

May 22, 2014

David Lochbaum
Union of Concerned Scientists
Two Brattle Square
Cambridge, MA 02138-3780

Dear Mr. Lochbaum:

This is in response to your letter dated April 18, 2014. It is the U.S. Nuclear Regulatory Commission's (NRC) policy to make as much information as possible available to the public relating to its health and safety mission, in accordance with its legal responsibilities to protect specific types of information. The NRC has established policies and procedures for the release of information to the public. These policies and procedures are contained in Title 10 of the *Code of Federal Regulations* (CFR), Part 9 and in NRC Management Directives 3.1, Freedom of Information Act, and 3.4., Release of Information to the Public.

Your letter addresses ten specific concerns regarding public disclosures, Freedom of Information Act (FOIA) responses in general, and a few specific agency disclosures in individual cases. Each of your ten concerns is addressed below.

1. *What management directives and procedures are used by the NRC staff in determining whether documents can be publicly released?*

Management Directive 3.4 lays out the NRC's general procedures and policies regarding the public release of NRC documents. Procedures and policies specific to release of information under FOIA are set forth in NRC regulations at 10 CFR Part 9 as well as Management Directive 3.1.

2. *What management directives and procedures are used by the NRC staff in determining whether information should be redacted from documents being provided in response to FOIA requests?*

The eligibility of information for release, as well as the application of exemptions to agency records, is codified in 5 U.S.C. 552 for FOIA requests, and 5 U.S.C. 552a for Privacy Act requests. The exemptions outlined in these statutes are then further explained by case law that governs what specific types of information should be withheld from public disclosure. These statutory exemptions have also been adopted by the agency within the NRC's regulations, at 10 CFR 9.17. Management Directive 3.1, at Exhibit 2, provides agency staff with additional guidance on applying FOIA's statutory exemptions.

Recommendations for applying exemptions are reviewed by NRC's Office of Information Services (OIS), as well as by the Office of General Counsel (OGC),

prior to the release of records, which is consistent with Management Directive 3.1 and 10 CFR 9.25(h). Records originating in the Office of the Inspector General or records for which the Office of Inspector General has primary responsibility are not reviewed by OGC.

3. *What formal training (i.e., number of hours, frequency, and classroom vs. computer-based training vs. read and sign) is provided by the NRC to staff who make determinations about publicly releasing documents and redacting information from documents being provided in response to FOIA requests?*

OIS conducts annual classroom training available to all NRC staff, totaling between 2-3 hours of instruction, on how to process FOIA requests and properly apply the statutory exemptions. Additionally, OIS has reached out to individual program offices to provide specialized instruction based on the types of records likely to be found in those offices. OIS is also working to supply electronic tools to NRC offices to help reduce processing times. OIS supports the continuing education of its FOIA staff, by sending them to seminars, workshops, and conferences that are offered by various sources, such as the U.S. Department of Justice (DOJ), and the American Society of Access Professionals.

NRC offers web based training to all staff, totaling approximately 3-4 hours of instruction. The courses provide a tutorial on the provisions of FOIA and how it is implemented at the NRC, how the technical staff can protect sensitive information and the distinction between the Controlled Unclassified Program and FOIA.

Although NRC staff can make recommendations for the application of FOIA exemptions, part of our system of internal controls includes review of these recommendations by OIS and by OGC. OIS and OGC both provide training, in collaboration with the DOJ, as well as the Office of Government Information Services (OGIS), to ensure that the NRC staff who provide release recommendations are familiar with the FOIA process and exemption applicability.

4. *What administrations (sic) controls does the NRC use to check whether its management directives and procedures governing about public release of documents and redaction of information from documents being provided in response to FOIA requests are being consistently applied?*

The NRC has well-established policies and procedures that provide guidance to NRC staff responding to FOIA requests. To be clear, these documents provide guidance, but they do not, and realistically could not, allow for mechanical application of exemptions that leaves no room for judgment or discretion.

One function of the centralized review of proposed redactions by the FOIA office in coordination with the OGC is to promote consistency in agency redaction determinations. Nonetheless, decisions as to when certain FOIA exemptions apply are often, by their nature, subjective or based on very context-specific inquiries. The age of the record affects the assessment of the risk of harm in disclosure, and may result in varying release decisions over the course of time. Perfect consistency in the application of FOIA exemptions is not possible.

