FOIA/PA REQUEST
Case No. 2009-00222
Date Rec'd 10-24-08
Specialist
Related Case

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

October 24, 2008

Via Electronic Mail

FOIA/PA Officer
U.S. Nuclear Regulatory Commission
FIOA Officer Mail Stop T5-F11
Washington, DC 20555-0001

Dear FOIA/PA Officer:

Pursuant to the Freedom of Information Act (FOIA), I respectfully request that the Nuclear Regulatory Commission (NRC) provide copies of any and all versions of the following documents:

> **Any documents dated from December 1, 1995 to December 31, 2003 from NRC's Division of Risk Analysis and Applications, Office of Nuclear Regulatory Research to NRC's Division of Licensing Project Management, Office of Nuclear Reactor Regulation regarding Indian Point Unit 2 Individual Plant Examination of External Events (IPEEE) Submittals.**
>
> **This request includes any documents or information, including, but not limited to, any memoranda, attachments, enclosures, evaluations, reports, appendices, charts, diagrams, CDs, DVDs, and/or transmittal letters that accompany/accompanied such documents.**

This information is requested by the Office of the New York State Attorney General in the course of its official governmental duties on behalf of the People of the State of New York. This request is not based on a commercial interest of the requester.

Request for Waiver of Fees

New York State hereby requests that the NRC waive all fees associated with this request. The public disclosure of the requested information will promote the public interest and public understanding of the NRC's activities. Accordingly, the NRC should waive any fees associated

with this request. Indeed, given that the requested information is in the public interest (as opposed to a commercial interest, Congress has mandated that the NRC waive fees for copies of the above-requested reports and documents. *See* 5 U.S.C. § 552 (a)(4)(A)(iii) ("Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."). Because this request satisfies the applicable statutory standard, NRC must waive any fees associated with this request.

Plainly, the information sought by this request - which is not accessible by the public - will contribute to the public's understanding of the operations of the federal government. *See* 10 C.F.R. § 9.41(c). New York's FOIA request sought information about the NRC's risk analysis and data developed as part of the Individual Plant Examination of External Events Program regarding the Indian Point Unit 2 nuclear power station located in Westchester County 24 miles north of the New York City line.[1] Since the State's request pertained to the NRC's assessment of the impact of external events (*e.g.*, earthquakes, floods, or fires), the request concern the operations or activities of the federal government. *See* 10 C.F.R. § 9.41(d)(1). Release of the information will allow New York State to understand the operations of NRC and, possibly, the NRC's interactions with, and the operations of, other federal agencies (*e.g.*, USGS, DOE) or private entities. *See* 10 C.F.R. § 9.41(d)(2). Release of the information will increase the ability of New York State residents and Americans across the Nation to better understand the interaction of external event hazards and the NRC's exercise of its authority. Finally, as noted above, the Attorney General's Office submits this request, not as a commercial competitor, but in the exercise of its sovereign governmental functions and on behalf of the people of the State of New York. *See* 10 C.F.R. § 9.41(d)(3). If the NRC wishes, the requested information may be placed on the public portion of the ADAMS document management system.

New York State provides the following additional information that you may also wish to consider. The Office of the Attorney General intends to use the information obtained in the furtherance of its official governmental functions on behalf of the People of the State of New York. By way of example, such functions include participating in administrative proceedings concerning the development and amendment of NRC regulations, Atomic Safety and Licensing Board proceedings, and other NRC activities. The Office of the Attorney General will extract

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[1] The Indian Point Nuclear Power Station has experienced various problems and unplanned shutdowns during the course of its 46-year operating history. By way of example, the Unit 1 reactor, which began operation in 1962, was shutdown in 1974 because it did not comply with various safety regulations promulgated by the Atomic Energy Commission. In February 2000, a degraded steam generator tube in Unit 2 burst releasing radionuclides in the station. This accident caused the shut down of the reactor, which remained off line and did not produce energy for 11 months. *See generally Consolidated Edison Co. v. Pataki*, 292 F.3d 338, 343 (2d Cir.), *cert. denied*, 537 U.S. 1045 (2002); New York State Public Service Commission, *Proceeding on Motion of Commission to Investigate Forced Outage at Consolidate Edison Company's Indian Point No. 2 Nuclear Generating Facility*, Case 00-E--0612, Order, (March 30, 2000). On April 5, 2007, a transformer exploded, caught fire, and caused the temporary shutdown of Unit 3. A January 2008 hydrogeological report confirmed that the spent fuel pools for Unit 1 and Unit 2 have released tritium, strontium, and other radionuclides into the groundwater under the station and that the plumes have reached the Hudson River.

