



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

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July 12, 1979

OFFICE OF THE
SECRETARY

79-A-8 (79-47)

Mr. Michael Hungerford
Environmental Law Clinic
Syracuse University College of Law
Ernest I. White Hall
Syracuse, New York 13210

Dear Mr. Hungerford:

This letter responds to your appeal of a denial of one document under the Freedom of Information Act (FOIA). That document was withheld in its entirety from you under the "deliberative process" privilege embodied in Exemption 5. For reasons stated herein, the Commission has denied your appeal. Accordingly, the entire document will continue to be withheld under Exemption 5.

The memorandum that you seek is for Howard Shapar from James L. Kelley, dated January 10, 1975, and is entitled "The Legal Effect of Granting a Construction Permit for a Nuclear Reactor -- the Extent to Which the Utility is Bound by Representations in its Application and on the Hearing Record." It was written for Mr. Shapar, a principal Commission legal advisor, by Mr. Kelley, an attorney then assigned to his staff who subsequently served as the NRC Acting General Counsel and Deputy General Counsel. This memorandum, consisting of twenty-three pages including a three-page attachment, discusses in detail the comparative merit of three different legal theories under which a Commission licensee might be held bound for design features, quality assurance programs, and measures to protect the environment. In the memorandum text, Mr. Kelley assesses the strengths and weaknesses of the different theories, explores possible approaches to rule-making in this area consistent with statutory requirements, and considers the potential results on judicial review. The attachment consists of a review of some staff practices with an opinion of that practice and was prepared for Mr. Kelley's use in preparing the memorandum. It is an integral part of the memorandum text, providing material background information.

The memorandum is being withheld as a predecisional document which is part of the Commission's deliberations on this subject. This specific memorandum is part of the General Counsel's review of petitions concerning a particular aspect of the Baily nuclear reactor. No final decision has been made on that subject, which continues to be actively considered by the Commission. For these reasons, the Commission has determined that this memorandum should continue to be withheld under Exemption 5, at least until the Commission makes a determination on the course it should take in this area. 5 U.S.C. 552(b)(5), 10 CFR 9.5(a)(3)(i). Commissioner Bradford noted that he preferred to defer action on this appeal until after the Commission reaches a decision on the Baily case and would not vote to withhold the document at this time.

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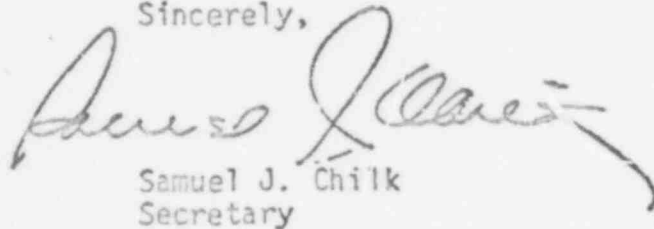
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Mr. Michael Hungerford

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This denial constitutes the final agency action on your appeal for this document. 10 CFR §§ 9.11, 9.15. Judicial review of this action is available in a United States District Court in the district where you reside or have your principal place of business, or in the District of Columbia.

Sincerely,



Samuel J. Chilk
Secretary

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