



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001
July 8, 2013

FOIA/PA-2013-00018A
FOIA/PA-2013-00239

Kathryn Douglass
Public Employees for Environmental Responsibility
2000 P Street, NW
Washington, DC 20036

Dear Requester:

We have logged your **July 5, 2013** correspondence as an appeal for **Denial of Information** to you under **FOIA/PA-2013-00239**.

Your appeal has been assigned the following reference number that you should use in any future communications with us about your appeal: **FOIA/PA-2013-00018A**.

The following person is the FOIA/PA Specialist who has been assigned responsibility for your appeal: **Linda Kilgore at 301-415-5775**.

If you have questions on any matters concerning your FOIA/PA appeal, please feel free to contact the FOIA/PA Specialist assigned to your appeal or me. I can be reached at 301-415-7169.

Sincerely,

/S/

Donna L. Sealing
FOIA/Privacy Act Officer
Office of Information Services

Enclosure:
Incoming Request



Public Employees for Environmental Responsibility

2000 P Street, NW • Suite 240 • Washington, D.C. 20036 • 202-265-PEER(7337) • fax: 202-265-4192
e-mail: info@peer.org • website: www.peer.org

FOIA REQUEST

Case No.: 2013-0018A
Date Rec'd: 7/8/13
Specialist: Kilgore
Related Case: 2013-00239

July 5, 2013

Ms. Donna L. Sealing
FOIA/Privacy Act Officer
Office of Information Services
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

CC: Mr. Bill Borchardt, Executive Director for Operations
Ms. Linda Kilgore, FOIA/Privacy Act Specialist

RE: Appeal From Initial Decision; FOIA/PA-2013-00239

Dear Ms. Sealing:

Public Employees for Environmental Responsibility (PEER) hereby appeals the U.S. Nuclear Regulatory Commission's (NRC) June 10, 2013 response to PEER's Freedom of Information Act (FOIA) request submitted on May 7, 2013 and assigned reference number FOIA/PA-2013-00239 (see attachment A).

PEER's FOIA request seeks records relating to the risk of inundation from dam failure to operating commercial nuclear reactors. Specifically, we requested the following eleven records:

- ML101900305, Identification of a Generic External Flooding Issue Due to Potential Dam Failures (Agency Response "Accession No. ML 13039A086");
- ML100780084, Generic Failure Rate Evaluation for Jocassee Dam Risk Analysis (Agency Response "Accession No. ML13039A084");
- ML091170104, Oconee Nuclear Station, Units 1, 2 And 3 - Non-concurrence on Evaluation of Duke Energy Carolinas, LLC September 26, 2008, Response to Nuclear Regulatory Commission Letter Dated August 15, 2008 Related to External Flooding (Agency Response "Accession No. ML13106A168");
- ML101610083, Oconee Nuclear Station, Units 1, 2, and 3, - External Flood Commitments (Agency Response "Accession No. ML101610083");



- ML081640244, Information Request Pursuant to 10 CFR 50.54(F) Related to External Flooding, Including Failure of the Jocassee Dam at Oconee Nuclear Station, Units 1, 2, and 3 (TAC Nos. MD8224, MD8225, and MD8226) (Agency Response "Accession no. ML12363A132");
- ML081750106, Oconee, Units 1, 2 and 3 - Response to 10 CFR 50.54(f) Request¹ (Agency Response "Accession No. ML12363A129");
- ML090570779, Oconee Nuclear Station Units 1, 2, and 3, Evaluation of Duke Energy Carolinas September 26, 2008, Response to External Flooding, Including Failure of the Jocassee Dam (Agency Response "Accession No. ML12363A133");
- ML111460063, Oconee Nuclear Site, Units 1, 2, and 3. Response to Confirmatory Action Letter (CAL) 2-10-003, dated April 29, 2011 (Agency Response "Accession No. ML13099A247");
- ML110740482, Analysis Report for the Proposed Generic Issue on Flooding of Nuclear Power Plant Sites Following Upstream Dam Failures;
- The 19- page letter from NRC employee Lawrence Criscione to the NRC Chairman dated September 18, 2012; and
- The email dated September 18, 2012 from Lawrence Criscione to the NRC Chairman.

NRC acknowledged receipt of PEER's FOIA request ("request") in a letter dated May 7, 2013 (see attachment B). NRC's partial response ("response"), dated June 10, 2013, includes one complete record, seven partial records, and a statement that three records "will be addressed in a later response" (see attachment C).

