

NATIONAL COMMITTEE FOR RADIATION VICTIMS

P.O. Box 9606
Washington, DC 20016
Telephone: (202) 363-3818

FOIA/PA REQUEST

July 16, 1997

Case No: 97-265
Date Rec'd: 7-18-97
Action Off: P-001
Related Cases: _____

Mr. Russell Powell
Chief, FOIA / LPDR Branch
Nuclear Regulatory Commission
T6D8
Washington, D.C. 20555-0001

Re: Freedom of Information Act / Privacy Act Request

Dear Mr. Powell:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, as amended, and the Privacy Act of 1974, 5 U.S.C. § 552a, as amended.

Pursuant to 5 U.S.C. § 552(a)(3), the National Committee for Radiation Victims requests copies of any and all agency records within the NRC's possession, custody or control¹ pertaining to any and all human radiation experiments which identify, or would in any way assist in identifying, the individuals upon whom the radiation experiment(s) was/were conducted. As to each individual so identified, please also provide copies of any agency records that would assist in the location of such individual, including any agency records indicating or otherwise evidencing the individual's last known address. In addition, to the extent that your records indicate that an experiment subject is deceased, the NCRV also requests copies of any and all agency records within the NRC's possession, custody or control which identify, or would assist in the identification of, the experiment subject's next of kin and his/her/their last known address.

In the alternative, the NCRV, acting as the class representative of the class of all individuals subjected to radiation experiments conducted, funded and/or sponsored by the Nuclear Regulatory Commission, hereby requests that each and every such experiment subject (or next of kin in the event the individual is deceased) be provided with all agency records pertaining to the radiation experiment to which each such individual was subjected, or that the individuals (or next of kin) be notified of the existence of such records and of their right to review and copy same.

To assist in the location of the agency records requested, please refer to the NRC's Office of Nuclear Materials Safety and Safeguards. This office was responsible for NRC search processes during, and in conjunction with, the investigation of the human radiation experiments conducted by the President's Advisory Committee on Human Radiation Experiments.

¹ "Agency records in the Department's possession, custody or control" is here meant to include, inter alia, NRC license files, and records of contractors created for the NRC's use (per 36 CFR 1222.48).

To the extent that this request indicates the likelihood of field office files instead of (or in addition to) agency headquarter's files, the NCRV asks that you forward this request to the appropriate field offices.

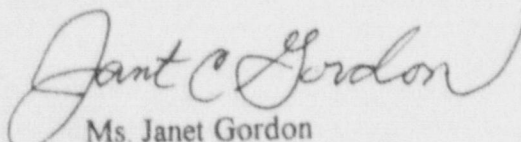
If all or any part of this request is denied, please list the specific exemption(s) which is (are) being claimed to withhold information.

To the extent that this request may give rise to personal privacy concerns, those concerns are outweighed by the public interest in disclosure. Immediately attached is a memorandum which more fully articulates the public interest and other considerations that, with respect to this request, outweigh any potential personal privacy concerns which might otherwise invoke Section 552(b)(6) of the Freedom of Information Act ("Exemption 6").

The National Committee for Radiation Victims requests that any fees associated with this request be waived. The FOIA expressly allows for a waiver of such fees (e.g. direct costs) "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." The NCRV is a 501(c)(3) tax exempt organization and, as such, has no commercial interest in this request. The NCRV seeks disclosure of the requested information in the public interest because such disclosure is likely to contribute significantly to a better public understanding of the federal government's involvement in and sponsorship of human radiation experiments. Since December of 1993, when then-Secretary of Energy Hazel O'Leary first acknowledged that agencies of the federal government had participated in such experimentation, this issue has been the subject of considerable public concern. What has been lacking, which this request seeks in part to assure, is first-hand information from those experimented upon about the radiation experiments, which the NCRV would bring to the public's attention upon receipt of the requested agency records, following subsequent outreach efforts.

