



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

January 14, 2014

IN RESPONSE REFER
TO FOIA/PA-2013-006A
(FOIA/PA-2013-0109)

Mr. Lawrence Criscione

(b)(6)

Dear Mr. Criscione:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to your e-mail correspondence of February 23, 2013, addressed to Mr. R. William Borchardt, Executive Director for Operations, and Ms. Donna Sealing, FOIA/PA Officer. In that correspondence, you appealed the agency's use of Freedom of Information Act (FOIA) Exemptions 4 and 7(F) in response to your February 6, 2013 FOIA request (FOIA/PA-2013-0109). In particular, you requested that the NRC provide unredacted copies of both the document you specifically requested by Agencywide Documents Access and Management System (ADAMS) accession number in your February 6, 2013 FOIA request and the document that was provided in response to your February 6, 2013 request.

In your appeal, you state that your February 6, 2013 request specifically asked the NRC to release ADAMS Accession No. ML110740482, but instead of providing the specified document, the NRC provided a redacted version of a document with the same title and nearly identical content (but with ADAMS Accession No. ML112430114 (unredacted); ADAMS Accession No. ML12188A239 (redacted)). The NRC mistakenly provided this document instead of the document that you requested because ADAMS Accession No. ML112430114 is the final version of the document that you requested. ADAMS Accession No. ML110740482 is a draft version of ADAMS Accession No. ML112430114, and thus could have been withheld using FOIA Exemption 5, which protects deliberative-process privileged information. The NRC has, however, decided to perform a discretionary release with regard to the information that could be protected in Accession No. ML110740482 solely using Exemption 5. The NRC is thus providing that document (Accession No. ML110740482) subject only to redactions under Exemption 7(F).

In your appeal, you asserted that any withholding of information in these documents using Exemption 7(F) is not proper because nothing in the record indicates that the information was compiled for law enforcement purposes, nor is there anything which would indicate that disclosure could reasonably be expected to endanger the life or physical safety of an individual. Additionally, you claim that the withheld information "merely pertains to the nuclear safety hazard which deficiencies in the Oconee Station's flooding defenses pose to the American public." You also state that "these safety risks are present due to the risks of natural disasters and latent engineering/construction flaws and have nothing specifically pertaining to terrorist activities." You also appealed any withholding of information in these documents under Exemption 4.

Acting on your appeal, the NRC has decided to release some of the information that was previously redacted in the record provided to you (ADAMS Accession No. ML12188A239). The revised record is enclosed. The NRC has granted your appeal to the extent that it has elected to release some of the previously-redacted information challenged in your appeal. The NRC has denied your appeal with regard to some of the previously-redacted information, as it is continuing to withhold some redacted information under FOIA Exemption 7(F). In addition, the NRC has concluded that the information previously redacted using Exemption 4 (which is not being released in response to your appeal) is more appropriately withheld using Exemption 7(F). The NRC has thus denied your appeal in part and granted your appeal in part.

As you point out in your appeal, FOIA Exemption 7(F) may be used to withhold information compiled for law enforcement purposes that, if disclosed, could reasonably be expected to endanger the life or physical safety of an individual. The term "law enforcement purposes" has been interpreted broadly by federal courts to include the enforcement of civil matters and regulatory proceedings.¹ As to the endangerment finding required for Exemption 7(F), courts will defer to an agency's assessment of danger within limits.² Furthermore, of particular relevance to this appeal, two federal district court cases have upheld agencies' use of Exemption 7(F) to withhold flooding-related information from public disclosure.³

The information withheld in these two documents was compiled for law enforcement purposes because these documents were prepared by technical staff within the NRC's Office of Nuclear Regulatory Research analyzing an issue related to licensees' compliance with the regulations that the NRC has established to implement the Atomic Energy Act (AEA). Under the AEA, the NRC is charged with establishing and enforcing regulations necessary to protect the public health and safety, as well as the common defense and security. Disclosure of the withheld information could reasonably be expected to endanger the life or physical safety of any individual because, if disclosed, the withheld information is expected to be useful to potential adversaries interested in executing an attack or other malevolent act affecting the specific dams discussed in these documents and those living near the specific dams, and release of this information could thus reasonably be expected to endanger the life or physical safety of the residents living downstream from the specific dams. In addition, disclosure of the withheld information could reasonably be expected to endanger the life or physical safety of the residents living nearby the specific nuclear power stations discussed in these documents.

¹ *E.g.*, *Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C. Cir. 2002); *Mapother v. DOJ*, 3 F.3d 1533, 1540 (D.C. Cir. 1993).

² *E.g.*, *Amuso v. DOJ*, 600 F. Supp. 2d 78, 101 (D.D.C. 2009); *Levy v. U.S. Postal Serv.*, 567 F. Supp. 2d 162, 169 (D.D.C. 2008).

³ *See PEER v. U.S. Section, Int'l Boundary & Water Comm'n*, 839 F. Supp. 2d 304, 328 (D.D.C. 2012); *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1320–1322 (D. Utah 2003).

This is the NRC's final decision. As set forth in the FOIA (5 U.S.C. 552(a)(4)(B)), judicial review of this decision is available in a district court of the United States in the district in which you reside or have your principal place of business. Judicial review can also be obtained in the district in which the agency's records are situated or in the District of Columbia.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Ash', with a long horizontal flourish extending to the right.

Darren B. Ash
Deputy Executive Director for
Corporate Management and
Chief Freedom of Information Act Officer
Office of the Executive Director for Operations