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Samuel J. Chilk  
Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
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APPEAL OF INITIAL FOIA DECISION  
81-A-6C (81-84)  
Rec'd 4-24-81

Re: Appeal from an Initial FOIA Decision; FOIA-81-84

Dear Mr. Chilk:

Your letter of March 24, 1981 to Christopher Hanback, Esq. of this office denied our Freedom of Information Act ("FOIA") request of March 4, 1981 (copy attached). This is an appeal to that denial, pursuant to subsection (a)(6) of the FOIA (5 U.S.C. 552) and 10 C.F.R. §9.11. As your letter of March 24, 1981 requests, we are directing this letter to you.

Our FOIA request of March 4, 1981 sought copies of all records, data memoranda, document drafts, notes, reports, correspondence, analyses, and other written materials in the Nuclear Regulatory Commission's ("NRC") possession or control which relates to the February 20, 1981 NRC Order in the Diablo Canyon security plan proceeding (Docket Nos. 50-275 O.L. and 50-323 O.L.).

Your denial letter provided us with only one document, a February 20, 1981 memo, already on the public record, from you to Leonard Bickwit, Jr., General Counsel of the NRC. Your letter denies us access to any part of all other documents that are responsive to our FOIA request -- a total of seventeen (17) documents identified in the index of responsive documents which you attached to your response ("withheld documents"). The NRC bases this denial of our FOIA request on the exemption

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in section (b)(5) of the FOIA [5. U.S.C. §552 (b)(5) and 10 C.F.R. §9.5(a)(5)] which permits an agency to withhold internal memoranda that contain information which reflects a predecisional, deliberative process.

We base our appeal on four grounds: (1) The NRC's index of withheld documents does not identify and describe the withheld documents with sufficient particularity or explain the legal justification for the withholding; (2) the NRC has failed to segregate and release the non-exempt, factual portions of the withheld documents; (3) the NRC has failed to meet its burden of explaining and justifying the application of the (b)(5) exemption to each of the withheld documents, and some of the withheld documents may record or explain the decision that the NRC reached in connection with its February 20, 1981 Order and therefore cannot be protected by the exemption in 5 U.S.C. §552(b)(5); and (4) the controversial and legally suspect nature of the February 20, 1981 Order and the suspect legality of one withheld document, in particular, (NRC Index No. 3) makes it imperative, if the public interest is to be served, that the NRC exercise its discretionary authority to make the requested documents available.

#### The Index is Insufficient

Our FOIA request asked the NRC to provide us with a complete and comprehensive index of withheld documents or portions thereof in the event that the NRC denied us access to any part of the requested material.

In the event that you deny us access to any part of the requested materials, please identify and describe the withheld or deleted material in detail, specify the statutory basis for the denial, and state your reasons for asserting an exemption. We request that your description of the deleted or withheld material include (1) the title of the material, (2) a description of its essence, (3) the identity of its author, and (4) the identities of any persons who have received copies or have had access to such materials. (March 4, 1981 FOIA request letter, p. 3)

In Vaughn v. Rosen, 484 F.2d 820, 826-826 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), the Court ordered the Civil

Service Commission to provide an FOIA requestor with a detailed justification of the Commission's claim that certain of its internal management reports were exempt under the FOIA. The opinion required the Commission to itemize the documents, or portions thereof, which the Commission sought to withhold and to correlate the legal justification for each claimed exemption with the actual records or portions of the records to which the claim applied.

The D.C. Court of Appeals has emphasized that the "Vaughn indexing requirement not only obligates agencies to identify withheld records carefully, but also to justify thoroughly and specifically each withholding." In Pacific Architects & Eng'rs, Inc. v. Renegotiation Board, 505 F.2d 383 (D.C. Cir. 1974) the Court of Appeals for the D.C. Circuit said:

"[T]he Vaughn and Cuneo decisions mandate more than mere indexing of allegedly exempt documents. They contemplate a procedure whereby the agency resisting disclosure must present a 'detailed justification' ... for application of the exemption to the specific documents in dispute."

505 F.2d at 385 (citations omitted).

The District of Columbia Court of Appeals has also held that the Vaughn Index requirement not only applies to judicial appeals, but is "equally applicable to proceedings within the agency" (Mead Data Central, Inc. v. United States Department of Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977)).

