APPENDIX TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1601

JIN-PYONG PETER YIM,
Appellant
v.
NATIONAL INSTITUTES OF HEALTH

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 3:21-cv-07031)
District Judge: Honorable Zahid N. Quraishi

Submitted Pursuant to Third Circuit LAR 34.1(a)
September 26, 2023
Before: HARDIMAN, PORTER, and FREEMAN,
Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on September 26, 2023. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the order of the District Court entered March 29, 2023 be and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:
s/ Patricia S. Dodszuweit
Clerk
Dated: October 13, 2023

APPENDIX B

Not Precedential
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1601

JIN-PYONG PETER YIM,
Appellant
v.
NATIONAL INSTITUTES OF HEALTH

On Appeal from the United States District Court
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Submitted Pursuant to Third Circuit LAR 34.1(a)
September 26, 2023
Before: HARDIMAN, PORTER, and FREEMAN,
Circuit Judges
(Opinion filed: October 13, 2023)

OPINION*

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*This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PER CURIAM

Jin-Pyong Peter Yim, an independent journalist, filed a Freedom of Information Act lawsuit against the National Institutes of Health. NIH issues non-binding guidelines for treating patients with COVID-19, with the approval of a panel of experts. Yim believes that NIH issued a guideline on the use of ivermectin, an antiparasitic drug, without an approving vote by the panel. His FOIA suit is aimed at getting NIH to admit that it did so. The District Court held that NIH's response to Yim's FOIA request was satisfactory and granted summary judgment to NIH. We agree and will affirm.

I.

In response to the COVID-19 pandemic, the National Institutes of Health created the COVID-19 Treatment Guidelines, a set of non-binding recommendations for clinicians treating patients with COVID-19. NIH develops the guidelines through its COVID-19 Treatment Guidelines Panel, a panel of experts appointed by the agency. "To be included in the Guidelines, a recommendation statement must be endorsed by a majority of [the Panel's] voting members; this applies to recommendations for and against treatments and cases where there is insufficient evidence to recommend either for or against treatments. Updates to existing sections that do not affect the rated recommendations are approved by Panel co-chairs without a Panel vote." [1]

On January 14, 2021, NIH released a recommen-

[1] *COVID 19 Treatment Guidelines: Guidelines Development*, National Institutes of Health (last updated December 1, 2022), https://www.covid19treatmentguidelines.nih.gov/about-the-guidelines/guidelinesdevelopment/

dation statement about the antiparasitic drug ivermectin.[2] The statement explained the reasoning behind the recommendation, briefly summarized the then-existing clinical data, and concluded: "[t]he 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." [3,4]

Independent journalist Jin-Pyong Peter Yim is convinced that NIH added this 2021 ivermectin recommendation to the Guidelines without the required vote of the Panel. To test his theory, he filed a request for records under the Freedom of Information Act. His request sought "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 01/01/2012 to 01/28/2021)". The only update to NIH's guidelines during that time was the recommendation on ivermectin. So the ivermectin recommendation would be responsive only if it had received a Panel vote.

NIH missed its statutory deadline to answer Yim's request, and Yim filed a private FOIA lawsuit on March

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[2]*The COVID-19 Treatment Guidelines Panel's Statement on the Use of Ivermectin for the Treatment of COVID-19*, National Institutes of Health (last updated January 14, 2021), https://files.covid19treatmentguidelines.nih.gov/guidelines/archive/statement-onivermectin-01-14-2021.pdf

[3]Id.

[4]NIH's current ivermectin Guideline states that "The Panel recommends against the use of ivermectin for the treatment of COVID-19". *COVID 19 Treatment Guidelines: Ivermectin*, National Institutes of Health (last updated March 6, 2023), https://files.covid19treatmentguidelines.nih.gov/guidelines/section/section_94.pdf

31, 2021 to compel the agency to respond. Yim apparently expected NIH to inform him that it had no responsive records, thereby tacitly admitting that its ivermectin recommendation was made without a Panel vote. But to Yim's consternation, when 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. NIH also offered to print out and send Yim the recommendation if he was unable to access it online.

Yim protested, responding by email that "NIH must confirm that the record I requested does not exist." The Assistant U.S. Attorney representing NIH then emailed Yim: she reiterated that the information Yim sought in his FOIA request did in fact exist and was publicly available, explained again where to find it, and offered to help him access it if needed. Undeterred, Yim replied that "NIH's response is not acceptable. I insist that NIH confirm that the record that I requested does not exist." The AUSA again assured him that it did and offered to help him access it. But Yim stated, "I remain convinced that my case against NIH is strong."

Yim and the AUSA continued to communicate but were unable to resolve the matter to Yim's satisfaction. Finally, NIH moved for summary judgment. The District Court found that NIH had conducted a reasonable and good-faith search for records responsive to Yim's FOIA request and that it had produced all non-exempt records it found. So the District Court granted summary judgment to NIH. Yim appeals.[5]

[5]We have jurisdiction under 28 U.S.C. § 1291.

II.