PEER hereby appeals the withholding of responsive material for the following reasons:

1. NRC fails to provide adequate justification for withholding the material or a *Vaughn* index of the withheld records (or withheld portions)²;
2. NRC fails to satisfy the basic Exemption 7 thresholds;
3. NRC fails to satisfy the specific Exemption 7(F) threshold;
4. NRC fails to explain how a portion of a record could be "outside of scope" of PEER's request;
5. NRC fails to abide by statutory time limits;
6. NRC's previously disclosed records cannot be withheld; and
7. NRC fails to address segregability.

¹ Original request listed "ML081750106." Upon review, PEER noticed a possible typo. The original request likely should have read "ML0821750106." However, PEER believes that the correct document was provided in the response.

² References to "withheld records" are to mean any record withheld in full or in part.

1. NRC fails to inform the requester of the reason(s) for denial, justify its withholding, and provide itemized descriptions or a *Vaughn* index of the withheld records.³

As a fundamental matter, NRC withholds many pages of records without providing any context, explanation or description of the withheld information. NRC has simply failed to meet its heavy burden to justify redacting the information. A decision to deny a request must inform the requester of the reasons for denial. See 5 U.S.C. § 552(a)(6)(A)(i) (requiring agencies to “immediately notify the [requester] of such determination *and the reasons therefor*”). NRC’s response is a boilerplate form that merely quotes the statutory language. Parroting the statutory language is not a justifiable “reason” for withholding records as it does not demonstrate how the records are properly exempt under FOIA.

Additionally, PEER’s request clearly states:

For any documents or portions of documents that you block release due to specific exemption(s) from the requirements of the [FOIA], please provide an index itemizing and describing the documents or portions of documents withheld. The index should, pursuant to the holding of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) cert. denied, 415 U.S. 977 [1974]), provide a detailed justification for claiming a particular exemption that explains why each such exemption applies to the document or portion of a document withheld.

Despite PEER’s written request for descriptions of the withheld information and the statutory requirement to provide “reasons” for withholding information, NRC makes no attempt to provide PEER with such information.

2. NRC fails to satisfy basic Exemption 7 threshold requirements because NRC’s response fails to indicate its “law enforcement purpose” and fails to identify a “law enforcement purpose” for which the records were “compiled.”⁴

³ Section 1 applies to all withheld records (or portions)

⁴ Section 2 applies to all records withheld pursuant to Exemption 7(F)

- ML101900305, Identification of a Generic External Flooding Issue Due to Potential Dam Failures (Agency Response “Accession No. ML 13039A086”);
- ML100780084, Generic Failure Rate Evaluation for Jocassee Dam Risk Analysis (Agency Response “Accession No. ML13039A084”);
- ML091170104, Oconee Nuclear Station, Units 1, 2 and 3 - Non-concurrence on Evaluation of Duke Energy Carolinas, LLC September 26, 2008, Response to Nuclear Regulatory Commission Letter Dated August 15, 2008 Related to External Flooding (Agency Response “Accession No. ML13106A168”);
- ML081640244, Information Request Pursuant to 10 CFR 50.54(F) Related to External Flooding, Including Failure of the Jocassee Dam at Oconee Nuclear Station, Units 1, 2, and 3 (TAC Nos. MD8224, MD8225, and MD8226) (Agency Response “Accession no. ML12363A132”);
- ML081750106, Oconee, Units 1, 2 and 3 - Response to 10 CFR 50.54(f) Request (Agency Response “Accession No. ML12363A129”);
- ML090570779, Oconee Nuclear Station Units 1, 2, and 3, Evaluation of Duke Energy Carolinas September 26, 2008, Response to External Flooding, Including Failure of the Jocassee Dam (Agency Response “Accession No. ML12363A133”); and

Pursuant to 5 U.S.C. § 552(b)(7) ("Exemption 7"), NRC withholds portions of seven requested records. Exemption 7 allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records" fit within one of Exemption 7's six subparts. 5 U.S.C. § 552(b)(7)(A)-(F). Accordingly, as a preliminary matter, NRC "must meet the threshold requirements of Exemption 7 before withholding requested documents on the basis of any of its subparts." *Pratt v. Webster*, 673 F.2d 408, 416 (D.C. Cir. 1982). The Exemption 7 threshold requirements involve two steps.

First, an agency claiming Exemption 7 must demonstrate that the agency serves a "law enforcement purpose." See *Schoenman v. FBI*, 575 F. Supp. 2d 136, 163 (D.D.C. 2008) (finding that agency "failed to establish" its law enforcement purpose and consequently failed to meet the Exemption 7 threshold requirement). Cf. *Pratt*, 673 F.2d at 414 (stating that "law enforcement purpose" not only describes the type of agency, but also functions as a condition on the use of the exemption) (internal quotes omitted).

