

January 24, 2012

Secretary Kathleen Sebelius
Department of Health and Human Services (HHS)
200 Independence Ave., SW
Washington, DC 20201

Dear HHS Secretary Sebelius:

We, the undersigned nonprofit organizations, are deeply concerned about a recent letter regarding the treatment of information related to the water contamination at U.S. Marine Corps Base Camp Lejeune from the Department of the Navy (DON) to Agency for Toxic Substances and Disease Registry (ATSDR), and the subsequent ATSDR decision to redact a report, in compliance with the request. The January 5 letter urged ATSDR to withhold, or remove from websites, information related to “active potable water wells, raw or treated potable water lines, water treatment plants or water storage tanks,” referencing concerns over possible security risks related to the disclosure of critical infrastructure information.¹ On January 19, ATSDR released a version of the Chapter B study of three water distribution systems at Camp Lejeune, specifically stating that redactions were made in response to the DON request.²

We believe this matter requires your prompt attention to ensure the full release of crucial information regarding ATSDR’s water-modeling and health studies related to what is likely the worst known water contamination site in U.S. history.

There are several troubling aspects of ATSDR’s compliance with this request. First, the mission of ATSDR is to protect the public health and the agency has over the past twenty years engaged in public health assessment and study activities at Camp Lejeune. The ATSDR website states that it is “responsible for preventing or reducing the harmful effects of exposure to hazardous substances on human health and quality of life.”³ This, not the mission or practices of another federal agency, should drive ATSDR work products. The public relies on the scientific integrity of the studies and the health information provided by ATSDR. The integrity of its analysis and assessments depends upon access to all relevant information.

The letter states, “I request that we work together to review our public domain materials and take appropriate steps to protect critical infrastructure information.” In our view, the only appropriate steps for ATSDR to take are those firmly rooted in law. It is hard to determine from the citations provided in the attachment to the letter, “References to Protection of Critical Assets,” precisely where the DON is deriving the authority for the guidance to withhold from release—or removal from the public domain—certain information. The references do not at all seem applicable to how well-water information might be managed by DON, much less ATSDR.

Notably, there is no mention of the recently passed law that specifically provides for the withholding of “Critical Infrastructure Security Information” or CISI, such as that apparently

¹ <https://s3.amazonaws.com/s3.documentcloud.org/documents/283117/navy-letter.pdf>

² http://www.atsdr.cdc.gov/sites/lejeune/docs/chapter_B_hadnotpoint.pdf

³ <http://www.atsdr.cdc.gov/sites/lejeune/atsdr.html>

asserted in the DON request, by the Department of Defense (DoD). This statutory exemption to the Freedom of Information Act (FOIA) passed as Section 1091 of H.R. 1540, the National Defense Authorization Act for Fiscal Year 2012, which was signed into law on December 31, 2011. This exemption defines CISI as:

sensitive but unclassified information that, if disclosed, would reveal vulnerabilities in Department of Defense critical infrastructure that, if exploited, would likely result in the significant disruption, destruction, or damage of or to Department of Defense operations, property, or facilities, including information regarding the securing and safeguarding of explosives, hazardous chemicals, or pipelines, related to critical infrastructure or protected systems owned or operated by or on behalf of the Department of Defense, including vulnerability assessments prepared by or on behalf of the Department of Defense, explosives safety information (including storage and handling), and other site-specific information on or relating to installation security.

It also includes a public interest balancing test, to ensure that CISI is withheld by DoD only where the public interest is outweighed by the need to protect the CISI. This determination is to be made in writing by the Secretary of Defense or his/her designee, and that determination is to be made publicly available. To say the least, it is troubling that the current Marine Corps procedures outlined by the Major General are not at all based on the most recent and most relevant law governing DoD treatment of CISI.

The Memorandum of Understanding (MOU) between ATSDR and DON for public health activities at Camp Lejeune states explicitly:

Information provided to ATSDR under this agreement will be maintained and released in accordance with the Privacy Act (5 U.S.C. 552(a) as amended), the Freedom of Information Act (5 U.S.C. 552) and applicable regulations.⁴

Yet, the ATSDR redactions made at the behest of the DON were made with highly questionable legal justification. According to the ATSDR report, the redactions were “based on 18 U.S. C. 795(a); Department of Defense Instructions, 2000.16; and SECNAV M-5510.36.” The former is a criminal statute for sketching or photographing defense installations that the President of the United States has defined as “requiring protection against the general dissemination of information,” due to national security interests. It is not recognized as a viable “Exemption 3 statute” under the FOIA.⁵ Moreover, to our knowledge, the Camp Lejeune water distribution information has not been so declared. The latter two references are for DoD-specific instructions that should have no bearing on ATSDR products. The ATSDR application of another agency or department’s rules relating to the disclosure of information seems extremely discretionary, deferential, and mistakenly lacking in legal justification.

