

EMPOWER OVERSIGHT

Whistleblowers & Research



August 11, 2022

VIA ELECTRONIC TRANSMISSION: gorka.garcia-malene@nih.gov

Gorka Garcia-Malene,
NIH Freedom of Information Institute/Center Coordinator
Office of the Director
Building 31 Room 5B35
9000 Rockville Pike
Bethesda, MD 20892

RE: FREEDOM OF INFORMATION ACT APPEAL:
FOIA CASE NUMBERS 57572 and 57775

Dear Mr. Garcia-Malene:

INTRODUCTION

With respect to the National Institutes of Health (“NIH”) Freedom of Information Act (“FOIA”)¹ Case Numbers 57572 and 57775, Empower Oversight Whistleblowers & Research (“Empower Oversight”)² appeals the NIH’s February 23, 2022, and May 17, 2022, final responses to Empower Oversight’s November 4, 2021, FOIA request.

Empower Oversight received the NIH’s final responses on May 17 and 18, 2022, and it appeals the responses on the grounds that the NIH’s FOIA staff did not perform a search for records that was reasonably calculated to locate all responsive records. Empower Oversight respectfully requests that the NIH review the nature and scope of its FOIA staff’s records search and correct any deficiencies that are identified.

¹ The FOIA is codified at 5 U.S.C. § 552.

² Empower Oversight is a nonpartisan, nonprofit educational organization, which is dedicated to enhancing independent oversight of government and corporate wrongdoing. It works to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and seeks to hold those authorities accountable to act on such reports by, among other means, publishing information concerning the same.

BACKGROUND

The FOIA Request

On November 4, 2021, to shed light on the Department of Health and Human Services (“HHS”), Office of Inspector General’s (“HHS-OIG’s”) provision to the NIH of a personal security detail for Dr. Anthony Fauci, Director, National Institute of Allergy and Infectious Diseases (“NIAID”), at the same time that it was investigating the NIH’s oversight of grants to support research conducted outside the United States, including research conducted by the Wuhan Institute of Virology, Empower Oversight, pursuant to the FOIA, requested copies of:

1. All records and communications regarding the HHS[-]OIG security detail provided to [Dr.] Fauci.
2. All records and communications regarding the work assignment of the six [HHS-OIG special agents comprising the security detail].
3. All records regarding the budget and/or budget justification for the protection detail, including reimbursement agreements and documentation of reimbursement of HHS[-]OIG by NIH or HHS.
4. Time sheets or reported time for agents assigned to the protective detail.
5. All records of expenses for the detail, including travel expenses.
6. All communications regarding reassignment of agents from HHS[-]OIG casework to the protective detail.³

Further, in light of the public’s keen interest in understanding how HHS-OIG’s limited resources are being allocated to simultaneously support its agents providing personal security for Dr. Fauci and investigating his role in delivering grants from the NIAID ultimately to the Wuhan Institute of Virology, Empower Oversight requested expedited processing of its FOIA request and a waiver of all fees associated with the same.

To provide HHS-OIG with background about its FOIA request, and to enlighten it concerning the public interest in the information sought by such request, Empower Oversight advised that:

Agents with the [HHS-OIG] are at the forefront of efforts to fight waste, fraud and abuse in HHS programs, including the [NIH]. In April 2020, ABC News reported that HHS[-]OIG agents would begin providing security for Dr. Anthony Fauci, director of the [NIAID] at the NIH. But last June, HHS[-]OIG announced its agents would also be investigating the NIH’s oversight of grants to support research conducted outside the United States. One of the grants discussed by multiple media outlets was awarded by Dr. Fauci’s NIAID and is connected to funding at the Wuhan Institute of Virology.

“We share stakeholders’ concerns regarding compliance and oversight of NIH grant funds. We have been monitoring this issue for some time and consider it a high-priority matter that can pose a threat to the integrity of the NIH grant

³ Empower Oversight’s November 4th FOIA request is attached as Exhibit 1.

program,” Tesia Williams, the director of communications for the HHS[-]OIG told CNN.

The Responses

By email dated November 4, 2021, HHS-OIG acknowledged receipt of Empower Oversight’s FOIA request and designated it FOIA Request Number OIG-22-0176-RB. Later that day, by letter, HHS-OIG denied Empower Oversight’s requests for expedited processing and a fee waiver.

On January 3, 2022, HHS-OIG issued a response to Empower Oversight’s November 4th FOIA request.⁴ HHS-OIG advised that it had located 39 pages and 2 Excel spreadsheets responsive to the request, and that it had determined to withhold the 2 spreadsheets under FOIA Exemptions (b)(6), (b)(7)(C), (b)(7)(E) and (b)(7)(F). Regarding the complementary 39 pages, the HHS-OIG stated they “originated with the [NIH]” and it had “referred those pages to NIH for review and direct response to” Empower Oversight.

On February 1, 2022, having received no confirmation from the NIH that it had received and docketed the referral from the HHS-OIG, Empower Oversight requested from HHS-OIG contact information for an NIH official with responsibility for the Empower Oversight’s November 4th FOIA request, which the HHS-OIG claimed to have referred to the NIH for a direct response.⁵

On February 2, 2022, the HHS-OIG confirmed that the NIH had received Empower Oversight’s November 4th FOIA request, stated that the NIH had “assigned it NIH FOIA Case Number is [sic.] 57775,” explained that the NIH had suffered from a technical glitch in which it was “inadvertently sending email to the junk folder,” and invited Empower Oversight to contact the NIH FOIA office directly.⁶

On February 3, 2022, Empower Oversight contacted the NIH’s FOIA office, sought confirmation that it had received Empower Oversight’s November 4th FOIA request, and solicited information concerning the NIH’s processing of the request.⁷ The same day, with the subject line “RE: [External] Fwd: HHS OIG FOIA Request Number OIG-22-0176-RB – NIH FOIA Requests – 57775 and 57572 Foster (Empower Oversight),” the NIH advised “The NIH is in possession of the records and we are actively processing them.”⁸

On May 17, 2022, by letter referencing FOIA Case Number 57775, the NIH issued its “final response” to Empower Oversight’s November 4th FOIA request.⁹ In its letter, the NIH acknowledged that the HHS-OIG had referred the request to it on January 3rd, recited the six items of the request, and concluded “[t]his request is an exact duplicate of NIH FOIA case 57572 and is closed as such.”

