

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

INFORMED CONSENT ACTION NETWORK,

Plaintiff,

-against-

CENTERS FOR DISEASE CONTROL AND
PREVENTION,

Defendant.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Plaintiff, as for its Complaint against the above-captioned Defendant, alleges as follows:

INTRODUCTION

1. The Centers for Disease Control and Prevention (“**CDC**”), an agency within HHS, is, according to its own statement, “committed to openness and accountability.”¹

2. The need for transparency and accurate information is only heightened during high-risk critical situations such as the current SARS-Cov-2, or COVID-19, pandemic. During a time when Americans’ constitutional and everyday rights are being restricted, by order of the government and “for the greater good,” the people’s need for and their right to data and information regarding such a critical subject is intensified.

3. Plaintiff Informed Consent Action Network (“**Plaintiff**” or “**ICAN**”) is a non-profit organization that advocates for informed consent with regard to all medical interventions. The CDC is and has been heavily involved in the federal government’s response to the COVID-19 pandemic. ICAN, therefore, submitted four narrowly tailored and specific requests pursuant to the Freedom of Information Act (“**FOIA requests**”) to the CDC on April 29, 2020 for emails from

¹ <https://www.cdc.gov/od/foia/index.htm>.

four individuals, all with leadership roles within the CDC, related to the handling of COVID-19. ICAN wished to review and share with the public the emails and the data within.

4. The CDC combined ICAN's four requests into one request and challenged it as overly broad and lacking specificity. The CDC provided no documents in response to the requests.

5. ICAN administratively appealed these findings, pointing out that the requests are in fact narrow and specific since they are (i) specifically limited to emails (ii) of four named individuals² (iii) that include one of four specific search terms (iv) sent or received during a discrete period of time.

6. These requests reasonably describe the records sought, as the CDC is able to precisely determine what records are being requested. The CDC has not explained what unreasonable burden exists in searching for these emails; therefore, it has a duty to search for and produce all non-exempt emails or portions of emails which are responsive.

7. ICAN brings this action to challenge the CDC's finding that the FOIA requests were improper and to challenge the CDC's failure to respond to its administrative appeal regarding same. Copies of these emails should be readily accessible to the CDC, and it should welcome sharing these emails with the public in furtherance of its goals of openness and accountability.

PARTIES

8. Plaintiff Informed Consent Action Network is a not-for-profit organization with an office located at 140 Broadway, 46th Floor, New York, New York 10005.

² “[T]he agency’s top personnel involved in the fight against COVID-19” according to the CDC. See Exhibit B, May 8, 2020 CDC letter in response to ICAN’s FOIA requests.

9. Defendant Centers for Disease Control and Prevention is an agency within the Executive Branch of the United States Government, organized within HHS. The CDC is an agency within the meaning of 5 U.S.C. §552(f).

JURISDICTION AND VENUE

10. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. Venue is proper within this District pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(a).

FACTS

11. A novel coronavirus, SARS-CoV-2, which causes coronavirus disease 2019 (“**COVID-19**”), and the resulting pandemic, has resulted in federal government officials taking swift action and recommending numerous restrictions on everyday life in America. Many of those restrictions press deeply upon cherished civil and constitutional rights. In such times, the media is right to demand transparency by the government to answer pressing questions by the public and to fulfill the role of the fourth estate.

I. The FOIA Requests and Administrative Record

12. The foregoing, including the many inquiries ICAN has received from its subscribers, donors, and followers, led it to submit four FOIA requests to the CDC. The first FOIA Request, submitted on April 29, 2020 (the “**First Request**”) sought the following documents:

All emails sent or received by Nancy Messonnier between November 1, 2019 and the present that include the term SARS-CoV, COVID, COVID-19 or coronavirus in any portion of the email, including the body, subject, metadata, sender line, or recipient line of the email, or any attachment to the email.

13. Later that same day, the same FOIA request was also submitted with regard to Robert Redfield (the “**Second Request**”), Frank DeStefano (the “**Third Request**”), and Anne Schuchat (the “**Fourth Request**”). Copies of all four FOIA requests are appended as **Exhibit A**.

14. On May 8, 2020, the CDC responded to all four FOIA requests in a letter objecting to these requests as follows:

This letter is to notify you that you have not submitted a proper FOIA request because your request is overly broad and lacks the specificity needed to assist the agency retrieve the information with a reasonable amount of effort. To assist the agency, locate the records you are requesting, we need you to provide the following additional information:

- Provide the names, titles and domain names of the sender and recipient of the emails you are seeking
- Specify the subject of the emails you are seeking as they relate to - SARS-CoV, COVID, COVID-19 and/or coronavirus
- Provide the name or subject and date of the exact email you are interested
- Provide a narrowed date range
- Consider omitting news clippings and information that is publicly available

...

In order to get you responsive information in the most timely manner possible, we ask that you be as specific as possible about the records/information you seek, rather than asking for broad categories of records containing only the name/nickname of the virus. Searches using only those terms cannot be performed with reasonable effort.

(Exhibit B).

15. On May 11, 2020, ICAN filed an administrative appeal challenging the CDC's determination that the FOIA requests "lack[] the specificity needed to assist the agency retrieve (sic) the information with a reasonable amount of effort." **(Exhibit C).**

16. On May 12, 2020, the CDC acknowledged receipt of the appeal and stated that "a 10 working day extension" would be utilized to process the appeal, and on May 27, 2020 acknowledged the appeal was in process. **(Exhibit D).** No further communications from the CDC regarding the appeal have been received.

