

# EGAN, FITZPATRICK, MALSCH & CYNKAR, PLLC

Counselors at Law

The American Center at Tysons Corner  
8300 Boone Boulevard • Suite 340  
Vienna, Virginia 22182  
Tel: (703) 891-4050  
Fax: (703) 891-4055

www.nuclearlawyer.com

1777 N.E. Loop 410 • Suite 600  
San Antonio, Texas 78217  
Tel: (210) 820-2667  
Fax: (210) 820-2668

Joseph R. Egan  
Martin G. Malsch  
Robert J. Cynkar

Charles J. Fitzpatrick  
[cfitzpatrick@nuclearlawyer.com](mailto:cfitzpatrick@nuclearlawyer.com)

## FREEDOM OF INFORMATION ACT APPEAL

March 11, 2005

VIA EMAIL, FACSIMILE  
and FEDERAL EXPRESS

**FOIA/PA REQUEST**  
Case No.: 2005-006A  
Date Rec'd: 3-11-05  
Specialist: P051  
Related Case: 2005-0060

FOIA/Privacy Act Officer  
U.S. Nuclear Regulatory Commission  
Mail Stop T6-D8  
Washington, D.C. 20555-0001

Re: NRC FOIA/PA 2005-0060

Dear Sir or Madam:

The purpose of this letter is to appeal a final Nuclear Regulatory Commission ("NRC") determination sent to me in correspondence dated February 11, 2005, by Carol Ann Reed, Freedom of Information Act and Privacy Act Officer. This "Freedom of Information Act Appeal" is being sent to you by email, facsimile, and Federal Express. A copy of NRC's February 11, 2005 decision is attached hereto (as Exhibit A). NRC's February 11, 2005 correspondence purported to be its final response to the Freedom of Information Act ("FOIA") request and explained the right of Appellant, acting on behalf of the State of Nevada ("Nevada") to appeal to your office. Attached hereto as Exhibit B is a copy of Appellant's November 30, 2004 FOIA request to which NRC's February 11, 2005 correspondence was responsive.

### BACKGROUND

On July 9, 2004, the United States Court of Appeals for the District of Columbia Circuit issued a decision and order vacating and remanding portions of Environmental Protection Agency's ("EPA") public health and environmental radiation protection standards for Yucca Mountain, Nevada (40 C.F.R. Part 197). Because NRC's licensing regulation pertaining to the proposed Yucca Mountain facility (10 C.F.R. Part 63) purported to rely upon and implement the 10,000-year protection standard time of compliance which had been embodied in the vacated portion of the EPA regulation, it was anticipated that NRC would undertake to amend or revise

its licensing regulation to be consistent with the Court's July 9, 2004 decision, and with whatever amended or revised standard EPA determines to promulgate. Accordingly, Appellant, by FOIA request, sought from NRC all documents demonstrating interaction between the NRC and other Yucca-interested agencies, including EPA and the Department of Energy ("DOE"), as well as a non-federal agency, the National Academy of Sciences ("NAS").

The FOIA request was triggered by a concern that, instead of initiating any new amended regulation openly through the public notice and comment process, by which all members of the public and all other entities, including federal and non-federal agencies, would have an opportunity to offer comments in a transparent manner, that NRC might instead be "lobbied" in private and secret meetings with other governmental and non-governmental entities interested in the content of any new regulation. Documents provided by EPA in response to a FOIA request similar to the one to NRC whose response is the subject of this appeal confirmed these concerns, reflecting (by diary entries and meeting notes of EPA personnel) private meetings and communications among at least representatives of NRC, EPA, DOE, and NAS concerning the topic in question.

### GROUNDNS FOR APPEAL

In its February 11, 2005 FOIA response, NRC did not provide a single responsive document. Instead, NRC took the position that there were only two responsive documents in existence and that both of them were being withheld in their entirety (one under attorney-client privilege and the other under deliberative-process privilege). Before discussing the particulars of NRC's deficient response, Appellant would point out that NRC's adoption of a procedure under which it responds to FOIA requests simply by means of checkmarks on a preprinted form, without any narrative or explanation with respect to the **particular** documents withheld under a **particular** requestor's request, renders every NRC FOIA response insufficient as a matter of law *ab initio*.

