

September 29, 1995

Ames FOIA  
Mike Marlaire, FOIA Officer  
Mail Stop 223-3  
Ames Research Center  
Moffett Field, CA 94035

Re: Freedom of Information Act Request

Dear Mr. Marlaire:

This is a request under the Freedom of Information Act.

I request that an entire and complete copy of the following documents [or documents containing the following information] be provided to me:

NASA Technical Memorandum: "Crew Factors in Flight Operations VII: Psychophysiological Responses to Overnight Cargo Operations." authors: Philippa H. Gander, Kevin B. Gregory, Linda J. Connell, Donna L. Miller, Mark R. Rosekind, and R. Curtis Graeber; to include any or all supporting documentation, such as drafts, revisions, attachments, supplements, statistics, reports, scientific research or information relating to data collected from Federal Express Corporation aircrew members or any other source which the authors relied upon for the purpose of authoring this report, study, or memorandum.

In order to help to determine my status to assess fees, you should know that I am an individual seeking information for personal use and not for a commercial use.

Disclosure of the requested information to me is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in my commercial interest.

Thank you for your consideration of this request.

Sincerely,



Mark S. Estabrook  
PO Box 1021  
Cordova, TN 38088  
901-382-2255

National Aeronautics and  
Space Administration  
**Ames Research Center**  
Moffett Field, CA 94035-1000



Reply to Attn. of

DX: 204-2 ( 95-172 )

October 16, 1995

Mark S. Estabrook  
P.O. Box 1021  
Cordova, TN 38088

Dear Mr. Estabrook:

The Freedom of Information Act (FOIA) Office at NASA-Ames Research Center received on October 16, 1995 your request for documents under the FOIA. This office will notify you of its initial determination after we have compiled all responsive documents and reviewed them for appropriate legal exemptions under the FOIA. We seek to comply with your request within 10 business days after we receive your letter, as required by federal law; however, we might require more than 10 days if the request is particularly voluminous or it is difficult to locate the requested records at NASA-Ames. We will contact you if we require additional time. If you have any questions, please contact Mr. Terry Pagaduan at (415) 604-1181.

Sincerely,

A handwritten signature in cursive script that reads "Michael L. Marlaire".

Michael L. Marlaire  
Freedom of Information Act Officer

October 25, 1995

Michael L. Marlaire  
Freedom of Information Act Officer  
National Aeronautics and Space Administration  
Ames Research Center  
Mail Code 204-2  
Moffett Field, CA 94035-1000

Re: Freedom of Information Act Request  
DX: 204-2 (95-172)

Dear Mr. Marlaire:

This letter is in reply to your recent letter to me dated October 16, 1995 (attached), regarding my September 29, 1995 request for "an entire and complete copy of the following documents [or documents containing the following information]:

NASA Technical Memorandum: "Crew Factors in Flight Operations VII: Psychophysiological Responses to Overnight Cargo Operations." authors: Philippa H. Gander, Kevin B. Gregory, Linda J. Connell, Donna L. Miller, Mark R. Rosekind, and R. Curtis Graeber; to include any or all supporting documentation, such as drafts, revisions, attachments, supplements, statistics, reports, scientific research or information relating to data collected from Federal Express Corporation aircrew members or any other source which the authors relied upon for the purpose of authoring this report, study, or memorandum"

under the Freedom of Information Act.

For the record, your agency received my request on October 2, 1995, as reflected by my certified returned receipt from the U.S. Postal Service (attached), and not October 16, 1995, as stated in your letter. As you mentioned to me, Federal law requires your agency to respond within 10 business days of receipt of my request. I pray your compliance with my request will be handled expeditiously and in accordance with Sec. 552 of the Code, based on a timeline that reflects your agency's October 2, 1995 receipt of my request.

Thank you for your consideration of this request.

Sincerely,



Mark S. Estabrook  
PO Box 1021  
Cordova, TN 38088



Reply to 401 9

DX: 204-2 (95-172)

November 9, 1995

Mark Estabrook  
P.O. Box 1021  
Cordova, TN 38088

Re: Freedom of Information Act (FOIA) Request  
Initial Determination

Dear Mr. Estabrook:

This letter is in response to your letter, dated September 29, 1995, in which you requested government agency records under the FOIA from the National Aeronautics and Space Administration (NASA) - Ames Research Center.

We regret to inform you that we must deny, at present, the release of all items in your request under 5 U.S.C. 552(b)(5) as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," also commonly referred to as FOIA Exemption B5.

In Federal Open Market Committee v. Merrill, 443 U.S. 340 (1979), the United States Supreme Court interpreted Exemption B5 to include a "qualified governmental privilege" which protects from release under FOIA those records that would harm the Government's interest if the records were released pending a final agency decision. A recent U.S. District Court, citing Merrill, Burka v. HHS, No. 92-2636, slip op. at 7-10 (D.D.C. Dec. 13, 1993), extended the coverage of this qualified governmental privilege to the results of Government research before the results are published, such as the research relevant to your FOIA request here.

