



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO
ATTORNEY GENERAL

FOIA/PA REQUEST
Case No. 2009-0006A
Date Rec'd 1-14-09
Specialist Raphael
Related Case 2009-0010

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

January 14, 2009

Via Electronic Mail – FOIA.Resource@nrc.gov

Donna L. Sealing
FOIA/PA Specialist
Office of Information Services
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Re: FOIA/PA Appeal of Determination on FOIA/PA 2009-0010

Dear Ms. Sealing:

The Office of the Attorney General of the State of New York (“OAG”) hereby appeals the NRC’s December 12, 2008 (received December 17, 2008) determination in the above-referenced matter. For purposes of this administrative appeal, the OAG incorporates the following: (1) the October 14, 2008 OAG Initial Request for Information and Fee Waiver (Exhibit A), (2) the October 15, 2008 NRC Denial of OAG Fee Waiver Request (Exhibit B), (3) the October 23, 2008 OAG Supplement to Fee Waiver Request (Exhibit C), (4) the November 5, 2008 NRC E-mail stating OAG’s fee waiver request is moot (Exhibit D), and (5) the December 12, 2008 NRC Response to FOIA/PA Request (Exhibit E).

The NRC’s Communication Plan re Seismic Risks

NRC has developed a plan to communicate with the public about seismic risks and generic safety issues 199.

NRC’s December 12 Appendix A identifies one document: a NRC interagency memorandum dated November 29, 2007 to Vonna L. Ordaz from Brian W. Sheron, “Communication Plan for Generic Issue 199, ‘Implications of Updated Probabilistic Seismic Hazard Estimates in Central and Eastern United States on Existing Plants’” (ML072950282). In the memorandum, Mr. Sheron states that “[i]mplementation of *this plan* will help to achieve the NRC’s strategic goal to ensure openness in the agency’s regulatory processes.” (emphasis added.) However, the memorandum’s enclosure, the communication plan, was not disclosed. Instead, the NRC asserts Exemption 5 under 5 U.S.C. § 552 and withheld the communication plan. See Item 5, Appendix B, “Communications Plan for Generic Issue (GI) 199 (10 pages).” The NRC’s “communication plan” should be released.

In addition to the provided document (ML072950282), the OAG notes there are two additional ADAMS Accession Nos. associated with this memorandum, Enclosure Accession No. ML072950292 and Package Accession No. ML072950185. These documents have not been released. The OAG believes these documents are currently available on the non-public portion of ADAMS. However, the OAG asserts that these documents are not subject to any exemption. Therefore, the OAG requests that these documents be released in their entirety and posted on the public portion of ADAMS.

The Deliberative Process Privilege Is Not Applicable

NRC's December 12 Appendix B identifies five documents: four *draft* versions of the "Communications Plan for Generic Issue (GI) 199" and one *final* version of the "Communications Plan for Generic Issue (GI) 199." The NRC determined these documents were not subject to release pursuant to Exemption 5 because "[t]he withheld information consists of interagency or intraagency records that are not available through discovery during litigation." The NRC further asserts that these documents are protected by the deliberative process privilege (5 U.S.C. § 552) and these documents are being withheld in their *entirety* because the facts not subject to the deliberative process privilege exemption are "inextricably intertwined with the predecisional information" and "[t]here 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."

The deliberative process privilege is limited to materials that are both predecisional and deliberative. *See generally EPA v. Mink*, 410 U.S. 73, 88 (1973). A document is predecisional when it is "prepared in order to assist an agency decisionmaker in arriving at his decision." *National Congress for Puerto Rican Rights v. City of New York*, 194 F.R.D. 88, 92 (S.D.N.Y. 2000), quoting *Hopkins v. United States Dep't of Housing and Urban Dev.*, 929 F.2d 81, 84 (2d Cir. 1991). "Thus, the privilege protects recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *National Congress* at 92, quoting *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473 (2d Cir. 1999)(citations omitted).

