No. 23-965

IN THE

Supreme Court of the United States

JIN-PYONG PETER YIM,
PETITIONER

V.

NATIONAL INSTITUTES OF HEALTH,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When the National Institutes of Health ("NIH") failed to respond to a record request within 20 business days, as required by statute, Petitioner ("Yim") filed suit. Subsequently, NIH responded by providing a website. When asked to to be more specific, the agency provided a single record but was unable to confirm that the record was responsive to the request.

The agency then produced a declaration attesting to the existence of the requested record but the declaration lacked a compliant endorsement. Thus, the agency left uncertainty as to the existence of the requested record. The court is therefore asked:

1. Must an agency specify which non-exempt records are responsive to a request?

2. Can an agency respond to a record request based on "information and belief"?

3. Must an agency confirm or deny the existence of a non-exempt record?

LIST OF PROCEEDINGS

United States Court of Appeals for the Third Circuit
No. 23-1601
Jin-Pyong Peter Yim, *Appellant* v. National Institutes of Health, *Appellee*
Date of Final Opinion: October 13, 2023
Date of Denial of Petition for En Banc and for Panel Rehearing: December 12, 2023

United States District Court, District of New Jersey
Civil Action No. 21-07031
Jin-Pyong Peter Yim, *Plaintiff* v. National Institutes of Health, *Defendant*
Date of Final Opinion: March 29, 2023

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jin-Pyong Peter Yim respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Opinion of the United States District Court for the District of New Jersey ("Opinion of the District Court") granting the motion for summary judgement is unreported and is reproduced in the appendix. App. *infra* pp. 13a-27a. The Opinion of the United States Court of Appeals for the Third Circuit ("Opinion of the Circuit Court") affirming the district court's decision is unreported and is reproduced in the appendix. App. *infra* pp. 3a-10a.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 2023. A timely filed petition for rehearing was denied on December 12, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved:

- **28 U.S.C. § 1254**
  Courts of appeals; certiorari; certified questions
  Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ...

- **5 U.S.C. § 552(a)**
  Public information; agency rules, opinions, orders,

records, and proceedings
(a) Each agency shall make available to the public information as follows. ...

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section. ...

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall— (i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person
(I) such determination and the reasons therefor; ...

(8)(A) An agency shall –
(i) withhold information under this section only if –
(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or (II) disclosure is prohibited by law; ...

- **28 U.S.C. § 1746**
  Unsworn declarations under penalty of perjury
  Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form: ...

  (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".

STATEMENT OF THE CASE

I. Background

On January 14, 2021, the National Institutes of Health ("NIH") published an update ("January 2021 Update") to the *COVID-19 Treatment Guidelines* ("Guidelines"). In the update, NIH provided a recommendation ("January 2021 Recommendation") on the use of the drug ivermectin. The recommendation begins:

> The COVID-19 Treatment Guidelines Panel (the Panel) has determined that

> currently there are insufficient data to recommend either for or against the use of ivermectin for the treatment of COVID-19.

COVID-19 Treatment Guidelines Panel, *Coronavirus Disease (COVID-19) Treatment Guidelines*, National Institutes of Health (January 14, 2021), 6.

The statement was accompanied by an explanation ("Guidelines Policy") for how the NIH develops the guideline:

> New Guidelines sections and recommendations are reviewed and voted on by the voting members of the Panel. To be included in the Guidelines, a recommendation must be endorsed by a majority of Panel members. Updates to existing sections that do not affect the rated recommendations are approved by Panel co-chairs without a Panel vote.

Id. at 19.

The Guidelines Policy implies that the majority of the Panel members endorsed the January 2021 Recommendation.[1] However, to clarify, Yim submitted a request ("Request") to the NIH under 5 U.S.C. § 552 ("FOIA"). The Request was received by NIH on January 29, 2021. .

Since FOIA does not require for the federal agencies to respond to questions, Yim posed the question of

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[1]The January 2021 Recommendation was an update to the August 27, 2020 recommendation on ivermectin ("January 2020 Recommendation"). Also, the January 2020 Recommendation was "rated". Thus, the voting policy implies that the January 2021 Recommendation was endorsed by a majority of the Panel members.

whether a vote was held on the January 2021 Recommendation as a record request:

> All updates to the Coronavirus Disease 2019 (COVID-19) Treatment Guidelines that were endorsed by a vote of the Panel. (Date Range for Record Search: From 01/01/2021 To 01/28/2021)

App. *infra* p. 5a.

NIH did not respond to the Request within 20 business days nor could NIH provide an expected date for responding to the Request. The deadline for an agency to respond is inflexible by 5 U.S.C. § 552(a)(6)(A)(i).