The NASA Technical Memorandum, "Crew Factors in Flight Operations VII: Psychophysiological Responses to Overnight Cargo Operations" authored by Philippa Gander, Kevin B. Gregory, Linda J. Connell, Donna L. Miller, Mark R. Rosekind, and R. Curtis Graeber, has not yet been published. Until the investigators' research results are published, we must withhold all records associated with their research in order to protect their interests in the study. The study might be published in a month from now. As you were informed previously by telephone, the investigators have your address and will gladly send you a copy of the final Technical Memorandum once it is published.

You have the right to appeal this initial determination to the NASA Administrator. Your appeal must (1) be addressed to the Administrator, NASA Headquarters, Washington D.C. 20546; (2) be clearly identified on the envelope and in the letter as an "Appeal under the Freedom of Information Act"; (3) include a copy of the request for the agency record and a copy of this initial adverse determination; (4) to the extent possible, state the reasons why you believe the initial determination should be reversed, and (5) be sent to the Administrator within 30 calendar days of your receipt of this letter.

Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Michael Marlaire".

Michael Marlaire  
Freedom of Information Officer

Enclosure

November 29, 1995

Mr. Daniel S. Goldin, Administrator  
National Aeronautics and Space Administration  
NASA Headquarters  
Washington, DC 20546

Re: Appeal under the Freedom of Information Act

Dear Mr. Goldin:

This is an appeal under the Freedom of Information Act.

On September 29, 1995, I requested documents under the Freedom of Information Act (FOIA). My request was assigned the following identification number: DX: 204-2 (95-172). On November 25, 1995, I received a response to my request in a letter signed by Michael Marlaire. I appeal the denial of my request.

The records I asked for in my September 29, 1995 FOIA request include the following documents [or documents containing the following information]:

NASA Technical Memorandum: "Crew Factors in Flight Operations VII: Psychophysiological Responses to Overnight Cargo Operations," authors: Philippa H. Gander, Kevin B. Gregory, Linda J. Connell, Donna L. Miller, Mark R. Rosekind, and R. Curtis Graeber; to include any or all supporting documentation, such as drafts, revisions, attachments, supplements, statistics, reports, scientific research or information relating to data collected from Federal Express Corporation aircrew members or any other source which the authors relied upon for the purpose of authoring this report, study, or memorandum.

The documents that were withheld must be disclosed under the FOIA because:

- after consulting with my attorney, we feel Mr. Marlaire erred in citing FOIA Exemption B5 as a reason to deny my request. NASA Technical Memorandums, as you know, are routinely published for public consumption and dissemination. Categorization of the study in question as an "inter-agency or intra-agency" memorandum or letter attempts to shield the study from public scrutiny, which I contend conflicts with the Act's original legislative intent;
- Mr. Marlaire's assertion that releasing the requested records would somehow "harm the Government's interest" is confusing considering that the study concerns private sector overnight cargo operations. The content of the study, funded by myself and millions of other taxpayers, contributes directly

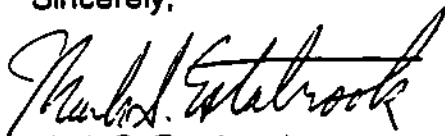
to the body of knowledge concerning flight safety. If there is any interest that would be harmed in this dispute, it would be the public's interest if the records were not released;

- Mr. Marlaire cites an unpublished court decision that extends a "qualified governmental privilege to the results of Government research before the results are published," but I assert that such a case would not apply to my FOIA request because the results of the research in question were published and disseminated to numerous ALPA representatives and Federal Express officials in Memphis, Tennessee in 1994. I am unaware of any scientific method that would allow study participants or private sector corporations to modify or manipulate research data or conclusions. Doing so would undermine the scientific and professional reputation of NASA, and could impact funding considerations by Congress for such programs in the future. Therefore, the dissemination of the study to the above referenced individuals would pierce any defense that NASA asserts regarding a "qualified governmental privilege to the results of Government research before the results are published"; and
- I find Mr. Marlaire's reference to a November 1995 telephone call from Mr. Terry Pagaduan in which he offered to "put me on a mailing list" when the final Technical Memorandum is published as an unacceptable resolution of this FOIA request. This report has been promised by Dr. Mark Rosekind, one of the study's authors, to numerous individuals throughout the Overnight Cargo industry on a weekly and monthly basis for more than a year. One can only conclude that the study is being withheld from the public for strictly political reasons. I will not accept any more delays, and filed this FOIA request as a result.

In closing, I would like to quote your Welcome Letter on the Internet:  
*'...NASA is deeply committed to spreading the unique knowledge that flows from its aeronautics and space research. This commitment grows from the Agency's unique, original congressional mandate to "provide for the widest practicable and appropriate dissemination of information concerning its activities and the results thereof."'*

Mr. Goldin, I believe that releasing the records I have requested would be in the public's best interest. Thank you for your consideration of this appeal.