17. The CDC's 20-day time limit to provide a determination with regard to the appeal lapsed as of June 9, 2020 and the additional 10 day extension lapsed as of June 23, 2020. (5 U.S.C. § 552(a)(6)(A)(ii).) The CDC therefore failed to make a final determination within 30 business days from receipt of Plaintiff's FOIA appeal as required by 5 U.S.C. § 552(a)(6)(A)(ii).

II. The FOIA Request is Proper and Not Overbroad

18. The purpose of FOIA is "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S.Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). Furthermore, "FOIA's prodisclosure purpose and legislative history reflect an intent to avoid creating loopholes for denial of access and reinforces the duty of federal agencies to construe a FOIA request liberally." *Public Emples. for Envtl. Responsibility v. United States EPA*, 314 F. Supp. 3d 68, 74-75 (D.D.C. 2018) (internal quotation marks and citations omitted). Therefore, FOIA requires federal agencies, including the CDC, to disclose records to any person upon request, unless the information falls within one of nine narrow exemptions to disclosure listed in the Act. *See* 5 U.S.C. § 552(a)(3)(A), (b).

19. FOIA thereby gives life to "the fundamental principle of public access to Government documents" and "a general philosophy of full agency disclosure." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151-52, 110 S. Ct. 471, 107 L. Ed. 2d 462 (1989).

20. A proper FOIA request is one which "reasonably describes" the records sought. 5 U.S.C. § 552(a)(3)(A). "A record is 'reasonably described' if a professional employee of the agency familiar with the subject matter can locate the records with a reasonable amount of effort." *Freedom Watch, Inc. v. CIA*, CV No. 12-0721, 895 F. Supp. 2d 221, 2012 U.S. Dist. (D.D.C. 2012) (internal citations and quotation marks omitted). It is clear that running search terms and date limiters within four individuals' email accounts can be done with little to no effort.

21. “A request reasonably describes records if the agency is able to determine precisely what records are being requested.” *Id.* (internal quotation marks and citations omitted). “Once an agency becomes reasonably clear as to the materials desired, FOIA’s text and legislative history make plain the agency’s obligation to bring them forth and disclose all reasonably segregable, nonexempt portions of the requested record(s).” *Id.* (internal quotation marks and citations omitted).

22. Here, each of the four FOIA requests reasonably describes the records sought since each request (i) is only for a specifically named individual, (ii) and only seeks that individual’s emails, (iii) which contain one or more of four very specific search terms, (iv) during a narrow period of a few months. Each request is simple and straightforward. They are not, as the CDC claimed, “overly broad” nor do any “lack[] the specificity needed to assist the agency retrieve the information with a reasonable amount of effort.” Indeed, the CDC can simply and quickly conduct an electronic search of each of the four email accounts at issue, limiting the search to the specified time and search terms.

23. “When an agency claims that complying with a request is unreasonable, it bears the burden to provide a sufficient explanation as to why such a search would be unreasonably burdensome.” *Am. Oversight v. United States GSA*, No. 18-2419 (CKK) 2020 U.S. Dist. LEXIS 68767, at *29 (D.D.C. April 20, 2020) (internal citations omitted). The CDC’s only complaint is that these individuals “generate large volumes of records every day”³ and that the search terms “are very common at this point.” The CDC however has not provided any estimate of time the search would require, the cost of any such search, or the number of documents that would have to be reviewed.

³ Exhibit C. Note also that ICAN’s request is not as broad as the CDC describes in that the request is limited to emails of specific individuals for a specific narrow time period that contain certain specific words and no other records.

Requested Relief

WHEREFORE, Plaintiff prays that this Court:

- a. Provide for expeditious proceedings in this action;
- b. Enter an Order declaring that it was unlawful for the CDC to fail to disclose documents responsive to each of the FOIA requests;
- c. Enter an Order directing the CDC to, within 5 days of issuance of the order, disclose a copy of all emails responsive to each of the FOIA requests;
- d. Award Plaintiff its costs and reasonable attorneys' fees incurred in this action as provided by 5 U.S.C. § 552(a)(4)(E); and
- e. Grant such other and further relief as the Court may deem just and proper.

Dated: August 6, 2020

SIRI & GLIMSTAD LLP



Aaron Siri
Elizabeth Brehm
200 Park Avenue, 17th Floor
New York, New York 10166
Tel: (212) 532-1091
aaron@sirillp.com
Counsel for Plaintiff

EXHIBIT A

Siri | Glimstad

200 Park Avenue, Seventeenth Floor, New York, NY 10166
sirillp.com | P: (212) 532-1091 | F: (646) 417-5967

FREEDOM OF INFORMATION ACT REQUEST

VIA FEDEX AND EMAIL

April 29, 2020

Roger Andoh
Freedom of Information Officer
Centers for Disease Control and Prevention
1600 Clifton Road, N.E., Building 57, Room MS D-54
Atlanta, Georgia 30333
Fax: (404) 235-1852
Email: FOIARequests@cdc.gov

Re: *Nancy Messonnier Emails Regarding COVID-19, November 2019 – Present*
(IR#0281)

Dear Mr. Andoh:

This firm represents the Informed Consent Action Network (“ICAN”). On behalf of ICAN, please provide the following records to foia@sirillp.com in electronic form:

All emails sent or received by Nancy Messonnier between November 1, 2019 and the present that include the term SARS-CoV, COVID, COVID-19 or coronavirus in any portion of the email, including the body, subject, metadata, sender line, or recipient line of the email, or any attachment to the email.