A document is deliberative when it is "related to the process by which policies are formulated." Thus, the privilege "focuses on documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." "The privilege does not, as a general matter, extend to purely factual material." *Grand Central*, 166 F.3d at 481, quoting *Hopkins*, 929 F.2d at 84-85.

A. The Communication Plan Document, Enclosure, and Package

There is no basis whatsoever to withhold the public communications plan, "Enclosure Accession No. ML072950292" and "Package Accession No. ML072950185" as they are referred to on the "Official Record Copy" of the November 29, 2007 memorandum from Dr. Sheron to Vonna Ordaz. The released November 29, 2007 memorandum states "[t]his plan has been reviewed by the Office of Nuclear Reactor Regulation (NRR), Office of Nuclear Regulatory

Research (RES), Office of New Reactors (NRO), and Office of Public Affairs (OPA), including regional contacts, in accordance with the Web-based Communication Plan Guidance (available at <http://www.internal.nrc.gov/communications/plans/guidance.html>). In addition, this plan has been coordinated with the Office of the Executive Director for Operations (EDO), and the Office of Congressional Affairs (OCA) has been briefed accordingly.” Lastly, there is no explanation for the refusal to release these documents and therefore, these documents should be released immediately.

B. The Draft Documents

Moreover, NRC does not identify what decision the four draft documents relate to and when the decision was reached or is anticipated to be made. Therefore, there is no basis for OAG to determine that these four draft documents are in anyway predecisional or that they contain actual recommendations or deliberations. Even if they did, any such deliberations would be segregable, and the remainder of the documents should be released to the public.

Conclusions

The OAG hereby requests that the five documents listed in Appendix B be released as follows: (1) items 1 through 4 (draft versions of the “Communications Plan for Generic Issue (GI) 199”) in total or in redacted form that maintains the NRC’s assertion of deliberative process privilege, and (2) item 5 (final version of the “Communications Plan for Generic Issue (GI) 199”) in its entirety. Also, the OAG hereby requests that MLs 072950292 and 072950185 be released in their entirety.

Respectfully submitted,

/s/

Teresa Fountain
Legal Assistant Trainee
(518) 474-1978



FOIA/PA REQUEST
Case No: 2009-0010
Date Rec'd: 10-14-08
Specialist: Hunkirk
Related Case: _____

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

October 14, 2008

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

Dear FOIA/PA Officer:

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

ML072950282, ML072950292, ML072950185.

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.

Request for Waiver of Fees

The public disclosure of these documents will promote the public interest. Accordingly, the NRC should waive any fees associated with this request. Indeed, given that the requested documents are in the public interest (as opposed to a commercial interest, an individual, private interest, or an academic research project), Congress has mandated that the NRC waive fees for copies of the above-requested 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 operative statutory standard, NRC must waive any fees associated with this request. Consistent with this Congressional directive, New York State hereby requests that the NRC waive all 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). Upon information and belief, the requested documents concern an assessment of seismic hazards on existing nuclear plants in the Central and Eastern United States and thus concerns 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 seismic 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.

In addition, although not required to do so by statute, New York State provides the following additional information that you are free 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 Atomic Safety and Licensing Board proceedings and other NRC activities. The Office of the Attorney General will extract and analyze the information contained in the documents to examine seismic conditions at various nuclear facilities in and around the State of New York and evaluate various NRC activities in the area. 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 # E-08-0077, ASLBP # 50-247-LR and 50-286-LR) 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 seismic hazard estimates in central and eastern United States when compared to the public's understanding before the release of such documents. At present, the public does not have access to the documents and its understanding of the seismic 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 # 50-247-LR and 50-286-LR). 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.

Thus, there is no reason to deny this Office's request that the NRC waive all fees associated with this request.

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.