NRC's response fails to meet this threshold because the response makes no mention of the agency's "law enforcement purpose" let alone demonstrates that it has one. Even if NRC could demonstrate a legitimate law enforcement purpose under Exemption 7(F), it would still be subject to a more rigorous standard when evaluating this threshold requirement. *Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C. Cir. 2002). While an agency whose primary function is law enforcement must establish only a "rational nexus" between the records it seeks to withhold and "its authority to enforce a statute or regulation," *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178, 186 (3d Cir. 2007), an agency with mixed functions is subject to a more "exacting standard" in showing the connection between the withheld documents and its law enforcement functions. *Tax Analysts*, 294 F.3d at 77. Such an agency "must demonstrate that it had a purpose falling within its sphere of enforcement authority in compiling the particular document." *Church of Scientology v. Department of the Army*, 611 F.2d 738, 748 (9th Cir. 1980). NRC has not demonstrated the fundamental requirement of Exemption 7 that it have a "law enforcement purpose," and therefore fails to meet its burden to justify redacting the information. It thus also cannot meet the heightened level of scrutiny applicable to mixed function agencies.

Second, an agency claiming Exemption 7 must show that the records at issue were *compiled to enforce* a statute or regulation within its law enforcement purpose. See *Birch v. USPS*, 803 F.2d 1206, 1210-11 (D.C. Cir. 1986) (explaining that threshold is met where the agency demonstrates that records were *compiled* pursuant to the *enforcement* of laws within the statutory authority of the agency) (emphasis added). NRC fails to satisfy this threshold requirement because it withholds information without any accompanying explanation as to how or why the information was *compiled to enforce* a statute or regulation within its law enforcement purpose. See *Antonelli v. ATF*, 555 F. Supp. 2d 16, 24 (D.D.C. 2008) (ruling in favor of plaintiff-requester where agency attempted to withhold information under Exemption 7 but failed to demonstrate that records were "*compiled for law enforcement purpose*"); *United Am. Fin. v. Potter*, 531 F. Supp. 2d 29, 46 (D.D.C. 2008) (finding that, as threshold matter, agency must explain that records were *compiled for law enforcement purposes*). Indeed, since

- ML111460063, Oconee Nuclear Site, Units 1, 2, and 3. Response to Confirmatory Action Letter (CAL) 2-10-003, dated April 29, 2011 (Agency Response "Accession No. ML13099A247").

NRC did not show that it had a law enforcement function, it would be hard to demonstrate that the sought records were specifically compiled for a law enforcement purpose.

Some of the sought records are from NRC's research department, which, by its nature is not an enforcement body and thus any records from it cannot be compiled for law enforcement purposes. Other records appear to be Office of Nuclear Reactor Regulation ("NRR") records, not the Office of Investigations or Office of Inspector General (the NRC arms with plausible law enforcement functions). It is doubtful that the records at issue here were compiled for a specific law enforcement purpose since NRR has not been shown to have a law enforcement purpose to which the records specifically relate. Moreover, the theoretical threat posed to reactors by natural disasters or structural failures outside of NRC jurisdiction are beyond the scope of any law enforcement proceeding.

In sum, to properly assert Exemption 7, NRC must provide a specific explanation as to the agency's law enforcement purpose and the specific law enforcement action for which the records were compiled. *See Miller v. DOJ*, 562 F. Supp. 2d 82, 118 (D.D.C. 2008) (finding Exemption 7 threshold cannot be satisfied when agency neither explains the "manner and circumstances" under which the records were compiled nor links the records to a law enforcement purpose). For its failure to meet, or even address, any of the Exemption 7 threshold requirements, NRC fails to justify withholding under Exemption 7 and all of its subparts.

3. NRC fails to satisfy the specific thresholds of Exemption 7(F) because it never shows that disclosure "could reasonably be expected to endanger the life or physical safety of any individual."⁵

If it satisfies the Exemption 7 threshold requirements, an agency asserting subpart (F) then must demonstrate that disclosure of the records "could reasonably be expected to endanger life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). Neither NRC's response nor the records it produced even suggest that disclosure of the withheld records "could reasonably be expected to endanger the life or physical safety of any individual." *Id.*

For decades, agencies have been relying on the phrase "could reasonably be expected to endanger life or physical safety of any individual" to prevent disclosure of records containing information such as the names and identifying information of witnesses, informants, government agents, non-law enforcement federal employees, local law enforcement personnel, and other third persons in connection with particular law enforcement matters. It is difficult to imagine how the records NRC withholds are similar to these examples. Even the NRC website acknowledges that 7(F) does not protect the types of records PEER requests. The website reads as follows:

Exemption 7(F): Disclosure could reasonably be expected to endanger life or physical security of any individual

- Exemption has rarely been used by NRC
- 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*

⁵ *Id.* Section 3 applies to the same withheld records (or portions) listed in footnote 4.