However, the NRC strives to balance the obligations of meeting statutory response times with those of consistent record processing.

5. *The NRC staff has withheld documents from the public on grounds they contained security sensitive information. Yet such documents have been publicly released in response to FOIA requests without any information being redacted and the "This letter contains security sensitive information. Withholding from Public Disclosure under 10 CFR 2.390" headers and footers lined through. Because no information, security sensitive or otherwise, was redacted from these documents, what was the legitimate basis for initially withholding them in the first place? [Some among many examples: Duke letter dated 11/29/2010 to NRC, ML103490330; Duke letter dated 6/24/2010 to NRC, ML10183007; Duke letter dated 10/03/2011 to NRC which merely sought a deadline extension; ML11278A173; and Duke letter dated 11/17/2011 to NRC, ML11294A341].*

The standard of review for proactive disclosure of records is significantly different than the statutory review that is conducted pursuant to a FOIA request. Proactive disclosures are governed by 10 CFR 9.21, and are limited to six discrete categories of information. In each of the examples cited above, the initial review determined that, due to the nature of a record, the document should not be proactively posted online. This is consistent with the requirements for handling all documents that fall under certain categories of records, known as Sensitive Unclassified Non-Safeguards Information (SUNSI) records. (For a list of all SUNSI categories, please see <http://www.nrc.gov/security/info-security.html>). SUNSI records are not eligible for proactive disclosure, including those categorized as Security Sensitive as outlined in 10 CFR 2.390(b)(1)(i). The SUNSI designation does not have the same boundaries as the FOIA exemptions. Therefore, if a SUNSI record is requested under FOIA, a separate analysis must be made to determine whether disclosure is required.

The FOIA analysis is governed by the nine exemptions in the statute. Once that review is complete, the record is either released or withheld depending on the applicability of the FOIA exemptions and propriety of any discretionary release. If the record is released to the requestor, it will be posted on the agency website if appropriate under 10 CFR 9.21(c)(5).

Additionally, assessments about security risks evolve over time. A record may be marked as SUNSI when created, but later, when requested under FOIA, the security risk may be re-evaluated as low enough to permit release. If the entire document is not releasable, the agency must segregate any non-exempt portions which are then released pursuant to 10 CFR 9.19.

6. *If the NRC staff withholds a document on grounds it contains information about a security problem to be resolved in the near future, does the NRC make the document publicly available, without a FOIA request for it, after the problem is corrected to the agency's satisfaction? If not, why not?*

The time for properly marking a document as SUNSI is at the time of the original submission of the record to the NRC or its creation by NRC. See 10 CFR 2.390(b)(1)(i)(A). Once a document has been properly marked, any subsequent disclosure under FOIA requires a separate review and segregation of exempt

information from non-exempt information as discussed under number 5 above. Requiring an automatic, periodic re-review of any records designated as SUNSI is not feasible considering the ever-growing list of records maintained and created by the agency. This is not to suggest that SUNSI records are never subject to review to remove the SUNSI designation over time. It is far more likely, however, that the review of the SUNSI designation is prompted by a FOIA request. Tens of thousands of pages of records previously-marked as SUNSI have been released in whole or in part in response to FOIA requests.

7. *The Southern Alliance for Clean Energy (SACE) submitted a FOIA request (FOIA/PA-2014-0208) for portions of the St. Lucie Updated Final Safety Analysis Report (UFSAR) and asked for both expedited handling and a fee waiver. The NRC denied both the original request and also SACE's appeal of the denial. The bases for both the expedited handling request and fee waiver appear comparable to similar requests granted by the NRC. Why is the NRC not treating such requests in a fair and consistent manner?*

All requests for expedited processing, as well as requests for a fee waiver, are handled on a case-by-case basis. Generally, in order to qualify for expedited processing, the requester has to show a compelling need, either because of a threat to life or safety, or, in cases of a requester who is primarily engaged in disseminating information, an urgency to inform the public about certain Government activity. As such, it is not the form of the request that governs whether or not the NRC grants such a request, but the urgency to disclose the records. Because a decision to take a FOIA request out of turn necessarily entails delay for other requesters waiting for their own requests to be processed, fairness demands that it be made only upon careful scrutiny of truly exceptional circumstances¹. Urgency, by its nature, is temporal, and not all requesters have the same capability to immediately inform the public. This means that two requesters may seek the same material, but because one requester is a news media requester and another is a public advocacy group, or because the one asks for the material earlier in time when the need to inform the public is greater, the one may be entitled to expedited processing while the other is not.

