

October 9, 2002

Maria D. Webb  
Legal Assistant  
Shaw Pittman  
2300 N Street, NW  
Washington, DC 20037-1128

IN REPLY REFER  
TO FOIA-2002-011A  
(FOIA-2002-0309)

Dear Ms. Webb:

I am responding to your letter of July 24, 2002, to the Freedom of Information Act / Privacy Act (FOIA/PA) Officer, in which you appealed the agency's June 28, 2002, response to your FOIA request (FOIA 2002-0309). The initial agency response denied in entirety, your FOIA request for the Office of Investigations' (OI) Investigative Procedures Manual (IPM).

Acting on your appeal, I have carefully reviewed the record in this case and have determined that some information may be made available to you. Therefore, your appeal is partially granted and partially denied. The released portions of the record are enclosed.

First, in the agency's initial response, we neglected to inform you that some portions of the document are being withheld pursuant to FOIA Exemption 5. The information marked and withheld under Exemption 5 constitutes advice and guidance provided by NRC attorneys to NRC staff on legal matters for which these clients sought professional advice.

Second, certain portions of the document that relate to either confidentiality of sources and consensual monitoring shall continue to be withheld under FOIA Exemption 7(E). Under Exemption 7(E), certain portions of the IPM meet the withholding requirements because they consist of techniques and procedures for law enforcement investigations that are confidential and must remain so to be effective.

You correctly point out that for Exemption 7(E) to apply, the procedures sought to be protected must not be well known to the public. You note that monitoring (i.e., wiretapping) is a procedure well known to the public. However, several courts have held that if disclosure of techniques known to the public could interfere with their effectiveness, then Exemption 7(E) applies to protect that information. Hale v. Department of Justice, 973 F. 2d 894, 902-03 (10<sup>th</sup> Cir. 1992); Bowden v. FDA, 925 F. 2d 1225, 1228 (9<sup>th</sup> Cir. 1991); LaRouche v. United States Dep't of Justice, No. 90-2753, slip op. at 21 (D.D.C. Nov. 17, 2000). Accordingly, the manual provisions that cover confidentiality of sources and consensual monitoring fall within this category of protected information and they will be withheld under Exemption 7(E).

Third, you have also asserted that withholding the OI IPM does not meet the foreseeable harm standard. However, this standard is no longer applicable, and has been superceded by a

“sound legal basis” standard for withholding of information. See, Attorney General’s Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (October 12, 2001).

Finally, you assert that the 1996 version of the OI manual is publicly available. I am advised that the 1996 OI manual was inadvertently made public at one time, however such release of the 1996 manual was subsequently retracted by the agency after further consideration. Please note that inadvertent disclosure does not render information publicly available for the purpose of future FOIA requests. Parker v. Bureau of Land Management, 141 F. Supp. 2d 71 (D.D.C.. 2001), citing Martin Marietta Corp. v. Dalton, 974 F. Supp. 37, 40 (D.D.C. 1997).

This is the final agency action on this record pursuant to 10 C.F.R. 9.29(c)(3)(2002). As set forth in the FOIA (5 U.S.C. 552(a)(4)(B) ), judicial review of this decision is available in a district court of the United States in the district in which you reside or have your principal place of business, or in the District of Columbia.

Sincerely,

*/RA/*

William F. Kane  
Deputy Executive Director  
for Reactor Programs

Enclosure: As stated

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**Re: FOIA 2002-011A**

**APPENDIX  
RECORD BEING WITHHELD IN PART**

<b><u>NO.</u></b>	<b><u>DATE</u></b>	<b><u>DESCRIPTION/(PAGE COUNT)/EXEMPTIONS</u></b>
1.	8/99	Office of Investigations' Investigative Procedures Manual (approximately 156 pages) <b>(EX. 5 and EX. 7E)</b>