



Department of Energy

Office of Science
Chicago Office
9800 South Cass Avenue
Argonne, Illinois 60439

March 18, 2011

Mr. Ian Smith
ianS@peta.org

Dear Mr. Smith:

SUBJECT: U.S. DEPARTMENT OF ENERGY (DOE) OFFICE OF SCIENCE-CHICAGO OFFICE (SC-CH) FREEDOM OF INFORMATION ACT (FOIA) REQUEST NO. CH-2011-00438-F

This is our final response to your request for information submitted under FOIA, 5 U.S.C. 552. In your request, you were seeking:

1. Copies of all correspondence (dated August 1, 2010 to present) between the Department of Energy's Office of Science and/or NASA and/or Brookhaven National Laboratory and/or Harvard University's McLean Hospital regarding the use of primates in a NASA-funded radiation experiment that was planned to take place at Brookhaven and McLean
2. Unredacted copies of the documents that were provided to PETA on September 29, 2010 in response to a September 1, 2010 FOIA request. For these records, you also stated "Since these documents were redacted mainly because they were predecisional at the time, now that a final decision has been made we believe that more of the information contained should be made publicly available."

As we had previously advised you, any documents that may exist at DOE-SC that are responsive to your request are under the jurisdiction of the DOE Headquarters FOIA Office, and your request was transferred to that office for processing of those records. This response only pertains to that portion of your request for records that may exist at the DOE Brookhaven Site Office (BHSO) and Brookhaven National Laboratory (BNL). For that portion of your request that relates to records located at the National Aeronautical and Space Administration (NASA), I had previously indicated to you that you may submit your request directly to the NASA FOIA Office for those records. See <http://www.hq.nasa.gov/office/pao/FOIA/> for instructions on how to submit your request to NASA.



Printed on Recycled Paper

With respect to the documents you requested in #1 above, Miriam Bartos of our office made several attempts through voice mail and e-mail messages to seek clarification of that portion of your request, but she did not receive any response from you. Ultimately, on February 22, Ms. Bartos sent you an e-mail asking again for you to contact her to clarify your request, and in that e-mail Ms. Bartos stated that if she did not hear from you by COB, Monday, February 28, your file would be closed for inactivity. Because we did not hear from you on clarifying that portion of your request, we are closing that portion of your request for inactivity.

With respect to the documents you requested in #2 above, the unredacted copies of those documents produced to you in our September 29, 2010 response to your FOIA request are being withheld for the following reasons.

Exemption 5

In our September 29, 2010 response to you, we produced redacted versions of those documents, so any material in those documents that was not redacted has already been produced to you. For the redacted material, we reiterate the reasons set out in our September 29, 2010 response letter for withholding that material under Exemption 5. In addition, it is well settled that the predecisional character of a document is not altered by the fact that an agency has subsequently made a final decision. *See, e.g., Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979). It is the document's role in the agency's decision-making process that controls. *See Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005).

The DOE regulations implementing FOIA provide that, "[t]o the extent permitted by other laws, DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. DOE can make a discretionary release of any material for which there is no foreseeable harm in doing so. *See Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA)* (March 19, 2009) at 2.

Here, we assessed whether, Exemption 5 still applies and whether, in light of the final decision, there would still be foreseeable harm in release of that information. We have determined that release of that information at this time would still negatively impact the quality of future DOE decisions and adversely affect frank, written discussion. Because decisions relative to research conducted at national laboratories are routine and ongoing, future decision-makers would be inhibited by the knowledge that the content of such discussion might be made public. Due to this chilling effect on agency decision-making, we have determined that the material falls under Exemption 5 and disclosure of the deliberative material is not in the public interest because foreseeable harm could result from such disclosure.

Appeal Rights

You are advised of your right to appeal my determination to withhold this information within 30 days of receipt of this letter, by writing to the Director, Office of Hearings and Appeals, United States Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585. Both the request and envelope should be clearly marked "Freedom of Information Appeal." Judicial review will be available thereafter in the district in which your concern is located or has its principal place of business, where the records are located, or in the District of Columbia.

Fees

You have been categorized as an "Other" requester, and as such, you are subject to search and duplication fees related to your request. The first 2 hours of search time and the first 100 pages of duplication are not charged under FOIA for an "Other" requester. Also, fees are not charged if the total cost does not exceed the \$15.00 threshold for charging fees under FOIA. However, because you have been granted a fee waiver, there is no duplication fee, there are no fees associated with your request at this time.

If you have any questions regarding your request for BNL or BHSO records, please contact Miriam Bartos, the DOE Chicago Office FOIA Officer, at (630) 252-2041 or miriam.bartos@ch.doe.gov, or Michael McCann, DOE FOIA Counsel, at (631) 344-3440 or mccann@bnl.gov. If you have any questions about the processing of the DOE SC portion of your request, you may contact Mr. Alexander Morris at the DOE HQ FOIA Office at 202-586-3159.

Sincerely,



Roxanne E. Purucker
Manager