The large body of case law which has evolved surrounding the FOIA and its implementation makes clear that the providing (or in this case non-providing) agency is required to make certain additional analyses, should it determine to withhold documents based upon one or more purported exemptions. Such analyses (discussed *infra*) not only are not present in NRC's February 11 response, but NRC's formulaic "express lane" checkmark response technique defeats any possibility of the required analyses being provided to **any** requestor and should be discontinued immediately.

NRC's February 11, 2005 FOIA response is deficient in at least the following particulars:

1. **Incompleteness:** NRC's response is simply incomplete, in that NRC has clearly failed to produce a large number of relevant, nonexempt documentary material meeting the description of the request, without so much as acknowledging its existence or asserting an *exemption thereto*.
2. **Description:** NRC has failed to describe the documents which it withheld on the basis of alleged exemption in the detail required by law and as a necessary prerequisite to any meaningful assessment of the validity of the exemption asserted.

3. **Segregation:** NRC has utterly failed to consider whether portions of documents it has withheld contain segregable nonexempt information which is required by law to be disclosed by NRC, even if other portions are exempt.
4. **Public Interest:** NRC has completely abdicated its responsibility to balance the interest in public disclosure of even arguably exempt materials versus the agency's need to withhold those documents based on some potential harm which their disclosure could cause to the Agency.
5. **Privilege:** While NRC asserts the exemption "attorney-client privilege" with respect to one of the two documents it identifies, it makes no effort to discuss the nature or content of that document or to articulate the necessary elements prerequisite to its being exempt as an attorney-client communication.

#### DISCUSSION

1. **The Incompleteness of NRC's Response:** It is obvious that a FOIA requestor cannot establish the existence *vel non* of responsive documents. The requestor must rely on the good faith of the government agency to whom the request is made to either produce, or at least identify and assert an exemption for, all relevant documents in the Agency's possession responsive to the request. Not being the party in possession of the documents, it is difficult for a requestor to establish that the Agency has simply hidden responsive documents, neither producing them nor asserting an exemption justifying their nondisclosure.

In this case, because the requestor made a similar FOIA request to a different federal agency (EPA), it is in a better position to gauge the incompleteness of NRC's response. The more candid response of EPA stands as an indictment of the incompleteness of NRC's: while withholding some information on the basis of asserted exemption, EPA produced no less than 107 pages of responsive documents. Since Appellant's requests to both agencies asked for documents relating to meetings between the two, the content of EPA's responsive documents highlights the deficient nature of NRC's response in that it specifically produces documents relating to meetings involving representatives of NRC! By way of example, personnel diary entries and meeting notes produced by EPA reflect conversations and meetings between EPA representatives and key NRC employees such as Bill Reamer, Tim McCartin, and "NRC-OGC," and included meetings at which representatives of the three agencies (EPA, DOE, and NRC) were all present.

This is precisely the information which Appellant's FOIA request sought; not only did NRC not produce a single document similar to the large collection produced by EPA regarding these meetings -- worse yet, NRC did not even **identify** any such documents and withhold them on the basis of some purported exemption.

It is disappointing for a FOIA requestor to learn of an agency's concealment of relevant responsive documents only through the accident of having made an identical request of another federal agency which was more candid in its response. One can only hope that the incompleteness of NRC's FOIA response was due to inadvertence and its failure to survey the appropriate persons who participated in meetings with EPA or DOE on the

subjects inquired about, and to identify and accumulate their relevant documentary materials. NRC should be required to do so promptly and to deliver to Appellant all responsive materials previously not identified or delivered.

One of the two documents acknowledged by NRC to exist is referred to as "staff notes on EPA's overall approach for revising standard" (eight pages). Even assuming that NRC's staff notes are exempt, the document they were analyzing, "EPA's Overall Approach for Revising Standards" is neither identified as a separate document, nor is it provided, nor is it claimed as exempt, nor can Appellant imagine what exemption could apply to it. NRC staff presumably could not have compiled eight pages of notes concerning a document unless they had the document before them.