Fees and charges for this search are to be waived pursuant to 5 U.S.C. § 552 (a)(4)(A)(iii) since ICAN is a not-for-profit 501(c)(3) organization and its mission is to raise public awareness about public health safety and provide the public with information to give informed consent regarding related health interventions. As part of its mission, ICAN investigates and disseminates information regarding public health safety issues, including through their website, and through press events and releases. ICAN is seeking the information in this FOIA request to allow it to contribute to its mission. The information requested in this FOIA request will not contribute to any commercial activities.

Please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We, therefore, request that we be provided with all non-exempt portions which are reasonably segregable. We further request that you describe any deleted or withheld material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies. Please also separately

state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements may help to avoid unnecessary appeal and litigation. ICAN of course reserves all rights to appeal the withholding or deletion of any information.

Access to the requested records should be granted within twenty (20) business days from the date of your receipt of this letter. Failure to respond in a timely manner shall be viewed as a denial of this request and ICAN may immediately file an administrative appeal.

If you would like to discuss our requests or any issues raised in this letter, please feel free to contact me at (212) 532-1091 or via email at foia@sirillp.com during normal business hours. Thank you for your time and attention to this matter.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'ASiri', with a long horizontal stroke extending to the right.

Aaron Siri, Esq.

Siri | Glimstad

200 Park Avenue, Seventeenth Floor, New York, NY 10166
sirillp.com | P: (212) 532-1091 | F: (646) 417-5967

FREEDOM OF INFORMATION ACT REQUEST

VIA FEDEX AND EMAIL

April 29, 2020

Roger Andoh
Freedom of Information Officer
Centers for Disease Control and Prevention
1600 Clifton Road, N.E., Building 57, Room MS D-54
Atlanta, Georgia 30333
Fax: (404) 235-1852
Email: FOIARequests@cdc.gov

Re: *Robert Redfield Emails Regarding COVID-19, November 2019 – Present*
(IR#0282)

Dear Mr. Andoh:

This firm represents the Informed Consent Action Network (“ICAN”). On behalf of ICAN, please provide the following records to foia@sirillp.com in electronic form:

All emails sent or received by Robert Redfield between November 1, 2019 and the present that include the term SARS-CoV, COVID, COVID-19 or coronavirus in any portion of the email, including the body, subject, metadata, sender line, or recipient line of the email, or any attachment to the email.

Fees and charges for this search are to be waived pursuant to 5 U.S.C. § 552 (a)(4)(A)(iii) since ICAN is a not-for-profit 501(c)(3) organization and its mission is to raise public awareness about public health safety and provide the public with information to give informed consent regarding related health interventions. As part of its mission, ICAN investigates and disseminates information regarding public health safety issues, including through their website, and through press events and releases. ICAN is seeking the information in this FOIA request to allow it to contribute to its mission. The information requested in this FOIA request will not contribute to any commercial activities.

Please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We, therefore, request that we be provided with all non-exempt portions which are reasonably segregable. We further request that you describe any deleted or withheld material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies. Please also separately

state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements may help to avoid unnecessary appeal and litigation. ICAN of course reserves all rights to appeal the withholding or deletion of any information.

Access to the requested records should be granted within twenty (20) business days from the date of your receipt of this letter. Failure to respond in a timely manner shall be viewed as a denial of this request and ICAN may immediately file an administrative appeal.

If you would like to discuss our requests or any issues raised in this letter, please feel free to contact me at (212) 532-1091 or via email at foia@sirillp.com during normal business hours. Thank you for your time and attention to this matter.

Very truly yours,

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Aaron Siri, Esq.

Siri | Glimstad

200 Park Avenue, Seventeenth Floor, New York, NY 10166
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FREEDOM OF INFORMATION ACT REQUEST

VIA FEDEX AND EMAIL

April 29, 2020

Roger Andoh
Freedom of Information Officer
Centers for Disease Control and Prevention
1600 Clifton Road, N.E., Building 57, Room MS D-54
Atlanta, Georgia 30333
Fax: (404) 235-1852
Email: FOIARequests@cdc.gov

Re: *Frank DeStefano Emails Regarding COVID-19, November 2019 – Present*
(IR#0283)

Dear Mr. Andoh:

This firm represents the Informed Consent Action Network (“ICAN”). On behalf of ICAN, please provide the following records to foia@sirillp.com in electronic form:

All emails sent or received by Frank DeStefano between November 1, 2019 and the present that include the term SARS-CoV, COVID, COVID-19 or coronavirus in any portion of the email, including the body, subject, metadata, sender line, or recipient line of the email, or any attachment to the email.

Fees and charges for this search are to be waived pursuant to 5 U.S.C. § 552 (a)(4)(A)(iii) since ICAN is a not-for-profit 501(c)(3) organization and its mission is to raise public awareness about public health safety and provide the public with information to give informed consent regarding related health interventions. As part of its mission, ICAN investigates and disseminates information regarding public health safety issues, including through their website, and through press events and releases. ICAN is seeking the information in this FOIA request to allow it to contribute to its mission. The information requested in this FOIA request will not contribute to any commercial activities.

Please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We, therefore, request that we be provided with all non-exempt portions which are reasonably segregable. We further request that you describe any deleted or withheld material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies. Please also separately

state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements may help to avoid unnecessary appeal and litigation. ICAN of course reserves all rights to appeal the withholding or deletion of any information.

Access to the requested records should be granted within twenty (20) business days from the date of your receipt of this letter. Failure to respond in a timely manner shall be viewed as a denial of this request and ICAN may immediately file an administrative appeal.

