

CITY OF CAMBRIDGE

CITY HALL, CAMBRIDGE, MASSACHUSETTS 02139 • (617) 498-9020

LAW DEPARTMENT

RUSSELL B. HIGLEY
CITY SOLICITOR

MICHAEL C. COSTELLO
ASSISTANT CITY SOLICITOR

EDWARD A. CUNNINGHAM
SEVERLIN B. SINGLETON
DAVID B. O'CONNOR
BIRGE ALBRIGHT
LEGAL COUNSEL

March 16, 1984

Mr. Robert W. Healy
City Manager
City Hall
Cambridge, Mass.

Re: Arthur D. Little, Inc. v. Melvin H. Chalfen

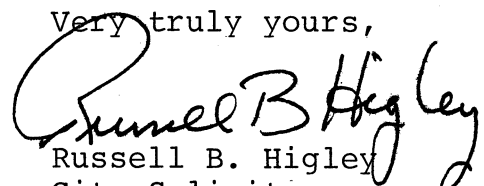
Dear Mr. Healy:

On March 15, 1984, I received a telephone call from Attorney Thomas Bracken. Attorney Bracken stated that he represented Arthur D. Little, Inc., and that he would appear at Middlesex Superior Court on March 16, 1984 at 9:30 a.m. seeking a temporary restraining order and a protective order concerning the regulation adopted by Commissioner Chalfen on March 13, 1984.

Today I appeared before Judge Mitchell at 10:00 a.m. Judge Mitchell issued a temporary restraining order against the enforcement of the regulation. He instructed Attorney Bracken to bring the Defense Department into this action as a necessary party, and ordered Arthur D. Little, Inc. to furnish all hazard assessment studies that had been prepared relative to this facility.

If the Defense Department does not become a party and/or the relevant information is not furnished, I have been instructed to return to the Court.

Very truly yours,


Russell B. Higley
City Solicitor

RBH/jl
Encs.

cc: Melvin H. Chalfen, M.D.
Commissioner

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, s.s.

SUPERIOR COURT DEPARTMENT
Civil Action No. 84-1529

ARTHUR D. LITTLE, INC.,

Plaintiff

v.

MELVIN H. CHALFEN, as he is
Commissioner of Health and
Hospitals in the City of
Cambridge,

Defendant

COMPLAINT

COMES NOW Plaintiff Arthur D. Little, Inc. and
petitions, under Mass. G.L. c. 111, §147, for review of
an Order issued by defendant Commissioner Melvin H.
Chalfen on March 13, 1984 under Mass. G.L. c. 111, §143
and for a declaratory judgment pursuant to Mass. G.L.,
c. 231A, §1, as follows:

1. Plaintiff is a corporation organized and
existing under the laws of Massachusetts and has its
principal offices at 25 Acorn Park, Cambridge,
Massachusetts.

2. Defendant is the Commissioner of Health
and Hospitals of the City of Cambridge, with his
office located at 1493 Cambridge Street, Cambridge,
Massachusetts.

3. Plaintiff is aggrieved by the March 13, 1984 Order issued by defendant Chalfen and by a regulation issued by defendant Chalfen on March 13, 1984. There exists between plaintiff and defendant an actual controversy.

4. In June, 1982 and September, 1983 plaintiff entered into contracts with the United States Department of Defense (DOD) pursuant to which plaintiff undertook to establish a laboratory at its Acorn Park facility for the purpose of conducting research on defense-related projects, including the testing of small quantities of certain chemicals. Pursuant to said contract, plaintiff established a laboratory to conduct research on very small amounts of several chemicals, in accordance with DOD safety requirements, which include design features to prevent any public or worker exposure to chemicals tested in the facility, even in the unlikely event of an accident. The chemical materials being tested by plaintiff are the property of DOD.

5. The laboratory facility as constructed and the research work performed therein has at all times been in compliance with all federal and state laws and regulations, including requirements of the Environmental Protection Agency, the Department of Transportation, OSHA, DOD, Massachusetts Department of Environmental Quality Engineering and Massachusetts Department of Public Health, and, until March 13, 1984, the facility and the work conducted therein, were in compliance with all laws and regulations of the City of Cambridge, including regulations of the Department of Health and Hospitals.