Sincerely,

/s/

Teresa Fountain
Legal Assistant Trainee

FOIA Resource

From: Teresa Fountain [Teresa.Fountain@oag.state.ny.us]
Sent: Tuesday, October 14, 2008 9:02 AM
To: FOIA Resource
Subject: Request for Information
Attachments: 2008 10 14 Request to NRC.pdf

Dear FOIA Officer:

Attached is the State of New York's request for information under FOIA. If you have any question, 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



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, DC 20555 - 0001

October 15, 2008

FOIA/PA 2009-0010

**Teresa Fountain
Environmental Protection Bureau
Office of the Attorney General
The Capitol
Albany, NY 12224**

Dear Requester:

We received your Freedom of Information Act/Privacy Act (FOIA/PA) request on October 10, 2008.

Your request has been assigned the following reference number that you should use in any future communications with us about your request: **FOIA/PA 2009-0010**

To ensure the most equitable treatment possible of all requesters, the NRC processes requests on a first-in, first-out basis, using a multiple track system based upon the estimated time it will take to process the request. Based on your description of the records you are seeking, we estimate completion of your request will take 10-20 workdays (2-4 weeks). We will advise you of any change in the estimated time to complete your request.

For purposes of assessing fees in accordance with our regulations (10 CFR 9.33), we have placed your request in the following category: Non-Excepted

If applicable, you will be charged appropriate fees for Search and Duplication of records.

A sheet has been enclosed that explains in detail the fee charges that may be applicable. **Please do not submit any payment unless we notify you to do so.**

You requested that fees be waived for your request and I have determined that your request for a fee waiver does not provide sufficient information under 10 CFR 9.41 for the NRC to make a determination to waive fees. A copy of the factors which must be addressed is enclosed.

The following person is the FOIA/PA Specialist who has been assigned responsibility for your request: **Regina Newkirk at (301) 415-6574.**

If you have questions on any matters concerning your FOIA/PA request please feel free to contact the assigned FOIA/PA Specialist or me at (301) 415-7169.

Sincerely,

/ S /

Donna L. Sealing
FOIA/Privacy Act Officer
Office of Information Services

Enclosures:
Incoming Request
Explanation of Fees
Fee Waiver Factors

Fee Waiver Factors

In order to grant your fee waiver we need additional information because your justification has not satisfied all of the factors required under 10 CFR 9.41. The specific factors and the reasons they have not been satisfied are explained below.

Factor (3): Describe the nature of the specific activity or research in which the agency records will be used and the specific qualifications the requester possesses to utilize information for the intended use in such a way that it will contribute to public understanding. You state that the Office of the Attorney General will extract and analyze the information contained in the documents to examine seismic conditions at various nuclear facilities in and around the State of New York and evaluate various NRC activities in the area. You further state that your office has expert scientists and engineers on staff and consults with additional state employees who have seismic and engineering experience. We accept that you have the expertise to analyze the data, but other than using the information in various proceedings, you have not demonstrated what product you will produce that can be disseminated to the public in a manner that will inform them.

Factor (6): Describe the intended means of dissemination to the general public. You state the release of the information could increase the understanding of numerous citizens and that each day approximately 20 million American citizens live, work, attend school, or travel within 50 miles of the Indian Point facilities. You further state that you 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. However, your answer is not specific enough as to describe the intended means of dissemination of the information to the general public, i.e., the 20 million residents within 50 miles of the Indian Point facilities. You must demonstrate a capability and intent to disseminate the information in such a way as to contribute to the understanding of the general public. Having information passively available in potential future filings does not constitute a means of disseminating the information to the general public. It is your burden, as the FOIA requester, to ensure dissemination of the requested information to the public at large.

EXPLANATION OF FEES

Requester Fee Categories

Commercial: Fees are charged for document search, duplication, and review, when records are requested for commercial purposes. Fees (above the minimum fee charge) cannot be waived for this category of requester.

Educational, Non-Commercial Scientific, News Media and Privacy Act: Fees may be charged only for document duplication when records are not sought for commercial use and the request is made by an Educational or Non-Commercial Scientific Institution, whose purpose is scholarly or scientific research; or a Representative of the News Media; or a person requesting his/her own records that are in a Privacy Act system of records. No fee is charged for the first one hundred pages of duplication for this category of requester.

