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FREEDOM OF INFORMATION ACT APPEAL

March 9, 2006

FOIA/PA REQUEST

Case No.: 2006-004A
Date Rec'd: 3-9-06
Specialist: Brown
Related Case: 2005-0144

VIA EMAIL, FACSIMILE and FEDERAL EXPRESS

FOIA/Privacy Act Officer
U.S. Nuclear Regulatory Commission
Mail Stop T5-F11
Washington, D.C. 20555-0001

Re: Freedom of Information Act Appeal: NRC FOIA/PA 2005-0144

Dear FOIA/PA Officer:

The purpose of this letter is to appeal a final United States Nuclear Regulatory Commission ("NRC") determination sent to me in correspondence dated February 14, 2006, by Russell A. Nichols, Freedom of Information Act and Privacy Act Officer, NRC.

This "Freedom of Information Act Appeal" is being sent to you by email, facsimile, and Federal Express. A copy of NRC's February 14, 2006 determination letter is attached hereto (as Exhibit A). NRC's February 14, 2006 response stated that it was a final determination that may be appealed within 30 days to your office.

BACKGROUND

On February 10, 2005, the undersigned delivered a request, pursuant to the Freedom of Information Act ("FOIA"), 55 U.S.C. 552 to NRC, on behalf of the State of Nevada, requesting documents (including agendas, summaries, audiotapes, videotapes, or transcripts, presentation papers, slides, audiovisual aids, or handouts) pertaining to a meeting held January 11-13, 2005, attended by representatives of NRC, among many others.

After improperly taking more than one full year to respond, NRC's February 14, 2006 determination letter delivered only a single paragraph of information, excerpted from one

document. NRC also provided a list of some 24 documents withheld by NRC on the basis of purported exemption from FOIA. With respect to only two of the documents withheld by NRC (Item Nos. 9 and 10 on Appendix B of the FOIA response) did the NRC identify more than one claimed exemption. With respect to the other 22 (Item Nos. 1-8 of Appendix B and Item Nos. 1-14 of Appendix C), NRC relied upon a single exemption (Exemption 4) as the justification for its withholding.

For the reasons which will be discussed further below, NRC's claims to exempt status to these 22 documents are groundless and made in bad faith by NRC and are accordingly the focus of this appeal.

GROUNDS FOR APPEAL

NRC's February 14, 2006 FOIA response is deficient in several particulars, including at least the following:

1. **Incorrect Assertion of FOIA Exemption 4:** Based on NRC's own regulations, it has not substantiated any valid premise for the withholding of the 22 documents on the basis of the asserted Exemption 4.
2. **Inadequate Description:** NRC has failed to describe the content of documents which it withheld in the detail required by law and as a necessary prerequisite to any meaningful assessment of the validity of the exemption asserted, by either the requestor or the reviewing authority.
3. **Failure to Segregate:** Whether any portion of the documents NRC has withheld pursuant to Exemption 4 meet its requisites is doubtful; it is **certain** that not all parts of all the documents withheld could possibly warrant the application of Exemption 4. Under NRC's own regulations, it is required to segregate exempt from nonexempt material and make available the nonexempt material. NRC has failed to do so.
4. **Failure to Weight Public Interest:** NRC has wholly failed to acquit its responsibility to balance the interest in public disclosure of arguably exempt materials against the Agency's purported need to withhold those documents based on some potential harm which their disclosure could cause to the Agency.

DISCUSSION AND AUTHORITIES

1. **Incorrect Assertion of FOIA Exemption 4:**

It is axiomatic that an agency seeking to withhold information pursuant to any FOIA exemption bears the burden of justifying its decision. *EPA v. Mink*, 410 U.S. 73, 79 (1973). As the United States Supreme Court observed, the Freedom of Information Act was adopted as a revision of Section 3 of the Administrative Procedure Act for the reason that Section 3 was "generally recognized as falling fall short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute" (*id.*).

NRC provides no justification or rationale for its suggestion that Exemption 4 permits the withholding of the 22 documents whose nondisclosure is the subject of this appeal. As can be seen at page 2 of NRC's determination letter (Exhibit A hereto), with respect to the 22 challenged documents, NRC merely placed a checkmark alongside a box providing "Exemption 4: The withheld information is a trade secret or commercial or financial information that is being withheld for the reason(s) indicated." This is followed by a second checkmark alongside a box reading: "The information was submitted by a foreign source and received in confidence pursuant to 10 C.F.R. 2.790(d)(2)."