6. The facility has been inspected by personnel of DOD and the Massachusetts Department of Public Health during various times of operation and no violations of any federal or state requirements have been found.

7. On March 13, 1984 at about 1:00 p.m. a letter of even date, signed by defendant Chalfen, enclosing a regulation purportedly adopted by defendant Chalfen alone on March 13, 1984, was delivered to plaintiff, copies of which are attached hereto as Exhibit A.

8. The March 13, 1984 regulation asserts that five specified chemical materials, which include materials used by plaintiff in connection with its research work for DOD, are "highly toxic, and extremely hazardous in the event of an accident, to the public health and safety of the population of the City of Cambridge." The regulation then prohibits "the testing, storage, transportation and disposal" of the five listed chemical materials within the City of Cambridge. The regulation further provides for creation of a Scientific Advisory Committee to study and assess the hazards of the proscribed materials and make recommendations to the Department of Health and Hospitals. The March 13, 1984 Order requires plaintiff to cease the storage and testing of all chemicals at its laboratory in Cambridge where it is performing defense-related research for DOD.

9. 18 U.S.C. §1361 provides that anyone who willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than ten years, or both.

10. Compliance with the March 13, 1984 Order would require destruction of the chemical materials owned by the DOD, and thereby subject plaintiff and its

officers to criminal sanctions under 18 U.S.C. §1361. Representatives of DOD have brought this criminal statute to the attention of plaintiff and have expressly instructed plaintiff not to destroy the chemical materials.

Supremacy Clause and Federal Preemption

11. The laboratory research on chemicals being performed by plaintiff for DOD is a federal activity, authorized and directed by DOD and conducted in compliance with all federal laws and regulations. The March 13, 1984 regulation and Order are in direct conflict with this federal activity and constitute a violation of the Supremacy Clause of the United States Constitution.

12. The United States Government has established a comprehensive and complex scheme for regulating toxic materials and specifically has assumed total control over the chemicals covered in the defendant's March 13, 1984 regulation. Accordingly, the federal Government has preempted the entire field with respect to the chemicals covered by the challenged regulation and the Commissioner has no authority to issue a regulation pertaining to those chemicals.

Substantive Defects of Regulation

13. The chemicals covered by the March 13, 1984 regulation are not hazardous to the population of Cambridge, except where public exposure would occur. The testing, storage, transportation and disposal of the very small quantities of the research chemicals poses no risk of public exposure when adequate measures are taken to insure that such activities will not subject the public to exposure, even in the unlikely event of an accident.

14. Plaintiff's laboratory facility in which it is conducting research for DOD involving chemicals covered by the March 13, 1984 regulation was constructed and is being operated in accordance with all federal and state requirements, and all local requirements, other than the regulation and order at issue in this action, which requirements include design features, operational procedures and contingency plans to prevent any public exposure to these chemicals in the event of spillage of the materials, fire or other accidental or natural causes. The design of the facility, together with implementation of the operating procedures and contingency plans will result in immediate control and containment of all chemical materials in the event of a spill, other type accident, or natural causes of whatever kind.

15. Neither the regulation nor the Order issued to plaintiff state or suggest that the design of plaintiff's laboratory or the operating procedures and contingency plans are not adequate to prevent public exposure to any chemical materials used in the plaintiff's laboratory and covered by the March 13, 1984 regulation, even in the event of an accident.

16. The public record contains no finding by defendant Chalfen that prohibiting the trade of laboratory research on chemicals, such as plaintiff is conducting, is a reasonable way to protect the public health from exposures to toxic chemicals identified in the March 13, 1984 regulation.

17. The March 13, 1984 regulation prohibiting all testing, storage, transportation and disposal of certain chemical materials in the City of Cambridge bears no reasonable relationship to any potential health hazard to the public posed by the chemicals listed in the regulation and is unreasonable and arbitrary, in contravention of Mass. G.L. c. 111, §31.

18. For the foregoing reasons, the March 13, 1984 regulation is in excess of the authority of defendant Chalfen to issue and is null and void, having no force or effect.

Procedural Defects in Adoption of Regulation

19. The March 13, 1984 regulation was summarily issued on that date without any notice to the public of the proposed regulation, opportunity for public comment or hearing and, on information and belief, without any inquiry into the potential health hazards which could arise from operation of a laboratory research facility, such as plaintiff's. Indeed, the regulation indicates that an assessment of the hazard claimed to be posed by these chemicals has not been made since the regulation provides for creation of a Scientific Advisory Committee to conduct such an inquiry.