and analyze the information contained in the documents to examine external event hazards and evaluate various NRC activities regarding such events. The Office may use or reference information contained in the requested documents in various New York State administrative proceedings or NRC administrative proceedings (*e.g.*, PSC No. E-08-0077, ASLBP No. 07-858-03-LR-BD01) and/or to evaluate NRC staff work product (*e.g.*, Safety Evaluation Reports, Supplemental Environmental Impact Statements). The Office has expert scientists and engineers on staff and consults with additional state employees who have seismic and engineering experience. The likely impact of the release of the requested information will be a substantial increase in the public understanding of the implications of external event hazard estimates when compared to the understanding of such events before the release of such documents. At present, the public does not have access to the documents, and its understanding of the external event hazard estimates is impeded. The release of the information could increase the understanding of numerous citizens. For example, and as you may be aware, each day approximately 20 million American citizens live, work, attend school, or travel within 50 miles of the Indian Point facilities. The NRC has acknowledged that the Indian Point facilities have the highest surrounding population density of any power reactor in the Nation. The Office may include the requested information in potential future filings or communications with the NRC and/or other federal or state governmental bodies; as such, the content of such filings would be available to the public through the operative proceeding or by request. Additionally, federal agencies typically post such filings in a publicly available docket (*e.g.*, NRC Rulemaking Docket; NRC Electronic Hearing Docket, ASLBP No. 07-858-03-LR-BD01). Further, as noted, if the NRC wishes, it may post the requested information at one or more location on its web site so that the public may view it. None of these methods would entail a charge to a citizen who wished to review the information. The Attorney General's Office submits this request, not as a commercial competitor, but in the exercise of its sovereign governmental functions and on behalf of the people of the State of New York.

Without seeing the quality and quantity of the information, it is difficult to guarantee the exact title, date, or length of a document that would contain the requested information. Nevertheless, the Office of the Attorney General anticipates that the information gleaned from the request would be incorporated in, for example, the State's (1) public petitions and other submissions to NRC concerning seismic issues as well as other related regulatory matters and generic safety issue and rulemaking processes; (2) public filings with the New York State Public Service Commission (*e.g.*, PSC Case No. E-08-0077); (3) public filings with the Federal Emergency Management Agency or other federal agencies regarding emergency planning issues; (4) public petitions, motions, reports, and legal memoranda in NRC ASLBP No. 07-858-03-LR-BD01.

The Office of the Attorney General disseminates its filings in a variety of ways. To begin with, such documents would be available on various public web sites such as those maintained by the New York Public Service Commission and the Nuclear Regulatory Commission (e.g., NRC Agencywide Documents Access and Management System (ADAMS) , NRC Office of Adjudication Electronic Hearing Docket (EHD)).

Separate and apart from such postings, such documents would be available directly from the Office of the Attorney General. In addition, the Office of the Attorney General has publicized various filings it has made with respect to the development of NRC regulations and/or the Indian Point facilities, which has increased the public awareness of such filings and their content.[2] Various media (internet, print, radio, television) have reported on such filings over the past two years.[3] And from time to time, the NRC officials, such as the Chairman or staff in the Office of Public Affairs, have responded to or commented on the State's filings -- thereby further increasing the public's awareness of the State's filings.[4] Assuming that the NRC actually possesses information and documents that are responsive to the State's FOIA request, such response would also be available from the Office of the Attorney General and, presumably, also from the NRC's public ADAMS site.

Furthermore, over the past two years, the Office of the Attorney General has organized public forums around the State during which citizens and staff may discuss issues of interest to a particular community. By way of example, forums have been held in White Plains, Westchester County (approximately 17 miles from the Indian Point facilities), in Manhattan (approximately 35 miles from Indian Point), and Middletown, Orange County (approximately 29 miles from Indian Point). Various forums have included discussions about Indian Point and NRC regulatory issues. The Office plans to organize additional public forums in the future. At the same time, representatives of the Office of the Attorney General have attended public meetings convened by the Nuclear Regulatory Commission and have submitted public comments about issues of concern during such meetings. Such comments have been based, in part, on public information from the NRC. The Office plans to attend future meetings scheduled by the NRC.