2. **NRC's Failure to Adequately Describe Withheld Documents:** NRC fails to meet the settled legal requirement that it accurately describe any document and its content which are being withheld under a claim of exemption. On the contrary, in withholding the only two documents NRC admitted were responsive to Appellant's FOIA Request, NRC simply makes the conclusory designation (by a checkmark in the appropriate box among a laundry list of exemptions) that one of the documents was exempt for attorney-client privilege and the other for deliberative-process privilege. There is no identification of the content of the documents sufficient to confirm the content of the document, in whole or in part, relative to any exemption. The law requires much more, and as an agency which responds to hundreds, if not thousands, of FOIA requests every year, it is not credible that NRC is unaware of this requirement. The reasons necessitating a clear description and justification for any documents withheld as exempt are obvious: without it, it is impossible for the requestor, and equally impossible for the reviewing authority (whether within NRC or judicial authority) to make any judgment with respect to the propriety of the purported exemption asserted by an agency. As the United States Court of Appeals for the D.C. Circuit (the court likely to hear a judicial challenge in this matter, should one be necessary) has observed:

The Freedom of Information Act was conceived in an effort to permit access by the citizenry to most forms of government records. In essence, the Act provides that all documents are available to the public unless specifically exempted by the Act itself. This Court has repeatedly stated that these exemptions from disclosure must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act. . . . Thus, the statute and the judicial interpretations recognize and place great emphasis upon the importance of disclosure.

In light of this overwhelming emphasis upon disclosure, it is anomalous, but obviously inevitable, that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously, the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. . . . In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements

categorizing information, and this case provides a classic example of such a situation. Here, the government contends that the documents contain information of a personal nature, the disclosure of which would constitute invasion of certain individuals' privacy. This factual characterization may or may not be accurate. It is clear, however, that appellant cannot state that, as a matter of his knowledge, this characterization is untrue.

*Vaughn v. Rosen*, 484 F.2d 820, 823-24 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974).

The court in *Vaughn* viewed with distress the idea that, if agencies were free to simply make a global conclusory assertion as to exemption, and nothing more, the already beleaguered court system would be swamped with requests for *in camera* review of documents sought by FOIA requestors and withheld by agencies. The court's response to that threat, and a requirement of every agency responding to a FOIA request, was to forbid conclusory and generalized allegations of exemption "such as the trial court was treated to in this case" and to require a relatively detailed analysis explaining the content of the withheld documents and the applicability of a purported exemption in detail: "The need for an itemized explanation by the government is dramatically illustrated by this case. The government claims that the documents, as a whole, are exempt . . . from the record, we do not and cannot know whether a particular portion is . . . exempt. . . . Given more adequate, or rather less conclusory, justification in the government's legal claims, and more specificity by separating and indexing the asserted exempt documents themselves, a more adequate adversary testing will be produced." *Id.* at 827-28.

In a follow-up opinion issued promptly after *Vaughn*, the D.C. Circuit spoke further on the issue of the requirement of specificity to justify a FOIA exemption. *Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974). In *Cuneo*, the District Judge was confronted with appellant's claim for total access to the requested documents, opposed by the government's claim to blanket exemption from disclosing them. Counsel made no discriminating analysis of how portions of the documents might differ in their purpose, nature, and content, and thus be subject to different criteria of disclosure. Citing its earlier decision, the court amplified: "In *Vaughn*, we concluded that the ease with which the government could carry its burden, and the difficulty the trial judge faces in determining whether information should be disclosed, created intolerable problems. . . . As in *Vaughn v. Rosen*, we believe that the problems adverted to will be substantially ameliorated if the government is required to provide particularized and specific justification for exempting information from disclosure. This justification must not consist of 'conclusory and generalized allegations of exemptions, such as the trial court was treated to in this case, but will require relatively detailed analysis and manageable segments'" (citing *Vaughn*).

The D.C. Circuit reiterated the burden placed upon an agency seeking to assert an exemption in *NTEU v. U.S. Customs Service*, 802 F.2d 525 (D.C. Cir. 1986) fn. 9: "An adversary cannot challenge, and a court cannot review, the agency's claim of exemption without (1) an adequate description of the records; (2) a plain statement of the exemptions relied upon to withhold each record; and (3) arguments that relate the

documents to the claimed exemption. A *Vaughn* index directly addresses the first two elements and enables a court to consider the parties' contentions."

In another case following *Vaughn*, the D.C. Circuit observed in *Mead Data Central, Inc. v. U.S. Department of Air Force*, 566 F.2d 242 (D.C. Cir. 1977), "we require that when an agency seeks to withhold information it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply."

It is apparent in this case that NRC merely assigned conclusory exemption status to the two documents it identified, without explanation of their content sufficient to justify the withholding of the document.