Sincerely,



Mark S. Estabrook  
PO Box 1021  
Cordova, TN 38088

November 29, 1995

Michael L. Marlaire  
Freedom of Information Act Officer  
National Aeronautics and Space Administration  
Ames Research Center  
Mail Code 204-2  
Moffett Field, CA 94035-1000

Re: Freedom of Information Act Request  
DX: 204-2 (95-172)

Dear Mr. Marlaire:

This letter is in reply to your recent letter to me dated November 9, 1995, but postmarked November 20, 1995, denying my September 29, 1995 request for "an entire and complete copy of the following documents [or documents containing the following information]:

NASA Technical Memorandum: "Crew Factors in Flight Operations VI: Psychophysiological Responses to Overnight Cargo Operations," authors: Philippa H. Gander, Kevin B. Gregory, Linda J. Connell, Donna L. Miller, Mark R. Rosekind, and R. Curtis Graeber; to include any or all supporting documentation, such as drafts, revisions, attachments, supplements, statistics, reports, scientific research or information relating to data collected from Federal Express Corporation aircrew members or any other source which the authors relied upon for the purpose of authoring this report, study, or memorandum"

under the Freedom of Information Act.

Although I will appeal your initial determination to the NASA administrator, I wanted to take this opportunity to request that you reconsider your decision based on the following information:

- after consulting with my attorney, we feel that you have erred in citing FOIA Exemption B5 as a reason to deny my request. NASA Technical Memorandums, as you know, are routinely published for public consumption and dissemination. Categorization of the study in question as an "inter-agency or intra-agency" memorandum or letter attempts to shield the study from public scrutiny, which I contend conflicts with the Act's original legislative intent;
- your assertion that releasing the requested records would somehow "harm the Government's interest" is confusing considering that the study concerns private sector overnight cargo operations. The content of the study, funded by myself and millions of other taxpayers, contributes directly to the body of

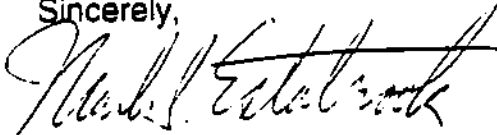


knowledge concerning flight safety. If there is any interest that would be harmed in this dispute, it would be the public's interest if the records were not released;

- you cite an unpublished court decision that extends a "qualified governmental privilege to the results of Government research before the results are published," but I assert that such a case would not apply to my FOIA request because the results of the research in question were published and disseminated to numerous ALPA representatives and Federal Express officials in Memphis, Tennessee in 1994. I am unaware of any scientific method that would allow study participants or private sector corporations to modify or manipulate research data or conclusions. Doing so would undermine the scientific and professional reputation of NASA, and could impact funding considerations by Congress for such programs in the future. Therefore, the dissemination of the study to the above referenced individuals would pierce any defense that NASA asserts regarding a "qualified governmental privilege to the results of Government research before the results are published"; and
- I find your reference to a telephone call from Mr. Terry Pagaduan in which he offered to "put me on a mailing list" when the final Technical Memorandum is published as an unacceptable resolution of this FOIA request. This report has been promised by Dr. Mark Rosekind, one of the study's authors, to numerous individuals throughout the Overnight Cargo industry on a weekly and monthly basis for more than a year. One can only conclude that the study is being withheld from the public for strictly political reasons. I will not accept any more delays, and have filed this FOIA request as a result.

I think it would be in NASA's and the public's best interest to release the requested records. Thank you for your reconsideration of this request.

Sincerely,



Mark S. Estabrook  
PO Box 1021  
Cordova, TN 38088

January 18, 1996

Mr. John Hall, Attorney-at-Law  
General Counsel's Office  
National Aeronautics and Space Administration  
NASA Headquarters  
Washington, DC 20546  
(202)358-2432

**VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED**

Re: Appeal under the Freedom of Information Act

Dear Mr. Hall:

This is to follow up on the telephone conversation you, Terry Pagaduan, and I held in December regarding my appeal under the Freedom of Information Act. In that conversation, it was my understanding that you and Terry concluded a discretionary release of the August 1994 draft of the NASA Technical Memorandum: "Crew Factors in Flight Operations VII: Psychophysiological Responses to Overnight Cargo Operations." would be forwarded to me. A month later, I still have not received the draft from Mr. Pagaduan.

It was also my understanding that releasing a copy of the August 1994 draft of the Memorandum would expedite my receipt of the requested documents and minimize my cost associated with this FOIA request. Please note that my agreeing to accept the written draft in lieu of the data stored in magnetic media does not waive my request for other documents as specified in my original request:

"...any or all supporting documentation, such as drafts, revisions, attachments, supplements, statistics, reports, scientific research or information relating to data collected from Federal Express Corporation aircrew members or any other source which the authors relied upon for the purpose of authoring this report, study, or memorandum."

