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May 9, 2003

BY HAND

Sean O'Keefe, Administrator
National Aeronautics and Space Administration
Two Independence Square
300 E Street, S.W.
Washington, D.C. 20546

Re: Appeal under the Freedom of Information Act

Dear Mr. O'Keefe:

This is an appeal under the Freedom of Information Act, 5 U.S.C. § 552(a)(6) (FOIA) and NASA regulations, 14 CFR § 1206 *et seq.*, of a "no records" response, dated April 11, 2003, to the January 31, 2003 FOIA request of my client Leslie Kean. Copies of the foregoing correspondence are enclosed. Exhibits 1 and 2.

As discussed in more detail below, NASA did not disclose documents in its possession and control that clearly fell within Ms. Kean's January 31 FOIA request. NASA's search was thus unreasonable and inadequate.

Background

Ms. Kean is an investigative journalist working on a project with the SCI FI Channel and History Associates, Inc. in her capacity as Research Director of the public advocacy group, the Coalition for Freedom of Information. Her FOIA request was directed at obtaining access to documents related to a "Project Moon Dust", a federal program involving the retrieval of Soviet

space debris and objects of unknown origin. Her request included reports and analyses of "fragments" of objects "to determine national ownership and vehicle origin," a process that NASA apparently refers to as "fragology." *E.g.*, Exhibit 3. Ms. Kean also requested copies of all documents relating to the 1965 crash of a specific object of unknown origin in Pennsylvania.

Based upon news reports, witness accounts, and other publicly available data, on or around December 9, 1965, the federal government was involved in the investigation of the "crash" of an object in a rural area of western Pennsylvania, near the towns of Kecksburg and Acme. Several civilians reported seeing NASA representatives investigating the incident. Also, on or around December 9, 1965, people in Ohio, Michigan, Indiana and Canada reported sighting a meteor-like object. According to news accounts and as confirmed by U.S. Air Force documents, fragments associated with these public reports were collected by representatives of the federal government. Earlier that same day, COSMOS 96 (sometimes spelled "KOSMOS"), a Russian Venera capsule, returned to earth in Canada. *See e.g.*, Exhibit 4.

In the 1960s, Richard M. Schulherr was an engineer employed by NASA whose responsibilities included fragology and who was connected with "Project Moon Dust". *E.g.*, Exhibit 3, 5. Newspaper accounts connect Mr. Schulherr with NASA's retrieval and testing of other objects of unknown origin found or reported by the public.

In her request of January 31, 2003, Ms. Kean asked NASA for "all documents of whatever form" relating or referring to "Kecksburg" or "Acme", "Richard M. Schulherr", "fragology", "Project Moon Dust", and "COSMOS 96". Her request was not date limited. As the sample documentation, attached as Exhibits 3-5, makes clear, there should be no issue that the requested documentation is or was in the possession or control of NASA.

NASA did not respond within the twenty working days set forth under FOIA. By telephone conversation of March 11, 2003, LaShonda Goodwin of NASA's Freedom of Information Act Office, acknowledged NASA's receipt of Ms. Kean's request and informed her that her response was delayed because resources had been diverted to fulfilling news media requests relating to the Challenger tragedy. Ms. Goodwin said the response would be sent soon.

Ms. Kean placed a second telephone call on April 7, 2003, and was informed by Ms. Kelly Robinson that she would be receiving a "no records" response from NASA. During that conversation, Ms. Robinson acknowledged that NASA did have correspondence regarding a FOIA request to it from another person, who had in fact received some documentation from NASA in response to his/her inquiry concerning the same events. Ms. Robinson stated that whatever documentation did exist was not in that FOIA file and that she could not disclose the earlier FOIA correspondence under the Privacy Act.

By e-mail dated April 11, 2003, Ms. Kean received NASA's "no records" response. Exhibit 1. The April 11 response does not reference or disclose the existence of the previous FOIA requests relating to the same events; it does not cite any reasons for not disclosing the correspondence, and it did not provide Ms. Kean with segregable portions of those documents.