The various means for dissemination identified by the State easily satisfy the applicable standard for fee waivers. *See Judicial Watch v. Rossotti*, 326 F.3d 1309 (D.C. Cir. 2003). Thus, there is no basis to deny this Office's application that the NRC waive all fees associated with this FOIA request.

The Office of the Attorney General notes that Congress intended that § 552(a)(4)(A)(iii) be liberally construed in favor of granting fee waivers. *See* 132 Cong. Record at S14,298 (Sept. 30, 1986) (Sen. Leahy); *id.* at H9464 (Oct. 8, 1986) (Rep. English). In enacting the provision,

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[2] *See, e.g.*, Press Release, King & Cuomo Reveal Unnecessary Lack Of Safeguards On Potentially Deadly Highly Enriched Uranium - Push Ban To Keep Dangerous Materials Out Of Terrorists' Hands (August 12, 2008), *available at* http://www.oag.state.ny.us/media_center/2008/aug/aug12a_08.html; Press Release, Attorney General Cuomo & 5 Other States Demand NRC Consider Terrorism And Earthquakes When Relicensing Nuclear Plants (November 15, 2007) *attached to* NRC ML073511837; Press Statement From Attorney General Andrew Cuomo (regarding the July 16, 2007 earthquake in Japan's Niigata Province and its impact on Tokyo Electric Power Company's Kashiwazaki-Kariwa nuclear power reactors), *available at* http://www.oag.state.ny.us/media_center/2007/jul/jul16c_07.html.

[3] *See, e.g.*, *Nuclear Plants Subject to Terrorism, Earthquakes, States Warn* (November 16, 2007), *available at* http://www.ens-newswire.com/ens/nov2007/2007-11-16-091.asp ; WNBC Broadcast *Earthquake Zone Intersection Threatens Indian Point Nuclear Plant* (August 22, 2008), *available at* http://www.wnbc.com/news/17261669/detail.html.

[4] *See, e.g.*, December 30, 2007 letter from NRC Chairman Dale E. Klein to New York State Attorney General Andrew M. Cuomo (responding to seismic and security concerns) NRC ML073400603.

Congress sought to ensure that noncommercial requesters would be granted fee waivers on a routine basis. *See id.* at S16496 (Oct. 15, 1986) (colloquy between Sens. Kerry and Leahy); *id.* at S14,299 (Sept. 30, 1986) (Sen. Leahy).[5] While the applicable statutory framework authorizes an agency to charge fees in cases in which FOIA requests are made for a "commercial" purpose, the State of New York's underlying request plainly is not for a commercial purpose. New York respectfully submits that a FOIA request submitted by a State for NRC documents concerning the hazards assessment at a power reactor having the highest surrounding population density in the Nation should satisfy the statute's "public interest" standard; the State's underlying request, which seeks information about the operations or activities of the federal government, will contribute to the public understanding of the government's operations and activities and will further the public interest. Accordingly, the NRC should waive any fees associated with the request. *Judicial Watch*, 326 F.3d 1309 ("Congress amended FOIA to ensure that it is 'liberally construed in favor of waivers for noncommercial requesters.'").

Conclusion

Please produce all responsive documents within 10 days of the receipt of this letter.

If you have any questions concerning this FOIA request, please contact me directly at (518) 474-1978 or Teresa.Fountain@oag.state.ny.us. Thank you for your attention to this matter.

Respectfully submitted,

/s/

Teresa Fountain
Legal Assistant Trainee
(518) 474-1978

[5] In revising the fee waiver standard, Congress dropped the reference to "general public" in favor of a reference to "public understanding." *See, e.g.*, 132 Cong. Rec. H9464 (daily ed. Oct. 8, 1986) (Rep. English).

FOIA Resource

From: Teresa Fountain [Teresa.Fountain@oag.state.ny.us]
Sent: Friday, October 24, 2008 8:53 AM
To: FOIA Resource
Subject: Request for Information
Attachments: 2008 10 24 FOIA Request to NRC.pdf

Dear FOIA Officer:

Attached is the State of New York's request for information under FOIA. If you have any questions, please contact me. No hard copy to follow.

Thank you,

Teresa Fountain
Legal Assistant Trainee I
Environmental Protection Bureau
Office of the Attorney General
The Capitol
Albany, NY 12224
(518) 474-1978
(518) 473-2534 fax