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GENERAL PATENT COUNSEL
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June 7, 1977

Representative Ray Thornton
Subcommittee on Science, Research
and Technology
2321 Rayburn House Office Building
Washington, D. C. 20515

Dear Mr. Thornton:

The enclosed memorandum is submitted for inclusion in the record of the hearings held by your Subcommittee May 25-6 on recombinant DNA legislation. This memorandum, in effect, supplements the testimony of that of our Dr. Irving S. Johnson at your earlier hearings, when the subject of the handling of confidential information was deferred to this later time.

You will note that my comments are confined to the disclosure question. It seems to me there is an unfortunate misunderstanding of the importance of protecting against premature disclosure because of adverse effects of such disclosures on the commercialization of inventions originating in corporate and university laboratories. This concern applies whether the research has been privately financed or funded by the government.

The misunderstanding arises from two assumptions which, I suggest, are wrong. First, it is assumed in some quarters that universities are not interested in patenting the results of their research investments. This is wrong, and demonstrably so, because of the importance of patents in attracting the corporate investments in development and production efforts to commercialize a university-originating invention. Mr. Latker has ably made this point in his presentation to the Subcommittee.

Second, it is assumed that the exemptions of trade secrets from disclosure under the Freedom of Information Act provide the corporate sector with the protection it needs against premature disclosure. I believe this misconception will dissipate, wherever it is held, on a consideration of the court decisions, agency practices and the practical problems facing agencies in making the determinations of trade secret status for information in their possession.

In this memorandum I have concentrated on the Freedom of Information Act problems. My conclusion urges that any legislation prescribing the licensing and registration of facilities and projects should provide positive protection against disclosure of information submitted to comply with statutory requirements. The exception, of course, is where the information must be released pursuant to the demands of public health and safety. Such provisions for protection should be as specific as possible, in view of a court decision which holds that a general statutory safeguard is inadequate.

The concerns I express are consistent with those contained in the reports of the President's Biomedical Research Panel and the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, a pair of studies commissioned by the Congress.

Since a high percent of requests for information under the Freedom of Information Act come from competitors trying to learn what their competitors are doing (over 90% in the case of the Food and Drug Administration), and because the approach I suggest would clearly provide for disclosure where the public health or safety was involved, I see no public interest served by placing in jeopardy the confidentiality of research and development efforts of corporate and university laboratories willing to invest in these undertakings. On the contrary, the threat of premature disclosure to competing laboratories,

which in turn would in most cases defeat the prospects for patenting and destroy much of the incentive for commercialization, would seem contrary to the public interest.

Please let me know if I can be of any help in further discussion of this important subject.

Very truly yours,

A. R. Whale

ARW:mfm

cc: Gail M. Pesyna, Ph. D.
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Enclosure