Just how deficient NRC's reliance on a mere check sheet is, and how little thought is actually put into the response by its FOIA officer, is illustrated by the fact that the cited regulatory basis for the claimed exemption (10 C.F.R. 2.790(d)(2)) **does not exist!** Years ago, NRC regulations were amended. A provision similar to that cited in the NRC determination is now found at 10 C.F.R. 2.390(d)(2). While reliance by NRC on a non-existent regulation should be grounds enough for reversal, Appellant will nonetheless address the issues on the merits.

The only information provided by NRC is the identity (and date, where available) of the 22 withheld documents. The mere titles of those documents are insufficient to establish that Exemption 4 is applicable to any of them, much less all of them. While 10 C.F.R. 2.390(d)(2) does address information submitted in confidence to the Commission by a foreign source, "the devil is in the details" in any regulatory scheme, and NRC's check sheet ignores critical portions of its own regulations. Specifically, 10 C.F.R. 2.390(d) **qualifies**, what NRC attempts to serve up as a blanket exemption. In fact, the introductory language in 2.390(d) (before listing "information submitted in confidence to the Commission by a foreign source") states: "The following information . . . is subject to disclosure only in accordance with the provisions of 9.19 of this Chapter." Section 9.19 (discussed *infra*) provides detailed requirements for NRC to segregate the information which is exempt from the information which is not exempt in any responsive document and to produce the nonexempt portion to the requestor. Accordingly, the provision relied upon by NRC does not provide a blanket exemption as NRC's check sheet indicates.

More importantly, there are two factors which militate strongly in favor of the conclusion that some or all of the 22 documents withheld by NRC may not qualify for this exemption. The first factor is the broad dissemination of the withheld information; the second is the identifying information, though limited, which is provided by NRC.

First, as is explained on the fourth page of NRC's determination letter (i.e., the one paragraph out of one document which was made available to the Appellant) NRC describes who the attendees were at the meeting whose agenda, handouts, etc., NRC refuses to produce. As admitted by NRC, representatives from at least the following entities were present at the meetings:

- The NRC's Division of High-Level Repository Safety
- The Nuclear Energy Agency's Radioactive Waste Management Committee
- The U.S. Environmental Protection Agency
- Belgium
- Canada

- Germany
- Japan
- Sweden
- The United Kingdom
- The United States
- Contractors

The presence of numerous individuals from different countries, different federal agencies, and civilian contractors unequivocally establishes that whatever information was delivered to that array of persons **cannot possibly** qualify as information "provided in confidence to the NRC." If one views the "provision of information in confidence to NRC" as akin to a privilege, that privilege was unquestionably waived by delivery of the information to numerous individuals and entities outside NRC. (In addition, since presumably some of the information at the meeting was provided by EPA or NRC or NEA or the contractors, none of that information would have been from a "foreign source.")

Second, the very brief description given for many of the documents withheld suggests the extreme unlikelihood that they qualify as information "provided in confidence to the NRC by a foreign source." Item No. 1 on Appendix B, for example, is the agenda for the meeting. The small amount of information provided in the determination letter recited that EPA hosted the meeting and that NEA had initiated the formation of the *ad hoc* committee which was meeting. Presumably then, one of those two entities framed the agenda, and it was not something "submitted in confidence to the NRC by a foreign source."

Item No. 4 of Appendix B is identified as "Mandate of the RWMC Task Group on Long-Term Safety Criteria Terms of Reference." Again, there is no basis on which either Appellant or any reviewing authority (administrative or judicial) could assess the content of such a document and determine its exemption-worthiness. Nor is there any reason to believe it constituted information provided in confidence to NRC by a foreign source. Clearly, NRC has not borne its burden of establishing the applicability of **any exemption** to the 22 documents whose nondisclosure is addressed by this appeal.

2. **Inadequate Description:**

NRC fails to meet the settled legal requirement, with respect to its assertion of Exemption 4, that it accurately and completely describe any document and its content which are being withheld under a claim of exemption. On the contrary, in withholding the 22 documents identified as responsive, NRC simply makes the conclusory statement that the documents are subject to the exemption. There is no identification or discussion of the content of the documents sufficient to establish the applicability to the documents, in whole or in part, of Exemption 4. 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. NRC's use of its check sheet *per se* places it in violation of the requirements of FOIA.

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 which may 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."

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 exemption status to the 22 documents which it identified as responsive in a conclusory fashion, without explanation of their content sufficient to justify the application of those exemptions.