20. For the foregoing reasons, the issuance of the March 13, 1984 regulation does not conform to procedural due process requirements and is, therefore, null and void and of no force or effect.

Invalidity of Regulation as Applied to Plaintiff

21. Plaintiff has expended large sums of money in establishing and maintaining the laboratory facility to conduct research work for DOD and has committed substantial resources to the training of personnel for operation of the facility. Compliance with the March 13, 1984 regulation would render worthless the facility and the training in connection with operating the facility.

WHEREFORE, plaintiff Arthur D. Little, Inc. prays this Court to enter judgment as follows:

1. Declare the March 13, 1984 regulation issued by defendant Chalfen to be null and void and of no force and effect.

2. In the alternative, declare the March 13, 1984 regulation to be invalid as applied to plaintiff.

3. Declare the March 13, 1984 Order issued by defendant Chalfen to be null and void and of no force or effect and order that it be set aside.

4. Preliminarily enjoin defendant Chalfen from implementing the March 13, 1984 regulation and from enforcing or taking any other action pursuant to the March 13, 1984 Order issued to plaintiff.

5. Permanently enjoin defendant Chalfen from implementing the March 13, 1984 regulation and from enforcing or taking any other action with respect to the March 13, 1984 Order issued to plaintiff.

6. Awarding plaintiff its costs incurred in this action, including reasonable attorneys' fees, and

22. The facility itself complies with all federal, state and local requirements and the operation of the facility complies with all federal and state requirements and until, March 13, 1984, complied with all regulations of the City of Cambridge. Retroactive application of the March 13, 1983 regulation to plaintiff's facility and its operation would constitute an unlawful taking of property without due process of law in violation of the United States Constitution.

Invalidity of the Order

23. The public record contains no finding by defendant Chalfen that the trade of laboratory research on certain chemicals, such as plaintiff is conducting, may result in a nuisance or be harmful to the inhabitants of Cambridge, injurious to their estates, dangerous to the public health, or may be attended by noisome and injurious odors, as required by Mass. G.L. c. 111, §143 to warrant issuance of an Order to plaintiff.

24. By reason on the invalidity of the March 13, 1984 regulation generally, its invalidity as applied to plaintiff, and the failure to make necessary findings under Mass. G.L. c. 111, § 143, the March 13, 1984 Order issued to plaintiff is invalid, having no force or effect.

7. Awarding plaintiff such other and further relief as this Court deems just and proper.

Respectfully submitted,

by Plaintiff

Richard T. Murphy, Jr.
Vice President and
Corporate Counsel
Arthur D. Little, Inc.
25 Acorn Park
Cambridge, MA 02138
617 864-5770

and by Plaintiff's Counsel

Thomas B. Bracken
Bracken and Baram
33 Mount Vernon Street
Boston, MA 02108
617 742-4950

March 15, 1984

VERIFICATION

COMMONWEALTH OF MASSACHUSETTS)
COUNTY OF MIDDLESEX)

Richard T. Murphy, Jr., ^{*under the pains and penalties of perjury,*} ~~being duly sworn~~ says
that he is Vice President and Corporate Counsel of
Arthur D. Little, Inc., plaintiff in this action, that
he has read the foregoing complaint and acknowledges that
the facts stated therein are true and correct, except
for those facts alleged on information and belief as to
which facts he believes them to be true and correct.

Richard T. Murphy, Jr.

~~Sworn to and subscribed
before me this
day of March, 1984.~~

~~_____
Notary Public~~

~~My commission expires:~~



CITY OF CAMBRIDGE
DEPARTMENT OF HEALTH AND HOSPITALS
1493 CAMBRIDGE STREET
CAMBRIDGE, MASSACHUSETTS 02139
498-1349

MELVIN H. CHALFEN, M.D.
COMMISSIONER

March 13, 1984

John F. Magee, President
Arthur D. Little, Inc.
25 Acorn Park
Cambridge, Mass. 02140

Re: Testing of Nerve Gas

Dear Mr. Magee:

Pursuant to M.G.L.A., c. 111, §§31 and 143, a regulation has been adopted by this office which prohibits the testing, storage, transportation and disposal of the following chemical materials within the City of Cambridge:

1. Soman - GD (nerve agent)
2. Sarin - GB (nerve agent)
3. VX (nerve agent)
4. Mustard - HD (blister agent)
5. Lewisite (blister agent)

Pursuant to M.G.L.A., c. 111, §146 entitled, "Orders of Prohibition," you are hereby ordered to cease the storage and testing of the above chemical materials at your facility which is located in Acorn Park, Cambridge, Massachusetts.