3. **NRC has Unlawfully Failed to Segregate Exempt from Nonexempt Data:** Even assuming, as NRC asserts in its February 11, 2005 FOIA response that some exemption may apply to the two documents it identified, NRC has nonetheless completely failed to address a critical legal requirement prerequisite to utilizing any exemption – that of making a good faith effort to segregate nonexempt material from exempt material. The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Accordingly, NRC should have reviewed any withheld material under the standard set forth in Section 552(b). However (particularly in view of its use of a checkmark form to respond), there is no indication whatsoever that NRC has done so. For that reason alone, this matter would be required to be remanded to NRC. (See DOE-OHA Decision PFA-0012 (Jan. 24, 2003).)

As explained in *Vaughn* case (*supra*): "This burden is compounded by the fact that an entire document is not exempt merely because an isolated portion need not be disclosed. Thus the agency may not sweep a document under a general allegation of exemption, even if that general allegation is correct with regard to part of the information. It is quite possible that part of a document should be kept secret while part should be disclosed." *Vaughn*, 484 F.2d at 825.

In *Mead, supra*, the agency at least made a weak effort at explaining its non-segregation, an effort NRC has not even attempted here. Yet, the court concluded: "We also hold that the Air Force did not adequately justify its claim that there was no nonexempt information which was reasonably segregable, and direct that agency segregability decisions be accompanied by adequate descriptions of the documents' content and articulate the reasons behind the agency's conclusion."

Discussing the same privileges asserted in this case, the court in *Mead* went on: "Although the attorney-client privilege or the privilege protecting the deliberative process within agencies may apply to some of the material in the documents which the Air Force has withheld from Mead Data, it appears that these documents also contain information which is not exempt. . . . The focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material. It has long been a rule in this Circuit that nonexempt portions of a

document must be disclosed unless they are inextricably intertwined with exempt portions. In 1974, Congress expressly incorporated that requirement into the FOIA, which now states that 'Any reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt.' 5 U.S.C. § 552(b) (Supp. V 1975)." *Id* at 259-60.

NRC identifies in its February 11, 2005 response a July 23, 2004 "E-Mail from Cordes to Jones, et al., telephone conversation with EPA on Yucca Mountain case," and identifies a November 22, 2004 document as "staff notes on EPA's overall approach for revising standard." NRC acknowledges that those two documents total ten pages. Beyond those naked descriptions, NRC makes no effort to segregate merely factual information in the two documents from that which is either attorney-client advice or subjective deliberative thought process, which might be subject to exemption. Presumptively, one engaged in a "deliberative process" begins with a basic set of factual information weighing pro or con, in favor or against various alternative decisions that may result from the deliberation. Those factual matters are not exempt from disclosure, and NRC makes no effort to segregate "the wheat from the chaff," in violation of its responsibility under the FOIA.

NRC's preprinted response form pays lip service to the matter of nonexempt factual information requiring disclosure, but ignores making the necessary analysis. Specifically, its checklist form has a single box to check alongside the privilege "deliberative process," which box NRC checked. Alongside the designation "deliberative process" the preprinted narrative goes on to state "the facts are inextricably intertwined with the predecisional information." The problem is this: there is only one place on the NRC preprinted form where the Agency can check "deliberative process." There is no space left open on the page for comment or discussion or explanation. In other words, every FOIA request as to which NRC checks the box "deliberative process" also contains the preprinted assertion "the facts are inextricably intertwined with the predecisional information," as though this preprinted mantra can substitute for an actual analysis to be made with respect to a particular FOIA request and particular documents claimed to be exempt under this privilege. No effort was made in this case to assess whether portions of the documents withheld as exempt were nonexempt, segregable, and ought to have been delivered to Appellant.

4. **NRC Failed to Conduct a Balancing Test to Consider the Public Interest in Disclosure:** NRC ignored yet another legal prerequisite to the assertion of any FOIA exemption in this case, that of weighing the public interest in disclosure (even in cases where assertion of an exemption could possibly be justified) against the risk of any harm to the agency. Thus, NRC was required to make available records, including even those it is authorized to withhold, whenever it determines that such disclosure is in the public interest. Should NRC decline to make such a discretionary release of responsive documents, it is required to provide an explanation of the reasons why a discretionary release was not appropriate. Based again on its laundry list/checklist form response, NRC does not even consider such a balancing assessment. NRC's claim that the two documents it identifies are exempt should only be the starting point of its inquiry. Only after a determination has been made that an exemption applies, does the duty arise for an

agency to then weigh the assertion of that exemption against the public interest in disclosure. NRC ignored this legal prerequisite to the assertion of an exemption.

