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Assistant Secretary of Defense for Public Affairs
Department of Defense
Washington, D.C. 20301

Dear Assistant Secretary:

This is an appeal pursuant to Subsection (a) (6) of the Freedom of Information Act as amended (5 U.S.C. 552).

On October 5, 1979, a letter was sent to me from the Acting Archivist of the United States, informing me that a component of the Department of Defense, the Joint Chiefs of Staff, had determined that my request for seven documents in the possession of the National Archives had been denied in full, and indicating that an appeal should be directed to you. This letter constitutes that appeal.

The denial letter states: "Release of the information contained in the requested documents would reveal techniques, concepts, and procedures that are used today in formulating unconventional warfare plans, strategy, and tactics."

The seven requested documents in question deal with the past policy of the United States in the field of biological warfare. Any strategic or tactical cover and deception plan, policy, or procedure devised for biological warfare could not be applicable to any other unconventional warfare system. Any similarities which exist between biological warfare and other methods of unconventional warfare would be of a general nature and no doubt be available to the public in declassified documents, books, and textbooks about war.

Furthermore, in 1975, fifty years after it was first drafted, the United States ratified the "Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction." Therefore, any current plan that the Joint Chiefs of Staff have on the first use of biological weapons would be in violation of this agreement since under the terms of the convention, the parties undertake not to develop, produce, stockpile, or acquire biological agents or toxins "of types and in quantities that have no justification for prophylactic protection, or other peaceful use," all such material is to be destroyed within 9 months of the convention's entry into force. In January, 1976, all heads of federal departments and agencies certified to the President that as of December 26, 1975, their respective departments and agencies were in full compliance with the convention.

If necessary, I intend to argue in court that the ratification of this treaty represents a declassification event as contemplated in Executive Order 12065, paragraph 3-301: "Orders shall be declassified as early as national security considerations permit. Decisions concerning declassification shall be based on the loss of the information's sensitivity with the passage of time or on the occurrence of a declassification event."

The denial letter further states that: "...the assignment of roles and missions among U.S. Government Departments, and their cooperation with foreign government organizations, has always been classified information and should not be released. Divulgence of this information identifies US targets for potential enemy collection and counterintelligence efforts, and breaks faith with foreign governments with regard to the information they have provided to the U.S in confidence."

Declassification guidelines do exist for foreign government information 30 years and older, requested under mandatory review pursuant to paragraph 3-404 of E.O. 12065 and paragraph 11-201 of DOD 5200.1.

In fact, there is a considerable amount of documentation already declassified pursuant to these regulations on the relationship between Great Britain and the United States in the chemical, biological and radiological field.

This Freedom of Information Act request is for documents dated within two or three years of the mandatory declassification date. The proximity in time is so short that the assignment of roles and missions among U.S. Government Departments or their cooperation with foreign government organizations has already been established by previously released documents.

For documents less than 30 years old, where declassification guidelines do not exist, the second part of paragraph 11-202 of DOD 5200.1 should be applied. "In cases where these guidelines cannot be applied to the foreign government information requested, or in the absence of such guidelines, consultation with the foreign originator through appropriate channels normally should be effected prior to final action on the request. When the responsible component is knowledgeable of the foreign originators view toward declassification or continued classification of the types of information requested, consultation with the foreign originator may not be necessary." Therefore, this material should be declassified, according to past procedure.

Furthermore, the assignment of roles and missions among U.S. Government Departments in the biological warfare field is already a matter of public record and described in great detail by the September, 1975, Hearings Before the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities, by two hearings before the

Senate Subcommittee on Health and Scientific Research titled: Biological Testing Involving Human Subjects by the Department of Defense, 1977, and Human Drug Testing by the CIA, 1977; by the two-volume book U.S. Army Activities in the U.S. Biological Warfare Programs, dated February 24, 1977, published by the U.S. Army; as well as by previously declassified documents.

The denial letter concludes: "Release of the documents to you is, therefore, denied by the OJCS in that they are currently and properly classified. The applicable FOIA exemption is 5 U.S.C. 552 (b) (1)."

Exemption (b) (1) states that the Act does not apply to matters that are: "(1) (A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order." Under Executive Order 12065 the minimum standard for classification is that the document is properly classified "confidential," meaning that its disclosure could "reasonably be expected to cause identifiable damage to the national security."

According to DOD 5200.1: "Examples of 'identifiable damage' include the compromise of information that indicates strength of ground, air, and naval forces in the United States and overseas areas; disclosure of technical information used for training, maintenance, and inspection of classified munitions of war; revelation of performance characteristics, test data, design, and production of munitions of war."

Thus the withholding component at the Department of Defense must identify what damage disclosure of these documents will have upon the national security, particularly in light of the testimony of General George S. Brown, then chairman of the Joint Chiefs of Staff before the Senate Armed Services Committee: "The Joint Chiefs of Staff do not believe that the capability of waging biological warfare is essential to our deterrent posture. I believe that the ratification of this treaty (the Geneva protocol of 1925) will have no detrimental impact on our national security and could enhance it." (Testimony of General Brown before the Senate Armed Services Committee, Military Posture for Fiscal Year 1976, page 115 of prepared statement.)

Since these documents are permanently valuable records of the Government as defined by 44 U.S.C. 2103, and information in the possession and control of the Administrator of General Services, pursuant to 44 U.S.C. 2107 and 2107 note, the Archivist of the United States according to E.O. 12065, paragraph 3-503 will have to determine, "...whether the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure." See E.O. 12065 paragraph 3-303.

I am willing to argue in a court of law that United States policy on biological warfare, the subject of many books, articles, public discussions, legislative actions and international treaties, is of great public interest. The declassification of these documents will contribute to public understanding of biological warfare policy during an important period in United States history. This public interest, outweighs the actions of the Office of the Joint Chiefs of Staff in keeping this past policy classified.

Sincerely,



Edward J. Becker

Enclosure: Letter of Denial of Freedom of Information Request, dated Oct. 5, 1979.