Like expedited processing, fee waivers are assessed on a case-by-case basis. If a fee waiver is sought, the requester is required to provide information regarding the eight criteria outlined in 10 CFR 9.41. These criteria are then analyzed to determine both the anticipated increase in public understanding of government activities, as well as a balance of the commercial interest the requester may have in the records against the interest in disclosure. Again, different requesters, although submitting similarly worded requests, will have differing abilities to inform the public, and will have varying commercial interests in receiving the records. As such, a careful review of every request is made to determine the eligibility of each requester for a full, or partial, waiver of the fees provided for by 5 U.S.C. 552(a)(4)(A)(i).

8. *SACE's FOIA/PA-2014-0208 sought portions of a 2012 updated (sic) to the UFSAR. That this information was not already publicly available, or made readily available upon request from the public, seems contrary to the policy espoused in SECY-04-091 which states "information related to the general workings of a nuclear power plant such as the*

¹ FOIA Update Vol. IV, No. 2, 1983; see also Al-Fayed v. CIA, 254 F.3d 300, 310 (D.C. Cir. 2001).

descriptions usually provided in licensing documents (e.g., updated final safety analysis reports, license renewal applications) are released since similar information (at the level useful to a potential adversary) is available in open source literature such as text books and internet sites.” Why did the NRC staff not make the requested UFSAR information readily available upon public request?

The current FOIA request for the updated UFSAR was completed, and the record was already being made public by the Office of Nuclear Reactor Regulation (NRR) prior to the submission of the request. The document that was requested was made publicly available, and the response to the FOIA request directed the requester to the public Agencywide Document Access and Management System (ADAMS) accession number (ML14104B631).

9. *In response to ASLB’s order dated April 7, 2014, in the MOX case (Docket No. 70-3098-MLA, ASLBP No. 07-856-02-MLA-BD01), the NRC staff proposed redaction of considerable information from LBP-14-01, the ASLB’s Initial Decision dated March 27, 2014. The basis for such redactions is questionable given that virtually all of this information has already been publicly released by MOX Services, Inc. in unprotected filings during the proceeding and have already been posted, in unredacted form, in NRC’s ADAMS. Why is the NRC staff now seeking to withhold information that is publicly available through the NRC’s electronic library?*

This issue is currently pending before the Atomic Safety and Licensing Board in the Mixed Oxide Fuel Fabrication Facility licensing proceeding. Therefore, it would be inappropriate for the NRC to comment on this question prior to the resolution of the matters subject to litigation.

10. *The third paragraph of the form letter used by the NRC to acknowledge receipt of FOIA requests states: “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” (e.g., NRC letter dated 02/14/2014 to UCS regarding FOIA/PA-2014-00148). But this first-in, first-out multi-track process often seems violated. For example:*
- a. *On October 9, 2012, UCS submitted a FOIA request (FOIA/PA-2013-008) for a single document of approximately 18 pages. That document (ML13256A370 and ML13256A372) was provided to another requester (PEER) who submitted a request for it many months after UCS did. NRC mailed a response dated September 25, 2013, to UCS indicating that the documents sought by FOIA/PA-2013-0008 were already publicly available. Why didn’t UCS receive the requested document first?*
 - b. *During the week of September 14, 2012, Greenpeace submitted a FOIA request (FOIA/PA-2012-0325) for records related to flooding hazards at Oconee. By letters dated February 6, 2013 (ML13052A790) and February 4, 2014 (ML14055A411), the NRC provided documents. But document ML110260443, which directly related to the flooding hazard at Oconee, was not included in either response package. Instead, it was released on February 27, 2014 – after both of the responses to the Greenpeace FOIA – to Larry Criscione, who requested it during the week of April 12, 2013 (FOIA/PA-2013-0213), nearly 28 weeks after*

Greenpeace's FOIA. Why didn't Greenpeace receive the requested document first?