Very truly yours,

Melvin H. Chalfen
Commissioner

MHC/jl
Enc.

A TRUE COPY
ATTEST:- Alex Hayes
Constable of Cambridge

EXHIBIT A



CITY OF CAMBRIDGE
DEPARTMENT OF HEALTH AND HOSPITALS
1493 CAMBRIDGE STREET
CAMBRIDGE, MASSACHUSETTS 02139
498-1349

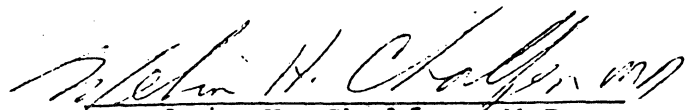
MELVIN H. CHALFEN, M.D.
COMMISSIONER

On this 13th day of March, 1984, I, Melvin H. Chalfen, M.D., Commissioner of Health and Hospitals, hereby adopt the following regulation pursuant to M.G.L.A., c. 111, §§31 and 143.

The following materials are hereby determined to be highly toxic, and extremely hazardous in the event of an accident, to the public health and safety of the population of the City of Cambridge. The testing, storage, transportation and disposal of the following chemical materials is hereby prohibited within the City of Cambridge:

1. Soman - GD (nerve agent)
2. Sarin - GB (nerve agent)
3. VX (nerve agent)
4. Mustard - HD (blister agent)
5. Lewisite (blister agent)

This regulation shall remain in effect until the Scientific Advisory Committee Study and an independent hazard assessment has been completed, and these recommendations have been reviewed by this office.


Melvin H. Chalfen, M.D.
Commissioner

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, s.s.

SUPERIOR COURT DEPARTMENT
Civil Action No. 84-1529

ARTHUR D. LITTLE, INC.,

Plaintiff

v.

MELVIN H. CHALFEN, as he is
Commissioner of Health and
Hospitals in the City of
Cambridge

Defendant

MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PROTECTIVE ORDER

COMES NOW Plaintiff Arthur D. Little, Inc.
and moves this Court, pursuant to Rule 65(a) of
Mass. R. Civ. P., for an order temporarily restraining
defendant Melvin H. Chalfen, as he is Commissioner of
Health and Hospitals of the City of Cambridge, from
enforcing the Order issued by said defendant on
March 13, 1984 requiring plaintiff to cease the storage
and testing of certain chemical materials at its
laboratory facility in Cambridge in connection with
research work being performed by plaintiff under contract
with the United States Department of Defense. Plaintiff
also seeks a protective order to preserve its right to
appeal the Order issued by defendant Chalfen notwith-
standing continuation of the defense-related research

work. Plaintiff has made a request, pursuant to Mass. G.L. c. 111, §148, to the Commissioner to stay the effectiveness of his Order while proceedings are pending before this Court. As of this date, the Commissioner has not acted on plaintiff's request. The grounds for plaintiff's motion are as follows:

1. Compliance with the March 13, 1984 Order would cause immediate and irreparable injury, loss and damage to the plaintiff and to the United States of America, including (a) destruction of valuable chemicals and other materials, which are property of the United States, (b) loss of research work product produced over the past five months at plaintiff's facility valued at \$163,288, which work product is owned by the Department of Defense and pertains to the national defense, (c) loss of use of a laboratory facility, the capital cost of which was \$873,653, (d) delay of the completion of research conducted for the purpose of rendering harmless chemicals stored at sites throughout the United States and protecting American soldiers against exposure to these chemicals, (e) loss to plaintiff of substantial future business with DOD, and (f) exposure of plaintiff to potential civil and criminal penalties under its contract with DOD and under federal statutes which prohibit the destruction of Government property, all as explained in the supporting affidavit of Judith C. Harris.