We review a district court's summary judgment order in a FOIA case using a two tiered process. *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178, 182 (3d Cir. 2007). First, we decide "whether the district court had an adequate factual basis for its determination." *Id.*, quoting *McDonnell v. United States*, 4 F.3d 1227, 1242 (3d Cir.1993) (citations omitted). If it did, we "must then decide whether that determination was clearly erroneous." *Abdelfattah*, 488 F.3d at 182 (citations omitted). Under this standard, we will reverse only "if the findings are unsupported by substantial evidence, lack adequate evidentiary support in the record, are against the clear weight of the evidence or where the district court has misapprehended the weight of the evidence." *Id.* (quoting *Lame v. U.S. Dep't of Justice*, 767 F.2d 66, 70 (3d Cir.1985)).

III.

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. *See Abdelfattah*, 488 F.3d 178, 182–86. Yim does not contend that NIH is withholding responsive records; he disputes whether the records he received are in fact responsive to his FOIA request. So our first task is to decide whether the District Court had an adequate factual basis for its determination that NIH's search for responsive records was reasonable.

For an agency's search to be reasonable, the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested. *Oglesby v. U.S. Dep't of Army*, 920 F.2d

57, 68 (D.C. Cir. 1990).6 [6] Here, NIH has searched for and produced the only record that could possibly be responsive to Yim's request: the 2021 recommendation statement about ivermectin. If the statement was endorsed by a vote of the Guidelines Panel, it is responsive to Yim's request.

We conclude that the NIH FOIA Officer had sufficient reason to believe that the ivermectin statement was responsive to Yim's request. On its face, the statement appears responsive because it purports to be a recommendation of the COVID-19 Treatment Guidelines Panel. See note 2, above. And because it was a new recommendation finding insufficient evidence for or against a particular treatment, NIH procedures would have required that the ivermectin recommendation be subject to a majority vote of the panel. See note 1, above. Under these circumstances—and without any evidence provided by

Yim to suggest otherwise—the NIH FOIA Officer was reasonable in believing that the record was what it purported to be, and in assuming that NIH had followed its own procedures in creating it. So the District Court had an adequate factual basis for

[6]Agencies typically meet their burden by submitting affidavits or declarations describing how the search was conducted—such as the locations that were searched and the search terms that were used—and affirming that all files likely to contain responsive materials were searched. *Abdelfattah*, 488 F.3d at 182. NIH's declaration does not contain such details. See NIH Supp. App'x, ECF. No. 20 at SA 038–042. But the parties agree that the only record that might even possibly be responsive to Yim's request is the one that NIH searched for and produced: the 2021 recommendation statement about ivermectin. So the lack of these details in NIH's declaration does not bear on the reasonableness of its search.

its determination that NIH's search for records was reasonable.

Because the District Court had an adequate factual basis for its determination, we will disturb that determination only if Yim has shown that it was clearly erroneous. *Abdelfattah*, 488 F.3d at 182. He has not.

First, Yim argues that the District Court erred "because there is uncertainty as to the existence of the Requested Record." ECF No. 10 at 12. As evidence of this, he states that (1) at least one email from NIH contained an incorrect hyperlink to the 2021 ivermectin recommendation; (2) a link to a website is not an acceptable form of producing a record because a website's contents can change; and (3) there are slight differences in wording between the cover letters and emails that NIH sent to him—such as a cover letter that notes the date range of his FOIA request and an email that does not. See id. at 12–15. These arguments are unavailing. Yim admits that on September 1, 2021, NIH sent him the record he requested, in the form that he had requested it. Joint App'x, ECF No. 8 at JA 54 ("NIH provided the record in the format requested by Yim"). Under the FOIA, that is all that the agency need do. Second, Yim argues that the trivial differences between NIH's cover letters and emails constitute a genuine issue of material fact. ECF No. 10 at 15–16. As we have just explained, they do not. Finally, Yim argues that the District Court erred when it ruled that its authority under the FOIA was limited to requiring an agency to produce records. ECF No. 10 at 16–17. Yim appears to argue that a court can also compel an agency to confirm to a FOIA requester that it has no records responsive to a FOIA request. We need not decide that issue because NIH has produced records in response to Yim's request.

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. His underlying belief—that NIH is deceiving the public about whether its 2021 ivermectin recommendation was approved by its panel of experts—is based on speculation, not evidence. Under the Freedom of Information Act, more than speculation is required.

IV.

For these reasons, we will affirm the judgment of the District Court.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JIN-PYONG PETER YIM,
Plaintiff,
v.
NATIONAL INSTITUTES OF HEALTH,
Defendant.

Civil Action No. 21-07031 (ZNQ) (LHG)

ORDER

QURAISHI, District Judge

THIS MATTER having been opened to the Court upon a Motion by Defendant National Institutes of Health ("Defendant"), pursuant to Rule 56 of the Federal Rules of Civil Procedure, for Summary Judgment on the Complaint of pro se Plaintiff Jin-Pyong Peter Yim ("Plaintiff"). (ECF No. 18, 19.) For the reasons set forth in the accompanying Opinion and for good cause shown,

IT IS on this 29th day of March 2023, ORDERED that Defendant's Motion for Summary Judgment is GRANTED; and it is further ORDERED that JUDGMENT is hereby entered in favor of Defendant; and it is further ORDERED that the Clerk's Office is hereby instructed to mark this matter CLOSED.

/s/ Zahid N. Quraishi
HON. ZAHID N. QURAISHI
UNITED STATES DISTRICT JUDGE

APPENDIX D

Not for Publication
UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JIN-PYONG PETER YIM,
Plaintiff,
v.
NATIONAL INSTITUTES OF HEALTH,
Defendant.