Since the Authors of the Memorandum relied upon information from Federal Express Corporation to author "Crew Factors in Flight Operations VII: Psychophysiological Responses to Overnight Cargo Operations." I would expect that all correspondence between Federal Express Corporation, its agents and employees, and NASA, its agents and employees, be included in the production of documents. These would necessarily include letters, faxes, e-mail, comments and all other forms of correspondence media. I do not believe these documents should be protected from this FOIA request because none of it can be considered proprietary in nature.

I offer the following summary of my FOIA request to assist you:

- On September 29, 1995, I requested documents under the Freedom of Information Act (FOIA). My request was assigned the following identification number: DX: 204-2 (95-172). On November 25, 1995, I received a response to my request in a letter signed by Michael Marlaire.
- The records I asked for in my September 29, 1995 FOIA request include the following documents [or documents containing the following information]:

NASA Technical Memorandum: "Crew Factors in Flight Operations VII: Psychophysiological Responses to Overnight Cargo Operations." authors: Philippa H. Gander, Kevin B. Gregory, Linda J. Connell, Donna L. Miller, Mark R. Rosekind, and R. Curtis Graeber; to include any or all supporting documentation, such as drafts, revisions, attachments, supplements, statistics, reports, scientific research or information relating to data collected from Federal Express Corporation aircrew members or any other source which the authors relied upon for the purpose of authoring this report, study, or memorandum.

- After consulting with my attorney, we feel the documents that were withheld must be disclosed under the FOIA because Mr. Marlaire erred in citing FOIA Exemption B5 as a reason to deny my request. NASA Technical Memorandums, as you know, are routinely published for public consumption and dissemination. Categorization of the study in question as an "inter-agency or intra-agency" memorandum or letter attempts to shield the study from public scrutiny, which I contend conflicts with the Act's original legislative intent;
- Mr. Marlaire's assertion that releasing the requested records would somehow "harm the Government's interest" is confusing considering that the study concerns private sector overnight cargo operations. The content of the study, funded by myself and millions of other taxpayers, contributes directly to the body of knowledge concerning flight safety. If there is any interest that would be harmed in this dispute, it would be the public's interest if the records were not released; and
- Mr. Marlaire cited an unpublished court decision that extends a "qualified governmental privilege to the results of Government research before the results are published," but I assert that such a case would not apply to my FOIA request because the results of the research in question were published and disseminated to numerous ALPA representatives and Federal Express officials in Memphis, Tennessee in August 1994. I am unaware of any scientific method that would allow study participants or private sector corporations to modify or manipulate research data or conclusions. Doing so would undermine the scientific and professional reputation of NASA, and could impact funding considerations by Congress for such programs in the future. Therefore, the dissemination of the study to the above referenced individuals would pierce any defense that NASA asserts regarding a


"qualified governmental privilege to the results of Government research before the results are published".

This letter serves as notice that I am continuing my appeal of the denial of my request, since I have, as of this date, not received a final response from you or the Administrator. If I do not receive the requested documents within ten (10) days of your receipt of this letter, I will of course, have to refer my FOIA request to my attorney for the appropriate legal action.

Mr. Hall, I believe that releasing the documents I requested would be in the public's best interest. I also believe that my request has been reasonable and conducted with the utmost patience.

Thank you for your further consideration of this appeal.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark S. Estabrook". The signature is written in a cursive style with a large, prominent initial "M".

Mark S. Estabrook  
PO Box 1021  
Cordova, TN 38088



JAN 26 1996

Mr. Mark S. Estabrook  
P.O. Box 1021  
Cordova, TN 38088

Dear Mr. Estabrook:

Thank you for your November 29, 1995, letter appealing the initial determination under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq., issued on November 9, 1995, by Mr. Michael Marlaire, Ames Research Center (ARC) Freedom of Information Officer. In response to your original request for documents containing information relating to a proposed NASA Technical Memorandum entitled "Crew Factors in Flight Operations VII: Psychophysiological Responses to Overnight Cargo Operations," Mr. Marlaire advised you that, while you would be provided with a copy of the requested Technical Memorandum when published, the draft materials and data were exempt from disclosure as interagency or intra-agency memoranda under Exemption (b) (5) of the FOIA.

You state several bases for reversal of Mr. Marlaire's determination, summarized as follows:

1. NASA Technical Memoranda are routinely published for public dissemination. Categorizing the requested study as interagency or intra-agency memoranda shields the study from public scrutiny and conflicts with the purposes of the FOIA.
2. No identifiable Government interest is harmed by the release of the requested data or materials; rather, the public's interest in flight safety information is harmed by its withholding.
3. The assertion of a qualified Government research privilege under Exemption (b) (5) is not dispositive where the research materials have allegedly been disclosed to parties outside of the Government or participating entities.
4. Similarly, the study should not be withheld for "strictly political reasons," where one of the

Principal Investigators in the study has allegedly promised the materials in question to "numerous individuals throughout the Overnight Cargo industry on a weekly and monthly basis for more than a year."