As provided under FOIA, Section 552(a)(6)(A)(i), we will expect to receive a determination response within ten (10) working days of your receipt of this request. It is recognized that an additional ten (10) working days for providing a determination as to this request may be in order pursuant to Section 552(a)(6)(B). In any event, given the considerable public interest in this request, coupled with the fact that both the Executive Branch and the U.S. Congress are currently either implementing or contemplating action in response to the issue of government sponsored/supported human radiation experimentation, a determination should be made expeditiously and, if necessary, out of turn to other pending FOIA/PA requests. Accordingly, any unwarranted delay in submitting a determination response and/or the agency records herewith requested will result in an immediate administrative appeal by the NCRV pursuant to 5 U.S.C. §552(a)(6).

Sincerely yours,



Ms. Janet Gordon
National Committee Chair

enclosures

cc. Cummins & Brown

THE PUBLIC INTEREST IN DISCLOSURE OUTWEIGHS ANY ASSERTED PRIVACY INTERESTS

Memorandum in Support of FOIA/PA Disclosure

1. The policy underlying FOIA favors disclosure.

The substantive test for Exemption 6 - as to whether disclosure "would constitute a clearly unwarranted invasion of personal privacy" - requires a balancing of the individual's right of privacy against "the preservation of the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny." Rose v. Department of the Air Force, 425 U.S. 352, 372 (1976). Accord Department of State v. Ray, 502 U.S. 164, 177 n.12 (1991) (disclosure of a list of names and other identifying information is not "inherently and always a significant threat to the privacy" of the named individuals). The courts have uniformly held that, in construction of Exemption 6, the FOIA "instructs the court to tilt the balance in favor of disclosure." Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir. 1971). "[U]nder Exemption (6), there is a strong presumption in favor of disclosure." Local 598 v. Army Corps of Engineers, 841 F.2d 1459, 1463 (9th Cir. 1988). See also Department of the Air Force v. Rose, 425 U.S. 352, 361, 378 n.16 (1976).

Indeed, the First Circuit has said that the case in which "the calculus unequivocally supports withholding [is] a rare case because Congress has weighted the balance so heavily in favor of disclosure. . . ." Kurzon v. HHS, 649 F.2d 65, 67 (1st Cir. 1981). "[U]nder Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act." Washington Post v. HHS, 690 F.2d 252, 261 (D.C. Cir. 1982).

2. The subjects of the experiments are witnesses of potential government wrongdoing.

The Supreme Court has stated that the "relevant 'public interest in disclosure' to be weighed in this balance [of privacy rights against disclosure] is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contributing significantly to public understanding of the operations or activities of the government.'" Department of Defense v. FLRA, 510 U.S. 487, 495 (1994). This public interest in favor of disclosure is strongest when disclosure would serve to inform the public about government misbehavior or wrongdoing. See e.g. Safeguard Services v. S.E.C., 926 F.2d 1197 (D.C. Cir. 1991); Aronson v. HUD, 822 F.2d 182, 187-88 (1st Cir. 1987); Aronson v. IRS, 767 F.Supp. 378 (D.Mass. 1991); Outlaw v. Dept. of Navy, 815 F. Supp. 505 (DDC 1993); Southern Utah Wilderness Alliance v. Hodel, 680 F.Supp. 37 (DDC 1988).

In cases similar to the instant request, where the information sought is key probative material of government wrongdoing, the courts have required disclosure despite the

assertion of an exemption. See e.g., Robles v. Environmental Protection Agency, 484 F.2d 843 (4th Cir. 1973). Those subjected to the radiation experiments are, themselves, witnesses - if not direct evidence - of the government's wrongdoing in conducting non-consensual radiation experimentation. Disclosure of the names of these individuals falls directly within FOIA's central purpose because each of these people will, based on their own personal testimony, more fully open up the government's human radiation experimentation practices to public scrutiny.

3. All of the experiment subjects are entitled to notice and warning. Many of the experiment subjects are entitled to compensation.

In the human radiation experiment case of In re Cincinnati Radiation Litigation, 874 F.Supp. 796 (S.D. Ohio 1995), the court recognized the applicability of the Nuremberg Code as a cognizable standard of constitutional due process protection. Section 7 of the Nuremberg Code mandates that "adequate facilities [be] provided to protect the experimental subject against even remote possibilities of injury, disability, or death." Public disclosure of the names of the experiment subjects is thus warranted, in order that the NCRV might, through an outreach effort to these individuals warning them of the risks associated with the radiation experiments to which they were subjected, ensure compliance with this mandate.