II. Procedural history

On the grounds that NIH failed to respond to the Request in a timely manner as required by statute, Yim filed a complaint ("Complaint") on March 29, 2021 in the United Stated District Court for the District of New Jersey ("District Court").

On April 23, 2021 the NIH FOIA officer ("FOIA Officer") provided a letter ("April 23 Letter") in response to the Request containing the following statement:

> All approved updates to the guidelines are posted online and can be found at https://www.covid19treatmentguidelines.nih.gov/whats-new/. The documents posted on this website respond to your request in full.

App. *infra* p. 40a.

The April 23 Letter appears to provide the January 2021 Recommendation.[2] Nevertheless, on May 6, 2021, Yim asked for the NIH to produce the specific record that is responsive to the Request.

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[2]The January 2021 Recommendation is currently located on the referenced website as it was when the letter was sent.

On June 30, 2021, NIH filed an answer to the Complaint. On July 6, 2021, the District Court ordered the scheduling of a telephone conference. The conference was held on August 25, 2021. Then, on August 26, 2021 the District Court ordered "parties to confer to attempt resolution to this dispute" and set the motion schedule.

On August 27, 2021, the NIH provided a hyperlink to a record containing the January 2021 Recommendation. The response was in the form of an email ("August 27 Email") from the NIH attorney ("NIH Attorney") with the following statement ("August 27 Statement"):

> Please be advised that the link you supplied, to wit https://files.covid19treatmentguidelines.nih.gov/guidelines/archive/statement-on-ivermectin-01-14-2021.pdf, is a valid NIH link that directs you to the document responsive to your FOIA request (#55822).

App. *infra* p. 37a.

Yim agreed to accept that August 27 Statement if it were provided in the format of a formal NIH FOIA response letter.

The FOIA Officer then provided a second letter ("August 31 Letter") dated August 31, 2021 and sent on September 1, 2021. However, the letter did not include the August 27 Statement. The corresponding statement in the August 31 Letter is shown below with emphasis added to the text in the August 31 Letter not found in the August 27 Email:

> Please be advised that https://files.covid19treatmentguidelines.nih.gov/guidelines/archive/statement-on-ivermectin-01-14-2021.pdf, is a valid NIH link that directs you to the document responsive to your FOIA re-

> quest **date range from 1/01/2021 to 0/28/2021** (#55822).

App. *infra* p. 36a.

On September 24, 2021, NIH filed a motion for summary judgement ("Motion") claiming that the complaint was mooted by its responses. The Motion was supported by the Declaration of Gorka Garcia-Malene ("Declaration") who is the NIH FOIA Officer. The Declaration confirmed that NIH produced the requested records:

> On April 23, 2021, NIH finalized the search of the requested records, and determined that they had been posted for public inspection on the NIH official government website. NIH sent the Plaintiff the link to access all responsive documents ...

App. *infra* pp. 32a-33a. ¶ 13.

However, the Declaration is non-compliant with 28 U.S.C. §1746 . In particular, the endorsement statement required by statute was not included. Instead, the Declaration included the following statement:

> I declare under penalty of perjury that the foregoing **to** true and correct **, to the best of my information and belief**. 28 U.S.C. § 1746. Executed this 16th day of September, 2021

App. *infra* p. 34a.

Emphasis is added to the language of the Declaration that is not present in the language required by statute. 28 U.S.C. §1746.. Moreover, as written, the statement is grammatically meaningless.

Yim opposed the motion on October 13, 2021. On March 29, 2023, the court granted the Motion. The Opinion of the District Court states:

> In sum, because Defendant has provided affidavits supporting its assertion that it conducted a reasonable, adequate and good faith search, and it has released all nonexempt material, while Plaintiff has not challenged the adequacy of the search or the documents produced, the Court concludes that there is no genuine issue of material fact as to NIH having properly discharged its obligation under FOIA.

App. *infra* p. 27a.

Subsequently, Yim appealed the decision to the 3rd Circuit Court of Appeals ("Circuit Court"). The notice of appeal was filed on on April 1, 2023 in a timely manner. On October 13, 2023, the Circuit Court affirmed the order of the district court to order summary judgement. The Opinion of the Circuit Court states:

> Ultimately, Yim has produced no evidence suggesting that the agency's search for records was unreasonable, or that the records it produced are unresponsive to his request.

App. *infra* p. 10a.

Subsequently, Yim petitioned the Circuit Court for panel rehearing or rehearing en banc. The petition was filed on November 24, 2023 and in a timely manner. On December 12, 2023 the court ordered the petition denied.

REASONS FOR GRANTING THE PETITION

The facts in this case are simple and overwhelmingly favor Petitioner, Yim. The responsible NIH employee, the FOIA Officer, provided three communications in response to the record request; the April 23 Letter, the August 31 Letter and the Declaration. All the responses were obviously evasive.