⁴ HHS-OIG’s January 3rd response to Empower Oversight’s FOIA request is attached as Exhibit 2.

⁵ A copy of the email thread of communications among representatives of Empower Oversight, HHS-OIG, and NIH on February 1 – 3, 2022, is attached as Exhibit 3.

⁶ See, Exhibit 3.

⁷ See, Exhibit 3.

⁸ See, Exhibit 3.

⁹ The NIH’s May 17th final response is attached as Exhibit 4.

The next morning, Empower Oversight sent an email to the NIH representative who had forwarded the NIH's May 17th final response to FOIA Case Number 57775.¹⁰ Empower Oversight's email states:

Thank you for your correspondence from yesterday, which begs my question: who is processing, and what is the status of the response to, FOIA Request 57572? Empower Oversight has received no information on that request, other than your February 3, 2022, email that references it in the subject line (indeed, I had thought that the two non-sequential tracking numbers in the subject line was an error).

Later, on May 18, 2022, the NIH responded by email that it had incorrectly transcribed Empower Oversight's email address, and hence Empower Oversight had not received the NIH's February 23, 2022, response to FOIA Case Number 57572.¹¹ A copy of the NIH's February 23rd correspondence was attached to the NIH's May 18th email.

The NIH's February 23rd final response to FOIA Case Number 57572 states that it is the NIH's:

...final response to your November 4, 2021, Freedom of Information Act (FOIA) request addressed to the Department of Health and Human Services, Office of the Inspector General (HHS OIG) FOIA Office. Your request was referred to the National Institutes of Health (NIH) FOIA Office, received January 3, 2022. You requested records regarding the personal security and protection services provided for Dr. Fauci, Director of the National Institute of Allergy and Infectious Diseases at NIH.

The NIH added that the HHS-OIG had "forwarded 38 pages of responsive records to it," it had reviewed the records, and determined to produce all of the pages subject to redactions pursuant to FOIA Exemption b(6). The NIH did not describe its search for any other records responsive to Empower Oversight's November 4th FOIA request, nor did it discuss its possession or production of any additional responsive records.¹²

ANALYSIS

The record herein demonstrates that the NIH significantly erred in its search for records responsive to Empower Oversight's November 4th FOIA request. The NIH advised that it received and twice docketed HHS-OIG's referral of the request (*i.e.*, FOIA Case Numbers 57572 and 57775), and explicitly claimed to have responded to entire FOIA request, not a select portion of it.¹³ However, it appears that the NIH's search extended no further than the interior of the envelope that HHS-OIG used to forward 39 pages of responsive records to the NIH.¹⁴ Worse, included among the 38 pages that the NIH reports to have received from HHS-OIG and produced to Empower Oversight is information that strongly suggests that other responsive

¹⁰ Empower Oversight's May 18th email is attached as Exhibit 5.

¹¹ The NIH's May 18th emails are attached as Exhibit 6.

¹² The NIH's February 23rd final response is attached as Exhibit 7.

¹³ See, Exhibits 4 and 7.

¹⁴ Indeed, the NIH's search of the interior of the envelope may have been less than diligent: the HHS-OIG advised that it forwarded 39 pages, but the NIH stated that only 38 pages were forwarded. Compare, Exhibits 2 and 7.

records (*i.e.*, monthly billing reports) should exist in the NIH's possession—otherwise it should not have reimbursed the HHS-OIG for the provision of security services for Dr. Fauci—but these reports either were not searched for or were withheld in full without citation of relevant authority.

The legal standard governing the search for records responsive to FOIA requests requires an agency to conduct a search that is “reasonably calculated to uncover all relevant documents.”¹⁵ Such calculation involves both an understanding of the nature and scope of the FOIA request and knowledge of where information may be stored within an agency. In the former regard, courts have found searches to be sufficient when they are based on a reasonable interpretation of the scope of the subject matter of the request.¹⁶

Courts tend to afford agencies a fair amount of leeway when determining the locations to search for responsive records, on the grounds that an agency generally “is not obliged to look beyond the four corners of [a FOIA] request for leads to the location of responsive” records.¹⁷ On the other hand, an agency “cannot in good faith ignore . . . a lead that is both clear and certain.”¹⁸ For example, an agency cannot ignore a responsive document that “clearly indicates the existence of [other] relevant documents.”¹⁹

The NIH produced two documents that clearly indicate the existence of other records that it did not produce. In that regard, the NIH produced two Memoranda of Understanding (“MOUs”) between the NIAID and the HHS-OIG, covering the periods October 1, 2020, through December 31, 2020, and October 1, 2021, through September 30, 2022.²⁰ The MOUs provide:

During the term of the proposed assignment, OIG will submit monthly bills through IPAC billing to NIH covering the costs associated with the protection of the Director. Such reimbursement shall include all hours, regular and overtime, expended by OIG personnel, plus costs of travel, vehicle usage, and any extraordinary expenses incurred by OIG during these assignments.