Instead, the April 11, 2003 letter states that "The NASA Headquarters History Office conducted a search and from that search no records were found responsive to your request."

This appeal is timely filed.

Statement of Appeal

The key purpose of FOIA is to disclose information that will assist the public in understanding the workings of government. *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). "[T]he purpose of FOIA is to permit the public to decide for itself whether government action is proper" *IBEW Local No. 41 v. HUD*, 763 F.2d 435, 436 (D.C. Cir. 1995). NASA's regulations reflect this purpose. It is "NASA policy to provide the 'widest practicable and appropriate dissemination of information concerning its activities and the results thereof.'" 14 CFR § 1206.102.

Ms. Kean is investigating the United States government's reaction – governmental, social, political and scientific – to events that nearly 40 years ago the government viewed as sensitive enough to warrant a "confidential" classification. See Exhibit 3. Ms. Kean understands that 40 years ago, the classification of such information as "confidential" and thus not subject to disclosure may have had a rational basis. In December 1965, for example, when the Kecksburg and COSMOS 96 events occurred, the United States government was still in the midst of the Cold War and was also beginning its own forays into space.

Whatever sensitivities existed that may have justified keeping these types of documents secret, however, have now been eclipsed by the end of the Cold War and the United States' own scientific advances. The public's interest now lies in the historical significance of these events, including an evaluation of government decisions, such as a "confidential" classification. *E.g.*, *Washington Post Co. v. Dep't of Agriculture*, 943 F. Supp. 31 (D.D.C. 1996)(public interest supported release of names and addresses of subsidy recipients to shed light on agency's administration of subsidy program); *Fine v. DOE*, 823 F. Supp. 888 (D.N.M. 1993)(disclosure of employees involved in processing government documents proper). There was a reason that NASA and other federal agencies, including the military, took an active interest in events like the one in Kecksburg and it is now time to evaluate why. Both the current Administration and its predecessor have recognized that documents over 25 years old are presumptively open for public inspection. *E.g.*, Executive Order 13292, Part 3 (March 28, 2003); Executive Order, Part 3 (April 17, 1995) Indeed, the process of declassification of the documents falling within Ms. Kean's request should have begun in or around April 1995, if not before.

As noted, Ms. Kean has evidence that NASA is or was in possession and control of documents responsive to her request. One sample of her research, in fact, indicates that there are a substantial number of NASA documents related to a government investigatory process known as "fragology." Exhibit 3. This document alone raises questions about the reasonableness of NASA's search. *Cf. Founding Church of Scientology v. NSA*, 610 F.2d 824, 836-837 (D.C. Cir. 1979)(positive evidence of overlooked materials justify discovery against agency in FOIA case). The sample documents attached also show that Richard M. Schulherr was a NASA employee,

was associated with "Project Moon Dust," and was involved in generating government reports related to that project. Exhibits 3, 5. In addition, it is noteworthy that the only installation apparently contacted by NASA in processing Ms. Kean's request was the "NASA Headquarters History Office." Compare Exhibit 4 (NSSDC/Goddard Space Flight Center document re: Cosmos 96).

It is difficult to believe that NASA would not maintain control over 24 "confidential" files relating to space programs as prominent as "Sputnik" or, at the very least, maintain some record indicating their proper transfer or disposal. E.g., Exhibit 3. See also 14 CFR 1206.604(c)(NASA FOIA office to "promptly" inform requester if document has been transferred to another agency).