More importantly, none of the NIH responses to the record request were legally adequate. Since the District Court and the Circuit Court cited the Declaration and April 23 Letter, respectively, in reaching their decisions, the legal shortcomings of those responses are discussed below.

Briefly, in the first response to the Request, NIH was unable to specify which record was responsive. Instead, the agency provided a website via the April 23 Letter. App. *infra* pp. 39a-40a. Then, in the August 31 Letter, the NIH provided a single record but was unable to confirm that that the record was responsive to the request. App. *infra* pp. 35a-36a. Finally, the NIH produced the Declaration that confirmed that the requested record exists but the endorsement was not compliant with 28 U.S.C. §1746..

The only real substantive legal question is whether an agency must confirm or deny the existence of a non-exempt record. The Circuit Court appears skeptical of that requirement whereas other courts have found that there is such a requirement. That is issue is discussed briefly below.

I. The court should decide if an agency must specify which non-exempt records are responsive to a request.

The Opinion of the Circuit Court implies that the Request was satisfied by the April 23 Letter that was transmitted as an attachment to an email:

> [W]hen NIH responded to the request by email on April 23, it stated that the information he had requested not only existed but was publicly available on the NIH website. The email included a link to the agency's 2021 ivermectin recommendation.

App. *infra* p. 6a.

However, the Circuit Court ignores the statutory requirement that the agency provide records in a specified form and format. 5 U.S.C. § 552(a)(3).

In this case, In the April 23 Letter, NIH provided the requested records in the form of a website while Yim specified that NIH provide the form or format of a specific record.

II. The court should decide if an agency can respond to a record request based on "information and belief".

The Opinion of the District Court implies that NIH confirmed the existence of the requested record in the Declaration:

> In this case, in processing Plaintiff's FOIA request, Defendant determined that the records Plaintiff requested were publicly available. Pursuant to the standard review process described in the Garcia-Malene Declaration, Defendant then informed Plaintiff that his requested records were available publicly on the NIH website and sent him the NIH Link to access the responsive records.

App. *infra* p. 26a.

However, the Declaration is non-compliant with 28 U.S.C. §1746.. In particular, the declaration endorsement statement is based on the "information and belief" of the FOIA Officer. App. *infra* p. 34a.

The court should decide whether that endorsement is sufficient for the response of an agency to a record request.

III. The court should decide if an agency must confirm or deny the existence of a non-exempt record.

When an agency cannot comply with a request, it is required to notify the person making the request of such a determination. 5 U.S.C. § 552(a)(6)(A)(i)(I).

In contrast, the Opinion of the Circuit Court does not recognize a statutory requirement that agencies confirm or deny the existence of the record:

> To meet its disclosure obligations under the FOIA, an agency must (1) conduct a reasonable search for responsive records and (2) produce the non-exempt records that it finds.

App. *infra* p. 7a.

This conflicts with rulings in a prior case:

> The agency has a duty to notify appellant "of the right . . . to appeal to the head of the agency," in cases where no records are found in its response as well as those in which specific records are denied. 5 U.S.C. § 552(a)(6)(A)(i).

Oglesby v. United States Dep't of the Army, 920 F.2d 57 (D.C. Cir. 1990).

Exceptions to the requirement for providing the "no records" response are recognized, as below, but those exceptions are not present in this case.

> We now join our sister Circuits in holding that "an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a[] FOIA exception.

Wilner v. Nat'l Sec. Agency, 592 F.3d 60 (2d Cir. 2009).

IV. The case is exceptional in importance.

The decision of whether to treat COVID-19 prior to hospitalization; so-called "early treatment", was one of the most contentious of the pandemic. This debate was particularly heated with respect to the drug ivermectin. One concern over the use of this drug, apart from questions of safety and efficacy, was that promotion of ivermectin might impact vaccine uptake and ultimately lead to increased mortality:

> To justify rejecting effective vaccines, you need to both denigrate the vaccines' efficacy and propose an alternative. That was the role ivermectin played: It was hyped as something you could take to feel better in the event you caught the virus. Then you get 'natural immunity' and you're covered as well as if you had been vaccinated — if you lived.
>
> The challenge, of course, is that many people didn't live. The Kaiser Family Foundation estimates that about 163,000 people died during the delta surge because they weren't vaccinated.

Philip Bump, *Ivermectin is the signature example of politics trumping health*, Washington Post (March 31, 2022).

Such comments were supported by the January 2021 Recommendation.

Americans deserve to know how the January 2021 Recommendation was developed. In particular, the NIH must properly respond to the record request allowing the public to know whether the January 2021 Recommendation was endorsed by a vote of the Panel.

CONCLUSION

This Court should, for the reasons given, grant a Writ of Certiorari and consider this case on its merits.

Respectfully submitted,
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February 28, 2024

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