Civil Action No. 21-07031 (ZNQ) (LHG)
OPINION

QURAISHI, District Judge

THIS MATTER comes before the Court upon a Motion for Summary Judgment filed by Defendant National Institutes of Health ("Defendant" or "NIH") pursuant to Rule 56 of the Federal Rules of Civil Procedure (ECF Nos. 18, 19). Defendant filed a Memorandum of Law in Support of the Motion ("Moving Br.", ECF No. 18), a Statement of Material Facts ("Def. SMF", ECF No. 19). Plaintiff Jin-Pyong Peter Yim ("Plaintiff" or "Yim") filed a Brief in Opposition to the Motion ("Opp. Br.", ECF No. 24), along with a Response to Defendant's Statement of Material Facts ("Plf. SMF", ECF No. 24-1). Defendant replied. (ECF No. 27.)

The Court has carefully considered the parties' submissions and decides the matter without oral ar-

gument pursuant to Federal Rule of Civil Procedure 78 and Local Civil Rule 78.1. For the reasons set forth below, the Court will GRANT Defendant's Motion for Summary Judgment.

I. BACKGROUND AND PROCEDURAL HISTORY

This matter concerns pro se Plaintiff's request to NIH pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for certain documents and records relating to NIH's COVID-19 treatment guidelines and recommendations. (Def. SMF ¶ 1.) Specifically, on or about January 28, 2021, Plaintiff requested: "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)". (Id. ¶ 2.) Approximately two months later, Plaintiff filed his FOIA complaint on March 31, 2021. (Complaint ("Cmpl."), ECF No. 1.)

On April 23, 2021, Defendant determined that Plaintiff's requested records were made public and were posted on the NIH official government website. (Def. SMF ¶ 6; Declaration of Gorka Garcia-Malene ("Garcia-Malene Decl."), Ex. 4, ECF No. 20.) During the requested time period, the only update to the NIH's Guidelines concerned the drug ivermectin, which Defendant published on January 14, 2021, on its website. [1](Cmpl. ¶ 22; Answer ¶ 22, ECF No. 9; Declaration of Jin-Pyong Peter Yim ("Yim Decl.") ¶ 3, ECF No. 24-3.) The parties' attempts to resolve this matter through

[1]The COVID-19 Treatment Guidelines Panel's Statement on the Use of Ivermectin for the Treatment of COVID-19 (Jan. 14, 2021), https://files.covid19treatmentguidelines.nih.gov/guidelines/archive/statement-on-ivermectin-01-14-2021.pdf ("NIH Link".)

email correspondence during this time were unsuccessful. (See Garcia-Malene Decl., Ex. 6; Yim Decl., Exs. A, B, C, ECF Nos. 24-4, 24-5, 24-6; Defendant's Status Update Letter dated September 8, 2021 ("Def. Ltr."), Exs. A, B, C, ECF Nos. 16-1, 16-3, 16-5.)

On May 10, 2021, the Court denied Defendant's request for an expedited status conference to determine whether the NIH had provided Plaintiff with documents responsive to his request and thereby mooted the matter. (ECF Nos. 5, 7.) Pursuant to a status conference held before the Court on August 25, 2021, the Magistrate Judge ordered the parties to confer to attempt to resolve their dispute. (ECF Nos. 11, 12, 13.)

Following the status conference, on August 26, 2021, Defendant contacted Plaintiff via email asking him to supply the exact web link he would like the NIH to certify as the responsive record to his FOIA request. (Def. SMF ¶ 18; Def. Ltr., Ex. D, ECF No. 16-6.) Plaintiff replied that the link to the specific record that would be responsive to the FOIA request was the NIH Link. (Def. Ltr., Ex. E, ECF No. 16-7.) In response, on August 27, 2021, Defendant stated via email the following:

> Please be advised that the link you supplied, to wit [NIH Link], is a valid NIH link that directs you to the document responsive to your FOIA request (55822). As you will recall, on or about May 5, 2021, the NIH supplied you with the link to the archive tab and with specific directions regarding how to find the exact document you requested. It appears you were able to locate the publicly available document with those directions.

(Def. Ltr., Ex. F, ECF No. 16-8; Yim Decl., Ex. D, ECF No. 24-7.)

Yim replied on August 27, 2021, that he wanted "this change to be reflected in a formal NIH FOIA response letter." (Def. SMF ¶ 22; Def. Ltr., Ex. G, ECF No. 16-10.) Following Defendant's request for the exact language which Plaintiff would like included in NIH's response letter, Plaintiff replied: "[t]he language from your previous email is fine. I am interested to know if an NIH employee is willing to sign the letter." (Def. SMF ¶¶ 23, 24; Def. Ltr., Ex. I, ECF No. 16-12.)

On September 1, 2021, Defendant transmitted to Plaintiff a revised letter dated August 31, 2021, from NIH regarding his FOIA request. (Def. Ltr., Ex. J, ECF No. 16-13; Yim Decl. ¶ 22.) The letter was signed by Gorka Garcia-Malene, FOIA Officer for NIH and contained the following language:

> Please be advised that [NIH Link], is a valid NIH link that directs you to the document responsive to your FOIA request *date range from 1/01/2021 to 0/28/2021* (55822). As you will recall, on or about May 5, 2021, the NIH supplied you with the link to the archive tab and with specific directions regarding how to find the exact document you requested. It appears you were able to locate the publicly available document with those directions.