Although the MOUs clearly contemplate monthly billing reports—making them the vehicles through which the HHS-OIG would secure reimbursement from the NIH through the Intra-Governmental Payment and Collection system, the NIH did not produce any of the

¹⁵ Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

¹⁶ Larson v. Dep’t of State, 565 F.3d 857, 869 (D.C. Cir. 2009) (affirming the adequacy of a search based on the agency’s reasonable determination regarding records being requested).

¹⁷ Kowalczyk v. DOJ, 73 F.3d 386, 389 (D.C. Cir. 1996).

¹⁸ Kowalczyk, 73 F.3d at 389.

¹⁹ Center for National Security Studies v. DOJ, 215 F. Supp. 2d 94, 110 (D.D.C. 2002) (holding that discovery of a document that “clearly indicates the existence of [other] relevant documents” creates an “obligation” for agency to further search for those additional documents), *aff’d in part, rev’d in part & remanded on other grounds*, 331 F.3d 918 (D.C. Cir. 2003); Tarullo v. DOD, 170 F. Supp. 2d 271, 275 (D. Conn. 2001) (declaring agency’s search inadequate because “[w]hile hypothetical assertions as to the existence of unproduced responsive documents are insufficient to create a dispute of material fact as to the reasonableness of the search, plaintiff here has [himself provided copy of agency record] which appears to be responsive to the request”); Kronberg v. DOJ, 875 F. Supp. 861, 870 – 871 (D.D.C. 1995) (holding that search was inadequate when agency did not find records required to be maintained and plaintiff produced documents obtained by other FOIA requesters demonstrating that agency possessed files which may contain records sought).

²⁰ The MOUs are attached as Exhibit 8.

approximately 15 monthly billing reports that the HHS-OIG should have submitted between October 31, 2020, and January 31, 2022.²¹

This evidence that the NIH failed to conduct a search for the HHS-OIG's monthly billing reports that are required by the MOUs does not inspire confidence that the NIH has satisfied its search responsibilities under the FOIA. Hence, Empower Oversight respectfully requests that the NIH review the work of its FOIA staff, ascertain the nature and scope of their search plan, determine whether such plan was appropriate and followed, and correct any errors that are discovered.

Thank you for your time and consideration. Please don't hesitate to contact me with any questions.

Cordially,

[/Jason Foster/](#)

Jason Foster
Founder & President

²¹ Additionally, the two MOUs that the NIH produced reveal a gaping hole in coverage from January 1, 2021, through September 30, 2021. See, Exhibit 8. Such hole suggests that there should be a third MOU covering the gap in coverage, and that the NIH did not search for the MOU and/or withheld it without citation to appropriate authority.

Exhibit 1

EMPOWER OVERSIGHT

Whistleblowers & Research



November 4, 2021

VIA ELECTRONIC TRANSMISSION: FOIA@oig.hhs.gov

Freedom of Information Officer, Office of the Inspector General
Department of Health and Human Services,
330 Independence Ave, S.W., Cohen Building, Suite 1062
Washington, D.C. 20201

RE: RECORDS REGARDING SECURITY DETAIL PROVIDED TO ANTHONY FAUCI

Dear FOIA Officer:

Introduction

Empower Oversight Whistleblowers & Research (“Empower Oversight”) is a nonpartisan, nonprofit educational organization dedicated to enhancing independent oversight of government and corporate wrongdoing. We work to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and seek to hold those authorities accountable to act on those reports by, among other means, publishing information concerning the same.

Background

Agents with the Department of Health and Human Services Office of Inspector General (HHS OIG) are at the forefront of efforts to fight waste, fraud and abuse in HHS programs, including the National Institutes of Health (NIH).¹ In April 2020, ABC News reported that HHS OIG agents would begin providing security for Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases (NIAID) at the NIH.² But last June, HHS OIG announced it agents would also be investigating the NIH’s oversight of grants to support research conducted outside the United States.³ One

¹ <https://oig.hhs.gov/about-oig/>.

² <https://abcnews.go.com/Politics/fauci-security-detail-threats-source/story?id=69933965>.

³ <https://thehill.com/policy/healthcare/558505-federal-watchdog-to-examine-nih-grants-likely-including-wuhan-funding>.

of the grants discussed by multiple media outlets was awarded by Dr. Fauci's NIAID⁴ and is connected to funding at the Wuhan Institute of Virology.⁵

"We share stakeholders' concerns regarding compliance and oversight of NIH grant funds. We have been monitoring this issue for some time and consider it a high-priority matter that can pose a threat to the integrity of the NIH grant program," Tesia Williams, the director of communications for the Department of Health and Human Services Office of Inspector General, told CNN.⁶

The public has an interest in understanding how limited HHS OIG resources are being allocated to simultaneously support its agents providing security for Dr. Fauci and investigate his role in grants from the NIAID to the Wuhan Institute of Virology.

Records Request

To shed light on the HHS OIG security detail for Anthony Fauci we respectfully request, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, copies of:

1. All records and communications regarding the HHS OIG security detail provided to Anthony Fauci.
2. All records and communications regarding the work assignment of the six individuals listed in Attachment A.
3. All records regarding the budget and/or budget justification for the protection detail, including reimbursement agreements and documentation of reimbursement of HHS OIG by NIH or HHS.
4. Time sheets or reported time for agents assigned to the protective detail.
5. All records of expenses for the detail, including travel expenses.
6. All communications regarding reassignment of agents from HHS OIG casework to the protective detail.

Definitions

"COMMUNICATION(S)" means every manner or method of disclosure, exchange of information, statement, or discussion between or among two or more persons,

⁴ <https://thehill.com/policy/healthcare/558505-federal-watchdog-to-examine-nih-grants-likely-including-wuhan-funding>.

⁵ <https://edition.cnn.com/2021/06/15/politics/nih-grants-review/index.html>.

