



June 18, 2024

The Honorable Hampton Dellinger
Special Counsel
Office of the Special Counsel
1730 M Street, NW, Suite 218
Washington, DC 20036

Request for Investigation: The National Institutes of Allergy and Infectious Disease’s Arbitrary and Capricious Withholding of Information Prohibited Under Section 552.

Dear Mr. Dellinger,

America First Legal Foundation (hereinafter “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 (“FOIA”) requests and is interested in ensuring that all federal records are properly preserved as required under federal law.

We write to request that you investigate the arbitrary and capricious withholding of information prohibited under 5 U.S.C. § 552 by the National Institutes of Allergy and Infectious Disease (hereinafter “NIAID”), and potentially by Dr. Anthony Fauci, the former Director of NIAID.¹

We previously wrote to your office regarding a federal employee named Dr. David Morens, who served as Senior Scientific Advisor to Dr. Anthony Fauci.² Dr. Morens stated in an email that he “tr[ies] to always communicate on gmail [*sic*] because [his] NIH email is FOIA’d constantly,”³ implying that this would allow him to communicate in secret. In another email, he explains that his Gmail account was “hacked” and he was forced to resume using his NIH account for sensitive matters,

¹ 5 U.S.C. § 1216(a)(3).

² Letter from Reed D. Rubinstein, Director of Investigations, America First Legal Foundation, to Henry Kerner, Special Counsel, Office of the Special Couns. (Jul. 27, 2023), (available at <https://bit.ly/3KKNYXY>).

³ 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>).

but he reassured his contact that he would “delete anything [he doesn’t] want to see in the New York Times.”⁴

At the time AFL brought Dr. Morens’ conduct to the attention of your office, it was not clear whether the misconduct went beyond Dr. Morens and included other agency leaders and was, therefore, impacting the conduct of the agency as a whole or whether Dr. Morens was acting alone.⁵ Since then, it has become abundantly clear that Dr. Fauci and other high level agency staff were involved in the same or substantially similar misconduct, the sole purpose of which was to bypass federal law.

Specifically, the House Select Subcommittee on the Coronavirus Pandemic (hereinafter “the Subcommittee”) obtained additional emails from Dr. Morens that implicate Dr. Fauci in the same type of serious wrongdoing.⁶ On April 21, 2021, Dr. Morens wrote, “PS, i [sic] forgot to say there is no worry about FOIAs. I can either send stuff to Tony [Fauci] on his private gmail [sic], or hand it to him at work or at his house. He is too smart to let colleagues send him stuff that could cause trouble.” On May 13, 2021, Dr. Morens wrote that he had connected a reporter to Dr. Fauci via a “secret back channel.”⁷

Other documents revealed that officials in the NIAID FOIA office taught Dr. Morens how to destroy records before they were captured by a FOIA search, thus defeating public oversight of the agency.⁸ When Dr. Morens testified before the committee, he said he “may have” sent documents related to COVID-19 to Dr. Fauci’s personal email account.⁹

This pattern of consciously evading federal law extended beyond Dr. Morens and to other members of Dr. Fauci’s inner circle. Dr. Fauci’s chief of staff, Greg Folkers, also sought to evade the FOIA, though he did so by intentionally misspelling key words that were likely to be the subject of FOIA requests, to ensure his emails would be missed in searches and thus not disclosed. For example, Mr. Folkers chose to render the name “EcoHealth” as “Ec~Health” to avoid FOIA.

⁴ *Id.*

⁵ Letter from Reed D. Rubinstein, Director of Investigations, America First Legal Foundation, to Henry Kerner, Special Counsel, Office of the Special Couns. (Jul. 27, 2023), (available at <https://bit.ly/3KKNYXY>).

⁶ Letter from Rep. Brad Wenstrup, Chairman, House Select Subcomm. on the Coronavirus Pandemic, to Dr. Anthony Fauci, Director of the Nat’l Inst. of Allergy and Infectious Diseases (May 29, 2024).

⁷ *Id.*

⁸ Press Release, House Select Subcomm. on the Coronavirus Pandemic, New COVID Select Memo Details Allegations of Wrongdoing and Illegal Activity by Dr. Fauci’s Senior Scientific Advisor (May 22, 2024) (available at <https://bit.ly/3Rmwfdq>).

⁹ *Id.*

The revelations that Dr. Fauci’s senior scientific advisor, his chief of staff, and the FOIA office at the agency Dr. Fauci led were all engaged in systematically avoiding FOIA, and that at least one of those individuals explicitly implicated Dr. Fauci in this pattern, led the Subcommittee to call Dr. Fauci to testify on June 3, 2024. Dr. Fauci could not recall conducting official business via his personal email account but stopped short of a full denial.¹⁰ While it does not seem credible that Dr. Fauci was personally unaware of the wrongdoing by his inner circle and his agency FOIA office, this is ultimately irrelevant. This pattern justifies an immediate investigation into the agency itself and its record-handling practices by your office.

As you surely know, your office has the jurisdiction to investigate under 5 U.S.C. § 1216(a). This jurisdiction does not require that a court first find that any agency employee acted improperly.¹¹ In *America First Legal Foundation v. Kerner*, the Court agreed with this conclusion, finding that “the Special Counsel does have the legal authority to initiate an investigation under § 1216(a) based on an alleged arbitrary or capricious withholding of information under FOIA.”¹²

That same opinion found that the Court lacked authority to compel the Special Counsel to open such an investigation, but this was based on an error of statutory interpretation (finding that the word “shall” in 1216(a) is permissive and not mandatory).¹³ This decision is currently on appeal at the D.C. Circuit.¹⁴ 5 U.S.C. 1216(a)(3) provides that “In addition to the authority otherwise provided in this chapter, the Special Counsel shall, except as provided in subsection (b), conduct an investigation of any allegation concerning— . . . (3) arbitrary or capricious withholding of information prohibited under section 552.” However, whether courts have the power to compel the OSC to investigate is beside the point; the OSC has the authority to investigate under §1216(a) and should do so to remedy potentially serious misconduct.

Unless your office investigates and holds those accountable who arbitrarily and capriciously withhold records subject to § 552 and other appropriate transparency and record preservation laws, information will necessarily be arbitrarily and capriciously withheld from America First Legal and the public. To remedy the situation, and as required by statute, your office should immediately open an

¹⁰ Press Release, House Select Subcomm. on the Coronavirus Pandemic, Chairman Wenstrup Opens Hearing with Dr. Anthony Fauci (Jun. 3, 2024) (available at <https://bit.ly/3XFvU9J>).

¹¹ See Memorandum Opinion, *America First Legal Foundation v. Kerner*, no. 22-cv-3576 (D.D.C. Sept. 29, 2023), ECF. No. 17.

¹² See *Id.* at *6.

¹³ See *Id.* at *10.

¹⁴ See Memorandum Opinion, *America First Legal Foundation v. Kerner*, no. 22-cv-3576 (D.D.C. Sept. 29, 2023), ECF. No. 17. (appeal filed but awaiting docketing).

investigation into Dr. Anthony Fauci, the NIAID, and the record preservation process at the NIH and its component agencies broadly.

Thank you in advance for your attention to this matter, and please do not hesitate to reach out to us if you have any additional questions about this matter.

Sincerely,

/s Jacob Meckler

Counsel

America First Legal Foundation

CC: 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