(Def. Ltr., Ex. J-1, ECF No. 16-14; Yim Decl., Ex. E, ECF No. 24-8) (emphasis added.)

On September 2, 2021, Plaintiff submitted a "status update" letter to this Court stating that he made a settlement offer to Defendant but "Defendant has not agreed to that offer." (Plaintiff's Status Update

Letter dated September 2, 2021 ("Plf. Ltr."), ECF No. 14.) Specifically, Plaintiff wrote that he would accept, as Defendant's FOIA response, Defendant's statement on August 27, 2021, confirming that the NIH Link directed him to documents responsive to his request "provided that an employee of the NIH signs a document with that statement." (Id.) The instant motion ensued.

II. LEGAL STANDARD

FOIA cases are typically adjudicated by summary judgment. *Manna v. United States Dep't of Justice*, 832 F. Supp. 866, 870 (D.N.J. 1993), *aff'd*, 51 F.3d 1158 (3d Cir. 1995). A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A material fact raises a "genuine" dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Williams v. Borough of W. Chester, 891 F.2d 458, 459 (3d Cir. 1989) (quoting *Anderson*, 477 U.S. at 248).

"In evaluating the evidence, the Court must consider all facts and their logical inferences in the light most favorable to the non-moving party." *Rhodes v. Marix Servicing, LLC*, 302 F. Supp. 3d 656, 661 (D.N.J. 2018) (citing *Curley v. Klem*, 298 F.3d 271, 276–77 (3d Cir. 2002)). "While the moving party bears the initial burden of proving an absence of a genuine dispute of material fact, meeting this obligation shifts the burden to the non-moving party to 'set forth specific facts

showing that there is a genuine [dispute] for trial.'" Id. (quoting Anderson, 477 U.S. at 250). "Unsupported allegations, subjective beliefs, or argument alone . . . cannot forestall summary judgment." *Read v. Profeta*, 397 F. Supp. 3d 597, 625 (D.N.J. 2019). "Thus, if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, . . . there can be no genuine issue of material fact." Id. (quoting *Katz v. Aetna Cas. & Sur. Co.*, 972 F.2d 53, 55 (3d Cir. 1992) (internal quotations omitted)). "In considering the motion, the Court 'does not resolve factual disputes or make credibility determinations.'" *Rhodes*, 302 F. Supp. 3d at 661 (quoting *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1127 (3d Cir. 1995)).

In the case of pro se litigants, courts have an obligation to construe pro se pleadings liberally and "apply the applicable law, irrespective of whether a pro se litigant has mentioned it by name." *Holley v. Dep't of Veteran Affairs*, 165 F.3d 244, 247–48 (3d Cir. 1999).

III. DISCUSSION

A. FOIA OVERVIEW

FOIA provides that a government "agency shall make available to the public" certain information specified in the statute. 5 U.S.C. § 552. "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Because the purpose of the statute is "to facilitate public access to Government documents," the statute reflects "a general philosophy of full agency disclosure." *Manna v. United States Dep't of Justice*, 51 F.3d 1158, 1163 (3d

Cir. 1995) (internal quotation marks omitted); *see also United States v. Tax Analysts*, 492 U.S. 136, 142 (1989). Accordingly, the FOIA requires federal agencies to make promptly available any records requested of it by a person, provided that the request "reasonably describes such records." *Landano v. United States Dep't of Justice*, 956 F.2d 422, 425 (3d Cir. 1992) (quoting 5 U.S.C. § 552(a)(3).)

Under § 552(a)(4)(B) of FOIA, federal courts only have jurisdiction over FOIA requests where a plaintiff shows that "an agency has (1) improperly (2) withheld (3) agency records." *Kissinger v. Reporters Comm. for Freedom of Press*, 445 U.S. 136, 150 (1980). An agency withholds records under FOIA when it has custody of responsive documents but declines to release them. *Nelson v. United States*, No. 15-1696, 2016 WL 2865786, at *2 (M.D. Pa. Apr. 8, 2016) (citing *Tax Analysts*, 492 U.S. at 149.) Once all requested nonexempt records have been produced, however belatedly, the district court has no further judicial function to perform under FOIA. *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982) ("[H]owever fitful or delayed the release of information under the FOIA may be, once all requested records are surrendered, federal courts have no further statutory function to perform"); *see also Hajro v. United States Citizenship & Immigr. Servs.*, 811 F.3d 1086, 1103 (9th Cir. 2016) ("[A]fter the agency produces all non-exempt documents . . ., the specific FOIA claim is moot because the injury has been remedied"); *Lechliter v. Dep't of Def.*, 371 F. Supp. 2d 589, 597 (D. Del. 2005) ("[O]nce the records are produced, the controversy becomes moot.")

B. PRODUCTION OF RESPONSIVE RECORDS

As set forth above, Plaintiff's FOIA request seeks records relating to "[a]ll 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 01/28/21)." (Def. SMF ¶ 2; Plf. RSMF ¶ 2.) In response to Plaintiff's request, Defendant determined that the documents he requested are publicly available on the NIH website. Defendant provided a link to Plaintiff for the responsive documents on its website. Accordingly, Defendant argues on the Motion that it is entitled to summary judgment because it conducted an adequate and reasonable search and produced all responsive documents, satisfying its obligations under FOIA.

