

FOIA/PA REQUEST

September 9, 2015

Case No.: 2015-0063A
 Date Recd.: 9/17/15
 Specialist: Burkhalter
 Related Case: 2015-0392

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Subject: Appeal from Initial FOIA Decision

This letter is meant to appeal the NRC's decision regarding Freedom of Information Act/Privacy Act (FOIA/PA) request FOIA/PA-2015-0392 dated July 24, 2015 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15208A091). In its decision, the NRC refused to issue "Charter from ROP Design Engineering Inspection Working Group (DEIWG)", dated September 23, 2010 (ADAMS Accession No. ML091380189), stating that it was an "Internal tasking memorandum from NRC management to staff". The document was interpreted to fall under the Exemption 3 of the FOIA, as information mandated by Federal statute to be withheld from public disclosure. The Federal statute in question is 10 CFR 9.17(a)(5), which states, "(a) The following types of agency records are exempt from public disclosure under § 9.15: . . . (5) Interagency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency".

It is my belief that the NRC has inappropriately determined that Exemption 3 to the FOIA can be applied to the requested document. Working group charters have not historically been withheld from public disclosure by the NRC. For example, since the beginning of calendar year 2015 the three following charters have been released on the NRC's publicly available ADAMS website:

- "NRC/Agreement State Working Group: Iodine-125 and Palladium-103 Low Dose Rate Brachytherapy Seeds Used for Localization of Non-Palpable Lesions", dated May 20, 2015, (ADAMS Accession No. ML15111A467).
- "Cybersecurity Forum for Independent and Executive Branch Regulators Charter", dated January 14, 2015, (ADAMS Accession No. ML15014A296).
- "Licensing Support Network Advisory Review Panel Charter", dated January 16, 2015, (ADAMS Accession No. ML15009A069).

Additionally, in the time period from the date of the requested document, September 23, 2010, through the present, there are currently 44 documents in the publicly available section of ADAMS of the type "Charter", further indicating the NRC makes program charters publicly available.

The decision to apply Exemption 3 to the FOIA in this case appears to be contrary to the Supreme Court's Decision in *Milner v. Department of the Navy*. In that decision, the Supreme Court overturned over 30 years of precedent stemming from *Crooker v. Bureau of Alcohol, Tobacco, and Firearms* by applying a strict textual interpretation to the meaning of Exemption 2 to the FOIA. The Supreme Court decision identified that only those matters "related solely to the internal personnel rules and practices of the agency" should be withheld from public disclosure.

September 9, 2015

Based on a review of those charters which are publicly available, they do not appear to be solely related to internal personnel rules and practices of the agency. While the cited FOIA Exemption in the Supreme Court case was not used by the NRC in the denial of FOIA/PA-2015-0392, the NRC does appear to be applying a broad interpretation of the language of FOIA Exemption 3 and not a more common-language interpretation, as is the threshold established by the Supreme Court.

Furthermore, those working group charters which are publicly available on the NRC's website do not appear to be "memorandums or letters" as referenced by 10 CFR 9.17(a)(5). NRC Management Directive (MD) 3.57, "Correspondence Management", dated September 17, 2014 (ADAMS Accession No. ML14191B160) provides the programmatic guidelines for all NRC correspondence, both internal and external. In sections VI, "Letters," and VII, "Memoranda" of MD 3.57, the NRC explicit guidance as to what constitutes an official NRC Letter or Memorandum, and the requirements of each. Charters are not listed explicitly as Letters or Memoranda in MD 3.57. The publicly available charters on ADAMS do not resemble any of the example letters or memoranda found in Figures 6.1-6.4 and 7.1-7.5, nor does any discussion of working group charters appear in MD 3.57. Because of the fact that charters are not listed as types of letters or memoranda, and they do not appear similar to a standard NRC letter or memorandum, it can reasonably be inferred that charters do not fall into either one of those categories and the NRC staff views these documents as being publicly available when they are being prepared.

This apparent lack of consistency in terms of releasing agency documents does not comply with the NRC's Principles of Good Regulation. Specifically, openness, clarity, and reliability are not being practiced in the decision to withhold the requested document from public disclosure. With over forty examples of documents of the type "Charter" released to the public domain since completion of the requested document, the NRC regulations clearly allow releasing working group charters to public disclosure. The lack of releasing this specific working group charter indicates that the NRC is not maintaining open channels of communication with the public. The inconsistency demonstrated by refusing to issue the requested document also indicates the FOIA regulations in 10 CFR 9 are not clearly written to produce consistent, reliable results.

This letter serves as an appeal to the NRC's decision to withhold the document entitled, "Charter from ROP Design Engineering Inspection Working Group (DEIWG)" from public disclosure. The NRC cited Exemption 2 to the FOIA as the reason for denying request FOIA/PA-2015-0392, stating that the document was an "Internal tasking memorandum from NRC management to staff." However, as described above, it is believed that the NRC has misapplied Exemption 2 to the FOIA to the requested document. The NRC has not historically withheld working group charters from public disclosure, with 44 documents of the type "Charter" being released since the date of the requested document. Furthermore, charters are not listed as a specific type of letter or memorandum in NRC MD 3.57, indicating that the NRC staff is most likely of the mind that the working group charters will be made publicly available upon completion.

September 9, 2015

In order to comply with the NRC's Principles of Good Regulation, the NRC should overturn its decision and release "Charter from ROP Design Engineering Inspection Working Group (DEIWG)", dated September 23, 2010, for public disclosure. The release of the document (ADAMS Accession No. ML091380189) is hereby requested as soon as is practical. Should you have any additional information, please contact me at al.haeger@certrec.com or 817-738-7661.

Finally, I note that I was not notified directly of the denial of a portion of my request. A colleague pointed out to me that the NRC's response was posted in ADAMS on August 3, 2015. I did not become aware of the response immediately and thus request that the 30-day period for appeal be extended.

Sincerely,



Allan R. Haeger
Director, Office of Licensing and Compliance
Certrec Corporation