

THE BIOWEAPONS AND BIODEFENSE FREEDOM OF INFORMATION FUND

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MISSION

THE BIOWEAPONS AND BIODEFENSE FREEDOM OF INFORMATION FUND PROMOTES TRANSPARENCY IN RESEARCH ON BIOLOGICAL WEAPONS.

THE FUND FILES REQUESTS UNDER THE US FREEDOM OF INFORMATION ACT AND OTHER OPEN RECORDS LAWS, DISTRIBUTING RESULTS TO CIVIL SOCIETY ORGANIZATIONS, ACADEMIC RESEARCHERS, AND THE GENERAL PUBLIC.

Principal Deputy General Counsel
Department of the Army
Office of the General Counsel
104 Army Pentagon
Washington DC 20310-0104

By certified mail, article number 7004 0750 0002 2401 1007

Dear Sir:

ORGANIZATION

THE FOI FUND IS A RESTRICTED OPERATING UNIT OF THE SUNSHINE PROJECT, A 501(C)3 NON-PROFIT ORGANIZATION.

DONATIONS ARE TAX-DEDUCTIBLE AND USED EXCLUSIVELY TO PURSUE REQUESTS UNDER OPEN RECORDS LAWS.

FREEDOM OF INFORMATION ACT APPEAL

This letter appeals the US Army Test and Evaluation Command's denial of the record *Chemical Warfare Agent Toxicity for Both Genders from Different Age and Ethnic Groups*, a report prepared under the D049 chemical and biological defense program.

Our initial request for this record was for Mandatory Declassification Review, which was made to US Army Dugway Proving Ground on 4 August 2004 (Attachment A). Dugway located the record, determined that it is not classified, and, per telephone and e-mail discussions the DPG FOIA Officer, treated my request under the FOIA, forwarding the record to the Test and Evaluation Command for a release determination.

This record was denied in its entirety by letter dated 7 Dec 2004 (postmarked 20 Dec) by the US Army Test and Evaluation Command, Deputy Chief of Staff for Information Management (Attachment B). In its denial, the Test and Evaluation Command withheld the whole record citing two FOIA exemptions, (b)(2) high and (b)(3). There is no indication that any attempt was made to segregate releasable portions of the record, nor were these allegedly applicable exemptions applied with specificity.

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Exemption (b)(2) high is applicable to internal records whose disclosure would compromise law enforcement. That is, information that about the methods used by the federal government to fight crime, such as security techniques used in prison or information that would reveal the identities of undercover agents or informants. In contrast, we have requested a study of the toxicity of chemical warfare agents. CW agents are not a (legal) method of law enforcement. Exemption (b)(2) high is simply inapplicable to this record.

The Army Test and Evaluation Command's faulty reasoning is that because developing chemical weapons is illegal, then information about chemical weapons toxicity cannot be disclosed. This is untrue. Information about chemical weapons toxicity is readily available to the public, for example, information released in ChemDemil programs. In fact, further dissemination of information about toxicity of CW agents is a significant element of homeland security efforts, so that elected officials, medical, law enforcement, and the general public may be better prepared in the event of their use. This information is available, for example, in the extensive training courses offered to civilians at Dugway Proving Ground itself, by conducting a search on DTIC, in the US Army's Textbook of Military Medicine: Medical Aspects of Chemical and Biological Warfare, or at any of the following example URLs, including example US Army URLs, all of which contain information on CW agent toxicity:

<http://www.bordeninstitute.army.mil/cwbw/Ch5.pdf>

<http://chppm-www.apgea.army.mil/chemicalagent/caw/ERDEC-TR-489.pdf>

<http://chppm-www.apgea.army.mil/hrarcp/CAW/vxHCD.pdf>

<http://www.mitretek.org/home.nsf/HomelandSecurity/NerveAgents>

<http://www.emedicine.com/emerg/topic899.htm>

<http://ehp.niehs.nih.gov/members/1994/102-1/munro-full.html>

Therefore, not only is law enforcement-oriented (b)(2) high exemption not applicable to this record, the Test and Evaluation Command's reasoning that information on chemical agent toxicity cannot be released is false. Nor is "mosiac theory" applicable here – the existence of CW agents such as VX, Tabun, Sarin, and others, as well as their high toxicity to humans, is already widely known and well-documented in the public record.

Although it was not the primary purpose of the *Chemical Warfare Agent Toxicity for Both Genders from Different Age and Ethnic Groups* study, it is possible that the study includes "cookbook" information for the production and/or dissemination of chemical weapons agents. We agree that US Army CW agent "cookbook" information, beyond that which is already in the public domain, should not be released. Accordingly, under a properly applicable exemption, we would not object to your redaction of undisclosed cookbook information that specifically concerns how to produce and/or disseminate CW agents.

However, since *Chemical Warfare Agent Toxicity for Both Genders from Different Age and Ethnic Groups* is a study of agent toxicity, rather than of CW agent production and dissemination, it is unlikely there is a significant amount of cookbook information to redact, if there is any in the record at all.

The Test and Evaluation Command also cites FOIA Exemption 3 in its denial letter. Although the requested record concerns chemical agents, when it invoked Exemption 3, the Test and Evaluation command referred only to biological agents.

As the denial is written, the only exemption claimed for information on chemical warfare agents is (b)(2) high. Because Exemption 3 is claimed only for biological warfare agent information, then it cannot be used to withhold any information about chemical agents from the record. Accordingly, the record should be released.

It is possible that the Test and Evaluation Command made an error in its reply, however, it has not responded to an e-mail asking if the reference to biological warfare agents was in error.

In any event, in this context Exemption 3 relates to export of weapons. By domestic and international law, the US Army does not produce chemical or biological weapons agents except for small quantities for specific, well-delineated defensive purposes. The application of Exemption 3 to *Chemical Warfare Agent Toxicity for Both Genders from Different Age and Ethnic Groups* is limited to cookbook information on how to manufacture chemical or biological weapons. This information, if any, would be minimal and ancillary to the report, because it is a defensive study about agent toxicity and not one about weapons making.

As we stated is the case with chemical weapons information, however, if previously unreleased and specific "cookbook" information on the production and dissemination of biological agents (as opposed to their effects on gender, age, and ethnic groups) is included in the record, then we would not object to its redaction.

In summary, FOIA Exemption (b)(2) high is entirely inapplicable to this record and has been improperly claimed. Exemption 3 may only be used to redact BW/CW weapons production information that is ancillary to the primary purpose of this study. Therefore we request that this record be immediately released in its entirety, with the exception of cookbook data that may be properly withheld under Exemption 3, if any such information actually exists in this record.

Sincerely,

Edward Hammond
Director

cc: Mr. Steve Erickson, Director, Citizen's Education Project, Salt Lake City, UT
BG James R. Myles, Commander, Test and Evaluation Command
by certified mail, article number 7004 0750 0002 2401 0994