The production of requested, nonexempt documents can moot a FOIA case. *Swick v. United States Dep't of the Army*, 596 F. Supp. 3d 66, 73 (D.D.C. 2022) (citations omitted); *see also OSHA Data / CIH, Inc. v. United States Dep't of Labor*, 220 F.3d 153, 168 (3d Cir. 2000) (stating that production of information sought ordinarily renders a FOIA claim moot).

Here, Defendant has produced all the responsive records in its possession. Plaintiff has not argued or alleged that Defendant is improperly or deliberately withholding any records, nor does Plaintiff dispute that the documents contained within the NIH Link are responsive to his request. *See, e.g., Dimodica v. United States Dep't of Justice*, No. 05-2165, 2006 WL 89947, at *4 (S.D.N.Y. Jan. 11, 2006) (noting that a claim is not mooted by agency's production where a plaintiff's FOIA claim alleges that the agency did not produce all the documents requested.)

Instead, Plaintiff argues in his opposition brief that he submitted his FOIA request to the NIH to find out who made the recommendation on the use of ivermectin for the treatment of COVID-19. (Opp. Br. at 5.) Specifically, he contends that "[g]iven that

the update for the ivermectin recommendation was made in the specified time period, the FOIA request test whether a vote was held on the ivermectin recommendation." (Id. at 6.) However, Plaintiff's FOIA request does not specify that it seeks such records disclosing information regarding "who made the ivermectin recommendation." (Def. SMF ¶ 2; Plf. RSMF ¶ 2.) FOIA only requires that agencies make available requested records, provided that the request "reasonably describes such records." 5 U.S.C. § 552(a)(3). Based on the text of Plaintiff's FOIA request describing the requested records, and absent any objections that the records provided were not responsive, the Court finds that NIH provided documents responsive to Plaintiff's request. Accordingly, Plaintiff's FOIA claim is now moot. *See, e.g., Campbell v. Social Sec. Admin.*, 446 F. App'x 447, 480 (3d Cir. 2011) (upholding district court's mootness determination where the agency produced all responsive records in its possession despite plaintiff's dissatisfaction with the response); *Offor v. United States Equal Emp't Opportunity Comm'n*, 687 F. App'x 13, 14 (2d Cir. 2017) (determining that EEOC's production mooted suit for EEOC records); *Perry*, 684 F.2d at 125, 129 (granting summary judgment for defendants appropriate because they "had at long last surrendered all of the requested documents"); *Harvey v. Lynch*, 123 F. Supp. 3d 3, 5 (D.D.C. 2015) (finding case moot because "Defendants processed the request and produced responsive records"); *Dimodica*, 2006 WL 89947, at *3 (dismissing FOIA claim as moot where the Department of Justice produced the requested documents after the plaintiff filed his complaint).

The Court finds that Plaintiff's remaining objections to Defendant's response to his FOIA request are without merit. Plaintiff does not dispute that the doc-

uments themselves, contained within the NIH Link provided to Plaintiff through various email correspondence, are responsive to his FOIA request. Instead, in his opposition brief, Plaintiff argues that the NIH violated FOIA by, inter alia, failing to respond promptly to his FOIA request [2]and failing to provide the responsive documents in an accessible format as requested by Plaintiff. [3](See, e.g., Opp. Br. at 6 ("NIH failed to respond to the request within 20 working days"); id. at 8 ("NIH failed to provide the record in an accessible format as requested by Yim.").) Further, Plaintiff asserts that Defendant failed to confirm that the documents were responsive to his FOIA request and that the statements in the Defendant's email correspondence and FOIA response letter were not responsive. (*See, e.g.*, Opp. Br. at 6–7 ("NIH provided non-responsive statements"); id. at 9 ("NIH provided the record in the format requested by Yim but did not confirm that the record was responsive to the FOIA request.").)

Even assuming arguendo that Plaintiff's objections to Defendant's response had merit, this Court does not have the authority to remedy issues unrelated

[2]Because Defendant has already provided the requested records to Plaintiff, Plaintiff's arguments with respect to the timeliness of the response are now moot. *See Atkins v. Dep't of Justice*, No. 90-5095, 1991 WL 185084, at *1 (D.C. Cir. Sept. 18, 1991) ("The question whether [the agency] complied with the [FOIA's] time limitations in responding to [the plaintiff's] request is moot because [the agency] has now responded to this request."); *Citizens for Responsibility & Ethics in Wash. v. FEC*, 839 F. Supp. 2d 17, 24 (D.D.C. 2011) ("[T]o the extent that Plaintiff's Complaint challenged the timeliness of [the agency's] production, it is now moot.")