A further argument in favor of disclosure is that, by so doing, the NCRV will ensure that individuals (or their families) are made aware of the fact that they may be entitled to compensation. In March of this year, the Administration released a report announcing the federal government's plan for addressing the concerns raised by the human radiation experiments. Entitled "*Building Public Trust: Actions to Respond to the Report of the Advisory Committee on Human Radiation Experiments*" (DOE/EH-0542), the plan calls for compensation for individuals subjected to the radiation experiments under certain circumstances:

[1] *Those cases in which efforts were made by the government to keep information secret from [the subjects of radiation experiment] or their families, or from the public, for the purpose of avoiding embarrassment or potential legal liability, or both, and where this secrecy had the effect of denying individuals the opportunity to pursue potential grievances.*

[2] *Those experiments that . . . did not involve a prospect of direct medical benefit to the subjects, or in which interventions considered to be controversial at the time were presented as conventional or standard practice, and physical injury attributable to the experiment resulted.*

In support of both of the foregoing points is the case of National Association of Atomic Veterans v. Defense Nuclear Agency, 583 F.Supp. 1483 (DDC 1984), where disclosure of the names and addresses of servicemen was ordered. The public interest overriding Exemption 6's privacy concerns was the fact that the requestor, a non-profit association, sought the names in order to develop and provide information about potential adverse health effects to the men, as

well as to inform them about Veterans Administration benefits.

Similarly, the First Circuit has held that the names and addresses of individuals to whom insurance refunds were owed by the Department of Housing and Urban Development had to be given to a "tracer" service. The appeals court reasoned that, "as long as HUD is actively searching for eligible mortgagors and a reasonable time has not passed, the privacy interests outweigh the public interest in disclosure; but once a search is no longer operating effectively, a shift in the balancing [in favor of disclosure] takes place." Aronson v. Dept. of Housing and Urban Development, 822 F.2d 182, 187 (1st Cir. 1987) (emphasis added). As indicated in "Building Public Trust," the Administration does not plan to undertake any pro-active, all-encompassing outreach and notification effort, contending that "the government has provided widespread opportunities for individuals to seek information about their own involvement as subjects of research." Although the refund of defined amounts of money to mortgagors is different than compensation for governmental wrongdoing, the logic of Aronson - by which the balance shifts in favor of disclosure - here applies.

4. Privacy rights that may have at one time existed have diminished in the years that have elapsed since the radiation experiments were conducted.

In Aronson, *supra*, the First Circuit concluded that the lapse of time - in that case, merely one year - could significantly diminish the privacy interests at stake in non-disclosure, such that those interests would no longer outweigh the public's need and interest in disclosure. 822 F.2s at 187-188. Clearly, if the passage of one year is significant enough to diminish privacy rights, then surely there can be little, if any, privacy grounds to justify public disclosure of information concerning radiation experiments that occurred more than thirty years ago. See McDonnell v. U.S., 4 F.3d 1227 (3rd Cir. 1993) (Exemptions 6 and 7(c) protection of privacy interests of individuals still living diminished by the passage in time of almost 70 years.)

5. Any personal privacy interests protected by Exemption 6 lapse upon death of the individual.

In many of the radiation experiments, the individual experiment subjects may by now be deceased. If agency records indicate that this is in fact the case, then clearly Exemption 6 cannot be relied upon to prevent disclosure of the names and identities of those individuals. The weight of the authorities is that the personal privacy interests protected by Exemptions 6 and 7(c) lapse upon the death of the individual. See Diamond v. FBI, 532 F.Supp. 216 (SDNY 1981), *aff'd* 707 F.2d 75 (2nd Cir. 1093); Journal-Gazette Publishing v. Department of the Army, No. F-89-147 (N.D. Ind., Jan. 8, 1990); Silets v. FBI, 591 F.Supp. 490, 498 (N.D.Ill. 1984); Providence Journal v. FBI, 460 F.Supp. 762, 778, 793 (DRI 1978), *rev'd on other grounds* 602 F.2d 1010 (1st Cir. 1979); U.S. v. Amalgamated Life Insurance, 534 F.Supp. 676, 679 (SDNY 1982).

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