⁶ <https://edition.cnn.com/2021/06/15/politics/nih-grants-review/index.html>.

including but not limited to, face-to-face and telephone conversations, correspondence, memoranda, telegrams, telexes, email messages, voice-mail messages, text messages, meeting minutes, discussions, releases, statements, reports, publications, and any recordings or reproductions thereof.

“DOCUMENT(S)” or “RECORD(S)” mean any kind of written, graphic, or recorded matter, however produced or reproduced, of any kind or description, whether sent, received, or neither, including drafts, originals, non-identical copies, and information stored magnetically, electronically, photographically or otherwise. As used herein, the terms “DOCUMENT(S)” or “RECORD(S)” include, but are not limited to, studies, papers, books, accounts, letters, diagrams, pictures, drawings, photographs, correspondence, telegrams, cables, text messages, emails, memoranda, notes, notations, work papers, intra-office and inter-office communications, communications to, between and among employees, contracts, financial agreements, grants, proposals, transcripts, minutes, orders, reports, recordings, or other documentation of telephone or other conversations, interviews, affidavits, slides, statement summaries, opinions, indices, analyses, publications, questionnaires, answers to questionnaires, statistical records, ledgers, journals, lists, logs, tabulations, charts, graphs, maps, surveys, sound recordings, data sheets, computer printouts, tapes, discs, microfilm, and all other records kept, regardless of the title, author, or origin.

“PERSON” means individuals, entities, firms, organizations, groups, committees, regulatory agencies, governmental entities, business entities, corporations, partnerships, trusts, and estates.

“REFERS,” “REFERRING TO,” “REGARDS,” REGARDING,” “RELATES,” “RELATING TO,” “CONCERNS,” “BEARS UPON,” or “PERTAINS TO” mean containing, alluding to, responding to, commenting upon, discussing, showing, disclosing, explaining, mentioning, analyzing, constituting, comprising, evidencing, setting forth, summarizing, or characterizing, either directly or indirectly, in whole or in part.

Instructions

The time period of the requested records is April 2020 through the present.

The words “and” and “or” shall be construed in the conjunctive or disjunctive, whichever is most inclusive.

The singular form shall include the plural form and vice versa.

The present tense shall include the past tense and vice versa.

In producing the records described above, you shall segregate them by reference to each of the numbered items of this FOIA request.

If you have any questions about this request, please contact Bryan Saddler by e-mail at bsaddler@empowr.us.

Fee Waiver Request

Empower Oversight agrees to pay up to \$25.00 in applicable fees, but notes that it qualifies as a “news media requester”⁷ and requests a waiver of any fees that may be associated with processing this request, in keeping with 5 U.S.C. § 552 (a)(4)(A)(iii).

Empower Oversight is a non-profit educational organization as defined under Section 501(c)(3) of the Internal Revenue Code, which helps insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and seeks to hold those authorities accountable to act on such reports by, among other means, publishing information concerning the same. Empower Oversight has no commercial interest in making this request.

Further, the information that Empower Oversight seeks is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the HHS OIG. Specifically, the public has a significant interest in understanding how the HHS OIG is providing a security detail to Anthony Fauci while simultaneously auditing/investigating NIAID funding provided to the Wuhan Institute of Virology and other foreign entities (*e.g.*, what protocols have been established to ensure that information developed by the HHS OIG audit/investigative team that is assigned to the NIAID funding inquiry is not available to Dr. Fauci’s security detail; what policies has HHS OIG put in place to ensure that investigative skills of the agents that it has assigned to Dr. Fauci’s security detail do not atrophy pending the completion of that detail, which has continued for 18 months or more; and, if the full costs Dr. Fauci’s security detail is not being reimbursed by NIH or HHS, what investigative or audit activities has HHS OIG had to curtail to stay within its budget). Empower Oversight is committed to government accountability, public integrity, and transparency. In the latter regard, the information that that Empower Oversight

⁷ As the Securities Exchange Commission recently conceded, with its issuances of ‘press releases’ describing its activities and findings, and its emails of research papers, FOIA updates, and news accounts of its activities to an address list more than 9,400 members of the press, Capitol Hill staff, and key thought leaders, Empower Oversight qualifies as a news media requester for purposes of fees assessed pursuant to the FOIA.

receives that tends to explain the HHS OIG practices will be disclosed publicly via its website, and shared copies with other news media for public dissemination.⁸

Request for Expedited Processing

Although Empower Oversight fully expects the HHS OIG to respond to this FOIA request within the 20 business days allotted by the FOIA, it requests expedited processing. Understanding how the HHS OIG is providing a security detail to Dr. Fauci while simultaneously auditing/investigating NIAID funding provided to the Wuhan Institute of Virology and other foreign entities can enlighten the public concerning its ability to be at the forefront of efforts to fight waste, fraud and abuse in HHS programs, including the NIH. The request is of widespread and exceptional media interest and the information sought involves questions about investigative/audit integrity that affect public confidence in the activities and operations of the HHA OIG. Empower Oversight is engaged in disseminating information to the public through its website and working with media.⁹ Accordingly, it is important that this request be processed and the results publicly disseminated as quickly as possible.

For ease of administration and to conserve resources, we ask that documents be produced in a readily accessible electronic format. In the event our request for a fee waiver is denied or if you have any questions about this request, please contact us immediately. Thank you for your prompt attention to this matter.

Cordially,

/Jason Foster/

Jason Foster
Founder & President

⁸ “Mission,” Empower Oversight (<http://empowr.us/mission>).

⁹ “Mission,” Empower Oversight (<http://empowr.us/mission>).

Exhibit 2



DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



FOIA Request 2022-0176

Freedom of Information Act Office
Cohen Bldg., Suite 5541A
330 Independence Ave., SW
Washington DC 20201

January 3, 2022

By Email.

