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Date:

To:

Special Assistant to the General Counsel (02C)

From:

Assistant General Counsel (024)

Subject:

Proposed Confidentiality Measures for an Environmental Protection Agency (EPA) Pesticide/Fat Bank Study on Accident Victims

1. At your request, we have reviewed the attached proposal dated September 6, 1983, concerning the protection of data generated in the subject study drafted by an EPA contractor.
2. It is our understanding that the parties involved in this study, i.e., the EPA, its contractor, and the Veterans Administration, desire to maintain, as far as possible, the confidentiality of medical records and other data used in this study, which is in the nature of a feasibility phase of a possible larger study to be funded by the interagency work group on Agent Orange. To maintain confidentiality of the medical records and other data, the contractor's proposal outlines the following suggested steps to be taken to reach that objective.
3. Essentially, autopsy or pathological reports of the accident victims are to be sent to the EPA from the various pathologists who generated those records. Immediately upon receipt, the EPA, acting only as a conduit, is to forward these reports to its contractor for preparation of a confidential identification roster that will be used by the contractor only. To be included in this roster, with VA involvement, is "study group assignment" information indicating the accident victims' military status, i.e., nonmilitary service, military service/Vietnam, and military service/non-Vietnam. The VA will provide the EPA with that information once it matches victims' social security numbers received from the EPA with VA veterans and beneficiaries identification and records location subsystem (BIRLS) information. However, neither the VA nor the EPA will retain a copy of that information, but will forward it to the EPA contractor for inclusion in the roster and for annotation of the medical records. At the conclusion of the study, the medical records would be transferred to the EPA, but disposition of the contractor's confidential identification roster is subject to one of three proposed options: (1) the contractor destroys the roster, precluding any further VA or EPA follow-up; (2) the contractor maintains the roster; or (3) the contractor turns over the roster to the EPA.

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4. From the viewpoint of the VA, it is our opinion that once the VA receives social security numbers of accident victims from the EPA that information, as well as the later included study group assignments, must be considered to be Agency records and, thus, subject to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. As such, that information must be released, so long as it remains in the custody of the Agency, to a FOIA requester subject to any applicable deletions permitted under one or more of the subsection (b) exemptions. In this regard, we note that, generally, the victims' social security numbers could be withheld from virtually all FOIA requesters under the (b)(6) exemption of the FOIA as a clearly unwarranted invasion of personal privacy. However, once that individually identifiable information is deleted, the remaining study group assignment information would have to be disclosed. Since we assume all the information is factual the (b)(5) (i.e., deliberative process privilege) exemption would not be available for use by the VA. Nevertheless, once that information leaves the control of the Agency (see, for example, Kissinger v. Reporters Committee, 445 U.S. 136 (1980)) and remains in the custody and control of the contractor, it is protected in its entirety from disclosure under the FOIA (see Forsham v. Harris, 445 U.S. 169 (1980)).

5. Considering confidentiality of the records from the perspective of the Privacy Act of 1974 (5 U.S.C. § 552a), we note that the Privacy Act applies to information maintained by the VA, the EPA or their contractors (under subsection (m) of the Act) and retrievable by individual identifiers of living individuals who are the subjects of the records. Assuming that the information in question will be maintained in a Privacy Act system of records, it is subject to access by the individuals involved (5 U.S.C. § 552a(d)) with even the contractor mandated to allow such access.

6. With respect to confidentiality of the contractor's confidential identification roster upon the conclusion of the study, we note that Option No. 1 affords the best confidentiality protection; Option No. 2 maintains the confidentiality of the roster until a suit requires disclosure under discovery or a court order but would constitute a violation of the Privacy Act if the contractor maintained these individually identifiable records and they were no longer relevant to a purpose of the EPA (5 U.S.C. § 552a(e)(1)); and Option No. 3 provides the least degree of confidentiality with the EPA taking responsibility for confidentiality. Since Option No. 1 would preclude any later

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VA use of the roster information, we believe that option should not be encouraged despite its excellent confidentiality protection. Thus, it appears that Option No. 3 may be the only viable option for VA purposes.

7. Finally, we note in passing that should the Agency receive a FOIA request for the subject study materials, the VA would not be able to "hide behind" the inscription contained in the contractor's "Attachment B."

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Attachment

VA COHORT STUDY CONFIDENTIALITY

Attachment B

Effects of EPA/VA Cohort Study Materials on Freedom of Information Requests:

It appears that the nature of this phase of proposed work will preclude its accessibility to outside firms under a Freedom of Information Act (FOIA) request. This phase of the VA Cohort Study is in the nature of a feasibility study for a larger, full-scale study potentially to be funded by the Inter-agency Workgroup on Agent Orange. A possible FOIA exclusion, therefore, would lie in the fact that the proposed phase of work concerns predecisional, opinion of draft materials developed by the Government. In addition, it is possible that this information is considered personal and medical, the disclosure of which could constitute an invasion of privacy. It is suggested that all deliverables containing confidential information (patient medical information or patient identifying information) that JRB produces include the following inscription on the cover page:

"Predecisional Draft: This report (material) contains predecisional information for administrative consideration by the EPA and the VA. For internal circulation only; not for quotation or citation."

These are suggestions as to possible interpretations under FOIA exclusions and are not meant to be conclusions of law as JRB is not a professional corporation licensed to practice law. These suggestions should be reviewed by the EPA General Counsel and, if accepted, might effectively exclude VA Cohort Study materials and deliverables from the Freedom of Information requests.