



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

50-320

April 14, 1979

MEMORANDUM FOR: Chairman Hendrie
Commissioner Gilinsky
Commissioner Kennedy
Commissioner Bradford
Commissioner Ahearne

FROM: *RB* Leonard Bickwit, Jr., General Counsel

SUBJECT: FREEDOM OF INFORMATION ACT REQUESTS FOR
DOCUMENTS CONCERNING THREE MILE ISLAND

The Commission has received a number of requests for documents relating to Three Mile Island under the Freedom of Information Act. Attached is a copy of an April 4, 1979 request from Tony Roisman asking for "all documents and communications of any kind" relating to Three Mile Island. The purpose of this memorandum is to outline the existing situation with respect to Three Mile Island FOIA requests and make tentative recommendations about how the Commission might respond to them.

Deadlines. Under our regulations (10 CFR Part 9, Subpart A) we normally have 10 working days in which to respond to an FOIA request. We understand that the Roisman request was the first comprehensive request and that it was received on April 5. This means that some response is due on April 19, 1979, 10 working days after date of receipt. The statute contemplates that extension of time to locate, assemble, and reproduce records may be granted in exceptional circumstances and that will undoubtedly be the case as to some documents covered by these TMI requests. However, the offices have ready at hand now a fairly substantial number of documents that are in the process of being assembled. Accordingly, the Commission should schedule its consideration of this matter in such a way as to reach policy decisions on at least some of these documents by the middle of the week.

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Materials Subject to the Request. The definition of "record" in our regulations (9.3a(b)) is derived from the statute and case law and is very broad. It is as follows:

(b) "Record" means any book, paper, map, photograph, brochure, punch card, magnetic tape, paper tape, sound recording, pamphlet, slide, motion picture, or other documentary material regardless of form or characteristics, made by, in the possession of, or under the control of the NRC pursuant to Federal law or in connection with the transaction of public business as evidence of NRC organization, functions, policies, decisions, procedures, operations, programs or other activities.

As a practical matter, this will include most of what is on paper or tape about the Three Mile Island incident. It would include, for example, drafts of press releases, legal advice, some notes of telephone conversations and the like.

Present Status of Responding to Requests. As an established practice, all FOIA requests are coordinated by Joe Felton's Rules and Records Division in the Office of Administration. As requests are received, they are distributed to cognizant staff and Commission offices, with a request that materials the offices have no objection to releasing be transmitted to Rules and Records. If a particular office believes (1) that a particular document is legally exempt from disclosure and (2) that an exemption should be claimed, it normally keeps those records in its files.

With respect to the Three Mile Island records, Joe Felton's office sent a request out yesterday that they be identified, assembled, and transmitted to him. As of today, no significant volume of records has been sent to him. However, he anticipates that a substantial volume of records should come to him shortly. Joe Felton is aware of the Commissioners' interest in this question. We have an understanding with him that he will not release any documents until there has been further consultation.

Examples of Three Mile Island Documents. We are not now in a position to give you even an approximate list of the kinds of documents that are covered by this request. However, or

the basis of discussions with staff, we know that the following documents exist:

1. Copies of interviews with the Met Ed operating people at TMI;
2. Logs of telephone calls at the incident response center and at Region I;
3. Chronologies of events.

In addition, a very lengthy tape recording exists from a machine that was running for several days at the incident response center. This tape has not yet been transcribed and obviously it would take some time to do that. However, we think the law obliges us to make a transcription as soon as we reasonably can in order to review it for possible exempt material.

Possible Bases for Withholding. It is difficult to discuss possible bases for withholding in the abstract. To do a proper review it is necessary to look at this material page-by-page and even line-by-line to determine whether it can legally be withheld. However, based on our limited present knowledge, we can indicate probable bases for withholding.

Exemption 4 -- Proprietary Information. This exemption provides for the protection of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Commercial or financial information is confidential "if the disclosure of the information is likely to have either of the following effects: (1) to impair the government's ability to obtain the necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

Exemption 5 -- Internal Advice and Recommendations. This exemption will certainly apply to some of the TMI material -- e.g. a note from a legal or technical assistant to a Commissioner urging some course of action. However, the plain language of this exemption -- "interagency or intra-agency memoranda or letters which would not be available by

