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ONE HUNDRED EIGHTEENTH CONGRESS

# Congress of the United States

## House of Representatives

### COMMITTEE ON ENERGY AND COMMERCE

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Majority (202) 225-3641

Minority (202) 225-2927

September 28, 2023

Lawrence A. Tabak, D.D.S., PhD.  
Acting NIH Director  
National Institutes of Health  
9000 Rockville Pike  
Bethesda, MD 20892

Dr. Tabak,

We write to inform you of our intention to issue a subpoena to obtain copies of documents in the custody of the National Institutes of Health (NIH).

On May 3, 2023, we sent you a request letter requesting documents relating to any early SARS-CoV2 sequences, data from early COVID-19 cases, and other pertinent documents related to the early phase of the pandemic that the NIH may have or has had.

NIH confirmed receipt of the letter on May 3, 2023. On June 28, 2023, committee staff sent a follow-up email about the status of the response and whether NIH was cooperating with the request. Not getting a response from NIH, on July 12, 2023, committee staff sent another follow-up email stating: "I have not received a reply. I need to hear from you by COB today. Your lack of response indicates that HHS and NIH is not willing to cooperate with this request." On July 12, 2023, NIH staff responded: "We are working on this. We intend to comply and will respond." On July 21, 2023, committee staff and NIH staff had a phone call to discuss this request, but unfortunately, NIH did not follow through with a response and document production.

Nearly three months later, with no meaningful evidence that the NIH is responding to this request, we sent a follow-up letter on August 9, 2023, requesting that the NIH provide responsive documents by no later than August 31, 2023. We alerted you that in the event the NIH did not provide documents by that date, the committee would consider compulsory process to secure production of the requested documents. NIH continues to not be responsive in a meaningful way.

Over the last four months, the NIH has failed, and continues to fail, to engage with the committee, and provide requested documents. NIH's disregard of this oversight request undermines the norms of interbranch cooperation and accommodation. As noted by the Department of Justice, Office of Legal Counsel memorandum of May 1, 2017,<sup>1</sup> when a committee, subcommittee, or chairman exercising delegated oversight authority asks for information from the Executive Branch, that request triggers the "implicit constitutional mandate to seek optimal accommodation . . . of the needs of the conflicting branches." *United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977); *see also* at 130–131 (describing the "[n]egotiation between the two branches" as "a dynamic process affirmatively furthering the constitutional scheme"). Such oversight requests are enforceable by the issuance of a subpoena and the potential for contempt-of-Congress proceedings. *See McGrain v. Daugherty*, 273 U.S. 135, 174 (1927); 2 U.S.C. §§ 192, 194; *see also* Rules of the House of Representatives, 118th Cong., Rule XI, cl. 2(m)(1) (2023) (empowering all standing committees to issue subpoenas). Upon receipt of a properly authorized oversight request, the Executive Branch's longstanding policy has been to engage in the accommodation process by supplying the requested information "to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch."

The committee's requests are specific and reasonable, and seek to substantiate what HHS and NIH have asserted. Unfortunately, HHS and NIH have not engaged with this committee to supply the requested documents to seek optimal accommodation, nor have any legal reasons been provided for not providing the requested documents.

Thus, to carry out our Constitutional responsibilities of oversight, if NIH does not produce the requested documents by October 5, 2023, it will be necessary to issue a subpoena for documents since the committee has a right to obtain these materials to aid in its legislative activities and to ensure that the Executive Branch is complying with the law.

Sincerely,



Cathy McMorris Rodgers  
Chair  
Committee on Energy and  
Commerce



H. Morgan Griffith  
Chair  
Subcommittee on Oversight and  
Investigations

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<sup>1</sup> U.S. Department of Justice, *Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch*, Letter Opinion for the Counsel to the President (May 1, 2017), <https://www.justice.gov/olc/file/966326/download>

Letter to Lawrence A. Tabak, D.D.S., PhD.

Page 3



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Brett Guthrie

Chair

Subcommittee on Health

CC: Frank Pallone Jr., Ranking Member, Energy and Commerce Committee

Anna Eshoo, Ranking Member, Subcommittee on Health

Kathy Castor, Ranking Member, Subcommittee on Oversight and Investigations