3. Failure to Segregate:

As discussed briefly (*supra*), 10 C.F.R. Section 2.390(d)(2) does not provide a blanket exemption for the entirety of documents which might contain **some** information provided in confidence to NRC by a foreign source. Rather, NRC is required to make an analysis of any information sought to be withheld, segregate that which is exempt, and make the remainder available to the requesting party. Thus, 10 C.F.R. Section 9.19 provides in pertinent part:

For records required to be made available under 5 U.S.C. 552(a), the NRC shall delete information that is exempt. . . . The amount of information deleted will be indicated on the released portion of the record, unless providing its indication would harm an interest protected by the exemption under which the matter has been withheld.

The exemption requirement is hardly unique to NRC and its own FOIA regulations, but it is a general requirement of the Freedom of Information Act. Specifically, FOIA Section 552(b) provides 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."

The requirement of segregation is a long-settled principle of federal agency FOIA obligations. It is a requirement which NRC has ignored.

In *Mead*, 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 non-exempt 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." 566 F.2d at 248. The court added, "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 non-exempt 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.

The requirement of the segregation of exempt from non-exempt portions of a document was reiterated by the United States Court of Appeals for the District of Columbia Circuit recently in *Judicial Watch, Inc. v. Department of Justice*, Case No. 04-5444 (D.C. Cir. 2005), decided December 27, 2005.

While it is doubtful that **any** of the 22 documents withheld by NRC were "provided in confidence to NRC by a foreign source," in view of the broadly heterogeneous attendance at the meetings in question, it strains credulity even further to suggest that no **parts** of the many responsive documents contain nonexempt information. We cannot know, however, for NRC has made no effort to conduct such a segregation analysis. Failure to do so constrains remand of the matter to the Agency for compliance with this requirement.

4. **Failure to Weigh Public Interest:**

Even if a FOIA exemption applies, **permitting** an agency to withhold information, FOIA does not **require** an agency to do so. *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) ("Congress did not design the FOIA exemptions to be mandatory bars to disclosure"); *Mobil Oil Corp. v. EPA*, 879 F.2d 698, 700 (9th Cir. 1989) ("The exemptions are permissive, and an agency may voluntarily release information that it would be permitted to withhold under the FOIA exemptions"). While FOIA **allows** an agency to withhold information in certain circumstances, it does not limit an agency's discretion to disclose information. *Chrysler Corp.*, at 294.

In view of the intended legislative bias which spawned FOIA, as an instrument to **disclose** information, not **withhold** information, FOIA has been uniformly interpreted by courts to require a balancing test between the public interest weighing in favor of disclosure on the one hand, and possible harm to the Agency resulting from its disclosure on the other. NRC, with its minimalist "check sheet," has failed to even consider the public interest, or any potential harm to the Agency, or the requirement that it conduct such a balancing and disclose the information if the public interest warrants it.

In *Mead Data Central, Inc. v. U.S. Department of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977), the rationale for requiring agencies to conduct this balancing test in a FOIA response was aptly explained:

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.

The subject of the disposal of nuclear waste and the long-range planning of governments to effect such disposal in a way that protects its citizens, is an issue of critical importance to all peoples, and certainly to the United States public, given the current effort of the federal government to authorize a scenario where spent nuclear fuel would be transported from all parts of the country to a planned repository in the State of Nevada. It is hard to imagine a countervailing harm threatening the Agency which would offset the benefit of recognizing this public interest.

RELIEF SOUGHT

Appellant respectfully requests that the final FOIA determination sent by NRC to Appellant on February 14, 2006 (Exhibit A) be set aside, reversed, and vacated and that NRC be required to promptly deliver to Appellant the 22 documents identified by NRC, but improperly withheld in their entirety. The withholding by NRC was predicated on nothing more than its conclusory assertion of an exemption aimed at "information provided in confidence to the NRC by foreign sources." As has been articulated in the foregoing argument and authorities, there is little or no likelihood that any part of the information withheld by NRC meets the exemption claimed, due to the multifarious parties attending the meetings, all of whom were provided the same information, and all of whom are free to disseminate it at their whim. Furthermore, NRC has wholly failed to meet basic FOIA requirements, compliance with which constrains the result that the matter be remanded to the Agency for compliance with FOIA and its own implementing regulations.

The agency to whom a FOIA request is directed bears the responsibility of substantiating application of any claimed exemption, if the responsive documents are not made available in their entirety. NRC has wholly failed to carry the burden of establishing its entitlement to any exemption relied upon in its February 14, 2006 correspondence.