Non-Excepted: For any request not described above (Non-Excepted), fees may be charged for document search and duplication. No fee is charged for the first two hours of search time or for the first one hundred pages of duplication for this category of requester.

Fee Schedules

Fee schedules provide only for the recovery of the direct costs of search, duplication, or review. Review costs include only the costs for initial examination of a document to determine whether it must be disclosed and to determine whether to withhold portions that are exempt from disclosure. The fee schedule is as follows:

Search & Review Conducted By

Rate

- SES/COMMISSIONER \$88.09/hour (ES-maximum)
- PROFESSIONAL \$53.80/hour (GG-13, Step 6)
- CLERICAL \$26.23/hour (GG-7, Step 7)

Duplication Charges \$.20 per page.

Fees for non-standard search or duplication will be charged at the actual cost (e.g. providing copying of audio tapes or conducting computer searches).

Minimum Fee: No fee will be charged unless the fee is equal to or greater than \$15.00.

When to Pay Fees

If we estimate that fees will not exceed \$25.00 or you have stated in your request a higher amount that you are willing to pay, we assume your willingness to pay up to \$25 or the amount stipulated and you will be billed after we have completed your request.

If we estimate that fees will exceed \$25.00 or any amount that has been stated by you in your request, we will not proceed with your request until we have notified you and obtained your agreement to pay the estimated fees.

If we estimate fees will exceed \$250, you will be required to pay the estimated fees in advance before we proceed further with your request. If, while processing your request, we find that the actual fees exceed the estimated fee, we will obtain your consent to pay the additional fees before continuing to process your request. If the actual fees to process your request are less than any advance payment you have made, you will be refunded the overpayment amount.

Fee Waivers

A waiver or reduction of fees may be granted for furnishing documents if a requester, by fully addressing the eight factors in 10 CFR 9.41, clearly demonstrates that 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.

SECTION 9.41- REQUESTS FOR WAIVER OR REDUCTION OF FEES

(a) FOIA Fee Waivers

(1) The NRC shall collect fees for searching for, reviewing, and duplicating agency records, unless a requester submits a request in writing for a waiver or reduction of fees. To assure that there will be no delay in the processing of Freedom of Information Act requests, the request for a waiver or reduction of fees should be included in the initial Freedom of Information Act request letter.

(2) Each request for a waiver or reduction of fees must be addressed to the Freedom of Information Act and Privacy Act (FOIA/PA) Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

(b) A person requesting the NRC to waive or reduce search, review, or duplication fees shall:

(1) Describe the purpose for which the requester intends to use the requested information;

(2) Explain the extent to which the requester will extract and analyze the substantive content of the agency record;

(3) Describe the nature of the specific activity or research in which the agency records will be used and the specific qualifications the requester possesses to utilize information for the intended use in such a way that it will contribute to public understanding;

(4) Describe the likely impact on the public's understanding of the subject as compared to the level of understanding of the subject existing prior to disclosure;

(5) Describe the size and nature of the public to whose understanding a contribution will be made;

(6) Describe the intended means of dissemination to the general public;

(7) Indicate if public access to information will be provided free of charge or provided for an access fee or publication fee; and

(8) Describe any commercial or private interest the requester or any other party has in the agency records sought.

(c) The NRC will waive or reduce fees, without further specific information from the requester if, from information provided with the request for agency records, it can determine that disclosure of the information in the agency records 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.

(d) In making a determination regarding a request for a waiver or reduction of fees, the NRC shall consider the following factors:

(1) How the subject of the requested agency records concerns the operations or activities of the Government;

(2) How the disclosure of the information is likely to contribute to an understanding of Government operations or activities;

(3) If disclosure of the requested information is likely to contribute to public understanding;

(4) If disclosure is likely to contribute significantly to public understanding of Government operations or activities;

(5) If, and the extent to which, the requester has a commercial interest that would be furthered by the disclosure of the requested agency records; and

(6) If the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(e) Within 10 working days after receipt of a request for access to agency records for which the NRC agrees to waive fees, the NRC shall respond to the request.