*of individuals) from possible harm by a requester who has threatened harm in the past*⁶ (emphasis added)

NRC's response fails to connect the withheld records with any "reasonably [] expected" danger to the "life or physical safety of any individual." 5 U.S.C. 552(b)(7)(F). NRC "does not need to identify [an endangered] individual by name," but the agency cannot simply "identify an individual only as being a member of a vast population." *American Civil Liberties Union v. Dep't of Defense*, 453 F.2d 59, 80 (2d Cir. 2008). NRC even fails to make a conclusory statement asserting that disclosure is reasonably expected endangered individuals. Indeed, PEER guesses that NRC's withholding appears to be based on speculative, abstract and unsubstantiated fears that disclosing the information will somehow aid in terrorist wrongdoing. This does not suffice to justify withholding the information. Furthermore, failing to publicly acknowledge the risks of dam failure and reactor flood inundation risks due to *natural hazards* puts individuals more at risk of harm. Because the issue has not been publically acknowledged, it is not getting the adequate level of attention to remedy the problems that may arise, putting the public more at risk.

4. NRC wrongfully withholds records as "outside of [the] scope" of PEER's request.⁷

NRC withholds portions of two records claiming that the redacted information is "outside of [the] scope" of PEER's request. Given the language in PEER's request, it is impossible for a record (or portion of a record) to be "outside of [the] scope." PEER's request seeks production of specific records in their entirety (see attachment A). PEER's request provides the "accession number" and title or brief description of each record. It is impossible for a portion of a document or record to "outside of [the] scope" of an entire record.

5. NRC fails to meet its statutory time limit.⁸

NRC's response fails to address three of the eleven records requested more than two months ago on May 7, 2013. NRC fails to meet the twenty-business day response time that FOIA imposes on agencies. FOIA states that agencies "shall make records promptly available" upon request. 5 U.S.C. § 552(a)(3)(A). Under FOIA's administrative appeal provision, a requester may administratively appeal an agency's adverse determination (including agency's

⁶ <http://www.nrc.gov/reading-rm/foia/foia-request.html#appeals>

⁷ Section 4 applies to the following records with redactions claimed to be "outside of scope"

- ML081640244, Information Request Pursuant to 10 CFR 50.54(F) Related to External Flooding, Including Failure of the Jocassee Dam at Oconee Nuclear Station, Units 1, 2, and 3 (TAC Nos. MD8224, MD8225, and MD8226) (Agency Response "Accession no. ML12363A132") (Outside of Scope redaction of page 3); and
- ML090570779, Oconee Nuclear Station Units 1, 2, and 3, Evaluation of Duke Energy Carolinas September 26, 2008, Response to External Flooding, Including Failure of the Jocassee Dam (Agency Response "Accession No. ML12363A133") (Outside of Scope, redaction of page 5).

⁸ Section 5 applies to the three records to which NRC has yet to address:

- ML110740482, Analysis Report for the Proposed Generic Issue on Flooding of Nuclear Power Plant Sites Following Upstream Dam Failures;
- The 19- page letter from NRC employee Lawrence Criscione to the NRC Chairman dated September 18, 2012; and
- The email dated September 18, 2012 from Lawrence Criscione to the NRC Chairman.

failure to address requested records). 5 U.S.C. § 552(a)(2). PEER appeals NRC's constructive denial of these records.

6. NRC wrongfully withholds records previously made public.⁹

Under FOIA, release to one is release to all. *NARA v. Favish*, 541 U.S. 157,174 (2004) (explaining that "once there is disclosure, the information belongs to the general public"). Since filing its request, PEER learned that the NRC fully released record "ML101900305" (Agency Response "Accession No. ML 13039A086") in response to a previous FOIA request to another organization.

Compare record "ML101900305, Identification of a Generic External Flooding Issue Due to Potential Dam Failures" (Agency Response "Accession No. ML 13039A086") with "ML13066A429, Email from F. Ferrante, NRR to J. Mitman, NRR on NRR Submittal to GIP - External Flooding Issue (Dam Failures)." Record ML13066A429, the latter, was released to Greenpeace's Jim Riccio on February 6, 2013 in response to FOIA 2012-0325 and remains available on NRC's public website. PEER requests record ML101900305 (Agency Response "Accession No. ML 13039A086"), but NRC provides PEER with a redacted version. Although the documents appear slightly different, ML13066A429 is an unredacted version of ML101900305 (Agency Response "Accession No. ML 13039A086"), the memorandum PEER requests but that NRC fails to produce in full.¹⁰ This record should be fully produced.