Jason Foster
2615 Columbia Pike, #445
Arlington, VA 22204
Email: jf@empowr.us

Dear Mr. Foster:

This is in response to the November 4, 2021, Freedom of Information Act (“FOIA”) request you submitted to the Department of Health and Human Services (“HHS”), Office of Inspector General (“OIG”), seeking:

1. All records and communications regarding the HHS OIG security detail provided to Anthony Fauci.
2. All records and communications regarding the work assignment of the six individuals listed in Attachment A.
3. All records regarding the budget and/or budget justification for the protection detail, including reimbursement agreements and documentation of reimbursement of HHS OIG by NIH or HHS.
4. Time sheets or reported time for agents assigned to the protective detail.
5. All records of expenses for the detail, including travel expenses.
6. All communications regarding reassignment of agents from HHS OIG casework to the protective detail.

This office located thirty-nine (39) pages and (2) two Excel spreadsheets responsive to your request; I have determined to withhold the two (2) Spreadsheets under FOIA Exemptions (b)(6), (b)(7)(C), (b)(7)(E) and (b)(7)(F).

Exemption (b)(6) permits the withholding of information that if released would constitute a clearly unwarranted invasion of personal privacy.

Exemption (b)(7)(C) permits the withholding of investigatory records compiled for law enforcement purposes when disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Exemption (b)(7)(E) permits the withholding of law enforcement information which “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.”

Exemption (b)(7)(F) permits the withholding of law enforcement information that could reasonably be expected to endanger the life or physical safety of any individual.

In addition, the thirty-nine (39) pages originated with the National Institutes of Health (“NIH”), I have referred those pages to NIH for review and direct response to you. Should you wish to contact NIH, you may do so using the information below:

NIH FOIA Office Building 31
Room 5B35
31 Center Drive, MSC 2107
Bethesda, MD 20892
PH: 301-496-5633
Fax: 301-402-4541
E-mail: [nihfoia@mail.nih.gov](mailto:.nihfoia@mail.nih.gov)

There is no charge for FOIA services in this instance because billable fees are under the Department’s \$25.00 cost effective threshold.

If you have reason to believe that any denied portions should not be exempt from disclosure, you may appeal. Your appeal must be electronically transmitted within 90 days from the date of this letter using the HHS [Public Link](#) or email [HHS FOIA Public Liaison@hhs.gov](mailto:HHS_FOIA_Public_Liaison@hhs.gov). Clearly include in the subject line “Freedom of Information Act Appeal.”

In addition, you may contact our FOIA Requester Service Center at 202.619.2541 or FOIA@oig.hhs.gov, for any further assistance or 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, Room 2510, 8601 Adelphi Road, 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.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Sincerely,



Robin R. Brooks
Director
Freedom of Information

Exhibit 3



Bryan Saddler <bsaddler@empowr.us>

RE: [EXTERNAL] Fwd: HHS OIG FOIA Request Number OIG-22-0176-RB - NIH FOIA Requests - 57775 and 57572 Foster (Empower Oversight)

2 messages

NIH FOIA <nihfoia@od.nih.gov>

Thu, Feb 3, 2022 at 1:39 PM

To: Bryan Saddler <bsaddler@empowr.us>

Cc: NIH FOIA <nihfoia@od.nih.gov>

Good Afternoon,

The NIH is in possession of the records and we are actively processing them.

Thank you.

Roger Bordine

Program Support

Freedom of Information Office

National Institutes of Health

Building 31, Room 5B35

[31 Center Drive](#)[Bethesda, MD 20892](#)

Phone: 301-496-5633

Fax: 301-402-4541

Roger.bordine@nih.gov

From: Bryan Saddler <bsaddler@empowr.us>**Sent:** Thursday, February 3, 2022 10:12 AM**To:** NIH FOIA <nihfoia@od.nih.gov>**Subject:** [EXTERNAL] Fwd: HHS OIG FOIA Request Number OIG-22-0176-RB

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and are confident the content is safe.

Dear FOIA Officer:

On November 4, 2021, Empower Oversight, pursuant to the Freedom of Information Act ("FOIA"), submitted the attached request for records to the Office of Inspector General of the Department of Health and Human Services ("HHS OIG").

On January 3, 2022, HHS OIG responded to Empower Oversight's FOIA request. HHS OIG's response included apprising Empower Oversight that it had referred 39 pages of responsive records to the National Institutes of Health ("NIH") for its direct response to Empower Oversight. HHS OIG explained that the 39 pages were originated by NIH.

As of February 1, 2022, Empower Oversight had not received any acknowledgment from NIH of HHS OIG's referral, and--in light of HHS OIG's responsibility to ensure that its referrals are processed by the receiving agency--Empower Oversight reached out to HHS OIG for assistance.

On February 2, 2022, HHS OIG confirmed that NIH had received its referral and advised that NIH had assigned tracking number 57775 to it.

Please confirm that NIH has indeed received Empower Oversight's November 4th FOIA request, and advise it of the status of your processing thereof.

Cordially, Bryan Saddler

----- Forwarded message -----

From: **OIG, FOIA** <FOIA.OIG@oig.hhs.gov>

Date: Wed, Feb 2, 2022 at 10:23 AM

Subject: RE: HHS OIG FOIA Request Number OIG-22-0176-RB

To: bsaddler@empowr.us <bsaddler@empowr.us>

Cc: jf@empowr.us <jf@empowr.us>, **OIG, FOIA** <FOIA.OIG@oig.hhs.gov>

Mr. Saddler:

Thank you for your email; NIH confirms they have received the referral and assigned it NIH FOIA Case Number is 57775. The NIH FOIA office email account was inadvertently sending email to the junk folder, they have since created a new [email account](#), which corrected the problem.

Should you wish to contact the NIH FOIA Office you may do so by [email](#) or by telephone at 301-496-5633.