(f) If the written request for a waiver or reduction of fees does not meet the requirements of this section, the NRC will inform the requester that the request for waiver or reduction of fees is being denied. The requester will be informed of the right to appeal a denial of a request to waive or reduce fees to the Secretary of the Commission within 30 days from the date of the denial.



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

October 23, 2008

Donna L. Sealing
FOIA & Privacy Act Officer
Office of Information Services
United States Nuclear Regulatory Commission
Washington, DC 20555-0001

Re: FOIA-PA 2009-0010

Dear Ms. Sealing:

This letter responds to your letter of October 15, 2008 concerning the recent Freedom of Information Act (FOIA) request submitted by the New York State Office of the Attorney General for three specific documents identified by ML accession numbers: ML072950282, ML072950292, and ML072950185.

In the October 15 letter you stated that the NRC could not yet make a determination about New York State's request to waive all fees associated with the FOIA request. You asked specific questions about two factors that appear in 10 C.F.R. § 9.41(b) – factor 3 and factor 6 – and invited the State to provide additional information as to those factors. Please include the following information in your determination.

Factor 3

You asked “what product” the State of New York “will produce that can be disseminated to the public in a manner that will inform the public.” *See* October 15, 2008 NRC letter.

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 (*see, 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)¹, NRC Office of Adjudication Electronic Hearing Docket (EHD)²).

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.³ Various media (internet, print, radio, television) have reported on such filings over the past two years.⁴ 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.⁵

Furthermore, 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.

Factor 6

You asked that the State of New York further describe the intended means of dissemination to the general public. Specifically, you stated that the State's initial "answer is not specific enough as to describe the intended means of dissemination of the information to the general public, *i.e.*, the 20 million residents within 50 miles of the Indian Point facilities. You must demonstrate a capability and intent to disseminate the information in such a way as to contribute to the understanding of the general public." *See* October 15, 2008 NRC letter.

¹ According to the NRC's website, the Agencywide Documents Access and Management System "is an information system that provides access to all image and text documents that the NRC has made public since November 1, 1999." The comments in this letter about ADAMS refer to the public section of that system

² According to the NRC's website, the Electronic Hearing Docket contains "all pleadings and other filings in adjudications."

³ *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.

⁴ *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>.

⁵ *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.

As an initial matter regarding Factor 6 and given the relatedness between Factor 3, Factor 6, and the NRC's questions, the State respectfully refers you the State's supplemental response to Factor 3, above, and incorporates that response here. The above-referenced response provides some examples of the Office's public outreach efforts on Indian Point and related nuclear regulatory matters over the past two years. As noted, the Office of the Attorney General issues press releases and press statements and also maintains a public website that contains its public statements. In addition, the response identifies the location of public postings of reports and comments submitted by the Office. These actions have contributed to the public's understanding of the issues. 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).

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 information sought as part of the underlying FOIA request could be referenced in future public forums and NRC public meetings.

The State of New York trusts that the above discussion addresses the two questions contained in your October 15, 2008 letter, and that the NRC will waive any fees associated with the request.

* * *

The State also reiterates that its waiver request is consistent with the applicable federal statute, and that the statute's fee waiver provision should be liberally applied.

Statutory Provisions

The State of the New York further notes that the federal freedom of information statute specifically requires federal administrative agencies to waive or reduce fees for the retrieval or photocopying of documents when the disclosure of the information is in the public interest. Specifically, 5 U.S.C. § 552 (a)(4)(A)(iii) requires that "[d]ocuments 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.”

Congress intended that the provision 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, 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).⁶ 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 the submission of a FOIA request by a State in which the AEC and NRC have licensed power reactors 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

For the reasons set forth in this letter as well as the initial FOIA request, the State of New York requests that the NRC promptly produce the requested documents and waive any fee associated with the request.