[3]Plaintiff admits that as of September 1, 2021, NIH did indeed provide the record in the requested format. (Opp. Br. at 9.)

to the production of responsive documents. The relief a court can order in a FOIA case is limited. Swick, 596 F. Supp. 3d at 72; *see also Canning v. United States Dep't of Def.*, 499 F. Supp. 2d 14, 23 (D.D.C. 2007) (quoting Kissinger, 445 U.S. at 151–52) ("FOIA is only directed at requiring agencies to disclose those 'agency records' for which they have chosen to retain possession or control."). For that reason, FOIA "only authorizes a court 'to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld.'" *Harvey*, 123 F. Supp. 3d at 7 (quoting 5 U.S.C. § 552(a)(4)(B)). The NIH has produced the requested documents to Plaintiff. Plaintiff does not object to the completeness of the production, nor does he allege that Defendant has withheld any specific documents described in his request. Therefore, the Court has no further statutory function to perform under FOIA with respect to Plaintiff's FOIA claim. See 5 U.S.C. § 552(a)(4)(B). Accordingly, the Court finds his claim to be moot. *See Perry*, 684 F.2d at 125 ("Once the records are produced the substance of the controversy disappears and becomes moot since the disclosure which the suit seeks has already been made".)

C. ADEQUACY OF AGENCY'S SEARCH

Next, Plaintiff argues that Defendant did not provide evidence of the adequacy of its search of its records pursuant to Plaintiff's FOIA request. (Opp. Br. at 8–9.) The Court finds Plaintiff's arguments unpersuasive.

In a FOIA case, "even where an agency has already produced the requested records," the plaintiff may still have "a cognizable interest in having a court determine whether the search for records was adequate," and that is true even where the agency that

is the subject of the litigation "has already produced the requested records." *Brustein & Manasevit, PLLC v. United States Dep't of Educ.*, 30 F. Supp. 3d 1, 5 (D.D.C. 2013) (internal quotation marks and brackets omitted); Judicial Watch, Inc. v. FDA, 514 F. Supp. 2d 84, 88 (D.D.C. 2007) (noting that "courts deciding FOIA disputes always have jurisdiction to determine the adequacy of a search by the agency for records duly requested under the FOIA") (internal quotation marks and citation omitted; *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 689 (9th Cir. 2012) ("A FOIA claim is not moot . . . if the agency produces what it maintains is all the responsive documents, but the plaintiff challenges whether the agency's search for records was adequate. In that situation, there is still a live controversy regarding whether the agency is withholding records.") (internal quotation marks and citations omitted), *overruled on other grounds, Animal Legal Def. Fund v. United States Food & Drug Admin.*, 836 F.3d 987 (9th Cir. 2016)).

Under FOIA, "an agency has a duty to conduct a reasonable search for responsive records." *Lechliter v. Rumsfeld*, 182 F. App'x. 113, 115 (3d Cir. 2006) (citations omitted). The relevant inquiry is not "whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Abdelfattah v. United States Dep't of Homeland Sec.*, 488 F.3d 178, 182 (3d Cir. 2007) (quoting *Weisberg v. United States Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).) To demonstrate the adequacy of its search, the agency should provide "a reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials . . . were searched." *Id.* (quoting

Valencia-Lucena v. United States Coast Guard, 180 F.3d 321, 326 (D.C. Cir. 1999).) However, an agency's affidavits "need not set forth with meticulous documentation the details of an epic search for the requested records." *Manna v. United States Dep't of Justice*, 815 F. Supp. 798, 817 (D.N.J. 1993) (citing *Perry*, 684 F.2d at 126.) "Moreover, a district court may award summary judgment on the basis of agency affidavits alone where the affidavits are sufficiently detailed and are submitted in good faith." *Manna*, 832 F. Supp. at 870 (citing *Simmons v. United States Dep't of Justice*, 796 F.2d 709, 711–12 (4th Cir.1986).) "Only when the agency's responses 'raise serious doubts as to the completeness of the search or are for some other reason unsatisfactory' will granting summary judgment in the agency's favor usually be inappropriate." *Manna*, 815 F. Supp. at 817 (quoting *Perry*, 684 F.2d at 126.)

Here, to demonstrate the adequacy of its search, Defendant submitted a declaration from Gorka Garcia-Malene, the FOIA Officer for NIH, describing the NIH's standard review process it utilizes for handling and responding to all FOIA requests. (Garcia-Malene Decl. ¶¶ 5–8.) During the review process, if the NIH determines that the requested records had been made available to the public the NIH sends a letter to the requestor detailing where he or she may access the records. (Id. ¶ 8.) Accordingly, "[o]n 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." (Id. ¶ 13.) NIH informed Plaintiff that "all updates to the Coronavirus Disease 2019 (COVID-19) Treatment Guidelines are publicly available" and sent the Plaintiff the link to access all responsive documents. (Id. ¶¶ 13–14.)

Plaintiff does not argue that Defendant's search itself was inadequate, only that Defendant's affidavit and supporting materials are not sufficiently detailed to demonstrate that it conducted an adequate search. (Opp. Br. at 8–9.) Specifically, Plaintiff contends that the Garcia Malene Declaration only provided a description of "NIH's standard review process" but failed to affirm that such a process was actually followed in responding to Plaintiff's FOIA request nor that it was appropriate to apply this process to his request. (Id. at 8.) However, an individual making a FOIA request must follow the published FOIA regulations for the agency to which the request is directed. *See Lechliter*, 371 F. Supp. 2d at 594 (citing 5 U.S.C. § 552(a)(3)(A)(ii).) 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.