The FOIA principle of “first-in, first-out” processing is subject to certain exceptions. First, requests that are granted expedited processing receive priority, and will be processed on an expedited basis before other requests. Second, the Electronic FOIA Amendments Act, which was enacted in 1996, allowed agencies to process requests on a multi-track processing system. This permits agencies to respond to relatively simple requests more quickly than requests involving complex or voluminous records². For example, several extremely large FOIA requests were submitted in 2011, which sought all records regarding the Fukushima-Daiichi disaster. Some of these are still currently being processed. Were the doctrine of first-in, first-out applied without any multi-track system, no FOIA requests could have been processed over the last three years until these larger, overarching requests had been closed. Ultimately, as emphasized in 10 CFR 9.25(d), the goal of multi-track first-in, first-out processing is not to mandate rigid adherence to first-in, first-out principles, but rather to “ensure the most equitable treatment possible of all requesters.”

As an illustration, in the second of your two examples the third accession number you list, ML110260443, references a document that was already listed within the groups of records that were publicly available at the time of the interim release in FOIA/PA-2013-0213³. Yet, the record was not yet publicly available at the time of the two prior interim releases you identified in FOIA/PA-2012-0325, which, consistent with first-in, first-out principles—occurred earlier than the interim release in FOIA/PA-2013-0213.

As such, it would have been inequitable, and against the principles of transparency, to intentionally delay identifying this publicly available record in the interim release for FOIA/PA-2013-0213. Particularly, in this case, despite the fact that the record was located in response to a chronologically newer case, any public ADAMS search for the responsive record after the document was publicly available, (including a search conducted by the requester in FOIA/PA-2012-0325), would have yielded the same document even absent the subsequent FOIA request.

By following the provisions of the FOIA, agency regulations, and management directives, the NRC is able to provide responses as efficiently and equitably as possible to each track of the multi-track processing categories of the various requesters.

Hopefully, through this response, the NRC has addressed each of the points you raised in your April 18, 2014, letter and you will not feel a meeting is necessary. If you still have questions or concerns, the DOJ Office of Information Policy will be teaming with the OGIS to host a series of roundtable discussions with the FOIA requester community in the upcoming months. More information about the FOIA requester roundtable can be found at <http://blogs.justice.gov/oip/archives/1310>.

² 5 U.S.C. § 552(a)(6)(D).

³ See ML13102A065 for the complete cover letter to the second interim release identifying ML110260443 as one of the records that was already publicly available and identified to the requester.

Finally, as part of the 2007 FOIA amendments, the OGIS was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a nonexclusive alternative to litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free telephone: 1-877-684-6448

If you have any questions regarding this matter, please telephone Stephanie Blaney at 301-415-6975, or e-mail to Stephanie.Blaney@nrc.gov.

Sincerely,

/RA/

Darren B. Ash
Deputy Executive Director
for Corporate Management
Office of the Executive Director for Operations

cc: M. Satorius, OEDO
M. Galloway, OEDO

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If you have any questions regarding this matter, please telephone Stephanie Blaney at 301-415-6975, or e-mail to Stephanie.Blaney@nrc.gov.

Sincerely,

/RA/

Darren B. Ash
 Deputy Executive Director
 for Corporate Management
 Office of the Executive Director for Operations

cc: M. Satorius, OEDO
 M. Galloway, OEDO

DISTRIBUTION: OIS Ticket #: OIS-2014-0087 / OEDO-14-00277

ADAMS Accession #: ML14140A330 (Package)

OFFICE	OIS	OIS	OIS	OIS	OIS
NAME	MGraff	SBlaney	LPearson	CNguyen	PHirsch
DATE	05/15/2014	05/20/2014	05/15/2014	05/13/2014	05/13/2014
OFFICE	OGC	OIS	OIS	OIS	
NAME	MSpencer NLO	MGivvines	JFlanagan	DAsh	
DATE	05/20/2014	05/14/2014	05/14/2014	05/22/2014	

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