We apologize for any inconvenience and if there's anything else we can do to assist you, please feel free to contact me at 202-619-2541.

Thank you,

Robin Brooks

Director, FOIA Division

Office of Inspector General

Department of Health & Human Services

330 Independence Ave SW

Suite 5541A

Washington DC 20201

202.619.2541



From: Bryan Saddler <bsaddler@empowr.us>
Sent: Tuesday, February 1, 2022 12:51 PM
To: OIG, FOIA <FOIA.OIG@oig.hhs.gov>
Cc: Jason Foster <jf@empowr.us>
Subject: HHS OIG FOIA Request Number OIG-22-0176-RB

CAUTION: External email. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear Ms. Robin R. Brooks:

On November 4, 2021, to shed light on HHS OIG's provision to the NIH of a security detail for Dr. Anthony Fauci, at the same time that it was investigating the NIH's oversight of grants to support research conducted outside the United States, including research conducted by the Wuhan Institute of Virology, Empower Oversight, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, requested copies of:

1. All records and communications regarding the HHS OIG security detail provided to [Dr.] Fauci.
2. All records and communications regarding the work assignment of the six [HHS OIG agents comprising the detail].

3. All records regarding the budget and/or budget justification for the protection detail, including reimbursement agreements and documentation of reimbursement of HHS OIG by NIH or HHS.
4. Time sheets or reported time for agents assigned to the protective detail.
5. All records of expenses for the detail, including travel expenses.
6. All communications regarding reassignment of agents from HHS OIG casework to the protective detail.

HHS OIG acknowledged Empower Oversight's FOIA request and designated it FOIA Request Number OIG-22-0176-RB.

Later, by letter dated January 3, 2022, you advised that HHS OIG had "located thirty-nine (39) pages and (2) two Excel spreadsheets responsive" to Empower Oversight's request, and that you had "determined to withhold the two (2) Spreadsheets under FOIA Exemptions (b)(6), (b)(7)(C), (b)(7)(E) and (b)(7)(F)." Regarding the 39 pages, you stated that they "originated with the National Institutes of Health ('NIH') and you had "referred [them] to the NIH for review and direct response. . . ."

The Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") has ruled that, although "consultations" are the only procedure expressly mentioned in the FOIA to address situations where another agency has an interest in the handling of requested records, it is permissible for agencies to refer records to their originating agency or agency component for direct response to the requester. See, Sussman v. U.S. Marshals Service, 494 F.3d 1106, 1118 (D.C. Cir. 2007) (quoting McGehee v. CIA, 697 F.2d 1095, 1110 (D.C. Cir. 1983)). However, even under the limited circumstances where referrals of FOIA requests are permissible (*i.e.*, referrals to the originator of records found in the files of the referring agency), the D.C. Circuit has cautioned that the referral may not "lead to improper withholding." *Id.* Additionally, the referring agency retains responsibility for the FOIA request following referral. See, Hall v. CIA, 668 F.Supp. 2d 172, 182 (D.D.C. 2010) (instructing the agency to "take affirmative steps to ensure that its referrals are being processed").

To date, the NIH has not acknowledged to Empower Oversight receipt of the referral from HHS OIG. Accordingly, in light of HHS OIG's continuing responsibility to ensure that its referral of the FOIA request is being processed by the NIH, Empower Oversight respectfully requests direct contact information (*i.e.*, the name, email address, and telephone number) of an NIH official who has authority with respect to your referral of Empower Oversight's November 4th FOIA request.

Cordially,

/Bryan Saddler/

Bryan Saddler

Bryan Saddler <bsaddler@empowr.us>

Thu, Feb 3, 2022 at 3:57 PM

To: Jason Foster <jf@empowr.us>

We heard back from NIH on the Fauci security detail referral from HHS OIG.

[Quoted text hidden]

Exhibit 4



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

National Institutes of Health
Freedom of Information Office
Building 31, Room 5B-35
31 Center Drive, MSC 2107
Bethesda, Maryland 20892-2107
phone: (301) 496-5633
fax: (301) 402-4541

Email: bsaddler@empowr.us

May 17, 2022

Bryan Saddler for
Jason Foster
Empower Oversight
2615 Columbia Pike, #445
Arlington, VA 22204

Re: FOIA Case Number: 57775

Dear Mr. Saddler:

This is our final response to your Freedom of Information Act (FOIA) request addressed to HHS OIG and was forwarded to National Institutes of Health (NIH), and then to NIAID, dated November 04, 2021 and received January 03, 2022. You requested copies of:

1. All records and communications regarding the HHS OIG security detail provided to Anthony Fauci.
2. All records and communications regarding the work assignment of the six individuals listed in Attachment A.
3. All records regarding the budget and/or budget justification for the protection detail, including reimbursement agreements and documentation of reimbursement of HHS OIG by NIH or HHS.
4. Time sheets or reported time for agents assigned to the protective detail.
5. All records of expenses for the detail, including travel expenses.
6. All communications regarding reassignment of agents from HHS OIG casework to the protective detail.

This request is an exact duplicate of NIH FOIA case 57572 and is closed as such.

If you are not satisfied with the processing and handling of this request, you may contact the [IC] FOIA Public Liaison and/or the Office of Government Information Services (OGIS):

NIH FOIA Public Liaison

Denean Standing-Ojo
Public Affairs Specialist
Office of Communications and Public Liaison
Building 31, Room 5B52S
31 Center Drive
Bethesda, MD 20814
301-496-5077 (phone)
301-496-0818 (fax)
[nihfoia@od.nih.gov](mailto:.nihfoia@od.nih.gov) (email)

OGIS

National Archives and Records Admin
8601 Adelphi Rd - OGIS
College Park, MD 20740-6001
202-741-5770 (phone)
1-877-684-6448 (toll-free)
202-741-5769 (fax)
ogis@nara.gov (email)

In certain circumstances, provisions of the FOIA and HHS FOIA Regulations allow us to recover part of the cost of responding to your request. Because no unusual circumstances apply to the processing of your request, there are no charges for search time.