The rationale for requiring agencies to conduct this balancing test was aptly explained in *Mead, supra*:

Certainly these procedures add significantly to the resource costs an agency must bear if it chooses not to disclose material it has in good faith decided is exempt. Those burdens may be avoided at the option of the agency, however, by immediate disclosure. Congress has encouraged the agencies to disclose exempt material which there is no compelling reason for withholding, and an agency's own balancing of the resource costs of justifying non-disclosure against the value of secrecy may provide a rough estimate of how compelling is its reason for withholding.

*Mead* at 261.

NRC is the agency with the primary responsibility to protect public health and safety in the area of nuclear power generation and including nuclear waste disposal such as that proposed to occur at a Yucca Mountain repository. The subject matter of Appellant's request inquired into documentation relating to newer amended rules under consideration by NRC and other agencies to protect that public health and safety in connection with that repository. One can hardly imagine any harm threatened to NRC by its disclosure of its deliberations on this subject **even where they are arguably exempt**, since the public interest in this subject matter is paramount.

5. **NRC's General Assertion of Attorney-Client Privilege is Insufficient:** In asserting the existence of "attorney-client privilege" with respect to one of the two responsive documents whose existence NRC admitted, NRC failed even to adequately assert that exemption. NRC makes the conclusory assertion of attorney-client privilege (by checkmark only) without recognizing the basic precept that simply because legal counsel might be involved, this does not render a document privileged. Not all utterances of attorneys are privileged, but only those made to a client in the provision of legal advice.

As observed by the court in *Mead (supra)*:

The privilege does not allow the withholding of documents simply because they are the product of an attorney-client relationship, however. It must also be demonstrated that the information is confidential. If the information has been or is later shared with third parties, the privilege does not apply.

The description of documents 1 and 5 (in the *Mead* case) gives no indication as to the confidentiality of the information on which they are based. It simply states the subject, source, and recipient of the legal opinion rendered. In the federal courts the attorney-client privilege does extend to a confidential communication from an attorney to a client, but only if that communication is based on confidential information provided

by the client. The Air Force has not shown that the information on which the legal opinions in documents 1 and 5 were based meets this confidentiality requirement, and since the FOIA places the burden on the Government to prove the applicability of a claimed privilege, the court could not assume that it was confidential.

*Mead*, 566 F.2d at 253-54.

The only information NRC provides to substantiate the attorney-client privilege claim is that the particular document was addressed "from Cordes to Jones, et al." Appellant believes that Cordes is an attorney with NRC. That, of course, is insufficient to qualify every document he authors as privileged. The recipients of the Cordes email, "Jones, et al.," standing alone do nothing to qualify the document for any exemption. The identify of "Jones" is unclear, and "et al." is by definition anonymous as to the remaining recipients. In addition, there is no indication whether the Cordes correspondence was made to a client alone, to a client and others alone, or to others alone and not to any client. Furthermore, hypothesizing that "Jones, et al." are all clients, still more is needed to qualify a communication from Cordes as privileged.

In addition, even if **part** of the Cordes correspondence communicated some confidential privileged information to clients alone (thus avoiding the waiver which would occur by distribution to non-clients), NRC made no effort to segregate the privileged from the non-privileged information in that correspondence. Factual information is not rendered privileged simply because it passes into the mind of an attorney and then out through his mouth.

Lastly, again, even assuming the correspondence could qualify for an exemption, NRC failed to make any balancing test of the threatened harm to the Agency in comparison to the public interest in disclosure. Where, as here, the matter under consideration is the welfare of the public itself, it is difficult to imagine a harm to the Agency consequent to its revelation, which would outweigh the benefit of disclosure.