If you would like to discuss our requests or any issues raised in this letter, please feel free to contact me at (212) 532-1091 or via email at foia@sirillp.com during normal business hours. Thank you for your time and attention to this matter.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'ASiri', with a long horizontal stroke extending to the right.

Aaron Siri, Esq.

Siri | Glimstad

200 Park Avenue, Seventeenth Floor, New York, NY 10166
sirillp.com | P: (212) 532-1091 | F: (646) 417-5967

FREEDOM OF INFORMATION ACT REQUEST

VIA FEDEX AND EMAIL

April 29, 2020

Roger Andoh
Freedom of Information Officer
Centers for Disease Control and Prevention
1600 Clifton Road, N.E., Building 57, Room MS D-54
Atlanta, Georgia 30333
Fax: (404) 235-1852
Email: FOIARequests@cdc.gov

Re: *Anne Schuchat Emails Regarding COVID-19, November 2019 – Present*
(IR#0284)

Dear Mr. Andoh:

This firm represents the Informed Consent Action Network (“ICAN”). On behalf of ICAN, please provide the following records to foia@sirillp.com in electronic form:

All emails sent or received by Anne Schuchat between November 1, 2019 and the present that include the term SARS-CoV, COVID, COVID-19 or coronavirus in any portion of the email, including the body, subject, metadata, sender line, or recipient line of the email, or any attachment to the email.

Fees and charges for this search are to be waived pursuant to 5 U.S.C. § 552 (a)(4)(A)(iii) since ICAN is a not-for-profit 501(c)(3) organization and its mission is to raise public awareness about public health safety and provide the public with information to give informed consent regarding related health interventions. As part of its mission, ICAN investigates and disseminates information regarding public health safety issues, including through their website, and through press events and releases. ICAN is seeking the information in this FOIA request to allow it to contribute to its mission. The information requested in this FOIA request will not contribute to any commercial activities.

Please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We, therefore, request that we be provided with all non-exempt portions which are reasonably segregable. We further request that you describe any deleted or withheld material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies. Please also separately

state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements may help to avoid unnecessary appeal and litigation. ICAN of course reserves all rights to appeal the withholding or deletion of any information.

Access to the requested records should be granted within twenty (20) business days from the date of your receipt of this letter. Failure to respond in a timely manner shall be viewed as a denial of this request and ICAN may immediately file an administrative appeal.

If you would like to discuss our requests or any issues raised in this letter, please feel free to contact me at (212) 532-1091 or via email at foia@sirillp.com during normal business hours. Thank you for your time and attention to this matter.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'ASiri', with a long horizontal flourish extending to the right.

Aaron Siri, Esq.

EXHIBIT B



Centers for Disease Control
and Prevention (CDC)
Atlanta GA 30333
May 8, 2020

Aaron Siri
Siri and Glimstad, LLP
200 Park Avenue
Seventeenth Floor
New York, New York 10166
Via email: aaron@sirillp.com

Dear Mr. Siri:

This letter is regarding to your Centers for Disease Control and Prevention and Agency for Toxic Substances and Disease Registry (CDC/ATSDR) Freedom of Information Act (FOIA) request of April 29, 2020, assigned #20-01462-FOIA, for:

All emails sent or received by the following people between November 1, 2019 and the present that include the term SARS-CoV, COVID, COVID-19 or coronavirus in any portion of the email, including the body, subject, metadata, sender line, or recipient line of the email, or any attachment to the email.

- **Robert Redfield**
- **Anne Schuchat**
- **Nancy Messonnier**
- **Frank DeStefano**

This letter is to notify you that you have not submitted a proper FOIA request because your request is overly broad and lacks the specificity needed to assist the agency retrieve the information with a reasonable amount of effort. To assist the agency, locate the records you are requesting, we need you to provide the following additional information:

- Provide the names, titles and domain names of the sender and recipient of the emails you are seeking
- Specify the subject of the emails you are seeking as they relate to - SARS-CoV, COVID, COVID-19 and/or coronavirus
- Provide the name or subject and date of the exact email you are interested
- Provide a narrowed date range
- Consider omitting news clippings and information that is publicly available

As you know, you have requested information from the agency's top personnel involved in the fight against COVID-19 and they generate large volumes of records every day. The key words you have provided as search terms are very common at this point.

Page 2 – Aaron Siri

In order to get you responsive information in the most timely manner possible, we ask that you be as specific as possible about the records/information you seek, rather than asking for broad categories of records containing only the name/nickname of the virus. Searches using only those terms cannot be performed with reasonable effort.

Fees and Fee Waivers

I have determined that your request for a waiver of fees does not meet the following criteria:

- It will not reveal meaningful information about government operations or activities that are not already public knowledge.
- The disclosure of the records will not contribute significantly to public understanding of the operations or activities of the government.
- You have failed to demonstrate that you disseminate information to the public.
- You have failed to provide sufficient information to warrant a waiver of fees.

Fee Category

The FOIA and HHS FOI regulations allow agencies to recover part of the costs of processing FOIA requests. There may be a charge for these records. You have been classified as a:

All Other Requester and as such, you will be charged search fees after two hours and duplication fees. You may also be charged for page duplication if you elect to receive any responsive records in hard copy (10 cents/page).

At this time, your request has been placed on hold until we receive the information requested.

If you fail to submit a proper FOIA request by **June 4, 2020**, we will close your request.