If you have any questions about this response, please call the NIH FOIA office at 301-496-5633.

Sincerely,

Gorka Garcia-Malene
Freedom of Information Officer, NIH

Exhibit 5



Bryan Saddler <bsaddler@empowr.us>

NIH FOIA Request Number 57775 - Final Response

2 messages

Bordine, Roger (NIH/OD) [E] <roger.bordine@nih.gov>

Tue, May 17, 2022 at 5:02 PM

To: Bryan Saddler <bsaddler@empowr.us>

Cc: NIH FOIA <nihfoia@od.nih.gov>

Good Afternoon,

Please see the attached letter concerning your NIH FOIA request, 57775.

Thank you.

Roger Bordine

Program Support

Freedom of Information Office

National Institutes of Health

Building 31, Room 5B35

[31 Center Drive](#)[Bethesda, MD 20892](#)

Phone: 301-496-5633

Fax: 301-402-4541

Roger.bordine@nih.gov

NIH FOIA 57775 Saddler - Response Letter.pdf
195K

Bryan Saddler <bsaddler@empowr.us>

Wed, May 18, 2022 at 9:14 AM

To: "Bordine, Roger (NIH/OD) [E]" <roger.bordine@nih.gov>

Bcc: Jason Foster <jf@empowr.us>

Mr. Bordine: Thank you for your correspondence from yesterday, which begs my question: who is processing, and what is the status of the response to, FOIA Request 57572? Empower Oversight has received no information on that request, other than your February 3, 2022, email that references it in the subject line (indeed, I had thought that the two non-sequential tracking numbers in the subject line was an error). Cordially, Bryan Saddler

[Quoted text hidden]

Exhibit 6



Bryan Saddler <bsaddler@empowr.us>

FW: NIH FOIA 57572

Yan, Hawyee (NIH/OD) [E] <hawyee.yan@nih.gov>
To: "bsaddler@empowr.us" <bsaddler@empowr.us>

Wed, May 18, 2022 at 10:51 AM

Dear Mr. Foster,

It's brought to my attention that you didn't receive the final response that I sent to you on February 23, 2022 (see email below).

It's because part of the email address was written incorrectly (@**empower**). Please find the final response for 57572 attached.

I apologize for the error and thank you for your patience.

Best regards,

Hawyee

From: Yan, Hawyee (NIH/OD) [E]
Sent: Wednesday, February 23, 2022 4:51 PM
To: bsaddler@empower.us
Subject: NIH FOIA 57572

Dear Mr. Foster,

Attached please find the records responsive to your FOIA request 57572. Let us know if you have any questions

Best regards,

Hawyee Yan | Government Information Specialist

Freedom of Information Act Office | National Institutes of Health

Phone: (301) 496-5633

hawyee.yan@nih.gov

2 attachments



-  **NIH FOIA 57572 Foster_Complete Response Letter.pdf**
206K
-  **NIH FOIA 57572 Foster_Complete Response.pdf**
4110K

Exhibit 7



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

National Institutes of Health
Freedom of Information Office
Building 31, Room 5B-35
31 Center Drive, MSC 2107
Bethesda, Maryland 20892-2107
phone: (301) 496-5633
fax: (301) 402-4541

Via Email: bsaddler@empower.us

February 23, 2022

Jason Foster
Empower Oversight
2615 Columbia Pike #445
Arlington, VA 22204

Ref: NIH FOIA Case No. 57572

Dear Mr. Foster:

This is the final response to your November 4, 2021, Freedom of Information Act (FOIA) request addressed to the Department of Health and Human Services, Office of the Inspector General (HHS OIG) FOIA Office. Your request was referred to the National Institutes of Health (NIH) FOIA Office, received January 3, 2022. You requested records regarding the personal security and protection services provided for Dr. Fauci, Director of the National Institute of Allergy and Infectious Diseases at NIH.

The HHS OIG forwarded 38 pages of responsive records to the NIH FOIA Office because those documents contained materials belonging to the agency. We reviewed the records, all of which are enclosed. I have determined to withhold portions of the released pages under exemption (b)(6) pursuant to exemption 6 of the FOIA, 5 U.S.C. § 552 (b)(6); and sections 5.31 (f) of the HHS FOIA Regulations, 45 CFR Part 5. Exemption 6 permits the withholding of privacy information, the release of which would constitute a clearly unwarranted invasion of personal privacy.

You have the right to appeal this determination to deny you access to information in the Agency's possession. Should you wish to do so, your appeal must be sent within ninety (90) days of the date of this letter, following the procedures outlined in Subpart F of the HHS FOIA Regulations (<https://www.federalregister.gov/documents/2016/10/28/2016-25684/freedom-of-information-regulations>) to the Assistant Secretary for Public Affairs at <https://requests.publiclink.hhs.gov/App/Index.aspx>. Clearly mark the communication "Freedom of Information Act Appeal."

If you are not satisfied with the processing and handling of this request, you may contact the NIH FOIA Public Liaison and/or the Office of Government Information Services (OGIS):

Jason Foster (57572)

NIH FOIA Public Liaison

Denean Standing-Ojo
Public Affairs Specialist
Office of Communications and Public Liaison
Building 31, Room 5B52S
31 Center Drive
Bethesda, MD 20892
301-496-5077 (phone)
[nihfoia@mail.nih.gov](mailto:.nihfoia@mail.nih.gov) (email)

OGIS

National Archives and Records Admin.
8601 Adelphi Rd – OGIS
College Park, MD 20740-6001
202-741-5770 (phone)
1-877-684-6448 (toll-free)
202-741-5769 (fax)
ogis@nara.gov (email)

In certain circumstances provisions of the FOIA and Department of Health and Human Services FOIA Regulations allow us to recover part of the cost of responding to your request. Because the cost is below the \$25 minimum, there are no charges associated with our response.