#### **RELIEF SOUGHT**

Appellant respectfully requests that the final FOIA response sent by NRC to Appellant on February 11, 2005 (Exhibit A) be set aside, reversed, and vacated and that NRC be required to promptly deliver to Appellant all documents responsive to Appellant's FOIA request of November 30, 2004 (Exhibit B). Due to the utter incompleteness of the response (presumably the consequence of NRC's failure to survey the appropriate persons for responsive documents), NRC should be required to conduct a complete search for responsive documents. NRC should likewise be required, with respect to each and every responsive document, to meet its obligations to provide a complete description of any document as to which an exemption is asserted in order to permit Appellant and the reviewing authority to ascertain the basis and validity of any claim of exemption; to segregate and produce all nonexempt portions of any responsive document from those which are exempt and may be withheld; with respect to each document, to weigh the public interest in disclosure against any harm that could occur to the Agency; and with respect to any document as to which attorney-client privilege is asserted, to identify both the author and **all**

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Page 10

recipients, to identify the subject matter of the letter sufficient to warrant application of attorney-client privilege for the conveyance of legal advice, and again, to segregate that which is not privileges from that which is and to produce all nonexempt portions of such documents.

If you have any questions, I may be reached at 210-820-2667 in the San Antonio office of Egan, Fitzpatrick, Malsch & Cynkar, PLLC.

Sincerely,

  
Charles J. Fitzpatrick

CJF:sm

Enclosure

cc: Mr. Robert R. Loux (w/encl)  
Joseph R. Egan, Esq. (w/encl)

U 001



**RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) / PRIVACY ACT (PA) REQUEST**

2005-0060

1

RESPONSE TYPE  FINAL  PARTIAL

REQUESTER  
**Charles Fitzpatrick**

DATE  
**FEB 11 2005**

**PART I. -- INFORMATION RELEASED**

- No additional agency records subject to the request have been located.
- Requested records are available through another public distribution program. See Comments section.
- APPENDICES Agency records subject to the request that are identified in the listed appendices are already available for public inspection and copying at the NRC Public Document Room.
- APPENDICES Agency records subject to the request that are identified in the listed appendices are being made available for public inspection and copying at the NRC Public Document Room.
- Enclosed is information on how you may obtain access to and the charges for copying records located at the NRC Public Document Room, 2120 L Street, NW, Washington, DC.
- APPENDICES Agency records subject to the request are enclosed.
- Records subject to the request that contain information originated by or of interest to another Federal agency have been referred to that agency (see comments section) for a disclosure determination and direct response to you.
- We are continuing to process your request.
- See Comments.

**PART I.A -- FEES**

AMOUNT \*  
\$ **202.69**

\* See comments for details

- You will be billed by NRC for the amount listed.  None. Minimum fee threshold not met.
- You will receive a refund for the amount listed.  Fees waived.

**PART I.B -- INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE**

- No agency records subject to the request have been located.
- Certain information in the requested records is being withheld from disclosure pursuant to the exemptions described in and for the reasons stated in Part II.
- This determination may be appealed within 30 days by writing to the FOIA/PA Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Clearly state on the envelope and in the letter that it is a "FOIA/PA Appeal."

**PART I.C COMMENTS (Use attached Comments continuation page if required)**

The actual fees for processing your request are:

1 hr. SES search @ \$79.21 per hr. = \$79.21  
 1 hr. SES review @ \$79.21 per hr. = \$79.21  
 1 hr. Professional search @ \$44.27 per hr. = \$44.27  
 Total = \$202.69