law to a party other than an agency in litigation with an agency" -- is the least clear of the exemptions and, therefore, has been the subject of much judicial interpretation. Among the matters covered by exemption 5 are the attorney work-product privilege, the attorney-client privilege, and the executive privilege (which protects advice, recommendations, and opinions which are part of the deliberative, consultative, decision-making processes of government). "The basis of Exemption (5), as of the privilege which antedated it, is the free and uninhibited exchange and communication of opinions, ideas, and points of view -- a process essential to the wise functions of a big government as it is to any organized human effort." Acherly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969). There is a distinction between predecisional documents, which are protected, and postdecisional documents, which are not protected, NLRB v. Sears Roebuck & Co., 421 U.S. 132 (1975). In applying Exemption 5, the focus is on the content of the document and a critical distinction is whether the matter contained in the document is "factual" or "deliberative". See Montrose Chemical Corp. v. Train, 491 F.2d 63, 66 (D.C. Cir. 1974). Generally, factual material must be disclosed, and if contained in deliberative materials and easily severable, the factual matter must be segregated out for disclosure. EPA v. Mink, 410 U.S. 73 (1973). However, another determination must also be made -- whether disclosure of the factual portion would harm the deliberative process either by "compromising the private remainder of the document", EPA v. Mink, supra at 91, or by subjecting "the mental processes of decisionmakers . . . to public scrutiny." Montrose Chemical Corp., supra at 70.

Examples of the types of documents usually withholdable under this exemption are: preliminary drafts of memoranda, speeches, press releases, etc.; notes from assistants to Commissioners or notes between Commissioners recommending courses of action; and ELD and OGC memoranda to their respective clients.

Exemption 6 -- Invasions of Personal Privacy. This exemption applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Application of this exemption requires the balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to government information. S. Rept. No. 813, 89th Cong.,

1st Sess. (1965) at 9. This could be applicable to a few isolated instances where specific individuals may be criticized by name in documents. Where it is possible to delete personally identifying details, this should be done along with disclosure of the remainder.

Exemption 7 -- Investigative Records. This exemption sets up a threshold -- "investigatory records . . . compiled for law enforcement purposes" -- and an additional test requiring a relationship of such records to one of six specifically enumerated harms. The I&E investigation which is being conducted for the express purpose of gathering facts for determination of possible enforcement action should qualify for meeting the threshold. Moreover, it appears that production of I&E investigatory records would probably "interfere with enforcement proceedings," the first of the six additional tests mentioned by the statute. The Supreme Court in NLRB v. Robbins Tire & Rubber Company, ___ U.S. ___, 57 L.Ed. 159 (1978), upheld the withholding of pre-hearing witness statements taken for NLRB unfair labor practice proceedings on this ground.

Among the risks of "interference" identified by the Court were possible coercion of employees and others who provide statements, the possible reluctance to give a statement unless it will be withheld until completion of the enforcement proceeding, and the ability of a suspected violator with advance access to the agency's case to "construct defenses which would permit violations to go unremedied." While Robbins Tire is an NLRB case, its rationale appears applicable to an NRC enforcement proceeding. If the contents of witness statements were prematurely disclosed, an employee or union could attempt to induce a change in the statement, there could be an inclination to adhere to a "party line", and the direction of an enforcement effort could be disclosed. On the other hand, witnesses may be willing to talk frankly, even without an assurance of confidentiality, if they know that their statements will only be made public months later and not in the emotion-charged immediate aftermath of the event.

Portions of the NRC Special Inquiry could also be subject to withholding under this exemption if they begin to take on the stamp of a criminal inquiry or enforcement action.

TENTATIVE RECOMMENDATIONS

1. Uniform Commission Policy. Under the regulations, decisions to withhold or release staff papers are made by staff offices, subject to an appeal to the EDO. Commission office papers are reviewed by Commission offices, subject to appeal to the Commission itself. In the circumstances of this case we think there should be a uniform Commission policy on release of all TMI documents.

2. Procedure for Review. Because of the likely bulk of these documents, we do not think that the Commissioners themselves should seek to review them all, page by page. Rather, we think that the usual procedures specified in Part 9 of the regulations should be employed, or alternatively, that a specific office be given the job and directed to apply Commission guidance as uniformly as possible. Our tentative view favors employing usual Part 9 procedures with the caveat that if a particular office is inundated with other tasks, such as the Division of Operating Reactors, then that office's FOIA responsibilities should be shunted to a less burdened office.

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April 4, 1979

PLEASE REFER TO:
AZR/NRC/79/2

FREEDOM OF INFORMATION
ACT REQUEST

Freedom of Information Officer
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

FOIA-79-98
Rec'd 4-5-79

Dear Sir or Madam:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, please supply me with all documents and communications of any kind received by or in the possession of the Nuclear Regulatory Commission relating to the Three Mile Island Unit 2. Please include all letters, memoranda, reports, and summaries or minutes of meetings concerning this subject from March 27, 1979, to the date of response to this request. We need this information as soon as possible, and no extensions of time can be allowed.

Thank you for your attention to this request.

Sincerely,


Anthony Z. Roisman

Sent By Hand To:

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Enclosure 1