You may contact our FOIA Public Liaison at 770-488-6277 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Page 3 – Aaron Siri

If you are not satisfied with the response to this request, you may administratively appeal by writing to the Deputy Agency Chief FOIA Officer, Office of the Assistant Secretary for Public Affairs, U.S. Department of Health and Human Services, Hubert H. Humphrey Building, 200 Independence Avenue, Suite 729H, Washington, D.C. 20201. You may also transmit your appeal via email to FOIARequest@psc.hhs.gov. Please mark both your appeal letter and envelope “FOIA Appeal.” **Your appeal must be postmarked or electronically transmitted by August 6, 2020.**

Sincerely,

Jonesa Davis
CDC/ATSDR FOIA Office
Office of the Chief Operating Officer
(770) 488-6399
Fax: (404) 235-1852

20-01462-FOIA

EXHIBIT C

Siri | Glimstad

200 Park Avenue, Seventeenth Floor, New York, NY 10166
sirillp.com | P: (212) 532-1091 | F: (646) 417-5967

CDC FREEDOM OF INFORMATION ACT APPEAL

VIA FEDEX AND EMAIL

May 11, 2020

Deputy Agency Chief FOIA Officer
Office of the Assistant Secretary for Public Affairs
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue
Suite 729H
Washington, D.C. 20201
FOIARequest@psc.hhs.gov

Re: Appeal of FOIA Request No. 20-01462-FOIA (IR#0281 - #0284)

Dear Sir or Madam:

This firm represents the Informed Consent Action Network (“**ICAN**”). On behalf of ICAN, on April 29, 2020, we submitted four requests for records from the files of the Centers for Disease Control and Prevention (“**CDC**”) pursuant to the Freedom of Information Act (5 U.S.C. § 552, as amended) (“**FOIA**”). The CDC combined the requests and assigned them under one number, 20-01462-FOIA (the “**FOIA Request**”). In a letter dated May 8, 2020, the CDC/ATSDR FOIA Officer (the “**CDC Officer**”) responded and stated we had not submitted a proper FOIA Request because the request was overly broad and “lacks the specificity needed to assist the agency retrieve the information with a reasonable amount of effort [*sic*].” ICAN appeals this determination.

A. The FOIA Requests

The First Request

The first April 29, 2020 FOIA Request (the “**First Request**”) sought the following documents:

All emails sent or received by Nancy Messonnier between November 1, 2019 and the present that include the term SARS-CoV, COVID, COVID-19 or coronavirus in any portion of the email, including the body, subject, metadata, sender line, or recipient line of the email, or any attachment to the email.

(Exhibit A.)¹

The Second Request

The second April 29, 2020 FOIA Request (the “**Second Request**”) sought the following documents:

All emails sent or received by Robert Redfield between November 1, 2019 and the present that include the term SARS-CoV, COVID, COVID-19 or coronavirus in any portion of the email, including the body, subject, metadata, sender line, or recipient line of the email, or any attachment to the email.

Id.

The Third Request

The third April 29, 2020 FOIA Request (the “**Third Request**”) sought the following documents:

All emails sent or received by Frank DeStefano between November 1, 2019 and the present that include the term SARS-CoV, COVID, COVID-19 or coronavirus in any portion of the email, including the body, subject, metadata, sender line, or recipient line of the email, or any attachment to the email.

Id.

The Fourth Request

The fourth April 29, 2020 FOIA Request (the “**Fourth Request**”) sought the following documents:

All emails sent or received by Anne Schuchat between November 1, 2019 and the present that include the term SARS-CoV, COVID, COVID-19 or coronavirus in any portion of the email, including the body, subject, metadata, sender line, or recipient line of the email, or any attachment to the email.

Id.

¹ All “Exhibits” referenced herein are appended to this letter.

B. Correspondence Regarding the FOIA Request

On May 8, 2020, the CDC Officer assigned the FOIA Request #20-01462-FOIA and stated in relevant part:

This letter is to notify you that you have not submitted a proper FOIA request because your request is overly broad and lacks the specificity needed to assist the agency retrieve the information with a reasonable amount of effort. To assist the agency, locate the records you are requesting, we need you to provide the following additional information:

- ☐ Provide the names, titles and domain names of the sender and recipient of the emails you are seeking
- ☐ Specify the subject of the emails you are seeking as they relate to - SARS-CoV, COVID, COVID-19 and/or coronavirus
- ☐ Provide the name or subject and date of the exact email you are interested
- ☐ Provide a narrowed date range
- ☐ Consider omitting news clippings and information that is publicly available

As you know, you have requested information from the agency's top personnel involved in the fight against COVID-19 and they generate large volumes of records every day. The key words you have provided as search terms are very common at this point.

In order to get you responsive information in the most timely manner possible, we ask that you be as specific as possible about the records/information you seek, rather than asking for broad categories of records containing only the name/nickname of the virus. Searches using only those terms cannot be performed with reasonable effort.

(Exhibit B).

C. Argument

The FOIA Request is Proper and Not Overbroad

A proper FOIA request is one the "reasonably describes" the records sought. 5 U.S.C. § 552(a)(3)(A). "A record is "reasonably described if a professional employee of the agency familiar with the subject matter can locate the records with a reasonable amount of effort." *Freedom Watch, Inc. v. CIA*, CV No. 12-0721, 895 F. Supp. 2d 221, 2012 U.S. Dist. (D.D.C. 2012) (internal citations and quotation marks omitted).