7. NRC fails to address segregability.¹¹

NRC's response fails to make any mention of segregability. FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt." 5 U.S.C. § 552(b) (sentence immediately following exemptions). "The segregability requirement applies to all . . . documents and all" FOIA Exemptions. *Judicial Watch, Inc. V. DOJ*, 432 F.3d 366, 371 (D.C. Cir. 2005). When responding to FOIA requests, agencies are to determine and explain to the requester whether "any intelligible portion of the contested" redactions can be "segregated for release." *Mays v. DEA*, 234 F.3d 1324, 1328 (D.C. Cir. 2000). Agencies are required to address segregability "with reasonable specificity" and cannot make assumptions as to the value of withheld information to the requester, no matter how seemingly insignificant the redacted portions may be in the eyes of the agency. *Stolt-Nielsen Transp. Group Ltd. V. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008). Furthermore, an agency cannot rely on conclusory assertions to satisfy the segregability requirement. The agency must demonstrate that all reasonably segregable, nonexempt information is properly disclosed. *United Am. Fin., Inc. v. Potter*, 531 F. Supp. 2d

⁹ Section 6 applies to record ML101900305, Identification of a Generic External Flooding Issue Due to Potential Dam Failures (Agency Response "Accession No. ML 13039A086").

¹⁰ The only differences are:

1. the first page (i.e. the email from Ferrante to Mitman);
2. the missing July 19, 2010 date at the top of the second page; and
3. the fact that every page is offset by about five lines due to the added date to the final version.

From an information standpoint, all the information redacted from ML13039A036 to PEER was provided to Greenpeace in ML13066A429.

¹¹ Section 7 applies to all withheld records.

29, 41 (D.D.C. 2008). Without any explanation or discussion of segregability, the responsive records appear to contain arbitrarily deleted swaths of information.

Missing Attachment

NRC produced 33 pages of record ML081750106, Oconee, Units 1, 2 and 3 - Response to 10 CFR 50.54(f) Request (Agency Response "Accession No. ML12363A129"). Record ML081750106 should contain four attachments (see attachment D at page 1: "Attachment 4 is a listing of regulatory commitments."), but NRC's production includes only three of the attachments. The final page of the record is a cover sheet for "attachment 4." It is not clear from the production whether attachment 4 was provided, and just did not contain any more information than is there, or whether it was omitted from the production. If it was omitted, NRC fails to cite a FOIA exemption for the missing attachment. NRC appears to be withholding a requested record without justification. NRC is required to clearly mark all redacted portions (all partially disclosed records) so that the claimed exemption, amount of information, and location of information is readily apparent to the requester. 5 U.S.C. § 552(b) (paragraph immediately following exemptions).

If NRC mistakenly omitted "attachment 4" from production, PEER requests that NRC produce the missing pages at this time. If NRC is withholding "attachment 4" pursuant to FOIA Exemption 7(F), PEER appeals the withholding.

Fee Waiver

Finally, PEER appeals NRC's assessment of our fee waiver request as "non-excepted" and appeals the assertions that "although your justification for fee waiver is not adequate, it is unlikely that you will incur any fees" and "your request for a fee waiver is moot." (see attachment C). NRC failed to explain how PEER's fee waiver was not adequate. PEER believes that its justification is adequate and fee waiver should be granted.

The request explains that PEER, a 501(c)(3) non-profit and tax exempt organization, meets the statutory requirements for a fee waiver. The request dedicates three pages of text to address all eight fee waiver factors listed in 10 CFR 9.41. The request clearly demonstrates that disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not in the commercial interest of the requester. (see attachment A).

Conclusion

In his January 21, 2009 memo, President Barack Obama declared the following policy for the Executive Branch:

"The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.

Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve... All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA."

NRC's claim that the records PEER requests are exempt from full disclosure falls short of meeting the requirements for any FOIA exemption, including 5 U.S.C. § 552 (b)(7). Consequently, PEER maintains that NRC fails to adequately or properly respond to its FOIA request and is in violation of the Freedom of Information Act for wrongfully withholding properly requested records.

Thank you for the consideration of this appeal.

Sincerely,



Kathryn Douglass
Staff Counsel

Enclosed Attachments:

- A. PEER's Original Request
- B. NRC's Acknowledgement Letter
- C. NRC's Response
- D. NRC's Production of Requested Record ML081750106