

July 13, 2016

Stephen G. Burns, Chairman
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

SUBJECT: Freedom of Information Act Concerns

Dear Chairman Burns:

We want to make you aware of practices by the staff of the U.S. Nuclear Regulatory Commission (NRC) that appear to violate the Freedom of Information Act and to request that you initiate steps to look into these practices. If, as we strongly suspect, that examination reveals problems with these practices, we would expect that appropriate remedies will be implemented to assure compliance with federal regulations and the agency's openness goals in the future.

Enclosure 1 is an email thread between NRC staff, an external party mistakenly receiving an email intended for an NRC staffer in the Freedom of Information Act (FOIA) office, and one of us (Lochbaum).

One of us (Blanch) submitted a FOIA request for records referred to by the NRC staff during the public meeting conducted on June 8, 2016, in the community near the Indian Point Energy Center. The NRC staff assigned number FOIA/PA-2016-0532 to this request. This FOIA request is the subject of the enclosed email thread.

NRC Management Directive 3.1, "Freedom of Information Act,"¹ describes how the agency handles FOIA requests. Page 42 of the handbook associated with Management Directive 3.1 describes the records that can be legally withheld from FOIA responses under Exemption 7F in the FOIA law:

Examples of information that may qualify for Exemption 7(F) protection:

- Records or information compiled for law enforcement purposes the disclosure of which could endanger the life or physical safety of an individual or individuals, for instance, where necessary to protect an individual (or group of individuals) from possible harm by a requester who has threatened harm in the past

Enclosure 1 clearly shows that the NRC's FOIA office questioned whether the requested information could be legitimately withheld via Exemption 7F. And Enclosure 1 also clearly shows that the NRC Region I counsel admits "it's a stretch to say that such information is law-enforcement related." Because Exemption 7F is only applicable to "information compiled for law enforcement purposes," it would be inappropriate at best and unlawful at worst for the NRC to withhold information not compiled for law enforcement purposes using Exemption 7F. Stretching Exemption 7F to cover records the NRC staff simply does not want to release is inconsistent with the NRC's openness value:²

¹ Available in ADAMS under ML11005002.

² Available online at <http://www.nrc.gov/about-nrc/values.html>

Openness:

Nuclear regulation is the public's business, and it must be transacted publicly and candidly. The public must be informed about and have the opportunity to participate in the regulatory processes as required by law. Open channels of communication must be maintained with Congress, other government agencies, licensees, and the public, as well as with the international nuclear community.

The requested records pertain to existing and proposed natural gas pipelines near the Indian Point Energy Center. These are the very same issues Mr. Blanch discussed with you and other Commissioners in September 2015. The NRC staff during the June 8, 2016, public meeting cited the records among their reasons for concluding the pipelines pose no undue hazard to the facility and the people living near it. If the requested records are being improperly withheld, the public is not being fully informed and the public's ability to participate in the regulatory process is being unduly impaired.

The situation also challenges another one of the NRC's values, namely clarity:

Clarity:

Regulations should be coherent, logical, and practical. There should be a clear nexus between regulations and agency goals and objectives whether explicitly or implicitly stated. Agency positions should be readily understood and easily applied.

During the June 8, 2016, public meeting, the NRC staff stated that it had evaluated the pipelines near Indian Point and concluded they posed no undue risk of harm. The NRC staff cited the requested records as evidence supporting their conclusion. But when the records are sought via a FOIA request, the NRC staff contends that their release could pose undue harm. It is clearly not clear how the NRC staff could arrive at opposite conclusions. If the pipelines truly do pose harm, the NRC staff should have said so clearly during the June 8 public meeting. If, as the NRC staff stated then, the pipelines truly pose no undue harm, the NRC staff should stick to its story and release the requested records via FOIA. We do not readily understand how harmless information in June became harmful in July.

Because our contention involves potential impropriety by the NRC staff, the NRC's Office of the Inspector General and/or the Office of Government Information Services³ would be better suited to examine the matter. The scope of the examination should be larger than this specific case. It should include at least a sampling of times when the NRC withheld records using Exemption 7F. If the sampling reveals that Exemption 7F has been wrongly applied, it would be appropriate to expand the inquiry to identify and correct other occasions when the NRC has improperly withheld information requested through the FOIA.