Additionally, the MOU states: “Neither party to this MOU has the authority over the other party to approve the content of final information materials.”

⁴ Section 7.2 <http://tftptf.com/Misc/MOU2009.pdf>

⁵ See: http://www.wcl.american.edu/lawandgov/cgs/existing_exemption_3_statutes.cfm

It would indeed be troubling if a precedent were set both for ATSDR and for other federal scientific, investigatory, or regulatory agencies whereby redactions of scientific assessments were made simply upon the request of the other federal entity under review.

In addition to fulfilling your missions, ultimately at issue for HHS and ATSDR is what should be disclosable under the law, especially under FOIA, and what is in keeping with the President's directive to apply a "presumption of disclosure."⁶ According to longstanding Department of Justice guidance,⁷ in cases where an original record sought under FOIA—in this case, let's presume an ATSDR water-modeling report on Camp Lejeune—may contain information provided by another agency, consultation with that other agency on disclosure may be appropriate. However, this does *not* mandate complete deference to that other agency. It may be that the DON raised legitimate concerns regarding the vulnerability of certain critical infrastructure information. If so, ATSDR must carefully weigh these concerns without undue deference to DON/Marine Corps' interests, and so that the public interest, public health, and the integrity of ATSDR science are not undermined.

Given the many documented instances of inappropriate secrecy related to the Camp Lejeune water contamination, it unfortunately is only reasonable to question the interest being sought by the Marine Corps in its letter urging ATSDR withhold information. Conflicts of interest should be strongly considered when a federal entity whose site is under investigation by another agency urges for secrecy of any kind.

The Marine Corps assertion in the letter that "Prudence requires, however, that information sharing be within the rubric of responsible force protection" rings very hollow to the Camp Lejeune service members and civilians and their families who after having lost loved ones, suffered cancer and grave illnesses, are still waiting for the truth and some justice. We urge you to carefully consider the strong public interest in making the public the unredacted report and relevant underlying information to the fullest extent required or permitted under law. Representatives from our organizations would be pleased to meet with you or your staff regarding this matter. You may reach us by contacting Angela Canterbury at the Project On Government Oversight at 202-347-1122 or acanterbury@pogo.org.

Sincerely,

The Agency for Toxic Substances and Disease Registry's Camp Lejeune Community Assistance Panel (CAP)

American Association of Law Libraries

American Booksellers Foundation for Free Expression

American Library Association

Association of Research Libraries

BlueGreen Alliance

Center for Environmental Health

Center for Media and Democracy

Citizens for Responsibility and Ethics in Washington – CREW

⁶ http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act

⁷ http://www.justice.gov/oip/foia_updates/Vol_XII_3/page2.htm

Community Research
Defending Dissent Foundation
Essential Information
Feminists for Free Expression
Freedom of Information Center at the Missouri School of Journalism
Government Accountability Project – GAP
Hampshire Research Institute
iSolon.org
Liberty Coalition
National Coalition Against Censorship
National Freedom of Information Coalition
OMB Watch
OpenTheGovernment.org
Progressive Librarians Guild
Project On Government Oversight – POGO
Public Employees for Environmental Responsibility – PEER
Reporters Committee for Freedom of the Press
Sierra Club
Society of Professional Journalists
Tri-Valley CAREs
Washington Coalition for Open Government

cc: The Honorable Leon Panetta, Secretary of Defense
White House Chief of Staff Jack Lew
Dr. Thomas R. Frieden, Director, Centers for Disease Control
Dr. Christopher Portier, Director, Agency for Toxic Substances and Disease Registry
The Honorable Ray Mabus, Secretary of the Navy
General James F. Amos, USMC, Commandant of the Marine Corps
Chairman Patrick Leahy and Ranking Member Chuck Grassley, Senate Judiciary
Committee
Chairman Carl Levin and Ranking Member John McCain, Senate Armed Services
Committee
Chairman Patty Murray and Ranking Member Richard Burr, Senate Veterans' Affairs
Committee
Chairman Darrell Issa and Ranking Member Elijah Cummings, House Oversight and
Government Reform Committee
Chairman Howard McKeon and Ranking Member Adam Smith, House Armed Services
Committee
Chairman Jeff Miller and Ranking Member Bob Filner, House Veterans' Affairs
Committee
Senator Kay Hagan
Senator Bill Nelson
Representative John Dingell
Representative Carolyn Maloney
Representative Brad Miller