Because the allegations in bases 3 and 4 are of particular concern to me, and could, if accurate, impact the Government's ability to assert appropriate protections under the FOIA, I would like to address those matters first. In my review of these allegations, which included inquiries to participants and investigators, I have been unable to find evidence that data, materials, or drafts of the requested Technical Memorandum have been disclosed by any U.S. Government officials to parties not directly involved in the conduct of the study. In any event, the Government does not bear the burden of demonstrating that positively no disclosure of any withheld information has occurred; indeed the burden is on the appellant to show that the requested information is public. See, e.g., Williams v. United States Department of Justice, 556 F. Supp. 63, 66. (D.D.C. 1982); Davis v. United States Department of Justice, 968 F.2d 1276, 1279-82 (D.C. Cir. 1992). Neither your initial request nor your appeal contains information sufficient to meet that burden.

At the same time, I have confirmed that copies of the draft Technical Memorandum were disclosed to certain participants of the study under longstanding Agency agreements providing for the conduct of the research, and pursuant to appropriate nondisclosure limitations on such information. Such disclosures to participating parties have been held not to invalidate the Government's assertion of an exemption. See McGilvra v. National Transportation Safety Bd., 840 F. Supp 100, 102 (D. Colo. 1993); cf. Farnsworth v. Proctor & Gamble Co., 101 F.R.D. 355 (N.D. Ga. 1984), aff'd, 758 F.2d 1545 (11th Cir. 1985). Of course, any unauthorized release of requested information, by Government officials, contractors, or study participants, cannot establish a waiver by the Government of any properly asserted exemption. See, e.g., Simmons v. United States Department of Justice, 796 F.2d 709, 712 (4th Cir. 1986). I therefore determine that the Agency has not waived its prerogative to withhold the requested information under FOIA Exemption (b) (5).


With regard to basis 1, while most NASA Technical Memoranda are published for public review and dissemination, draft memoranda, data, and related materials are not normally published or released prior to publication of the final study

results in Technical Memoranda. As discussed below, these materials are properly exempt from disclosure under FOIA Exemption (b) (5).

Regarding basis 2, the courts have recognized several important concerns which would permit the withholding of the requested information. In addition to the concern that release and publication of research data prior to completion could skew the results of ongoing research, several courts have observed that prepublication disclosure could endanger Government-sponsored researchers' interests in having their research published in prestigious, peer-reviewed journals, which require rigorous and time-consuming processes of submission and review. See, e.g., Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 560-61 (7th Cir. 1984); Burka v. United States Department of Health & Human Services, No. 92-2636, slip op. at 9 (D.D.C. Dec. 13, 1993). More importantly, publication in prestigious, peer-reviewed journals advances the public's interest in the success and effective dissemination of the "Overnight Cargo" study. As the District Court in Burka observed, peer-reviewed journals would likely refuse to publish articles by researchers if the underlying data had already been published elsewhere. Burka, No. 92-2636, slip op. at 9-10. I therefore affirm Mr. Marlaire's determination that the requested information may properly be withheld under FOIA Exemption (b) (5).

However, I have determined, as a matter of discretion in this specific instance, to authorize the release of the draft Technical Memorandum provided to participating parties in the conduct of the "Overnight Cargo" study. In reviewing this matter and the materials concerned, I have concluded that, in this particular case, the potential harm to researchers' legitimate concerns is relatively minor. By copy of this letter, ARC is directed to provide you with this document. I am informed by NASA's Office of the General Counsel that, pursuant to discussions with you of December 14, 1995, this disclosure will satisfy your request. As such, I will consider this appeal moot.

Sincerely,

  
J. R. Dailey  
Associate Deputy Administrator

cc:  
ARC/PA/Mr. Marlaire

Mark S. Estabrook  
PO Box 1021  
Cordova, TN 38088

February 13, 1996

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mr. J. R. Dailey  
Associate Deputy Administrator  
National Aeronautics and Space Administration  
Office of the Administrator  
Washington, DC 20546-0001

Re: Appeal of Freedom of Information Act Request DX: 204-2 (95-172)

Dear Mr. Dailey:

I have received your letter of January 26, 1996 constituting final agency action on my appeal of NASA's determination on the above FOIA request. I appreciate your agreeing to release a copy of the August 1994 draft Technical Memorandum. However, I have still not received that draft, despite the fact that it was promised to me nearly two months ago by Mr. John Hall of the General Counsel's Office, and by you in your January 26, 1996 letter to me. I cannot determine that I will not proceed with court action regarding the other materials I requested until I have received the 1994 draft.

Frankly, I do not understand the delay in NASA providing me a document whose disclosure you have stated will not significantly harm any interest NASA may have. I urge you to ensure that ARC follows up promptly on your directive to provide me with a copy of the 1994 draft.