Furthermore, "FOIA's prodisclosure purpose and legislative history reflect an intent to avoid creating loopholes for denial of access and reinforces the duty of federal agencies to construe a FOIA request liberally." *Public Emples. for Env'tl. Responsibility v. United States EPA*, 314 F. Supp. 3d 68, 74-75 (D.D.C. 2018) (internal quotation marks and citations omitted). "A request

reasonably describes records if the agency is able to determine precisely what records are being requested." *Id.* (internal quotation marks and citations omitted). "Once an agency becomes reasonably clear as to the materials desired, FOIA's text and legislative history make plain the agency's obligation to bring them forth and disclose all reasonably segregable, nonexempt portions of the requested record(s)," *Id.* (internal quotation marks and citations omitted).

Here, the FOIA Request reasonably describes the records sought. It relates only to four specifically named people, for a short time period of only a few short months, and seeks only their emails containing one or more of four clear search terms. It is simple and straightforward. It is not broad or sweeping and requires no guesswork on the part of the CDC. Therefore, the FOIA Request creates in CDC the duty to search for and produce the responsive documents. CDC failed to uphold its duty.

D. Appellate Request

Given the foregoing, ICAN hereby appeals and requests that the documents responsive to the FOIA Request be produced within 20 days of this appeal. Thank you for your time and attention to this matter. If you require any additional information, please contact me at **(212) 532-1091** or through email at **foia@sirillp.com**.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'ASiri', is written over a light blue horizontal line.

Aaron Siri, Esq.

Enclosures

Exhibit A

Siri | Glimstad

200 Park Avenue, Seventeenth Floor, New York, NY 10166
sirillp.com | P: (212) 532-1091 | F: (646) 417-5967

FREEDOM OF INFORMATION ACT REQUEST

VIA FEDEX AND EMAIL

April 29, 2020

Roger Andoh
Freedom of Information Officer
Centers for Disease Control and Prevention
1600 Clifton Road, N.E., Building 57, Room MS D-54
Atlanta, Georgia 30333
Fax: (404) 235-1852
Email: FOIARequests@cdc.gov

Re: *Nancy Messonnier Emails Regarding COVID-19, November 2019 – Present*
(IR#0281)

Dear Mr. Andoh:

This firm represents the Informed Consent Action Network (“ICAN”). On behalf of ICAN, please provide the following records to foia@sirillp.com in electronic form:

All emails sent or received by Nancy Messonnier between November 1, 2019 and the present that include the term SARS-CoV, COVID, COVID-19 or coronavirus in any portion of the email, including the body, subject, metadata, sender line, or recipient line of the email, or any attachment to the email.

Fees and charges for this search are to be waived pursuant to 5 U.S.C. § 552 (a)(4)(A)(iii) since ICAN is a not-for-profit 501(c)(3) organization and its mission is to raise public awareness about public health safety and provide the public with information to give informed consent regarding related health interventions. As part of its mission, ICAN investigates and disseminates information regarding public health safety issues, including through their website, and through press events and releases. ICAN is seeking the information in this FOIA request to allow it to contribute to its mission. The information requested in this FOIA request will not contribute to any commercial activities.

Please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We, therefore, request that we be provided with all non-exempt portions which are reasonably segregable. We further request that you describe any deleted or withheld material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies. Please also separately

state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements may help to avoid unnecessary appeal and litigation. ICAN of course reserves all rights to appeal the withholding or deletion of any information.

Access to the requested records should be granted within twenty (20) business days from the date of your receipt of this letter. Failure to respond in a timely manner shall be viewed as a denial of this request and ICAN may immediately file an administrative appeal.

If you would like to discuss our requests or any issues raised in this letter, please feel free to contact me at (212) 532-1091 or via email at foia@sirillp.com during normal business hours. Thank you for your time and attention to this matter.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'ASiri', with a long horizontal stroke extending to the right.

Aaron Siri, Esq.

Siri | Glimstad

200 Park Avenue, Seventeenth Floor, New York, NY 10166
sirillp.com | P: (212) 532-1091 | F: (646) 417-5967

FREEDOM OF INFORMATION ACT REQUEST

VIA FEDEX AND EMAIL

April 29, 2020

Roger Andoh
Freedom of Information Officer
Centers for Disease Control and Prevention
1600 Clifton Road, N.E., Building 57, Room MS D-54
Atlanta, Georgia 30333
Fax: (404) 235-1852
Email: FOIARequests@cdc.gov

Re: *Robert Redfield Emails Regarding COVID-19, November 2019 – Present*
(IR#0282)

Dear Mr. Andoh:

This firm represents the Informed Consent Action Network (“ICAN”). On behalf of ICAN, please provide the following records to foia@sirillp.com in electronic form:

All emails sent or received by Robert Redfield between November 1, 2019 and the present that include the term SARS-CoV, COVID, COVID-19 or coronavirus in any portion of the email, including the body, subject, metadata, sender line, or recipient line of the email, or any attachment to the email.

Fees and charges for this search are to be waived pursuant to 5 U.S.C. § 552 (a)(4)(A)(iii) since ICAN is a not-for-profit 501(c)(3) organization and its mission is to raise public awareness about public health safety and provide the public with information to give informed consent regarding related health interventions. As part of its mission, ICAN investigates and disseminates information regarding public health safety issues, including through their website, and through press events and releases. ICAN is seeking the information in this FOIA request to allow it to contribute to its mission. The information requested in this FOIA request will not contribute to any commercial activities.

Please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We, therefore, request that we be provided with all non-exempt portions which are reasonably segregable. We further request that you describe any deleted or withheld material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies. Please also separately

state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements may help to avoid unnecessary appeal and litigation. ICAN of course reserves all rights to appeal the withholding or deletion of any information.