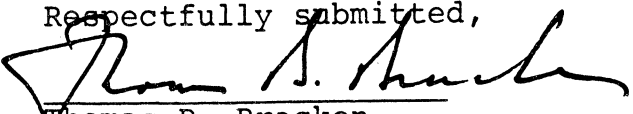
2. It is likely that plaintiff will prevail on the merits of its complaint.

3. Substantial harm would not result to any other parties if the motion is granted,

4. The public interest would be served by the granting of a temporary restraining order, and

5. Equity and fairness require this Court to issue a Protective Order to preserve plaintiff's right to appeal the Order issued by defendant Commissioner. Mass. G.L. c. 111, §147 requires plaintiff to notice an appeal to certain local and state bodies and to file a petition with the Superior Court appealing the Order within three days after service. Mass. G.L. c. 111, §148 provides that unless plaintiff is in compliance with the challenged Order, the appeal shall be dismissed. Compliance with the Order would cause the immediate and irrevocable harm referred to in paragraph 1 above. Failure to comply risks loss of the right to appeal. Hence without relief from the Court, plaintiff is in an untenable situation and without any means for protecting its interests.

Respectfully submitted,



Thomas B. Bracken
Bracken and Baram
33 Mount Vernon Street
Boston, MA 02108
617 742-4950

March 15, 1984

CITY OF CAMBRIDGE
DEPARTMENT OF HEALTH AND HOSPITALS

IN RE: ARTHUR D. LITTLE, INC.
March 13, 1984 Order, issued
under Mass. G.L. c. 111, §143

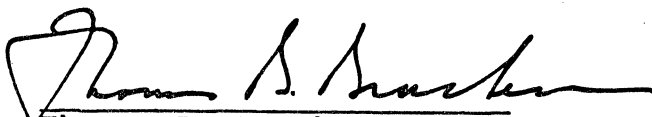
NOTICE OF APPEAL
AND REQUEST FOR STAY

COMES NOW Arthur D. Little, Inc. and gives notice, pursuant to Mass. G.L. c. 111, §147, of its appeal from an Order issued by the Commissioner of Health and Hospitals of the City of Cambridge on March 13, 1984 to Arthur D. Little, Inc., pursuant to Mass. G.L. c. 111, §§31 and 143. The grounds for said appeal are set forth in a Complaint filed in the Massachusetts Superior Court for Middlesex County, a copy of which is attached.

Arthur D. Little, Inc. requests, pursuant to Mass. G.L. c. 111, §148, the Commissioner to stay the effectiveness of his March 13, 1984 Order to allow the defense-related research work to continue at plaintiff's Acorn Park facility while the proceedings are pending in the Middlesex Superior Court. The grounds for

granting the stay are set forth in plaintiff's motion for temporary restraining order and protective order filed in the Middlesex Superior Court and affidavit in support thereof, copies of which are attached.

Respectfully submitted,
Arthur D. Little, Inc.
By its counsel

A handwritten signature in cursive script, appearing to read "Thomas B. Bracken". The signature is written in black ink and is positioned above a horizontal line.

Thomas B. Bracken
Bracken and Baram
33 Mount Vernon Street
Boston, MA 02108
617 742-4950

Dated: March 15, 1984

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, s.s.

SUPERIOR COURT DEPARTMENT
Civil Action No. 84-1529

ARTHUR D. LITTLE, INC.,

Plaintiff

v.

MELVIN H. CHALFEN, as he is
Commissioner of Health and
Hospitals in the City of
Cambridge,

Defendant

*
*
*
* AFFIDAVIT OF
* JUDITH C. HARRIS IN
* SUPPORT OF PLAINTIFF'S
* MOTION FOR TEMPORARY
* RESTRAINING ORDER AND
* PROTECTIVE ORDER
*
*

Judith C. Harris, under the pains and
penalties of perjury, states:

1. I am Manager of ^{Chemical and} Food Sciences at Arthur
D. Little, Inc. (ADL) and have held that position since
September, 1983. I have worked for ADL since 1975 as an
analytical and environmental chemist.

2. In June, 1982 and September, 1983 ADL
entered into contracts with the United States Department
of Defense (DOD) which called for the establishment of
a research laboratory, designed in accordance with DOD
safety specifications, for the testing of certain
chemical surety materials. The purpose of the first
contract was to develop improved test kits for soldiers
in the field to test the purity of drinking water. The

purpose of the second contract was to design and test a calibration system for ambient air monitoring to be used by DOD in developing procedures to protect workers involved in DOD's program to detoxify chemical wastes stockpiled at sites throughout the United States.