Sincerely,



Mark S. Estabrook



National Aeronautics and  
Space Administration  
**Ames Research Center**  
Moffett Field, CA 94035-1000



Reply to Attn of:

DX: 204-2 (95-172)

February 9, 1996

Mark Estabrook  
P.O. Box 1021  
Cordova, TN 38088

Re: Freedom of Information Act (FOIA) Request  
Initial Determination

Dear Mr. Estabrook:

In accordance with the instruction to our office set forth in the Associate Deputy Administrator's decision on your appeal, please find enclosed a copy of the draft version of NASA Technical Memorandum, "Crew Factors in Flight Operations VII" Psychophysiological Responses to Overnight Cargo Operations," authored by Philippa H. Gander, Kevin B. Gregory, Linda J. Connell, Donna L. Miller, R. Curtis Graeber, and Mark R. Rosekind.

Sincerely,

A handwritten signature in cursive script that reads "Michael Marlaire".

Michael Marlaire  
Freedom of Information Officer

Enclosure

Mark S. Estabrook  
PO Box 1021  
Cordova, TN 38088

March 11, 1996

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mr. J. R. Dailey  
Associate Deputy Administrator  
National Aeronautics and Space Administration  
Office of the Administrator  
Washington, DC 20546-0001

Re: Appeal of Freedom of Information Act Request DX: 204-2 (95-172)

Dear Mr. Dailey:

I received Mr. Michael Marlaire's letter of February 9, 1996, from Ames Research Center (ARC), in response to your January 26, 1996 decision on my FOIA appeal. He states the following in his response:

"In accordance with the instruction to our office set forth in the Associate Deputy Administrator's decision on your appeal, please find enclosed a copy of the draft version of NASA Technical Memorandum, "Crew Factors in Flight Operations VII" Psychophysiological Responses to Overnight Cargo Operations," authored by Philippa H. Gander, Kevin B. Gregory, Linda J. Connell, Donna L. Miller, R. Curtis Graeber, and Mark R. Rosekind."

The document referenced above was enclosed with his letter. Regrettably, I must inform you that he has not complied with both my FOIA request or your directive letter of January 26, 1996. The NASA Technical Memorandum which he forwarded to me is dated "December 1995," and is not the August "1994 DRAFT" that was promised to me in-lieu of the magnetic storage media. The "December 1995" version he sent me is considered a "final" version that was released and widely distributed to Federal Express pilots on or about December 8, 1995, and was already in my possession. (*See attached December 8, 1995 letter from Joe DePete to FedEx pilots*).

As you indicated in your January 26, 1996 letter to me, Mr. Hall and I did speak via telephone on or about December 14, 1995, referencing my FOIA request. That conversation appears to be a source of confusion between myself, NASA, ARC and the General Counsel's office. I do not know what Mr. Hall's understanding of the conversation was, but it was my understanding that he would recommend a discretionary release of the "draft" version of the TM in-

lieu of duplicating massive magnetic tape and disk media, and the associated administrative cost of collating archived data. I agreed to his suggestion only as a way to expedite my request and minimize costs. However, it appears Mr. Hall has interpreted that agreement as a way to narrow my entire FOIA request. If he had proposed such a "narrowing" arrangement in writing I would have certainly declined it. I expressed similar concerns to Mr. Hall in a January 18, 1996 letter to him, and have attached a copy for your review as well.

As I have stated numerous times in the past, I am seeking the "1994 DRAFT", and all other drafts that may exist, including all correspondence between Federal Express Corporation and NASA, as well as any other documents that were relied upon by the TM's authors and requested in my FOIA, before I can consider this request fulfilled.

You previously stated in your January 26, 1996 letter to me "...In reviewing this matter and the materials concerned, I have concluded that, in this particular case, the potential harm to researchers' legitimate concerns is relatively minor." Considering your position on this case, I think you and I can avoid the legal actions specified in the Act if you immediately order ARC to comply with all, and not just part, of my FOIA request.

Thank you for your consideration.

Sincerely,



Mark S. Estabrook

cc: Mr. J. R. Dailey, Associate Deputy Administrator, NASA  
Mr. John Hall, Jr., General Counsel's Office, NASA

Attach: 2-9-96 letter from MM to ME  
2-13-96 letter from MSE to JRD  
1-26-96 letter from JRD to MSE  
1-18-96 letter from MSE to JH  
12-8-95 letter from JD to FedEx Pilots

National Aeronautics and  
Space Administration  
**Headquarters**  
Washington, DC 20546-0001



Reply to Attn of. G

MAR 8 1996

Mr. Mark S. Estabrook  
Post Office Box 1021  
Cordova, TN 38088

Dear Mr. Estabrook:

Your letter of February 13, 1996, regarding the delay in Ames Research Center's (ARC) provision to you of a draft copy of a NASA Technical Memorandum entitled "Crew Factors in Flight Operations VII: Psychophysiological Responses to Overnight Cargo Operations," has been referred to my office for a reply. Mr. Michael Marlaire, ARC Public Affairs Director, has assured me that the requested document was sent to you on February 16, 1996. If you have not yet received it, please contact me directly at (202) 358-2450, and I will arrange for another copy to be sent to you.