Access to the requested records should be granted within twenty (20) business days from the date of your receipt of this letter. Failure to respond in a timely manner shall be viewed as a denial of this request and ICAN may immediately file an administrative appeal.

If you would like to discuss our requests or any issues raised in this letter, please feel free to contact me at (212) 532-1091 or via email at foia@sirillp.com during normal business hours. Thank you for your time and attention to this matter.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'ASiri', with a long horizontal stroke extending to the right.

Aaron Siri, Esq.

Siri | Glimstad

200 Park Avenue, Seventeenth Floor, New York, NY 10166
sirillp.com | P: (212) 532-1091 | F: (646) 417-5967

FREEDOM OF INFORMATION ACT REQUEST

VIA FEDEX AND EMAIL

April 29, 2020

Roger Andoh
Freedom of Information Officer
Centers for Disease Control and Prevention
1600 Clifton Road, N.E., Building 57, Room MS D-54
Atlanta, Georgia 30333
Fax: (404) 235-1852
Email: FOIARequests@cdc.gov

Re: *Frank DeStefano Emails Regarding COVID-19, November 2019 – Present*
(IR#0283)

Dear Mr. Andoh:

This firm represents the Informed Consent Action Network (“ICAN”). On behalf of ICAN, please provide the following records to foia@sirillp.com in electronic form:

All emails sent or received by Frank DeStefano between November 1, 2019 and the present that include the term SARS-CoV, COVID, COVID-19 or coronavirus in any portion of the email, including the body, subject, metadata, sender line, or recipient line of the email, or any attachment to the email.

Fees and charges for this search are to be waived pursuant to 5 U.S.C. § 552 (a)(4)(A)(iii) since ICAN is a not-for-profit 501(c)(3) organization and its mission is to raise public awareness about public health safety and provide the public with information to give informed consent regarding related health interventions. As part of its mission, ICAN investigates and disseminates information regarding public health safety issues, including through their website, and through press events and releases. ICAN is seeking the information in this FOIA request to allow it to contribute to its mission. The information requested in this FOIA request will not contribute to any commercial activities.

Please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We, therefore, request that we be provided with all non-exempt portions which are reasonably segregable. We further request that you describe any deleted or withheld material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies. Please also separately

state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements may help to avoid unnecessary appeal and litigation. ICAN of course reserves all rights to appeal the withholding or deletion of any information.

Access to the requested records should be granted within twenty (20) business days from the date of your receipt of this letter. Failure to respond in a timely manner shall be viewed as a denial of this request and ICAN may immediately file an administrative appeal.

If you would like to discuss our requests or any issues raised in this letter, please feel free to contact me at (212) 532-1091 or via email at foia@sirillp.com during normal business hours. Thank you for your time and attention to this matter.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'ASiri', with a long horizontal flourish extending to the right.

Aaron Siri, Esq.

Siri | Glimstad

200 Park Avenue, Seventeenth Floor, New York, NY 10166
sirillp.com | P: (212) 532-1091 | F: (646) 417-5967

FREEDOM OF INFORMATION ACT REQUEST

VIA FEDEX AND EMAIL

April 29, 2020

Roger Andoh
Freedom of Information Officer
Centers for Disease Control and Prevention
1600 Clifton Road, N.E., Building 57, Room MS D-54
Atlanta, Georgia 30333
Fax: (404) 235-1852
Email: FOIARequests@cdc.gov

Re: *Anne Schuchat Emails Regarding COVID-19, November 2019 – Present*
(IR#0284)

Dear Mr. Andoh:

This firm represents the Informed Consent Action Network (“ICAN”). On behalf of ICAN, please provide the following records to foia@sirillp.com in electronic form:

All emails sent or received by Anne Schuchat between November 1, 2019 and the present that include the term SARS-CoV, COVID, COVID-19 or coronavirus in any portion of the email, including the body, subject, metadata, sender line, or recipient line of the email, or any attachment to the email.

Fees and charges for this search are to be waived pursuant to 5 U.S.C. § 552 (a)(4)(A)(iii) since ICAN is a not-for-profit 501(c)(3) organization and its mission is to raise public awareness about public health safety and provide the public with information to give informed consent regarding related health interventions. As part of its mission, ICAN investigates and disseminates information regarding public health safety issues, including through their website, and through press events and releases. ICAN is seeking the information in this FOIA request to allow it to contribute to its mission. The information requested in this FOIA request will not contribute to any commercial activities.

Please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We, therefore, request that we be provided with all non-exempt portions which are reasonably segregable. We further request that you describe any deleted or withheld material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies. Please also separately

state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements may help to avoid unnecessary appeal and litigation. ICAN of course reserves all rights to appeal the withholding or deletion of any information.

Access to the requested records should be granted within twenty (20) business days from the date of your receipt of this letter. Failure to respond in a timely manner shall be viewed as a denial of this request and ICAN may immediately file an administrative appeal.

If you would like to discuss our requests or any issues raised in this letter, please feel free to contact me at (212) 532-1091 or via email at foia@sirillp.com during normal business hours. Thank you for your time and attention to this matter.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'ASiri', with a long horizontal stroke extending to the right.

Aaron Siri, Esq.

