



July 27, 2023

**Via Electronic Mail**

The Hon. Henry Kerner  
Office of Special Counsel  
1730 M. ST. NW #218  
Washington, D.C. 20036

**Request for Investigation: Dr. David Morens's Arbitrary and Capricious Withholding of Information Prohibited Under Section 552**

Dear Special Counsel Kerner:

America First Legal Foundation ("AFL") is a national, nonprofit organization working to promote the rule of law in the United States, prevent executive overreach, and ensure due process and equal protection for all Americans, all to promote public knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. AFL frequently files Freedom of Information Act requests and is interested in ensuring that records are properly preserved.

Under 5 U.S.C. § 1216(a)(3), we write to request that you investigate the arbitrary and capricious withholding of information prohibited under 5 U.S.C. § 552 by a federal employee named Dr. David Morens and by the National Institute of Allergy and Infectious Diseases, the National Institutes of Health, and/or the Department of Health and Human Services.<sup>1</sup> On June 29, 2023, the House Select Subcommittee on the Coronavirus Pandemic recently revealed that the Senior Scientific Advisor to the Office of the National Institutes for Allergy and Infectious Disease Director, Dr.

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<sup>1</sup> See, e.g., Letter from Reed Rubinstein, Director of Oversight, America First Legal Foundation, to Christi Grimm, Inspector General, United States Department of Health and Human Services (Mar. 29, 2023) (available at <https://bit.ly/3Ohd5EJ>); Letter from Laurence Brewer, Chief Records Officer, NARA, to Patricia Bosco, Agency Records Officer, Agency for Healthcare Research and Quality (Feb. 24, 2020), <https://bit.ly/3Zqi482>; Letter from Laurence Brewer, Chief Records Officer, NARA, to Patricia Bosco, Agency Records Officer, Agency for Healthcare Research and Quality (May 5, 2020), <https://bit.ly/3Zqi482>.

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David Morens, deliberately chose to evade 5 U.S.C. § 552 and other applicable federal records retention and transparency laws by using a private email account for official business, and by willfully and systematically destroying government records.<sup>2</sup> The evidence is that Dr. Morens stated that he “tr[ies] to always communicate on gmail because [his] NIH email is FOIA’d constantly.”<sup>3</sup> In one email, he explains that his Gmail account was “hacked” and he was forced to resume using his NIH account for sensitive matters, but he reassured his contact that he would “delete anything [he doesn’t] want to see in the New York Times.”

Consequently, it seems that Dr. Morens knowingly and willingly engaged in purposive conduct to arbitrarily and capriciously avoid disclosing information that should have been disclosed to the public under § 552. It is not clear whether the National Institute of Allergy and Infectious Disease, the National Institutes of Health, or the Department of Health and Human Services was aware of or complicit in Dr. Morens’s conduct. However, in this case, either Dr. Morens’s supervisors were aware of and complicit in his unlawful conduct, or the responsible agency failed to have appropriate institutional controls in place to prevent him from hiding the information. We note that the Department of Health and Human Services processes tens of thousands of FOIA requests each year,<sup>4</sup> yet permits its employees to use their personal email accounts to conduct official business. Unless each of the specified agencies comprehensively and routinely search employees’ personal email accounts for responsive records while holding them accountable for violating § 552 and other appropriate transparency and record preservation laws, information will necessarily be arbitrarily and capriciously withheld from America First Legal and the public. Consequently, your Office should open an investigation of this matter.

Thank you in advance for your attention to this matter.

Sincerely,

/s/ Reed D. Rubinstein  
Reed D. Rubinstein  
America First Legal Foundation

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<sup>2</sup> Letter from Rep. Brad Wenstrup, Chairman, House Select Subcomm. on the Coronavirus Pandemic, to Dr. David Morens, Senior Sci. Advisor, Nat’l Inst. of Allergy and Infectious Diseases at 2 (Jun. 29, 2023) (available at <https://bit.ly/44tRsWS>).

<sup>3</sup> *Id.*

<sup>4</sup> 2023 *Chief FOIA Officer Report HHS*, <https://bit.ly/3Kb38pR> (last visited July 24, 2023).

cc: National Archives and Records Administration, Records Management  
Oversight and Reporting Program ([UnauthorizedDisposition@nara.gov](mailto:UnauthorizedDisposition@nara.gov))  
Hon. Brad Wenstrup, Chairman, House Select Subcommittee on the  
Coronavirus Pandemic  
Hon. Paul Ruiz, Ranking Member, House Select Subcommittee on the  
Coronavirus Pandemic  
Hon. James Comer, Chairman, House Committee on Oversight and  
Accountability  
Hon. Jamie Raskin, Ranking Member, House Committee on Oversight and  
Accountability