Sincerely,

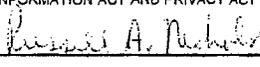


Charles J. Fitzpatrick

CJF:sm

Enclosure

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

NRC FORM 464 Part I (6-1998) 	U.S. NUCLEAR REGULATORY COMMISSION RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) / PRIVACY ACT (PA) REQUEST	FOIA/PA 2005-0144	RESPONSE NUMBER 1						
REQUESTER Charles J. Fitzpatrick		RESPONSE TYPE <input checked="" type="checkbox"/> FINAL <input type="checkbox"/> PARTIAL DATE FEB 14 2008							
PART I. -- INFORMATION RELEASED <input type="checkbox"/> No additional agency records subject to the request have been located. <input type="checkbox"/> Requested records are available through another public distribution program. See Comments section. <input type="checkbox"/> 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. <input checked="" type="checkbox"/> APPENDICES A 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. <input type="checkbox"/> Enclosed is information on how you may obtain access to and the charges for copying records located at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD 20852-2738. <input checked="" type="checkbox"/> APPENDICES A Agency records subject to the request are enclosed. <input checked="" type="checkbox"/> 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. <input type="checkbox"/> We are continuing to process your request. <input type="checkbox"/> See Comments.									
PART I.A -- FEES <table border="0"> <tr> <td data-bbox="203 940 381 1021"> AMOUNT * \$ 154.06 </td> <td data-bbox="397 940 917 1021"> <input checked="" type="checkbox"/> You will be billed by NRC for the amount listed. </td> <td data-bbox="933 940 1445 1021"> <input type="checkbox"/> None. Minimum fee threshold not met. </td> </tr> <tr> <td></td> <td data-bbox="397 981 917 1021"> <input type="checkbox"/> You will receive a refund for the amount listed. </td> <td data-bbox="933 981 1445 1021"> <input type="checkbox"/> Fees waived. </td> </tr> </table> <small>* See comments for details</small>				AMOUNT * \$ 154.06	<input checked="" type="checkbox"/> You will be billed by NRC for the amount listed.	<input type="checkbox"/> None. Minimum fee threshold not met.		<input type="checkbox"/> You will receive a refund for the amount listed.	<input type="checkbox"/> Fees waived.
AMOUNT * \$ 154.06	<input checked="" type="checkbox"/> You will be billed by NRC for the amount listed.	<input type="checkbox"/> None. Minimum fee threshold not met.							
	<input type="checkbox"/> You will receive a refund for the amount listed.	<input type="checkbox"/> Fees waived.							
PART I.B -- INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE <input type="checkbox"/> No agency records subject to the request have been located. <input checked="" type="checkbox"/> 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. <input checked="" type="checkbox"/> 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) Two records subject to the request were originated by the Environmental Protection Agency. We have forwarded the records to that agency for review and direct response to you. The actual fees for processing the request are as follows: \$ 65.86 - search 88.00 - review .20- duplication \$154.06 - TOTAL You will be billed by the NRC in the amount noted above.									
SIGNATURE - FREEDOM OF INFORMATION ACT AND PRIVACY ACT OFFICER Russell A. Nichols 									

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

2005-0144

FEB 14 2006

PART II.A -- APPLICABLE EXEMPTIONS

APPENDICES
B & C

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 253b, 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
Jack Strosnider	Director, Office of Nuclear Material Safety and Safeguards	Appendix B & C	<input checked="" type="checkbox"/>		

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
RECORD BEING RELEASED

<u>NO</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)</u>
1.	No date	Office of Nuclear Material Safety and Safeguards Items of Interest - Week Ending January 21, 2005. 1 page

Office of Nuclear Material Safety and Safeguards
Items of Interest
Week Ending January 21, 2005

Meeting of the Ad Hoc Task Group on Long-Term Safety Criteria

On January 11-13, 2005, staff from the Division of High-Level Waste Repository Safety attended a meeting of an ad hoc task group on long-term safety criteria, at U.S. Environmental Protection Agency (EPA) Headquarters in Washington, DC. The Nuclear Energy Agency's (NEA's) Radioactive Waste Management Committee (RWMC) established this task group to prepare a topical session on "long-term protection criteria and attending regulation" for RWMC's 38th Meeting in March 2005. The EPA hosted this meeting. Representatives from eight countries - Belgium, Canada, Germany, Japan, Sweden, Switzerland, the United Kingdom, and the United States - as well as NEA staff and contractors, participated. Discussion included: a) the nature of long-term safety; b) the need to link time frames for compliance to the logic of the regulatory process; c) the role of active and passive institutional controls; d) the value of realism in assessments of long-term repository performance; and e) the degree of agreement among the levels of protection provided for geologic repositories by the regulatory criteria from various member states. At the end of the meeting, the group drafted a proposed agenda for the forthcoming topical session. A supporting document summarizing the task group's deliberations is in preparation.