Further, the inquiry into the adequacy of the search begins with the "presumption that the agency affidavits and the related search were made in good faith." *Jackson v. United States Gen. Servs. Admin.*, 267 F. Supp. 3d 617, 622 (E.D. Pa. 2017) (citations omitted). For Plaintiff to rebut such a presumption, "more than purely speculative claims about the existence and discoverability of documents" must be presented, since "[s]peculation that uncovered documents may exist is insufficient to show that the agency's search was unreasonable." *Id.* Here, Plaintiff does not allege that uncovered documents may exist or that Defendant has improperly withheld any records. Plaintiff offers no ar-

guments or support that raises substantial doubt that Defendant's search was adequate. *See Cozen O'Conner v. U.S. Dep't of Treasury*, 570 F.Supp.2d 749, 766 (E.D. Pa. 2008) (citing *Valencia-Lucena*, 180 F.3d at 326) ("[T]he requesting party may defeat the agency's motion for summary judgment by producing evidence that raises a substantial doubt that the search was adequate.")

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. The Defendant's Motion for summary judgment is therefore GRANTED.

IV. CONCLUSION

For the reasons stated above, the Court will GRANT Defendant's motion for summary judgment. An appropriate Order will follow.

Date: March 29, 2023
s/ Zahid N. Quraishi
ZAHID N. QURAISHI
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1601

JIN-PYONG PETER YIM,
Appellant
v.
NATIONAL INSTITUTES OF HEALTH

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 3-21-cv-07031)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, and CHUNG, Circuit Judges

The petition for rehearing filed by Appellant in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular

service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is denied.

By the Court,
s/ Arianna J. Freeman
Circuit Judge

Dated: December 12, 2023
CJG/cc: Jin-Pyong Peter Yim
Margaret A. Mahoney, Esq.
J. Andrew Ruymann, Esq.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JIN-PYONG PETER YIM,
Plaintiff,
v.
NATIONAL INSTITUTES OF HEALTH,
Defendants.

Civ. Action No. 3:21-CV-07031-BRM-LHG

DECLARATION OF GORKA GARCIA-MALENE

---

1. I, Gorka Garcia-Malene, declare the following to be true and correct. I am the Freedom of Information Act ("FOIA") Officer, National Institutes of Health ("NIH"), U.S. Department of Health and Human Services ("HHS" or "the Department"). I have held this position with NIH since October 15, 2017.

2. My duties include responding to requests for NIH records under FOIA, 5 U.S.C. § 552. These duties include managing searches for NIH records in response to FOIA requests, providing guidance to NIH record custodians or personnel regarding these searches and determining whether to release or withhold records or portions of records in accordance with FOIA and the HHS regulations implementing the FOIA.

3. I make this declaration based upon my personal knowledge and information available to me in

my official capacity.

4. The purpose of this declaration is to describe NIH's administrative handling and processing of Plaintiff's FOIA request.

NIH's Standard Review Process

5. The NIH FOIA program is decentralized. Each institute or center (IC) has a FOIA staff dedicated to responding to requests. Requesters can send requests to the IC of interest or to NIH Office of the Director (OD). When an IC receives a request, it is placed into one of two tracks: Simple or Complex.

6. When responding to a FOIA request, the FOIA staff conducts a page-by-page, word-by-word review of all potentially responsive records in order to determine whether the document is responsive to the request, whether the information is publically available, whether information should be withheld under one or more of the nine exemptions to the FOIA, and whether the records contain the equities of other federal agencies or third-party stakeholders. During the review process, FOIA coordinators will consult with HHS program offices, federal agencies, or any other stakeholders of the records involved, as appropriate.

7. When a request requires a partial or full denial under a FOIA exemption, or relates to COVID, the request is processed by the FOIA program at the OD for the NIH FOIA Officer to manage. In these cases, my office reviews each page and makes a final determination as to each proposed withholding.

8. When the records are finalized, a response letter is prepared detailing the number of pages processed, the number of pages withheld in part, the number of pages withheld in full, the number of pages sent for referral, and the reasons for any withhold-

ings. If the records have been made available to the public during the time between the FOIA request and my office's review, we send a letter to the requestor detailing where they may access the records.

Administrative Processing of Plaintiff's FOIA Request

9. On January 28, 2021, Plaintiff submitted a FOIA request via email to the NIH FOIA office seeking "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)." Plaintiff also requested expedited processing citing that "the information requested is necessary for the public to have confidence in how the NIH is handling the pandemic." The request was received by NIH on January 29, 2021 and was assigned the NIH identifier Case # 55822 (see NIH Exhibit 1).

10. On February 11, 2021, NIH denied the request for expedite processing (see NIH Exhibit 2).

11. On March 7, 2021, Plaintiff requested an estimated completion date for the FOIA request (see NIH Exhibit 3). On March 8, 2021, NIH responded to the Plaintiff stating that the "request is being processed and is in the queue behind all other requests received ahead of yours...Once the review begins on any records responsive to your request, the NIH will provide an estimated completion date (see NIH Exhibit 4)."

12. On March 31, 2021, Plaintiff filed suit against NIH in the United States District Court, District of New Jersey (see NIH Exhibit 5).

13. 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 (see NIH Exhibit 6).

