

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE
NATIONAL INSTITUTES OF HEALTH

LBR
File 79/1

TO : Freedom of Information Contacts

DATE: May 19, 1976
PATENT BRANCH, OGC
DHEW

FROM : NIH Freedom of Information Coordinator

JUN 22 1976

SUBJECT: FOI Advisory 76-7, Procedure for Requests for Grant Applications and Progress Reports

The Assistant Secretary for Health has signed a letter (attached) formalizing and adding to our procedure for notifying grantees when a request is received for grant applications and progress reports.

The Assistant Secretary's letter will be given wide circulation among investigators and officials of grantee institutions, and others. This distribution will be made through a special issue of "NIH Guide for Grants and Contracts."

Will you kindly put the procedure spelled out in the letter into effect, including the procedure of asking investigators about copyrightable material. We anticipate that asking them the question about copyrightable material will cause some confusion. You could inform investigators that copyrights cannot be used to protect ideas or facts; a copyright is used to protect a certain sequence of words--that is, the language in which an application is expressed. If the scientist intends to use the exact language of part of his application or progress report in a later, copyrighted article or book, then it would be appropriate for us to put the copyright notice on the material before releasing it.

We do not recommend that you ask the HEW Patent Counsel to decide whether a scientist's claim of copyrightability is justified. Rather, we recommend that you accept the scientist's word on this--that you include the appropriate notice in any instance in which a scientist claims material is copyrightable. (You may wish to have a rubber stamp prepared with the appropriate notice.)

We do recommend that you continue the practice of consulting the HEW Patent Counsel when grantees claim patentable material is present in an application or progress report.


Bowen Hosford

Attachment



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20201

May 10, 1976

TO PRINCIPAL INVESTIGATORS AND OFFICIALS OF GRANTEE INSTITUTIONS

As you may be aware, the United States Court of Appeals for the District of Columbia has held that the Public Health Service must make available upon request copies of research and research training grant applications and progress reports for projects which have received funding from the Public Health Service. Washington Research Project, Inc. v. DHEW, 504 F.2d 238 (1974). However, the Office of the General Counsel, DHEW, has interpreted the court's decision to permit withholding, as confidential financial or commercial information, any portions of applications and reports which reveal inventions as well as other similar valuable materials (e.g., copyrights) where such disclosures would have adverse effects upon future rights. This interpretation is embodied in an amendment to the Department's Public Information Regulation which was published in the Federal Register on May 1, 1975 (40 F.R.18997).

Since the Washington Research Project decision we have received requests for several hundred grant applications and reports. In each instance we have made careful effort to ascertain if the requested documents contained inventive or copyrightable material, the rights to which might be adversely affected by disclosure. Unfortunately, our procedures for such determinations have resulted in occasional excessive delays in responding, particularly in instances when a single request involved a number of applications.

The Freedom of Information Act amendments of 1974 (P.L.93-502) have imposed very tight time limits on government agencies in their response to requests for documents and records. If an agency does not make a definitive determination as to a request and communicate it to the requestor within ten (10) working days after the request is received, the requestor can deem this non-action as a denial and bring suit.

It is obvious that we must protect your future rights and at the same time comply with the Freedom of Information Act. To accomplish these ends we need your active cooperation.

Henceforth, when the Public Health Service receives a request for access to a funded grant application or progress reports on a funded project, a PHS Agency official whose office administers

the grant will immediately contact the principal investigator and the responsible official at the grantee institution by telephone or telegram. These will be asked to advise the Agency whether any material contained in the requested application or report reveals any material, the disclosure of which might adversely affect future rights. In doing so it will be necessary for the grantee to identify precisely what portions of the application or report disclose the matter in question.

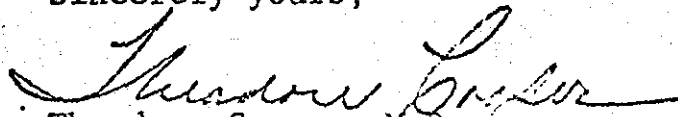
In instances where we are informed that patentable material is present, the records will be reviewed by the HEW Patent Counsel and, if the Department determines that portions of the records sought are exempt because disclosure thereof would adversely affect future patent rights, we shall, as in the past, excise such material from the records before they are provided to the requestor.

If there is a reasonable expectation that certain portions may be copyrighted, this in itself will not preclude release; rather, we shall release the material with an appropriate notice to the requestor. (For example: "While the National Institutes of Health is providing you with this copy, the originator of the material has retained his or her copyright, and you should obtain permission from the originator before making further duplication.")

In the event we are advised by the grantee institution that no invention subject to possible future patent or material on which a copyright is sought is contained in the application or report or if no response is received by the PHS Agency official within 72 hours (excepting weekends and holidays) after notifying the grantee institution of the request, it will be assumed that no patentable or other excludable material is contained in the requested records, and they will be released subject only to such deletions (e.g., detailed budgets showing individual salaries) as may otherwise be authorized under the Act.

We regret that we must impose such a stringent time limit on your response to such inquiries. In view of the tight time limits which Congress has imposed upon government agencies, we see no feasible alternative in protecting your rights and answering requests in a timely manner.

Sincerely yours,


Theodore Cooper, M.D.
Assistant Secretary for Health