Respectfully submitted,

/s/

John Sipos
Assistant Attorney General

/s/

Teresa Fountain
Legal Assistant Trainee

cc: Regina Newkirk, NRC FOIA/PA Specialist

⁶ 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).

From: Regina Newkirk <Regina.Newkirk@nrc.gov>
To: Teresa.Fountain@oag.state.ny.us
Date: 11/5/2008 2:02 PM
Subject: FOIA 2009-0010

Dear Ms. Fountain,

Your fee waiver request regarding FOIA-2009-0010 is moot. The fees associated with this request does not exceed the minimum amount (currently \$15.00), therefore this request is not subject to any fees.

Thank you,

Regina Newkirk
FOIA Specialist
301-415-6574



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

2009-0010

1

RESPONSE TYPE FINAL PARTIAL

REQUESTER

Teresa Fountain

DATE

DEC 12 2008

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 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.
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.
APPENDICES A 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 * \$

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

* See comments for details

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 incoming FOIA/PA-2009-0010 request is located in ADAMS at ML082890238.

NYS OFFICE OF THE ATTORNEY GENERAL
RECEIVED
DEC 17 2008
ENVIRONMENTAL PROTECTION BUREAU
ALBANY

SIGNATURE - FREEDOM OF INFORMATION ACT AND PRIVACY ACT OFFICER

Donna L. Sealing

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

2009-0010

DEC 12 2008

PART II.A -- APPLICABLE EXEMPTIONS

**APPENDICES
B**

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.
 - Low 2 Internal matters of a relatively trivial nature.
 - High 2 Disclosure would risk circumvention of a legal requirement.
- 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 2.390(d)(1).
 - The information was submitted by a foreign source and received in confidence pursuant to 10 CFR 2.390(d)(2).
 - Disclosure will harm an identifiable private or governmental interest.
- 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
Dr. Brian W. Sheron	Director, Office of Nuclear Regulatory Research	Appendix B	✓		

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 RELEASED IN THEIR ENTIRETY**

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)</u>
1.	11/29/07	Memo to Ordz from Sheron, Communication Plan for Generic issue 199 "Implications of Updated Probabilistic Seismic Hazard Estimates in Central and Eastern United States on Existing Plants" (2 pages) ML072950282

November 29, 2007

MEMORANDUM TO: Vonna L. Ordaz
Assistant for Operations
Office of the Executive Director for Operations

FROM: Brian W. Sheron, Director /RA/
Office of Nuclear Regulatory Research

SUBJECT: COMMUNICATION PLAN FOR GENERIC ISSUE 199,
"IMPLICATIONS OF UPDATED PROBABILISTIC SEISMIC HAZARD
ESTIMATES IN CENTRAL AND EASTERN UNITED STATES ON
EXISTING PLANTS"

The staff of the U.S. Nuclear Regulatory Commission (NRC) has developed the enclosed communication plan for Generic Issue (GI) 199, "Implications of Updated Probabilistic Seismic Hazard Estimates in Central and Eastern United States on Existing Plants." Implementation of this plan will help to achieve the NRC's strategic goal to ensure openness in the agency's regulatory processes. In addition, this plan will facilitate communication within the agency, and provide timely, consistent, and understandable information to our external stakeholders.

This plan has been reviewed by the Office of Nuclear Reactor Regulation (NRR), Office of Nuclear Regulatory Research (RES), Office of New Reactors (NRO), and Office of Public Affairs (OPA), including regional contacts, in accordance with the Web-based Communication Plan Guidance (available at <http://www.internal.nrc.gov/communications/plans/guidance.html>). In addition, this plan has been coordinated with the Office of the Executive Director for Operations (EDO), and the Office of Congressional Affairs (OCA) has been briefed accordingly.