Thank you for your patience and interest.

Sincerely,

A handwritten signature in black ink, appearing to read "Edward A. Frankle".

Edward A. Frankle  
General Counsel

Mark S. Estabrook  
PO Box 1021  
Cordova, TN 38088

March 13, 1996

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mr. Edward A. Frankle  
General Counsel  
National Aeronautics and Space Administration  
Headquarters  
Washington, DC 20546-0001

Re: Appeal of Freedom of Information Act Request DX: 204-2 (95-172)

Dear Mr. Frankle:

Thank you for your offer of assistance in your letter to me of March 8, 1996. I have not received the "requested document" you refer to in your letter. Ames Research Center has sent the wrong version of the requested TM. They sent the "December 1995" final version, which was widely distributed to Federal Express pilots on or about December 8, 1995, and is one that I was already in possession of. I am seeking all prior drafts of the TM, including the version labeled "1994 DRAFT" on the cover, which was distributed to participants as well as non-participants of the study in an August 1994 ARC briefing in Memphis, Tennessee. (*See attached December 8, 1995 letter from Joe DePete to FedEx pilots*).

As important as that issue is, there remains a broader problem with NASA's noncompliance with my original FOIA request. It appears that Mr. Dailey has issued a decision on my FOIA based on information given to him by one of your associates, Mr. John Hall, Jr.. Mr. Dailey, in his January 26, 1995 decision letter to me, considers my FOIA request "moot" with NASA's provision of a single copy of a TM. Beyond an oral agreement with Mr. Hall to specifically limit magnetic tape and computer disk media to written draft material, I never agreed to such a broad narrowing of my FOIA request. Hence, I do not consider my request "moot," as Mr. Dailey concludes in his letter of January 26, 1996. Please allow me to explain further.

I received Mr. Michael Marlaire's letter of February 9, 1996, from Ames Research Center (ARC), in response to Mr. Dailey's January 26, 1996 decision on my FOIA appeal. Mr. Marlaire states the following in his response:

"In accordance with the instruction to our office set forth in the Associate Deputy Administrator's decision on your appeal, please find enclosed a

copy of the draft version of NASA Technical Memorandum, "Crew Factors in Flight Operations VII" Psychophysiological Responses to Overnight Cargo Operations," authored by Philippa H. Gander, Kevin B. Gregory, Linda J. Connell, Donna L. Miller, R. Curtis Graeber, and Mark R. Rosekind."

The document referenced by Mr. Marlaire was enclosed with his letter. However, the NASA Technical Memorandum which he forwarded to me is dated "December 1995," and is not the August "1994 DRAFT" that was promised to me as one of the drafts I agreed to receive in-lieu of the magnetic storage media.

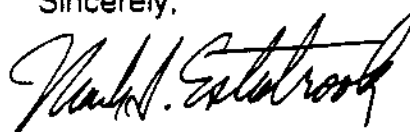
As Mr. Dailey indicated in his January 26, 1996 letter to me, Mr. Hall and I did speak via telephone on or about December 14, 1995, referencing my FOIA request. That conversation appears to be a source of confusion between myself, NASA, ARC and the General Counsel's office. I do not know what Mr. Hall's understanding of the conversation was, but it was my understanding that he would recommend a discretionary release of the "draft" version of the TM in-lieu of duplicating massive magnetic tape and disk media, and the associated administrative cost of collating archived data. I agreed to his suggestion only as a way to expedite my request and minimize costs. However, it appears Mr. Hall has interpreted that agreement as a way to narrow my entire FOIA request. If he had proposed such a "narrowing" arrangement in writing I would have certainly declined it. I expressed similar concerns to Mr. Hall in a January 18, 1996 letter to him, and have attached a copy for your review as well.

As I have stated numerous times in the past, I am seeking the "1994 DRAFT", and all other drafts that may exist, including all correspondence between Federal Express Corporation and NASA, as well as any other documents that were relied upon by the TM's authors and requested in my FOIA, before I can consider this request fulfilled.

Mr. Dailey aptly stated in his January 26, 1996 letter to me *"...In reviewing this matter and the materials concerned, I have concluded that, in this particular case, the potential harm to researchers' legitimate concerns is relatively minor."* Considering his position on this case, I pray you will recommend that Mr. Dailey instructs ARC to immediately comply with all, and not just part, of my FOIA request.

Thank you for your assistance in this matter.