14. On May 5, 2021, an email was sent to the Plaintiff explaining again that all updates to the Coronavirus Disease 2019 (COVID-19) Treatment Guidelines are publicly available. This email provided a more direct link to the records sought by the Plaintiff. On May 5, 2021, Mr. Yim replied to the email stating the "NIH's response is not acceptable. I insist that NIH confirm that the record that I requested does not exist." On May 6, 2021, another email was sent to the Plaintiff informing him that the records he requested do exist and that the records were made public and are posted on the NIH website. Plaintiff was informed that the records are available to him in electronic format and he was told if he was unable to access them himself, the NIH would provide him with a printed copy of the records. On May 6, 2021, Plaintiff responded, "I remain convinced that my case against the NIH is strong. I would like to discontinue this discussion."

15. On or about May 7, 2021, Defendants sent a letter to the Court requesting a telephone conference call in order to determine if the NIH had supplied Plaintiff with the responsive documents thereby mooting the matter. That request was denied.

16. On August 26, 2021, Defendants contacted Plaintiff asking him to supply the exact web link he wanted to be certified as the responsive record to his request, and Plaintiff responded with the exact link. On August 27, 2021, Defendants, complying with Plaintiff's request, replied to Plaintiff via email confirming that the specific Ivermectin-recommendation link he sent the day before was a valid NIH link and was

responsive to his FOIA request. The Government also supplied Plaintiff with a Stipulation of Dismissal Without Prejudice for him to sign. On August 27, 2021 Plaintiff responded, stating that he wanted the change reflected in the formal FOIA response letter. On September 1, 2021 Defendants responded by issuing a revised formal letter containing the exact language specified by Plaintiff.

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

s/ Gorka Garcia-Malene
FOIA Officer, NIH

APPENDIX G

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: yimpjp@gmail.com

August 31, 2021

Peter Yim
Virtual Scalpel, Inc.
912 Primrose Ct.
Belle Mead, NJ 08502

Re: NIH FOIA Case No.: 55822; Yim v. NIH, 21-cv-07031

Dear Mr. Yim:

This is a complete response to the Freedom of Information Act (FOIA) request that is the subject of the Complaint filed in Yim v. NIH, 21-cv-07031, now pending in the U.S. District Court for New Jersey. Your FOIA request, dated January 28, 2021, was received by the National Institutes of Health (NIH) January 29, 2021. You requested 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). Per the final response sent on April 23, 2021, 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.

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 request date range from 1/01/2021 to 0/28/2021 (#55822). As you will recall, on or about May 5, 2021, the NIH supplied you with the link to the archive tab and with specific directions regarding how to find the exact document you requested. It appears you were able to locate the publicly available document with those directions.

Please direct any questions regarding this response to Margaret Mahoney of the Department of Justice, at Margaret.Ann.Mahoney@usdoj.gov.

Sincerely,
s/ Gorka Garcia-Malene
Gorka Garcia-Malene, FOIA Officer for the NIH

APPENDIX H

10/5/21, 7:08 PM Gmail - Settlement 3:21-cv-07031
Peter J. Yim <yimpjp@gmail.com>
Settlement 3:21-cv-07031
Mahoney, Margaret Ann (USANJ)
<Margaret.Ann.Mahoney@usdoj.gov>
Fri, Aug 27, 2021 at 10:41 AM
To: Peter Yim <yimpjp@gmail.com>
Cc: "Garcia-Malene, Gorka (NIH/OD) [E]"
<gorka.garcia-malene@nih.gov>,
"Lampe, Karen (NIH/OD) [E]"
<karen.lampe@nih.gov>,
"Bowen, Elizabeth (HHS/OGC)"
<Elizabeth.Bowen@hhs.gov>

Mr. Yim,

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). As you will recall, on or about May 5, 2021, the NIH supplied you with the link to the archive tab and with specific directions regarding how to find the exact document you requested. It appears you were able to locate the publicly available document with those directions.

The NIH considers your FOIA request satisfied and based upon your representations to the Court, you will now also consider your FOIA request satisfied. To that end, attached above is a Stipulation of Dismissal Without Prejudice. Please review the Stipulation, sign it, and email it back to me at your earliest convenience. Once I have the signed Stipulation, I will file it with

the court, send you a copy via email, and the matter will be closed.

Thank you very much.

Margaret Mahoney
Assistant United States Attorney
District of New Jersey

[Quoted text hidden]

2021 08 26 YIM Stipulation of Dismissal.pdf
80K

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APPENDIX I

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: yimpjp@gmail.com

April 23, 2021

Peter Yim
Virtual Scalpel, Inc.
912 Primrose Ct.
Belle Mead, NJ 08502

Re: NIH FOIA Case No.: 55822; Yim v. NIH, 21-cv-07031

Dear Mr. Yim:

This is a complete response to the Freedom of Information Act (FOIA) request that is the subject of the Complaint filed in Yim v. NIH, 21-cv-07031, now pending in the U.S. District Court for New Jersey. Your FOIA request, dated January 28, 2021, was received by the National Institutes of Health (NIH) January 29, 2021.

You requested 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). 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. Please direct any questions regarding this response to Margaret Mahoney of the Department of Justice, at Margaret.Ann.Mahoney@usdoj.gov.

Sincerely,

s/ Gorka Garcia-Malene
Gorka Garcia-Malene
Freedom of Information Officer, NIH

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SUPREME COURT
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