have sought guidance from legal professionals to ensure how he could effectively scrub his government email of any trace of certain communications after learning of a FOIA request, but before he would be required to disclose such communications.[39] If an investigation were to establish that Dr. Morens or others indeed participated in this conduct for the purpose of circumventing FOIA obligations, then such individuals would be responsible for a violation of their federal legal obligations.

Additionally, if such an investigation did establish such facts, responsible NIH/NIAID employees would be responsible for violations of other federal criminal statutes. From the evidence published in the House Memorandum, it appears that these additional violations are probable. The emails sent by Dr. Morens show, at least, that he knowingly destroyed or concealed records to impede the function of NIH/NIAID with respect to its public disclosure requirements under FOIA. On repeated occasions, Dr. Morens discussed deleting emails[40] and using private channels as his preferred method of communication.[41] If proven to be the case, this behavior appears to violate the prohibitions outlined in 5 U.S.C. section 1519.

In a similar vein, Dr. Morens and others seem to have worked in tandem to avoid fulfilling their legal obligations under FOIA. Dr. Morens stated numerous times that he wanted his associates to rope other individuals into their "secret back channel" so that their communications would not be subject to FOIA requests.[42] If true, it would seem that the employees in question conspired to commit an offense against the United States in violation of 18 U.S.C. section 371. The same holds true for 18 U.S.C. section 1001, which NIH/NIAID employees appear to have violated through their repeated efforts to conceal and cover up certain facts material to the administration of NIH/NIAID.[43]

Likewise, by using intentional misspellings to thwart FOIA requests, NIH and/or NIAID employees appear to be acting dishonestly to impair or impede the lawful functions of government.

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[38] *Id.* p. 3.

[39] *Id.* p. 3–4.

[40] *Id.*

[41] *Id.* p. 2–3.

[42] *Id.* p. 4.

[43] *Id.* p. 3.

Finally, while carrying out these seemingly criminal activities, Dr. Morens and other NIH/NIAID employees appear to have violated their ethical responsibilities. Notably, the previously mentioned employees deleted or otherwise seem to have purposefully obfuscated information contained in government records by using private modes of communication, deleting government emails, and otherwise communicating using intentional mistakes in spelling to avoid FOIA keyword searches.[44] These practices, if true, outline a pattern of unethical conduct that appears to be in direct conflict with the ethical requirements of Executive Branch and NIH employment, as described in 5 C.F.R. section 2635 and Appendix A of 45 C.F.R. section 73.

IV. Conclusion

The nature and circumstances of Dr. Morens's and others' conduct at or while associated with NIH/NIAID raise obvious and serious questions, including whether such individuals acted criminally. If the evidence shown in the House Memorandum and Chairman's Letter bears any resemblance to the truth, an investigation into potential legal and ethical violations is necessary.

Accordingly, we call for an immediate and comprehensive investigation into Dr. Morens's, Ms. Moore's, Mr. Folkers's, and others' potential legal violations with respect to their obligations to preserve federal records and comply with FOIA.

Sincerely,

Michael Chamberlain
Director
Protect the Public's Trust

[44] *Id.* p. 2–4.