A second, but related, ground for this appeal is the failure of NASA to provide Ms. Kean with copies of the earlier FOIA requests for the identical information and NASA's response(s) to those requests. In its April 11, 2003 "no records" response, NASA does not even acknowledge the existence of these prior requests or its responses. Even assuming a request under FOIA triggered legitimate Privacy Act concerns, NASA was required to provide Ms. Kean with reasonably segregable portions of that correspondence. 5 U.S.C. § 552(b); *Department of State v. Ray*, 502 U.S. 164 (1991)(disclosure of personal information without identifying details). At most, the name and address of the previous FOIA requester(s) may be subject to nondisclosure. Compare *Minnis v. Dep't of Agriculture*, 737 F.2d 784, 786 (9th Cir. 1984)(withholding names and addresses of permit applicants), with *Baltimore Sun v. Marshals Service*, 131 F. Supp. 2d 725, 729 (D. Md. 2001)(identity of purchasers of seized government property disclosed). See also, *National Association of Atomic Veterans, Inc. v. Director*, 583 F. Supp. 1483, 1487 (D.D.C. 1984)(potential media inquiries flowing from disclosure not the type of privacy interest covered by Exemption 6).

There are no *per se* rules of nondisclosure. *Stern v. FBI*, 737 F.2d 84, 91 (D.C. Cir. 1984). FOIA Exemption 6 does not justify the withholding of information regarding individuals, particularly where the privacy interest is minimal and the public interest in disclosure is strong. The balance of interests under Exemption 6 "instructs the court to tilt the balance in favor of disclosure." *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971). The "core purpose" of FOIA – to contribute to the public's understanding of government operations and activities – outweighs privacy concerns. *Dep't of Defense v. FLRA*, 510 U.S. 487, 497 (1994).

As noted above, Ms. Kean's investigation includes the government's reaction to events related to Kecksburg and NASA's fragology investigation on a variety of different levels, including document disposal and/or transfer decisions, the judgments regarding historical significance that play a part in those decisions, and an agency's responsiveness to public reports and/or inquiries regarding these types of events. Access to the identities of the people involved is a crucial part of Ms. Kean's research and evaluation. E.g., *Painting Indus. of Hawaii Market Recovery Fund v. Dep't of the Air Force*, 26 F.3d 1479, 1482 (9th Cir. 1994)(derivative use of information must be considered in determining public interest in disclosure); *Sheet Metal Workers' Int'l Ass'n, Local #19 v. Dep't of Veterans Affairs*, 940 F. Supp. 712 (E.D. Pa. 1995)(release of names to facilitate interviews supported disclosure). Moreover, the

individual(s) who previously requested the information that Ms. Kean has requested presumably shares her interest in disclosure. *Cf. Lepelletier v. FDIC*, 164 F.3d 37, 47 (D.C. Cir. 1999)(consideration must be given to whether release may benefit person named in government file); *Washington Post Co. v. HHS*, 690 F.2d 252, 261-262 (D.C. Cir. 1982)(disclosure of information about person's professional activities not a significant privacy interest).

In conjunction with this appeal, we also request that NASA provide Ms. Kean: (1) a description of the search conducted regarding her request and any documentation (*e.g.*, e-mails) related thereto; (2) a copy of NASA's draft affidavit on FOIA searches or, in lieu thereof, a copy of affidavits that have been filed on NASA's behalf in FOIA disputes; (3) copies of the relevant information management manuals, memoranda, *etc.*, that would have governed the transfer or disposal of documentation during the early 1960s, and including the transfer of the files listed in Exhibit 3; (4) copies of the relevant information management manuals, memoranda, *etc.*, that would have governed the retention, transfer or disposal of FOIA requests at the time that any earlier request was processed; (5) all documentation relating to NASA's processing of any earlier request(s), and (6) copies of instructional or procedural memoranda, manuals, *etc.*, relating to the process for conducting investigations, such as "fragology", that were in force in the 1960s.

If you have any questions concerning this appeal or if there is anything that we can do to assist your search, please do not hesitate to contact me. In accordance with the FOIA, we will expect a response to this appeal within 20 working days.

Sincerely,



Lee Ellen Helfrich

cc: Leslie Kean
Exhibits (5)