Exhibit B



Centers for Disease Control
and Prevention (CDC)
Atlanta GA 30333
May 8, 2020

Aaron Siri
Siri and Glimstad, LLP
200 Park Avenue
Seventeenth Floor
New York, New York 10166
Via email: aaron@sirillp.com

Dear Mr. Siri:

This letter is regarding to your Centers for Disease Control and Prevention and Agency for Toxic Substances and Disease Registry (CDC/ATSDR) Freedom of Information Act (FOIA) request of April 29, 2020, assigned #20-01462-FOIA, for:

All emails sent or received by the following people between November 1, 2019 and the present that include the term SARS-CoV, COVID, COVID-19 or coronavirus in any portion of the email, including the body, subject, metadata, sender line, or recipient line of the email, or any attachment to the email.

- **Robert Redfield**
- **Anne Schuchat**
- **Nancy Messonnier**
- **Frank DeStefano**

This letter is to notify you that you have not submitted a proper FOIA request because your request is overly broad and lacks the specificity needed to assist the agency retrieve the information with a reasonable amount of effort. To assist the agency, locate the records you are requesting, we need you to provide the following additional information:

- Provide the names, titles and domain names of the sender and recipient of the emails you are seeking
- Specify the subject of the emails you are seeking as they relate to - SARS-CoV, COVID, COVID-19 and/or coronavirus
- Provide the name or subject and date of the exact email you are interested
- Provide a narrowed date range
- Consider omitting news clippings and information that is publicly available

As you know, you have requested information from the agency's top personnel involved in the fight against COVID-19 and they generate large volumes of records every day. The key words you have provided as search terms are very common at this point.

Page 2 – Aaron Siri

In order to get you responsive information in the most timely manner possible, we ask that you be as specific as possible about the records/information you seek, rather than asking for broad categories of records containing only the name/nickname of the virus. Searches using only those terms cannot be performed with reasonable effort.

Fees and Fee Waivers

I have determined that your request for a waiver of fees does not meet the following criteria:

- It will not reveal meaningful information about government operations or activities that are not already public knowledge.
- The disclosure of the records will not contribute significantly to public understanding of the operations or activities of the government.
- You have failed to demonstrate that you disseminate information to the public.
- You have failed to provide sufficient information to warrant a waiver of fees.

Fee Category

The FOIA and HHS FOI regulations allow agencies to recover part of the costs of processing FOIA requests. There may be a charge for these records. You have been classified as a:

All Other Requester and as such, you will be charged search fees after two hours and duplication fees. You may also be charged for page duplication if you elect to receive any responsive records in hard copy (10 cents/page).

At this time, your request has been placed on hold until we receive the information requested.

If you fail to submit a proper FOIA request by **June 4, 2020**, we will close your request.

You may contact our FOIA Public Liaison at 770-488-6277 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Page 3 – Aaron Siri

If you are not satisfied with the response to this request, you may administratively appeal by writing to the Deputy Agency Chief FOIA Officer, Office of the Assistant Secretary for Public Affairs, U.S. Department of Health and Human Services, Hubert H. Humphrey Building, 200 Independence Avenue, Suite 729H, Washington, D.C. 20201. You may also transmit your appeal via email to FOIARequest@psc.hhs.gov. Please mark both your appeal letter and envelope “FOIA Appeal.” **Your appeal must be postmarked or electronically transmitted by August 6, 2020.**

Sincerely,

Jonesa Davis
CDC/ATSDR FOIA Office
Office of the Chief Operating Officer
(770) 488-6399
Fax: (404) 235-1852

20-01462-FOIA

EXHIBIT D



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Assistant Secretary for Public Affairs
Washington, D.C. 20201

Case No. 2020-00199-A-PHS

May 12, 2020

Mr. Aaron Siri
Attorney
Siri & Glimstad
200 Park Avenue - 17th Floor
New York, NY 10166
Sent via email: foia@sirillp.com

Dear Mr. Aaron Siri:

This letter acknowledges receipt of your Freedom of Information Act (FOIA) appeal, submitted to the Department of Health and Human Services (HHS), FOI/Privacy Acts Division. We received your appeal on **May 11, 2020**. Your appeal challenges the *Centers for Disease Control and Prevention (CDC's)* response to your original request **CDC # 20-01462-FOIA**. Your appeal has been assigned the above-stated case number based on when it was received in this office. Please reference this number on your correspondence.

Your appeal is summarized below:

“Appeal of CDC FOIA Request No. 20-01462-FOIA (IR#0281 - #0284)”.

Pursuant to 45 CFR 5.35 (c) your appeal falls under “unusual circumstances” in that our office will need to consult with another office or agency that has substantial interest in the determination of the appeal. The actual processing time will depend on the complexity of the issues presented in the appeal and consultation with other U.S. Department of Health and Human Services (HHS) components involved. For more information about how your appeal will be processed please see 45 CFR 5.34 <http://www.hhs.gov/foia/45cfr5.html>.

In addition, due to the COVID-19 National Emergency, many staff have been reassigned to tasks aimed at responding to that Emergency and virtually all staff are teleworking, making access to certain records more difficult. As a result, processing of FOIA requests will take longer than would usually be the case. We will utilize a 10 working day extension to process your request, as permitted pursuant to the FOIA. This policy is consistent with court decisions regarding FOIA’s time limits.

The FOIA and the HHS FOIA regulations are available at the following web addresses:
<http://www.justice.gov/oip/doj-foia-regulations> and <http://www.hhs.gov/foia/45cfr5.html>.

If you have any questions, please call (202) 260-6933, or email us at foiarequest@psc.hhs.gov.

Sincerely yours,

Brandon J. Gaylord
Director
FOI/Privacy Act Division