3. The contracts provide that no changes or modifications in any of the terms and conditions or scope of work may be made without express direction from the Contracting Officer. Pursuant to the contracts, all chemical surety materials tested by ADL in its laboratory are supplied by DOD and remain the property of DOD. No action may be taken by ADL to dispose of, ^{without express authorization} destroy, or transport the materials/ from the Contracting Officer. If such disposal, destruction or transportation is expressly authorized, it must be accomplished in the presence of a witness from the Defense Contract Administrative Services Region or some other person approved by the Contracting Officer.

4. Compliance by ADL with the March 13, 1984 Order of Commissioner Chalfen, which prohibits storage of the chemical surety materials at ADL's Cambridge facility, would require the disposal/destruction of DOD's materials. ADL has advised the Contracting Officer of the March 13, 1984 Order and has been specifically instructed by the Contracting Officer not to destroy or dispose of any of the chemical surety materials in its possession.

5. ADL's research laboratory represents the state-of-the-art for such facilities and fully complies with all requirements of DOD and other federal and state agencies. The facility consists of several separate laboratory work areas, all connected by antechambers to a common clean-up (decontamination) area for the personnel. The chemical surety materials are stored in a double-locked specially constructed container in the inner chamber which has decontamination provisions built into it. Appropriate intruder alarms and detectors and a 24-hour watch/patrol afford full security for the materials.

6. Security controls and safety procedures for storage and use of the chemical surety materials have been developed and implemented in accordance with federal requirements. All personnel working in the laboratory have been subjected to rigorous personnel screening procedures as required by DOD, which include physical and psychological evaluations. Upon completion of construction, the facility was inspected by representatives of the DOD and the Massachusetts Department of Public Health and found to be in complete compliance with all federal and state requirements. Personnel of DOD's Chemical Surety Office have visited the facility after it became operational and have found that the operation complies with all federal requirements.

7. The capital cost of constructing the laboratory, including the associated safety and security systems, was \$752,801. In addition, ADL has spent \$120,852 for furnishing the facility and planning and developing the operating procedures. The continuing operating costs of the facility are estimated to be \$163,224 per year.

8. If ADL complied with the March 13, 1984 Order, by destroying or disposing of the chemical surety materials owned by DOD, the result would be to render worthless the work already performed by ADL with respect to designing the calibration procedures for air monitoring in connection with DOD's development of a program for worker safety during DOD detoxification of existing chemical stockpiles. DOD has invested \$163,288 in this project as of this date.

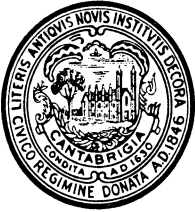
9. In addition, if ADL is not allowed to continue testing the chemical materials provided by DOD, the entire \$2.1 million effort now underway by ADL and other contractors for DOD would be jeopardized. Further, if the testing is not allowed to continue, the entire \$875,653 invested in building the facility, developing safety procedures and operating plans and training personnel would be lost. Finally, if the March 13,

1984 Order and regulation are implemented against ADL, the potential for obtaining additional work from DOD, which ADL conservatively estimates to be worth about \$1 million per year over the next ten years, would be unavailable to ADL.

Respectfully submitted,

Judith C. Harris

Dated: March 15, 1984



CITY OF CAMBRIDGE

CAMBRIDGE, MASSACHUSETTS 02139
Tel. 498-9011

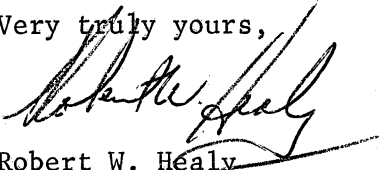
EXECUTIVE DEPARTMENT
ROBERT W. HEALY
City Manager

March 19, 1984

To the Honorable, the City Council:

Enclosed is a status report relative to the testing of
"nerve gas" being done at Arthur D. Little.

Very truly yours,



Robert W. Healy
City Manager

RWH/mbf
Enc.

Agenda Item Number Seven

S-172

Re: enclosing a status report on the testing of "nerve gas" being done at Arthur D. Little.

In City Council,

March 1984

Placed

*ON
File*