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Legal

DDA 78-2930

25 July 1978

MEMORANDUM FOR: Director of Central Intelligence

FROM: John F. Blake
Deputy Director for Administration

Stan:

1. I write to comment on Tony Lapham's paper of 24 July 1978 to you on "MKULTRA - Program to Identify Subjects of Agency-Sponsored Drug Testing."

2. I believe this is a very solid paper, which from Tony is not at all an unusual product.

3. In a more specific sense I address myself to paragraph 15 and the idea expressed there that "it would appear to be necessary organizationally to take a staff or task force approach." Tony goes on to suggest that "for this purpose an OMS official may be best suited to heading this effort." While I believe I understand why my learned, legal colleague made that observation, I believe an equally viable alternative is to have a senior general duty staff officer undertake the organization and direction of this undertaking. In making this alternate recommendation, I have a specific individual in mind and would be willing to make him available for such time as is necessary to see this onerous task through.

/s/ Jack

John F. Blake

Att

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DDA:JFBlake:kmg (25 Jul 78)

OGC 78-4825
24 July 1978

78-2930/1

MEMORANDUM FOR : Director of Central Intelligence
VIA : Deputy Director of Central Intelligence
FROM : Anthony A. Lapham
General Counsel
SUBJECT : MKULTRA - Program to Identify Subjects
of Agency-Sponsored Drug Testing

1. Action Requested: It is requested that you review the portions of this memorandum which summarize the opinion of the Justice Department to the effect that the United States Government has an obligation to attempt to identify, locate, and notify persons who unwittingly may have been subjected to, and continue to suffer harm from, drug-testing activities sponsored by this Agency in the past, and that you consider the approach described below to implement that opinion.

2. Background:

A. Summary of the Opinion. On 17 July 1978 the Department of Justice responded finally and officially to our 22 September 1977 request for guidance concerning the existence, extent and nature of any legal or other responsibility on the part of the U.S. Government to persons who were subjected to CIA-sponsored drug-testing in the 1950s and 1960s. (A copy of our request is attached for your information as Tab A. A copy of the Justice opinion and a covering letter which summarizes that opinion in some detail are attached as Tab B.)

3. Briefly stated, the opinion concludes that the government does have an obligation, supported by general principles of tort law, to attempt to identify, locate, and notify unwitting persons whose health might continue to be affected adversely as a result of those portions of the Agency activities in question which may reasonably be determined to have resulted in such long-term present-day consequences. You should be aware that the prior drafts of this opinion which we have seen concluded in addition that there existed a policy judgment to be made by CIA, although Justice

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favored proceeding in this regard, as to whether unwitting persons who were subjected to drug-testing sponsored by CIA, which however could not reasonably be expected to have produced long-term effects, also should be found and notified of this fact. The discussion of this policy area was removed from the final opinion, reportedly on the instructions of Judge Bell. Although the opinion now is limited to the legal aspects of this problem and finds a duty to notify only persons who may suffer continuing health consequences, it is of course still open to you to determine that a larger number of persons meeting different criteria should be included in the notification program.

4. After concluding that such a duty to notify exists, at least where further harm may be thus avoided, the opinion notes that any effort to fulfill this duty must be circumspect because of existing legal constraints and a concern for avoiding damaging intrusions into the privacy of these individuals. Accordingly, such an effort must be limited generally to an examination of federal records and the records of the institutions which were involved where such records have survived and are not protected by law from disclosure, and other documents not subject to limited disclosure such as telephone books and voter registration lists. "To the greatest extent practicable" this effort should be conducted, it is the Justice Department's opinion, without the use of personal interviews with family members, former neighbors, employers or friends since such interviews would cause further embarrassment and loss of privacy to identified subjects.

5. We have determined, and Justice has agreed in this opinion, that this Agency is not in a position, without special legislation, to offer indemnification to any institution or associated individual against liability which may be incurred as a consequence of their involvement in these activities and their agreement to cooperate with the government by making their records available and facilitating the identification of test subjects. In addition, notes Justice, in some cases the institutions themselves may be precluded by law or professional ethic from allowing the government to review their records for these purposes.

6. As to what may be done for confirmed test subjects who are identified and located, the Justice Department conclusion is that a simple notification of involvement may be made along with an offer to provide available information to the subject's physician. Neither this Agency nor any other federal agency appears to have authority, again in the absence of special legislation, to provide medical treatment or to pay the costs of private treatment in this regard. The sole recourse for persons suffering medical expenses as a result of governmental activities is to file claims and institute litigation under the Federal Tort Claims Act.