SIGNATURE - FREEDOM OF INFORMATION ACT AND PRIVACY ACT OFFICER

Carol Ann Reed

Exhibit A

**PART II.A -- APPLICABLE EXEMPTIONS**

- APPENDICES  
**A** Records subject to the request that are described in the enclosed Appendices are being withheld in their entirety or in part under the Exemption No.(s) of the PA and/or the FOIA as indicated below (5 U.S.C. 552a and/or 5 U.S.C. 552(b)).
- Exemption 1: The withheld information is properly classified pursuant to Executive Order 12958.
  - Exemption 2: The withheld information relates solely to the internal personnel rules and procedures of NRC.
  - Exemption 3: The withheld information is specifically exempted from public disclosure by statute indicated.
    - Sections 141-145 of the Atomic Energy Act, which prohibits the disclosure of Restricted Data or Formerly Restricted Data (42 U.S.C. 2161-2165).
    - Section 147 of the Atomic Energy Act, which prohibits the disclosure of Unclassified Safeguards Information (42 U.S.C. 2167).
    - 41 U.S.C., Section 253(b), subsection (m)(1), prohibits the disclosure of contractor proposals in the possession and control of an executive agency to any person under section 552 of Title 5, U.S.C. (the FOIA), except when incorporated into the contract between the agency and the submitter of the proposal.
  - Exemption 4: The withheld information is a trade secret or commercial or financial information that is being withheld for the reason(s) indicated.
    - The information is considered to be confidential business (proprietary) information.
    - The information is considered to be proprietary because it concerns a licensee's or applicant's physical protection or material control and accounting program for special nuclear material pursuant to 10 CFR 2.790(d)(1).
    - The information was submitted by a foreign source and received in confidence pursuant to 10 CFR 2.790(d)(2).
  - Exemption 5: The withheld information consists of interagency or intraagency records that are not available through discovery during litigation. Applicable privileges:
    - Deliberative process: Disclosure of predecisional information would tend to inhibit the open and frank exchange of ideas essential to the deliberative process. Where records are withheld in their entirety, the facts are inextricably intertwined with the predecisional information. There also are no reasonably segregable factual portions because the release of the facts would permit an indirect inquiry into the predecisional process of the agency.
    - Attorney work-product privilege. (Documents prepared by an attorney in contemplation of litigation)
    - Attorney-client privilege. (Confidential communications between an attorney and his/her client)
  - Exemption 6: The withheld information is exempted from public disclosure because its disclosure would result in a clearly unwarranted invasion of personal privacy.
  - Exemption 7: The withheld information consists of records compiled for law enforcement purposes and is being withheld for the reason(s) indicated.
    - (A) Disclosure could reasonably be expected to interfere with an enforcement proceeding (e.g., it would reveal the scope, direction, and focus of enforcement efforts, and thus could possibly allow recipients to take action to shield potential wrongdoing or a violation of NRC requirements from investigators).
    - (C) Disclosure would constitute an unwarranted invasion of personal privacy.
    - (D) The information consists of names of individuals and other information the disclosure of which could reasonably be expected to reveal identities of confidential sources.
    - (E) Disclosure would reveal techniques and procedures for law enforcement investigations or prosecutions, or guidelines that could reasonably be expected to risk circumvention of the law.
    - (F) Disclosure could reasonably be expected to endanger the life or physical safety of an individual.
  - OTHER (Specify)

**PART II.B -- DENYING OFFICIALS**

Pursuant to 10 CFR 9.25(g), 9.25(h), and/or 9.65(b) of the U.S. Nuclear Regulatory Commission regulations, it has been determined that the information withheld is exempt from production or disclosure, and that its production or disclosure is contrary to the public interest. The person responsible for the denial are those officials identified below as denying officials and the FOIA/PA Officer for any denials that may be appealed to the Executive Director for Operations (EDO).

| DENYING OFFICIAL | TITLE/OFFICE   | RECORDS DENIED | APPELLATE OFFICIAL |      |    |
|------------------|--|----------------|--------------------|------|----|
|                  |  |                | EDO                | SECY | IG |
| Sandy M. Joosten | Executive Assistant, Office of the Secretary               | Appendix A/1   |                    | ✓    |    |
| Jack Strosnider  | Director, Office of Nuclear Material Safety and Safeguards | Appendix A/2   | ✓                  |      |    |
|                  |  |                |                    |      |    |
|                  |  |                |                    |      |    |

Appeal must be made in writing within 30 days of receipt of this response. Appeals should be mailed to the FOIA/Privacy Act Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, for action by the appropriate appellate official(s). You should clearly state on the envelope and letter that it is a "FOIA/PA Appeal."

**APPENDIX A  
RECORDS BEING WITHHELD IN THEIR ENTIRETY**

| <u>NO.</u> | <u>DATE</u> | <u>DESCRIPTION/(PAGE COUNT)/EXEMPTIONS</u>   |
|------------|-------------|--|
| 1.         | 7/23/04     | E-Mail from Cordes to Jones et al., Telephone Conversation with EPA on Yucca Mountain Case (2 pages) EX. 5 |
| 2.         | 11/22/04    | Staff Notes on EPA's Overall Approach for Revising Standard (8 pages) EX. 5                                |

# EGAN, FITZPATRICK, MALSCH & CYNKAR, PLLC

Counselors at Law

7918 Jones Branch Drive • Suite 600  
McLean, Virginia 22102  
Tel: (703) 918-4942  
Fax: (703) 918-4943

[www.nuclearlawyer.com](http://www.nuclearlawyer.com)

