



## Department of Energy

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

**SEP 29 2010**

Mr. Ian Smith  
Research Assistant, Laboratory Investigations Division  
People for Ethical Treatment of Animals  
501 Front Street  
Norfolk, VA 23510

Dear Mr. Smith:

**SUBJECT: U.S. DEPARTMENT OF ENERGY (DOE) FREEDOM OF INFORMATION ACT (FOIA)  
REQUEST #CH-2010-02011-F**

I am the authorizing official responsible for making the determination required by Section 1004.5(b) of DOE regulations found at 10 CFR Part 1004, which implements the FOIA, 5 U.S.C. 552.

This letter is in final response to your e-mail request for information dated September 1, 2010, which was controlled under the subject FOIA request number. In your request, you were seeking "copies of any documents (July 1, 2010 – present)(including but not limited to, letters, emails, and memos) containing statements or drafts of statements announcing the cancellation of a proposed radiation experiment on primates which would be conducted in part at the Brookhaven National Laboratory and funded by the National Aeronautics and Space Administration (NASA)."

Be advised that we conducted a search of our office and we located no responsive records. We then requested that Brookhaven Science Associates, Inc. (BSA), the contractor that operates Brookhaven National Laboratory, conduct a search for responsive records, and BSA identified the following records responsive to your request:

- 1) E-mail – 7/20/10 – Doon L. Gibbs to Samuel Aronson, Margaret M. Lynch, and Michael J. Bebon – Subject: PC Discussion
- 2) E-mail – 8/1/10 – Samuel Aronson to Margaret M. Lynch, Doon L. Gibbs, and Michael J. Bebon – Subject: N-249 decision draft, with attachment draft decision regarding the disposition of NSRL Proposal N-249



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We are withholding portions of the responsive documents from disclosure to you because those portions are protected under Exemption 5 of the FOIA, i.e., 5 U.S.C. 552(b)(5) for the following reasons:

#### **Exemption 5**

Exemption 5 of the FOIA protects from mandatory disclosure “inter-agency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. 552(b)(5). To qualify, a document must satisfy two conditions: it must be inter-agency or intra-agency, and it must fall within a privilege against discovery under judicial standards that would govern litigation against the agency that holds it. *See Department of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 10-11 (2001).

“Courts have routinely held that documents provided by an agency’s contractor employees or by outside consultants may be considered ‘intra-agency memoranda’ for the purposes of Exemption 5.” *Eugenie Reich*, TFA-0279 (2008). Courts have applied a common-sense approach to documents generated by consultants of an agency and found that these documents qualify for Exemption 5 protection because in the exercise of their functions, agencies have a need for the opinions and recommendations of consultants. *See id.*, *see Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971); *cf. CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1161 (D.C. Cir. 1987) (observing the importance of outside consultants in deliberative process privilege context).

Exemption 5 incorporates the deliberative process privilege which protects recommendations, advice, and opinions that are part of the process by which agency decisions and policies are formulated. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1974). Courts established two requirements for invocation of the deliberative process privilege. In order to be shielded by this privilege, a document must be both pre-decisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Tri-Valley CAREs*, VFA-0563 (2000); citing *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). It has long been held that public revelation of preliminary employee deliberations regarding controversial issues could inhibit employees from making candid assessments and recommendations. *See Competitive Enterprise Institute*, TFA-0354 (2010). “This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs.” *Eugenie Reich*, TFA-0279 (2008).

Here, DOE has determined that the responsive documents fall under Exemption 5 of FOIA. The documents provided by DOE’s contractor, BSA, are considered intra-agency memoranda because DOE has a need for the opinions and recommendations of BSA. See Prime Contract for

Brookhaven National Laboratory - Contract No. DE-AC02-98CH10886, Section C.3.1.2 - Program Development and Mission Accomplishment, available at:

<http://www.bnl.gov/prime/default.asp>. In this case, these documents are pre-decisional because no decision has yet been announced concerning "the proposed radiation experiment on primates which would be conducted in part at the Brookhaven National Laboratory and funded by NASA." In addition, the release of this deliberative material could cause confusion for the public because a final decision on the matter has not been made yet.

These documents contain recommendations, advice, and opinions privileged as part of the deliberative process, which DOE relies on to make decisions and policies. The release of this deliberative material would have a chilling effect upon the agency by inhibiting the ability and willingness of DOE contractors to make honest and open recommendations concerning similar matters in the future. If DOE contractors were reticent in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. The functioning of DOE's scientific research programs would be harmed by the reduction in the free exchange of ideas and opinions.

The DOE regulations implementing the FOIA provide that, "[t]o the extent permitted by other laws, the 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.*

With respect to the discretionary disclosure of deliberative information here, the foreseeable harm would be that the quality of DOE decisions would be adversely affected if frank, written discussion were inhibited by the knowledge that the content of such discussion might be made public. Due to the chilling effect and public confusion as described above that would occur, we have determined that disclosure of the deliberative material is not in the public interest because foreseeable harm could result from such disclosure.

The FOIA requires that any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. 5 U.S.C. 552(b). The exceptions are where exempt and non-exempt material are so "inextricably intertwined" that release of the non-exempt material would compromise the exempt material, or where non-exempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. *See Lead Industries Ass'n v. Occupational Safety & Health Administration*, 610 F.2d 70, 85 (2nd Cir. 1979). Non-exempt material that is "distributed in logically related groupings" and that would not result in a "meaningless set of words and

phrases" may be subject to disclosure. *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

Here, the material being withheld under Exemption 5 is exempt material under the deliberative process privilege. Any non-exempt material that is not so "inextricably intertwined" that release would compromise the deliberative process material, and that can be provided in a way that would not result in meaningless words, is provided in the attached redacted copies.

#### **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 are no fees associated with your request at this time.

If you have any questions regarding your request, please contact Miriam Legan, the DOE Chicago Office FOIA Officer, at (630) 252-2041 or [miriam.legan@ch.doe.gov](mailto:miriam.legan@ch.doe.gov), or Attorney Michael McCann, DOE FOIA Counsel, at (631) 344-3440 or [mccann@bnl.gov](mailto:mccann@bnl.gov).

Sincerely,



Roxanne E. Purucker  
Manager

Enclosures:  
As Stated