

January 24, 2012

Secretary Leon Panetta
Department of Defense
1400 Defense Pentagon
Washington, DC 20301-1400

Dear Secretary of Defense Panetta:

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 address the Department of Navy’s request to withhold 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 the DON request.

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 Major General 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 by the Department of Defense (DoD) in the DON request. 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

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

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.

As you know, it also includes a public interest balancing test, to ensure that CISI is only withheld by DoD where the public interest is outweighed by the need to protect the CISI. This determination is to be made in writing by you, or the serving 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 in the letter are not at all based on the most recent and most relevant law governing DoD treatment of CISI.

We urge you to take measures immediately to properly implement the use of the CISI exemption to FOIA. We request that you initiate rulemaking in order to allow for notice and comment, and to clarify the appropriate usage of the exemption and how it may relate to existing instructions, regulations, or statutes relating to critical infrastructure information security.

Also, of great concern is the legal basis used to redact the Camp Lejeune report. 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.³

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,” which were in the DON request letter. 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.⁴ 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.

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 DON/Marine Corps in its letter urging ATSDR withhold information. Conflicts of interest are of great concern when a federal entity whose site is under investigation by another agency urges for secrecy of any kind. What ought to be at issue for DoD is full transparency and accountability with respect to the Camp Lejeune water contamination.

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

³ Section 7.2 <http://tftptf.com/Misc/MOU2009.pdf>

⁴ See: http://www.wcl.american.edu/lawandgov/cgs/existing_exemption_3_statutes.cfm

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 provide the legal justification for the request made by DON and to immediately initiate rulemaking to promulgate regulations regarding the use of the new DoD CISI exemption to FOIA. Please also ensure the public interest is being served by urging ATSDR to make 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
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 Kathleen Sebelius, Secretary of Health and Human Services
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