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7. The Justice opinion concludes that CIA has lawful authority to conduct this program, within the constraints described above, but notes that CIA may legitimately approach any other federal agency for assistance it may be authorized and equipped to provide. As is discussed further below, it may be necessary or advisable to call upon HEW or DOD for help in this effort.

8. Finally, the Justice Department opinion points out several circumstances in which the duty to conduct such a notification program may not apply. One such circumstance exists where there are sound policy reasons not to notify such persons. The exception would appear to be unavailable in this instance, particularly since you have already committed the Agency to supporting such a program. The second circumstance would exist were CIA so peripherally involved or ignorant of the nature of the testing as to be not aware of or responsible for any resulting harm to the subjects. By and large, given the nature of the testing programs and the CIA role, this exception also would appear to be inapplicable. Finally, a factor which may apply to exclude certain groups of individuals is that no duty to notify exists where the subject had actual notice of participation in a testing program, although presumably this circumstance would not obviate the duty unless the subject was made aware of all relevant aspects of the experiment, e.g., identity of the drug involved, dosages, etc.

B. Implementation

8. A number of matters require decisions before this opinion may be implemented. In addition to the policy determinations concerning the categories of persons to be included and whether to approach HEW or another federal entity to request assistance, there are numerous questions concerning how the Agency should best organize itself to initiate and maintain such an effort. The paragraphs which follow present for your consideration my thoughts on how to approach this matter.

9. While CIA must of course play an important part in such a program, it may not be the entity best suited for the undertaking. Due to the fragmentary nature of the surviving CIA records, we do not have sufficient information either to allow identification of any test subjects or to develop sufficiently specific details to be very useful to treating physicians in a medical sense. Thus, there will have to be very heavy reliance upon records which may be available at the various institutions, by and large academic in nature, which were involved in these activities. As you are aware, however, CIA enjoys a somewhat less than favorable standing, partially as a result of the MKULTRA disclosures themselves, in the eyes of the very institutions whose records must be

relied upon for this effort to have even a marginal chance of success. For this reason, and to assist in the process of properly evaluating existing Agency records to determine in the first instance which institutions it will be necessary to contact, Secretary Califano should be requested to make available the good offices and assistance of HEW in evaluating the existing information concerning the MKULTRA projects, in approaching appropriate institutions and requesting their cooperation, in examining the records of any institutions which agree to help, and in providing assistance to any subjects who may be located. CIA has, of course, been in contact with most of the institutions identified in the MKULTRA documents during the past several months. Although these communications generally have been courteous, further correspondence from CIA cannot be expected to be received warmly by officials who have been wrestling with the media and inquisitive students as a result of the MKULTRA disclosures. Further, we would be in this case asking these institutions to undertake affirmative efforts to review their records, to make those records available to our investigators, and to expose themselves and their personnel to potential civil liability arising from litigation by identifiable test subjects.

10. In addition, CIA may be open to charges, if it conducts such a program alone, that it suppressed evidence, influenced recollections, or failed to pursue or consider adequately any information which might arise. While the institutional exposure to liability cannot be eliminated, we can alleviate the adverse reaction which might be expected to result from further contact by CIA and also reduce the basis for charges of bad faith against the Agency by cooperating in this effort with HEW. The Agency must participate in the identification of the institutions to be contacted, and, based upon our prior correspondence, the preparation of the initial requests for help. Those requests, however, should come from an "untainted" third party such as HEW to assure the most favorable response. Furthermore, since HEW has been involved in promulgating guidelines to govern human experimentation by the entire federal government, it would seem to be the most appropriate agency to assist not only in contacting the institutions but also in determining which projects most likely would have resulted in long-term ill effects on the health of the subjects and thus which institutions should be contacted. Similarly, the impartial advice and assistance of HEW representatives would be valuable in ensuring and evidencing that such a program has been conducted fairly, impartially, and thoroughly. Furthermore, as is noted in the Justice opinion, there are limited circumstances in which HEW may be enabled to provide medical assistance, such as a "follow-up research program" or a pre-litigation medical examination, and any prospect of such assistance would be heightened by early HEW involvement.

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11. At the same time as HEW is being approached, you should direct that the Agency component most familiar with the surviving MKULTRA papers, probably the Office of Technical Services (OTS), begin reviewing all drug research documents to identify, insofar as is possible, the activities which involved drug testing on humans; the specific dates, places, researchers, amounts and sources of money; the specific nature of the testing, dosages, all drugs used, any recorded effects; the status of the subjects (i.e., student volunteers, inmate volunteers, hospital patients, etc.), the population from which these subjects were drawn [redacted] [redacted], Atlanta Federal Penitentiary, etc.), the identities of any subjects, and any other information of relevance to the determination of whether adverse effects might result and where the subjects might be located. We have tentatively divided the projects into various categories based upon summary information supplied to us last summer and a copy of this breakdown is attached as Tab C for your information and as a starting point for OTS. This listing should be verified and supplemented by a close review of the documents themselves.