Enclosure:
As stated

CONTACTS: Jack W. Foster, RES/DRA
301-415-6250

Timothy M. Mitts, RES/DRA
301-415-4067

ALL

November 29, 2007

MEMORANDUM TO: Vonna L. Ordaz
Assistant for Operations
Office of the Executive Director for Operations

FROM: Brian W. Sheron, Director /RA/
Office of Nuclear Regulatory Research

SUBJECT: COMMUNICATION PLAN FOR GENERIC ISSUE 199,
"IMPLICATIONS OF UPDATED PROBABILISTIC SEISMIC HAZARD
ESTIMATES IN CENTRAL AND EASTERN UNITED STATES ON
EXISTING PLANTS"

The staff of the U.S. Nuclear Regulatory Commission (NRC) has developed the enclosed communication plan for Generic Issue (GI) 199, "Implications of Updated Probabilistic Seismic Hazard Estimates in Central and Eastern United States on Existing Plants." Implementation of this plan will help to achieve the NRC's strategic goal to ensure openness in the agency's regulatory processes. In addition, this plan will facilitate communication within the agency, and provide timely, consistent, and understandable information to our external stakeholders.

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Enclosure:
As stated

CONTACTS: Jack W. Foster, RES/DRA
301-415-6250

Timothy M. Mitts, RES/DRA
301-415-4067

Distribution:

JDyer, NRR	WBorchardt, NRO	MGalloway, NRR	EBrenner, OPA	GBagchi, NRO
RHogan, RES	MMurphy, NRR	AMauer, EDO	CJackson, NRO	JGolla, NRR
GHolahan, NRO	RSchmidt, OCA	NChokshi, NRO	MJohnson, RES	BWelling, RI
JWiggins, NRR	ECobey, RI	JAdams, EDO	PHiland, NRR	CHaney, NRR

ENCLOSURE ACCESSION NO.: ML072950292

PACKAGE ACCESSION NO.: ML072950185

OADR in ADAMS? (Y or N) Y

ADAMS ACCESSION NO.: ML072950282

TEMPLATE NO. RES-006

PUBLICLY AVAILABLE? (Y or N) N

DATE OF RELEASE TO PUBLIC: N/A

SENSITIVE? N

OFFICE	OEGIB	E	Tech Editor	N	OEGIB	E	D:DRA	C	D:DE	E	OPA	C	Reg I	E
NAME	TMitts		PGarrity		JFoster JKauffman for		CLui		JUhle		SBurnell		DRoberts	
DATE	11/15/07		10/18/07		11/16/07		11/19/07		11/17/07		11/16/07		11/19/07	
OFFICE	Reg II	E	Reg III	E	Reg IV	E	NRO	E	NRO	E	NRR	E	D:RES	
NAME	GHopper		MHolmberg		WJones		MMayfield		JLyons NChokshi for		JGrobe		BSheron	
DATE	11/19/07		11/19/07		11/19/07		11/16/07		11/16/07		11/16/07		11/29/07	

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RES File Code: 2C-3

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

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)</u>	<u>EXEMPTION</u>
1.	10/07	Communications Plan for Generic Issue (GI) 199 (10 pages) - Draft	5
2.	10/07	Communications Plan for Generic Issue (GI) 199 (10 pages) - Draft	5
3.	11/07	Communications Plan for Generic Issue (GI) 199 (10 pages) - Draft	5
4.	11/07	Communications Plan for Generic Issue (GI) 199 (10 pages) - Draft	5
5.	11/07	Communications Plan for Generic Issue (GI) 199 (10 pages)	5

FOIA Resource

From: Teresa Fountain [Teresa.Fountain@oag.state.ny.us]
Sent: Wednesday, January 14, 2009 8:51 AM
To: FOIA Resource
Subject: FOIA/PA Appeal of Determination on FOIA/PA 2009-0010
Attachments: 2009 01 14 OAG Appeal of NRC Final Response.pdf

Dear Ms. Sealing:

Attached is the State of New York's appeal of NRC's determination on FOIA/PA 2009-0010 received in this office on December 17, 2008. If you have any questions, please contact me. No hard copy to follow.

Thank you,

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