

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL PUBLIC RADIO, INC.)
1111 North Capitol Street, NE)
Washington, DC 20002)
and)
JINGNAN HUO)
c/o National Public Radio, Inc.)
1111 North Capitol Street, NE)
Washington, DC 20002) Case No:
Plaintiffs,)
v.)
UNITED STATES DEPARTMENT OF)
HEALTH AND HUMAN SERVICES)
200 Independence Avenue, S.W.)
Washington, DC 20201)
Defendant.)

**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF FOR
VIOLATION OF THE FREEDOM OF INFORMATION ACT**

Plaintiffs National Public Radio, Inc. and Jingnan Huo (collectively, “NPR”), by their undersigned attorneys, allege as follows:

Background

1. NPR brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, to enjoin the U.S. Department of Health & Human Services (“HHS”), a Cabinet-level department of the Federal executive branch, from improperly withholding records responsive to NPR’s FOIA request submitted on August 18, 2020 (the “Request”).

2. NPR's Request seeks records related to HHS's dealings with TeleTracking, Inc., a vendor awarded several multi-million dollar contracts to collect and coordinate COVID-19 data. NPR's reporting has raised questions about irregularities in how those contracts were awarded.

3. The Freedom of Information Act "focuses on the citizens' right to be informed about 'what their government is up to,'" by requiring the release of "[o]fficial information that sheds light on an agency's performance of its statutory duties." *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 750, 773 (1989) (citation omitted). "[D]isclosure, not secrecy, is the dominant objective" of FOIA. *Dept't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (internal quotation marks and citations omitted). NPR plays a critical role in providing information to citizens about "what their government is up to." Indeed, the First Amendment's guarantee of freedom of the press is meant to enable journalists to play an "essential role in our democracy," to "bare the secrets of government and inform the people." *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J. concurring).

4. Through its FOIA Request, NPR seeks to fulfill its journalistic function and to shine a public light on the operations of HHS and its managing of COVID-19 data.

Jurisdiction and Venue

5. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 2201(a) and 2202. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

6. Plaintiff National Public Radio, Inc. is a non-profit multimedia organization and the leading provider of non-commercial news, information, and entertainment programming to the

American public. NPR's fact-based, independent journalism helps the public stay on top of breaking news, follow the most critical stories of the day, and track complex issues over the long term. NPR reaches approximately 53 million people on broadcast radio, podcasts, NPR apps, NPR.org and YouTube video content per month. NPR distributes its radio broadcasts through more than 1,000 non-commercial, independently operated radio stations, licensed to more than 250 NPR members and numerous other NPR-affiliated entities.

7. Plaintiff Jingnan Huo is a resident of Virginia, and an award-winning journalist who works as an assistant producer on NPR's investigations team. Ms. Huo has reported on black lung disease's resurgence, as well as air monitoring data to see if lockdowns during the coronavirus pandemic have made the air cleaner. She has a Master's degree from Northwestern University's Medill School of Journalism.

8. Defendant U.S. Department of Health and Human Services ("HHS") is a Cabinet-level department of the Executive branch of the Federal government that was created to protect the health of all Americans. Accordingly, HHS is an agency subject to FOIA. Upon information and belief, HHS has possession and control of the records sought by the Request.

Facts

9. On August 18, 2020, NPR submitted a FOIA Request seeking records related to the agency's interactions with TeleTracking Technologies, Inc., a government vendor tasked with managing COVID-19 data. Specifically, the Request sought: 1) White Papers or Full Proposals submitted to HHS under the Broad Agency Announcement, BAA-19-ASPR NEXT-SOL-75A50119R0044, Area of Interest 4: "Real-Time Healthcare System Capacity Reporting"; 2) written evaluation reports created in response to White Papers or Full Proposals under Area of Interest 4; 3) any white paper submitted by TeleTracking to HHS between Aug. 1, 2019 and

Aug. 1, 2020; 4) the Non-Disclosure Agreement signed by TeleTracking relating to BAA-19-ASPR NEXT-SOL-75A50119R0044; 5) the contract signed by TeleTracking ASPR-BARDA, Contract No. 75A50120C0042; 6) emails referring to “TeleTracking” from Feb. 1, 2020 to Aug. 18, 2020, to, from, or copying the following HHS or CDC officials: Bryan Shuy, Jose Arrieta, Jim Parker, Dr. Deborah Birx, Robert Redfield, Cameron Hernandez; 7) emails referring to “TeleTracking” from June 1, 2020 to Aug. 18, 2020, to, from, or copying the following HHS officials: Michael Caputo, Katherine McKeogh. Attached as Exhibit A is a copy of the Request.

10. Although HHS acknowledged receipt of NPR’s Request on August 20, 2020, it did not provide a final response until three months later, on November 19, 2020 (the “Response”). In its Response, HHS declared that to date, the Assistant Secretary for Preparedness and Response (ASPR) and the Assistant Secretary for Administration (ASA) had located 31 pages of responsive records; HHS determined two pages were to be withheld in their entirety under Exemptions (b)(4) (the exemption for trade secrets and privileged commercial or financial information) and (b)(5) (the deliberative process privilege) of the FOIA; and seven pages were to be withheld in part under Exemptions (b)(4) (the exemption for trade secrets and privileged commercial or financial information) and (b)(6) (the personal privacy privilege). Attached as Exhibit B is a copy of the acknowledgement of the Request and attached as Exhibit C is a copy of the final Response letter.

11. NPR appealed this decision on December 8, 2020 (the “Appeal”). Attached as Exhibit D is a copy of the Appeal letter.

12. In its Appeal, NPR noted that HHS conducted an inadequate search for records. HHS returned no records relating to white papers, proposals, or written evaluation; it returned no records relating to TeleTracking’s own white paper submissions; and it returned no records

relating to TeleTracking's non-disclosure agreement. Ex. D at 3-4. In addition, HHS conducted an inadequate email search, producing only a fragment of one email. Ex. D at 4-5. HHS merely asserts that ASPR and ASA conducted a search, but HHS does not provide information on what databases it searched, what search terms it used, or what files it searched.

13. NPR also noted that HHS improperly redacted information under Exemptions 4 and 5. The TeleTracking contract cannot be considered a "trade secret" or "commercial" information because TeleTracking is not engaged in the production of "trade commodities." Nor is the information in the contract "confidential" — TeleTracking's own website contains a page dedicated to 16 case studies describing the company's COVID-19 work. Ex. D at 6. The deliberative process privilege would not apply because the TeleTracking contract was executed on April 10, 2020, and any discussions of TeleTracking after that would be post-decisional and disqualified from the privilege. Ex. D at 7. TeleTracking's contract was recently renewed for another year. Attached as Exhibit F is an article from the Pittsburgh Business Times disclosing the renewal. The public should be able to view the contract of a company acting as the federal government's main conduit for COVID-19 data.

14. HHS finally responded on June 29, 2021, estimating that it would require another 12 months or more to process NPR's appeal. HHS responded later that same day that it was taking another look at the appeal. Attached as Exhibit E is a copy of the Response to Appeal.

15. To date, NPR has not heard anything further from HHS.

16. As of the filing of this Complaint, over a year has elapsed since NPR made its Request to HHS, and filed its Appeal. TeleTracking has been awarded another year on its contract, making the need for transparency more relevant. Because the agency has failed to

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