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12. All Agency documents relating to drug testing on human subjects which are available should be reviewed. This would include BLUEBIRD/ARTICHOKE, MKSEARCH, OFTEN/CHICKWIT, and other drug-testing conducted without regard to specific project designations, not just those specifically related to MKULTRA which were discovered last summer. To the extent the Office of Security or any other Agency component is more familiar with any of these collections than is OTS, that other component should be assigned the same review responsibilities as to those papers. Further, it is my understanding that the Information and Privacy Staff is the Agency entity charged with accumulating requests and inquiries from persons who claim to have been test subjects. This information should be correlated with the project breakdowns by OTS and other components to determine whether, according to alleged dates and places of involvement, these inquiries include any credible claims which should be investigated. The final compilation will be necessary for a determination as to which institutions should be contacted and requested to help in this effort.

13. Appropriate Agency personnel familiar with these materials should assist HEW representatives in evaluating this information and in drafting correspondence to the appropriate institutions. These letters should describe the goals of this effort, identify the circumstances of the testing as specifically as is possible, alert the institutions to their own potential liabilities and to the indemnification

problem, and request assistance and all pertinent information, including access to the institutional records whenever possible. It seems to me that it is going to be very difficult, if not impossible, to protect the identities of the researchers involved from any institution which agrees to assist us in this effort and which requests such information as an aid to locating the records in question. As you know, up to this point we have striven to protect the identities of the researchers from disclosure either to the public or to the institutions. However, a continued policy of non-disclosure in the present context could prevent access to the only available sources of information necessary to sustain the notification program, thus frustrating its purposes and further exposing CIA to the charge of deliberately crippling the entire effort. To the extent that the identities of researchers are to be disclosed, I believe the researchers themselves must be notified as the first order of business, and some special problems and unpleasant exchanges can probably be anticipated in this regard.

14. CIA and HEW personnel also will have to cooperate in following up and coping with any unforeseen problems which might arise in this effort. Institutions which agree to help would have to be contacted by representatives of HEW and the Agency's Office of Security for the purpose of amassing as much information as possible about identifiable subjects of the testing. The Office of Security would be responsible for utilizing open sources such as telephone directories, in accordance with the Justice opinion, to attempt to identify and locate persons who may have been subjected to Agency-sponsored drug testing. Contact with any subject located should be made by HEW and CIA representatives jointly. Unless HEW is prepared to furnish further assistance of some sort, it would appear that the most that can or should be done for identified subjects is to supply them or their physicians with all pertinent data concerning the tests so as to facilitate treatment. My Office will, of course, be involved in the development of a policy for dealing with and for disposing of the administrative claims and litigation which may be expected to develop from this effort.

15. It is entirely possible that, depending upon the determinations which are made as to the categories of persons to be notified and the likelihood of long-term effects from the various drugs involved, the actual numbers of persons to be located and notified, and thus the numbers of institutions to be contacted, may be very small. However, in order to accomplish the analysis effort which must precede these determinations and because of the potential size and scope of this project, it would appear to be necessary organizationally to take a staff or task force approach and have

specific Agency personnel designated by the various components involved as primarily responsible for the coordination and accomplishment of the many functions which relate to this program, and for maintaining contact with the HEW representatives. Such a group, in order to be at all successful, must have direction, and for this purpose an OMS official may be best suited to heading this effort.

16. If HEW declines the request, we will have to reconsider that aspect of the program. An alternative course of action would be to call upon the military services which have had some experience in recent years in the initiation and conduct of similar programs to review the claims of servicemen who participated in drug-testing programs. However, I believe the responsibilities proposed for O'S, the Office of Security, OMS, and this Office in this memorandum are appropriate and should proceed unchanged regardless of HEW's reaction.

17. Recommendation: Copies of this paper have been submitted to the components mentioned in order that they may furnish you with their views concerning the wisdom and consequences of these recommendations. The scope and form of this program should be the subject of further discussion at a meeting called by you or the DDCI and you may wish to reserve decision on these matters until after such a discussion.



Anthony A. Lapham

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Attachments

SUBJECT: MKULTRA - Program to Identify Subjects of
Agency-Sponsored Drug Testing

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