



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

September 19, 2014

Simone Aponte
Executive Producer, Special Projects
KTVU/Channel 2
2 Jack London Square
Oakland, CA 94607

IN RESPONSE REFER TO
FOIA/PA-2014-0034A
(FOIA/PA-2014-0378)

Dear Ms. Aponte:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to your letter received on August 20, 2014. In your letter, you appealed the agency's August 12, 2014, decision to deny your August 8, 2014, Freedom of Information Act/Privacy Act (FOIA/PA) request (FOIA/PA-2014-0378). You had requested documents that you believe were "previously released and detailed...in FOIA #2014-0134."

The NRC did not release the documents requested in FOIA-2014-0134. In that underlying case (filed by a different requester than you), the NRC withheld all records in full and cited FOIA Exemption 5. In your appeal, you have argued that the NRC must provide a more complete justification for application of Exemption 5.

FOIA Exemption 5 concerns certain classes of communication, which are protected by legal privileges, and which occur inside an agency or between agencies. In FOIA-2014-0134, the NRC withheld all records in full from the original requester; that requester has not filed an administrative appeal.

Your FOIA request (FOIA/PA-2014-0378), sought documents you said the NRC released under a prior FOIA request. In the closure of your request (enclosed as Document 1), the agency informed you that "[t]here were no responsive records released in whole or in part in response to FOIA-2014-0134," and that "No agency records subject to the request have been located." In this instance, the NRC made the correct decision at the administrative level. Since the NRC did not release any records in that prior FOIA request, a "no document" response was appropriate. The NRC has not invoked any FOIA exemption in the processing of your request.

Acting on your appeal (enclosed as Document 2), I have carefully reviewed the record in the case. I have determined that the NRC properly denied your request because the agency did not release the records that you claim were released.

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

S. Aponte

- 2 -

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a nonexclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. 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

Sincerely,



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

Enclosures:
As stated

ENCLOSURES

DOCUMENT 1



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

2014-0378

1

RESPONSE TYPE FINAL PARTIAL

REQUESTER
Simone Aponte

DATE
AUG 12 2014

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.
- | |
|-------|
| GROUP |
|-------|

 Agency records subject to the request that are identified in the specified group are already available for public inspection and copying at the NRC Public Document Room.
- | |
|-------|
| GROUP |
|-------|

 Agency records subject to the request that are contained in the specified group are being made available for public inspection and copying at the NRC Public Document Room.
- | |
|-------|
| GROUP |
|-------|

 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*
- \$
- * See comments for details
- You will be billed by NRC for the amount listed.
 - None. Minimum fee threshold not met.
 - You will receive a refund for the amount listed.
 - Fees waived.

PART I.B -- INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE

- No agency records subject to the request have been located. For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.
- 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)

There were no responsive records released in whole or in part in response to FOIA-2014-0134. A total of 42 pages were withheld in full pursuant to FOIA Exemption 5 under the deliberative process privilege.

The incoming FOIA request will be available in ADAMS at ML14224A026.

Records with an ML accession number are available in the NRC Library at www.nrc.gov/reading-rm/adams.html. For assistance in obtaining any public records, please contact the NRC's Public Document Room (PDR) at 1-800-397-4209 or by e-mail at PDR.Resource@nrc.gov.

SIGNATURE - FREEDOM OF INFORMATION ACT AND PRIVACY ACT OFFICER

Nina Argent (Acting) */s/*

DISTRIBUTION--FOIA/PA Subject, Action Officer, FOIA/PA Officer, Other (Specify)

FOIA

OFFICE	ACTION OFFICER	FOIA/PA OFFICER
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NAME	Mark H. Graff <i>MG</i>	NArgent (Acting) <i>NA</i>
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DATE	8/5/14	8/12/14
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DOCUMENT 2

FOIA Resource

From: Aponte, Simone (CMG-Oakland) <simone.aponte@ktvu.com>
Sent: Tuesday, August 19, 2014 7:37 PM
To: FOIA Resource
Subject: FOIA APPEAL: KTVU request for NRC Records

Nina E. Argent
Acting FOIA Officer
Office of Information Services
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

FOI/PA REQUEST
Case No.: 2014-0034A
Date Rec'd: 8/20/14
Specialist: Graff
Related Case: 2014-0378

Re: Freedom of Information Act Appeal

Dear Ms. Argent:

I am writing to respectfully submit an appeal under the Freedom of Information Act.

On August, 8, 2014, I requested documents under the Freedom of Information Act. My request was assigned the following identification number: FOIA/PA-2014-00378, under the responsibility of Mark Graff. On August 15, 2014, I received a response to my request and would like to appeal its denial.

~~The letter I received stated that NRC was denying my FOIA request based on Exemption 5, which exempts inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.~~

However, the documents that were withheld must be disclosed either entirely or in part under the FOIA for two reasons:

- 1. The withheld documents "must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." (*Dep't of Interior v. Klamath Water Users Protective Assn.*, 532 U.S. 1 (2001)). However, the documents withheld from this FOIA request are not subject to denial based on the rule of discovery privilege. NRC has not provided an explanation claiming that the withheld documents are protected from discovery for any active litigation or pre-litigation judicial proceedings. If this is not the case, and NRC is in fact involved in any active litigation or pre-litigation in which the withheld documents are likely to be subject to discovery privilege, I request that NRC please release the Title, Case Number, and Court in which the judicial proceedings are being heard. Otherwise, please released the withheld records as required.**
- 2. The FOIA Exemption 5 does not cover purely factual portions of any pre-decisional documents. If any internal NRC memorandum contains advisory recommendations (and the NRC has yet to make a final decision on those recommendations), the documents should be released with only the portions related to active decision-making processes redacted. If a decision on the advisory recommendations of Dr. Michael Peck has already been made, the entire "post-decision" document is not subject to exemption under FOIA. Please confirm whether a decision is still pending or not, and release the records entirely or in part as required.**

Please confirm your receipt of this appeal letter. You can reach me directly at the number below if you have any further questions or concerns regarding my request.

Thank you for your consideration of this appeal.

Sincerely,

Simone Aponte
Executive Producer, Special Projects
KTVU/ Channel 2
2 Jack London Square
Oakland, CA 94607
Direct: (510) 874-0235