1777 N.E. Loop 410 • Suite 600  
San Antonio, Texas 78217  
Tel: (210) 820-2667  
Fax: (210) 820-2668

Joseph R. Egan  
Martin G. Malsch  
Robert J. Cynkar

Charles J. Fitzpatrick  
[cfitzpatrick@nuclearlawyer.com](mailto:cfitzpatrick@nuclearlawyer.com)

November 30, 2004

## VIA FACSIMILE

FOIA/Privacy Act Officer  
U.S. Nuclear Regulatory Commission  
Mail Stop T-6 D8  
Washington, D.C. 20555-0001

Re: Freedom of Information Act — Request for Documents

To Whom It May Concern:

Pursuant to the Freedom of Information Act ("FOIA"), 55 U.S.C. 552, please provide the following described documents<sup>1</sup>:

1. All correspondence between any representative of the Nuclear Regulatory Commission ("NRC") and any representatives of either the Department of Energy ("DOE") or the Environmental Protection Agency ("EPA") or the National Academy of Sciences ("NAS") (between July 9, 2004, and the date of your final response to this request) discussing or relating in any way to:
  - a. Any aspect of the decision of the U.S. Court of Appeals for the D.C. Circuit in Case No. 01-1258, *Nuclear Energy Institute, Inc. v. Environmental Protection Agency*, on July 9, 2004, which decision, in part, vacated the 10,000-year compliance period in EPA's 40 C.F.R. 197 and NRC's 10 C.F.R. 63; or
  - b. The potential adoption by EPA (or DOE or NRC) of new or amended Rules relating to the duration of the compliance period or the dosage aspects of either 40 C.F.R. 197, 10 C.F.R. 963, or 10 C.F.R. 63.
2. All meeting agendas, meeting notes, meeting transcripts or reports or memoranda relating to any meeting between any representative of NRC and any

Exhibit B

November 30, 2004

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representatives of DOE or EPA or NAS (between July 9, 2004, and the date of your final response to this request) , during which meeting a topic of discussion was either:

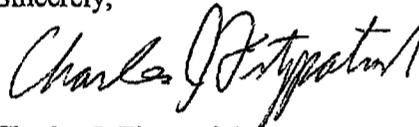
- a. Any aspect of the decision of the U.S. Court of Appeals for the D.C. Circuit in Case No. 01-1258, *Nuclear Energy Institute, Inc. v. Environmental Protection Agency*, on July 9, 2004, which decision, in part, vacated the 10,000-year compliance period in EPA's 40 C.F.R. 197 and NRC's 10 C.F.R. 63; or
- b. The potential adoption by EPA (or DOE or NRC) of new or amended Rules relating to the duration of the compliance period or the dosage aspects of either 40 C.F.R. 197, 10 C.F.R. 963, or 10 C.F.R. 63.

This request is made on behalf of the State of Nevada.

The requesting party is willing to pay up to a total amount of \$1,000 for search time and document copying costs without the necessity for further approval. The requesting party has specifically made this request as narrow as possible in order to facilitate expeditious and timely response by NRC.

Thank you for your prompt attention to this request. If you have any questions, please contact me at 210-820-2667.

Sincerely,



Charles J. Fitzpatrick

CJF:sm

Enclosure

cc: Joseph R. Egan, Esq. (via fax)  
Mr. Robert R. Loux (via fax)

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1. "Documents," in this regard, should be given the broadest possible interpretation, to include, without limitation, all electronic documents and hard copies, tapes, CD-ROMs, notes, letters, papers, books, reports, graphics, studies and files, together with any associated compilations.

**From:** "Charles Fitzpatrick" <cfitzpatrick@nuclearlawyer.com>  
**To:** <foia@nrc.gov>  
**Date:** Fri, Mar 11, 2005 12:12 PM  
**Subject:** APPEAL - FREEDOM OF INFORMATION ACT REQUEST - NO. FOIA/PA 2005-0060

Attached is an appeal of FOIA/PA-2005-0060. This appeal is also being sent via facsimile transmission and Federal Express.

Charles J. Fitzpatrick  
Egan, Fitzpatrick, Malsch & Cynkar, PLLC  
Phone: 210.820.2667  
Fax: 210.820.2668

cfitzpatrick@nuclearlawyer.com  
<<http://www.nuclearlawyer.com/>> [www.nuclearlawyer.com](http://www.nuclearlawyer.com/)

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