If you have any questions about this response, please call 301-496-5633

Sincerely,

Gorka Garcia-Malene
Freedom of Information Officer, NIH

Enclosed: 38 pages (pdf)

Exhibit 8



**MEMORANDUM OF UNDERSTANDING
BETWEEN
National Institute of Allergy and Infectious Diseases (NIAID)
And
Office of Inspector General/Office of Investigations (OIG/OI)**

This agreement establishes the basis under which the Office of Inspector General (OIG) Office of Investigations will provide certain protective services to the Director, NIAID.

PURPOSE: At the recommendation of the Office of Inspector General on March 28, 2020, the OIG/OI established and carried out personal security and protection services for the Director, NIAID. Services being provided include, but are not limited to, personal protection guidance and assistance, and personal security services when there is an actual threat of harm or potential harm to the Director, NIAID relating to the discharge of his official duties. Note that such protective services may include personal protection while the NIAID Director is in transit to and from his residence (b)(6) his duty station in Bethesda, MD and in the course of any out of-city travel on official government business.

AUTHORITY: This agreement is entered into under the authority of the Economy Act 31 U.S.C. 1535 and FAR 17.5.

TERMS OF AGREEMENT: OIG's ability to provide protective services under this agreement is subject to the approval and continued special deputation by the U.S. Marshals Service. NIAID and OIG agree to a continued agreement as outlined in the accompanying Interagency Agreement starting on October 1, 2020 and ending September 30, 2021. During the term of the proposed assignment, OIG will submit monthly bills through IPAC billing to NIH covering the costs associated with the protection of the Director. Such reimbursement shall include all hours, regular and overtime, expended by OIG personnel, plus costs of travel, vehicle usage, and any extraordinary expenses incurred by OIG during these assignments.

PERIOD OF AGREEMENT: This MOU will cover the initial funding amount of \$175,000 for the period of October 1, 2020 through December 31, 2020, and any additional funding modifications for the duration of the agreement NTE September 30, 2021 as approved by both organizations. This agreement may be extended, additional funding can be added, or the agreement can be terminated upon a 15-day written request of either organization.

NIAID APPROVALS:

Jill R. Harper -S

Digitally signed by Jill R. Harper -S
Date: 2020.11.06 15:56:34 -05'00'

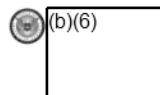
**Jill R. Harper, Ph.D.
Deputy Director for Science
Management, NIAID**

Date



Approve

Disapprove

OIG APPROVALS:

Digitally signed by ROBERT OWENS
DN: c=US, o=U.S. Government, ou=Department of
Health and Human Services, ou=OFFICE OF THE
INSPECTOR GENERAL, cn=ROBERT OWENS,
0.9.2342.19200300.100.1.1=75001001099399
Date: 2020.11.13 16:36:50 -05'00'

**Robert Owens,
Deputy Inspector General for
Mgmt. & Policy, OIG**

Date

Approve

Disapprove



**MEMORANDUM OF UNDERSTANDING
BETWEEN
National Institute of Allergy and Infectious Diseases (NIAID)
And
Office of Inspector General/Office of Investigations (OIG/OI)**

This agreement establishes the basis under which the Office of Inspector General (OIG) Office of Investigations will provide certain protective services to the Director, NIAID.

PURPOSE: At the recommendation of the Office of Inspector General on March 28, 2020, the OIG/OI established and carried out personal security and protection services for the Director, NIAID. Services being provided include, but are not limited to, personal protection guidance and assistance, and personal security services when there is an actual threat of harm or potential harm to the Director, NIAID relating to the discharge of his official duties. Note that such protective services may include personal protection while the NIAID Director is in transit to and from his residence (b)(6) his duty station in Bethesda, MD and in the course of any out of-city travel on official government business.

AUTHORITY: This agreement is entered into under the authority of the Economy Act 31 U.S.C. 1535 and FAR 17.5.

TERMS OF AGREEMENT: OIG's ability to provide protective services under this agreement is subject to the approval and continued special deputation by the U.S. Marshals Service. NIAID and OIG agree to a continued agreement as outlined in the accompanying Interagency Agreement starting on October 1, 2021 and ending September 30, 2022 (pending FY22 funds availability). During the term of the proposed assignment, OIG will submit monthly bills through IPAC billing to NIH covering the costs associated with the protection of the Director. Such reimbursement shall include all hours, regular and overtime, expended by OIG personnel, plus costs of travel, vehicle usage, and any extraordinary expenses incurred by OIG during these assignments.

PERIOD OF AGREEMENT: This MOU will cover FY22 funding in the initial amount of \$1,114,000 for the period of October 1, 2021 through September 30, 2022. This agreement may be extended, additional funding can be added, or the agreement can be terminated upon a 15-day written request of either organization.

NIAID APPROVALS:

Jill R. Harper
-S
Digitally signed by Jill R. Harper -S
Date: 2021.09.30 08:38:32 -04'00'

**Jill R. Harper, Ph.D.
Deputy Director for Science
Management, NIAID**

Date



Approve



Disapprove

OIG APPROVALS:

(b)(6)
Digitally signed by ROBERT OWENS
Date: 2021.10.15 14:18:51 -04'00'

**Robert Owens,
Deputy Inspector General for
Mgmt. & Policy, OIG**

Date



Approve



Disapprove