³ For information on OGIS's role as the Federal FOIA Ombudsman, see ML1608A035 in ADAMS.

We appreciate your attention to this matter and look forward to its resolution.

Sincerely,

Handwritten signature of Paul M. Blanch in black ink.

Paul Blanch
135 Hyde Road
West Hartford, CT 06117
860-922-3199, cell

Handwritten signature of David A. Lochbaum in blue ink.

David Lochbaum
Director, Nuclear Safety Project
Union of Concerned Scientists
PO Box 15316
Chattanooga, TN 37415
423-468-9272, office

Enclosure: as stated

Enclosure 1: NRC Email Thread

Hi David,

Lo and behold, Brett Kulkin of the NRC, accidentally sent me the email below, that was actually intended for an NRC employee also named "Margo."

Then he sent me 2 "recall the email" messages- lol.

Can you let me know what to make of it? Scroll down for the whole thread.

Thank you,

Margo - (the activist, not the NRC employee!)

Sent from my iPhone

Begin forwarded message:

From: "Klukan, Brett" <Brett.Klukan@nrc.gov>

Date: July 11, 2016 at 11:15:58 AM EDT

To: "Holt, Dennis" <Dennis.Holt@nrc.gov>, Margo Frances <margofrances@yahoo.com>

Subject: RE: FOIA-2016-0532

Margo,

Region I labeled those portions 7F consistent with what it considered to be past practice regarding such information based on the possible use of such information in the planning of malicious / terrorist activities endangering public health and safety of those living within the vicinity of the facility.

If you don't believe that 7F applies (and I recognize that it's a stretch to say that such information is law-enforcement related), then I don't know if we still have a basis to withhold it.

However I would suggest that you reach out your NSIR FOIA contact to verify this—we are, in a sense, simply following the lead we had believed that they had established on this.

Let me know if you need anything else.

Cheers,

Brett Klukan

RI Regional Counsel

From: Holt, Dennis

Sent: Monday, July 11, 2016 10:55 AM

To: Klukan, Brett <Brett.Klukan@nrc.gov>

Subject: FW: FOIA-2016-0532

Brett,

Can you please discuss this with Margo? Thanks.

Regards,

Dennis Holt

Region I Help Desk/FOIA

610.337.5050

Enclosure 1: NRC Email Thread

From: Stevens, Margo
Sent: Monday, July 11, 2016 10:54 AM
To: Holt, Dennis <Dennis.Holt@nrc.gov>
Subject: FOIA-2016-0532

Good morning Dennis. I've now looked through the records you sent. Someone provided an "Exemption 7F Harm Statement" to accompany certain information (it was attached to an email from Garrett Newman to Paul Krohn that had a redaction of [redacted] as well as to several docs being recommended as withheld in their entirety. It says simply "Releases of the information could cause harm to a member of the public."

That really doesn't do it. The exemption itself says that "information compiled for law enforcement purposes" may be withheld if "disclosure could reasonably be expected to endanger the life or physical safety of any individual." That is just about what the "harm statement" provided says.

In the case of the partial redaction, I think what we are looking for in a "foreseeable harm statement" is a brief articulation how this distance from an old gas pipeline could be used by a wrongdoer to endanger folks.... Similarly, for the Entergy 10/15/2015 letter, I note that the letter itself Entergy is not saying is proprietary or contains security-related information; just the attachment 1. So, how does all of the content raise this same type of danger to persons near Indian Point? Might you ask whomever wrote this to try and amplify a bit? It's not obvious on its face to me. (I know in my own neighborhood, gas pipelines are marked, so anyone can know where they are....)

I also note that the 10/15/2015 letter refers to a CD, which was not provided. The CD is supposed to contain Enclosures 1 thru 4 to the Attachment. The names of these enclosures appear on the final page of the Attachment 1. The last record you provided is an email from Brandon Pinson to Doug Pickett that mentions a CD (perhaps the same one) and that the attachment to that email was on this CD – so it may be the first Enclosure referenced. But I couldn't find the others. And a Google search didn't show them to be publicly available. It's not clear to me whether these attachments are also being recommended for withholding or may be released (or are already publicly available).

Thanks.

Margo L. Stevens
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