Al

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

<u>NO</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)</u>
1	12/21/04	Agenda for the 1 st meeting of the Radioactive Waste Management Committee (RWMC) ad-hoc Task Group on Long-Term Safety Criteria (6 pages) EX. 4
2	12/21/04	Mandate of the RWMC ad-hoc Task Group on Long-Term Safety Criteria (2 pages) EX. 4
3	12/21/04	Secretariat's Observations on Issues for Discussion at the LT Group Meeting at the EPA Headquarters (6 pages) EX. 4
4.	No date	Mandate of the RWMC Task Group on Long-Term Safety Criteria Terms of Reference (2 pages) EX. 4
5.	No date	Questions for Preparing RWMC-37 on Long-term Protection Criteria for Waste Disposal (Item 11.c and 11.d of agenda) (2 pages) EX. 4
6	12/21/04	Summary of Responses to Questionnaire on Long-Term Protection Criteria for Waste Disposal (12 pages) EX. 4
7.	01/11/05	Slides: Presentation paper on Active/passive post-closure institutional controls- Item 4.1 of agenda - Planning of RWMC 2005 topical session (prepared during meeting and presented by Janet Kotra, NRC and Hiroyuki Umeki, NUMO) (6 pages) EX. 4
8	01/14/05	E-mail from Claudio Pescatore, Organisation of Economic Co-operation and Development (OECD) to members of Radioactive Waste Management Committee ad-hoc Task Group on Long-Term Safety Criteria transmitting raw notes from 1/11-13/05 meeting and Topical Session Programme (22 pages) EX. 4
9	01/18/05	E-mail from Janet Kotra, NRC to Margaret V. Federline, NRC, Subject: Draft agenda for RWMC topical session on LT criteria (4 pages) EX. 4, EX. 5, and EX. 6
10.	08/20/04	RWMC Regulators' Form (RWMC-RF) Summary Record of the 7 th Meeting of the RWMC Regulators' Forum (RWMC RF) (19 pages) EX. 4 and EX. 6

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

<u>NO</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)</u>
1.	1/11-13/05	Presentation by Bruno Baltes, GRS, entitled How long is long enough? RWMC Task Group on LT Safety Criteria (6 pages) EX. 4
2.	1/11-13/05	Presentation by Bruno Baltes & Klaus-Jurgen Rohlig, GRS, entitled, Ongoing Revision of Safety Criteria in Germany: Human Intrusion (6 pages) EX. 4
3.	1/11-13/05	Presentation by Bruno Baltes, GRS entitled, Contribution to Session 3.3 Compliance and Confidence (9 pages) EX. 4
4.	1/11-13/05	Presentation by Bruno Baltes, GRS entitled, Contribution to Session 2.2 Basic Nature of LT Safety Criteria (4 pages) EX. 4
5.	1/11-13/05	Session 3.3 Compliance and Confidence (3 pages) EX. 4
6.	1/11-13/05	Responses to LTC Questionnaire (10 pages) EX. 4
7.	1/11-13/05	Safety-1 (11 pages) EX. 4
8.	1/11-13/05	Item 2.1 (6 pages) EX. 4
9.	1/11-13/05	Presentation by Carl-Magnus Larsson, Swedish Radiation Protection Authority (16 pages) EX. 4
10.	1/11-13/05	Presentation by P. De Preter, IGSN Initiative "Handling of Time scales in a safety case" (22 pages) EX. 4
11.	1/11-13/05	A. Duncan, NEA - Key Issues of Compliance and Confidence (1 page) EX. 4
12.	1/11-13/05	Presentation by Hiroyuki Umeki, Nuclear Waste Management Organization of Japan entitled, The role of monitoring in a safety case (17 pages) EX. 4
13.	1/11-13/05	Presentation by nagra entitled, Summary of discussion & consensus (7 pages) EX. 4
14.	1/11-13/05	Presentation by Bruno Baltes, GRS entitled, Contribution to Session 2.2, Basic Nature of LT Safety Criteria (4 pages) EX. 4