Sincerely,



Mark S. Estabrook

cc: Mr. J. R. Dailey, Associate Deputy Administrator, NASA  
Mr. John Hall, Jr., General Counsel's Office, NASA

Attach: 3-8-96 letter from EAF to MSE  
3-11-96 letter from MSE to JRD  
2-9-96 letter from MM to ME  
2-13-96 letter from MSE to JRD  
1-26-96 letter from JRD to MSE  
1-18-96 letter from MSE to JH  
12-8-95 letter from JD to FedEx Pilots



MAR 21 1996

Mr. Mark S. Estabrook  
P.O. Box 1021  
Cordova, TN 38088

Dear Mr. Estabrook:

Thank you for your letter dated March 11, 1996, regarding your November 29, 1995, appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq., concerning information relating to a proposed NASA Technical Memorandum entitled "Crew Factors in Flight Operations VII: Psychophysiological Responses to Overnight Cargo Operations." Your letter discusses two issues relating to my January 26, 1996, response to your appeal.

First, pursuant to my January 26 determination to authorize a limited discretionary release of the August 1994 draft Technical Memorandum, you state that you were erroneously provided with a December 1995 draft. Although I have been informed that these documents are virtually identical, I am directing Mr. Michael Marlaire, Ames Research Center Freedom of Information Officer, to provide you with a copy of the August 1994 draft as well.

Second, you dispute the representations of the Office of the General Counsel regarding your agreement to treat your appeal as moot in return for the limited discretionary release of the draft Technical Memorandum to you. However, having carefully reviewed this matter, including your several recent letters on the subject, it is not necessary to weigh the accuracies of representations made by the parties to any such agreement.

My determination to authorize the limited release of the draft Technical Memorandum in the specific instance of your appeal did not authorize any further disclosure of other drafts, correspondence, or other documents or materials relating to the Technical Memorandum or the underlying study. I determined that this limited discretionary release was appropriate primarily due to the close similarity between the draft Technical Memorandum and the final version, and the understanding that the draft did not disclose protected information beyond the scope of that discussed in the final



Technical Memorandum. My determination that the potential harm to researchers' legitimate concerns for protection would be relatively minor was premised on this fact. As such, any alleged agreement regarding the narrowing of your request was not relevant to my determination to provide you with the draft Memorandum which you requested.

As stated in my January 26 response, draft memoranda, data, and related materials are not normally published or released prior to publication of the final study results in Technical Memoranda, as such materials are properly exempt from disclosure under FOIA Exemption (b)(5). The courts have recognized several important concerns which permit the withholding of such information. In addition to the concern that release and publication of research data prior to completion could adversely impact the results of ongoing research, several courts have observed that prepublication disclosure could endanger Government-sponsored researchers' interests in having their research published in prestigious, peer-reviewed journals, which require rigorous and time-consuming processes of submission and review. See, e.g., Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 560-61 (7th Cir. 1984); Burka v. United States Department of Health & Human Services, No. 92-2636, slip op. at 9 (D.D.C. Dec. 13, 1993). More importantly, publication in such journals advances the public's interest in the success and effective dissemination of the "Overnight Cargo" study. As the District Court in Burka observed, peer-reviewed journals would likely refuse to publish articles by researchers if the underlying data had already been published elsewhere. Burka, No. 92-2636, slip op. at 9-10. Thus, the information beyond the scope of the draft Memorandum was, and remains, properly withheld.

Additionally, as stated in my previous response, disclosure to certain participants of the study under Agency agreements providing for the conduct of the research, and pursuant to appropriate nondisclosure limitations on such information have been held not to invalidate the Government's assertion of an exemption. See McGilvra v. National Transportation Safety Bd., 840 F. Supp 100, 102 (D. Colo. 1993); cf. Farnsworth v. Proctor & Gamble Co., 101 F.R.D. 355 (N.D. Ga. 1984), aff'd, 758 F.2d 1545 (11th Cir. 1985). Nor has any evidence been cited that data, materials, or drafts of the requested Technical Memorandum have been disclosed by any U.S. Government officials to parties not directly involved in the conduct of the study, sufficient to constitute a waiver of NASA's authority to withhold such information.

In summary, with the exception of my determination to authorize the limited disclosure of the August 1994 draft Technical Memorandum to you, Mr. Marlaire's initial determination is hereby affirmed. This is a final determination and is subject to judicial review under the provisions of the FOIA, 5 U.S.C. § 552 (a) (4), a copy of which is enclosed.

Sincerely,



J. A. Dailey  
Associate Deputy Administrator

Enclosure

cc:  
ARC/PA/Mr. Marlaire

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comments, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acting arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employer, and in the case of a uniformed service, the responsible member.

National Aeronautics and  
Space Administration  
**Ames Research Center**  
Moffett Field, CA 94035-1000



Reply to Attn of

DL: 204-2

March 28, 1996

Mark Estabrook  
P.O. Box 1021  
Cordova, TN 38088

Dear Mr. Estabrook:

Pursuant to the Associate Deputy Administrator's letter dated March 21, 1996, I am releasing the August 1994 draft of the NASA Technical Memorandum entitled "Crew Factors in Flight Operations VII: Psychophysiological Responses to Overnight Cargo Operations." As stated in Associate Deputy Administrator Dailey's letter, this release is made purely as a discretionary matter by NASA.

*Michael L. Marlaire*  
Michael L. Marlaire

Enclosure