Despite the terms of our initial request and the clear requirements imposed by the courts, the index attached to your response of March 24, 1981 is vague and incomplete. The index does not describe the essence or content of even one of the withheld documents or provide a "detailed justification" for withholding each document.

Without a useful or legally adequate index, it is impossible for us to evaluate the applicability of the NRC's claimed exemption to the withheld documents. Thus, assuming that the NRC continues to assert that some parts of some of the responsive documents are exempt, we request that we be provided with a legally adequate and practicably useful index. In the event that we file a lawsuit in this matter, the NRC will be required certainly to file such an index.

The NRC Has Failed to Segregate and Release Non-Exempt  
Parts of Withheld Documents

We see no evidence that the NRC has segregated those portions of the documents allegedly containing exempt information. Section 552(b) of the FOIA requires agencies, where possible, to segregate exempt portions of the documents so as to make the non-exempt portions available.

"Any reasonably segregable portions of a record shall be provided to any person requesting such record after deletion of the portions which are exempt."  
[5 U.S.C. §552(b)].

The Exemption Claim

The exemption in 5 U.S.C. §552(b)(5) permits an agency to withhold material that contains information which reflects a pre-decisional, deliberative process. In order to invoke the (b)(5) exemption an agency must show that: (1) the withholding only covers records or parts of records which contain information that reflects a pre-decisional, deliberative process; (2) the records would not be available to a party in litigation with the agency; and (3) the withholding is necessary to protect a valid agency interest such as fostering creative debate and discussion, or avoiding publication of misleading or unadopted theories, or protecting the integrity of defendants' decision-making process. Tax Reform Research Group v. Internal Revenue Service, 419 F.Supp. 415, 422 (D.D.C. 1976); National Labor Relations Board v. Sears Roebuck & Co., 421 U.S. 132, 148-153, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975); Renegotiation Board v. Grumman Aircraft Engineering Corporation, 421 U.S. 168 185-190, 95 S.Ct. 1941, 44 L.Ed.2d 57 (1975); Sterling Drug Inc. v. Federal Trade Commission, 450 F.2d 698, 704-708 (D.C. Cir. 1971).

Without an adequate index we are handicapped in evaluating whether all parts of all of the documents that are responsive to our request can be sheltered by this exemption. However, the NRC has not met its burden of specifying, explaining and justifying the application of this exemption to each withheld document. Furthermore, we remind the NRC that the (b)(5) exemption is not available to protect final legal opinions, or documents that record or explain an agency's final decision

[NLRB v. Sears Roebuck and Co., 421 U.S. 132 (1975)]. Accordingly, we emphasize the necessity of your making available SECY-81-76, which is the paper submitted to the Commission for decision and the type of document normally released by the Commission in conjunction with each of its decisions.

The Withheld Documents Should Be Released In the Public Interest

Even if the NRC concludes that some portions of some of the withheld documents are, in fact, exempt from disclosure the NRC should exercise its discretionary authority to release those documents. Our interest in the withheld documents does not stem from mere idle curiosity. The Commission's controversial and highly irregular decision of February 20, 1981, to which all of the withheld documents pertain, has had a material adverse impact upon two members of this firm.

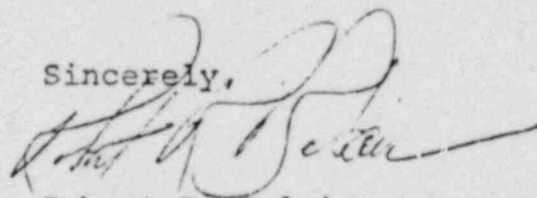
Moreover, we direct your attention to the NRC document entitled "Memo from Richard Salzman to James Fitzgerald re Protected Information, dated 2/13/81 (NRC Index No.3). On its face, this document appears to be in violation of the separation of functions requirements of the NRC and the Commission's ex parte rules. In order to set the record straight on this matter, we request that this document be made available in the public interest.

In addition, all of the other documents, given that the subject of the Commission's February 20 Order was purely of a personal nature, should be promptly made available. There can be no countervailing reason to deny the affected persons access to clearly relevant information that has no bearing on the general decision making or procedures of the Commission.

We look forward to receiving your answer to this appeal within 20 working days. In the event that any information covered by our request continues to be denied, we also expect to receive a revised index of the kind described in this appeal.

We request that the NRC's response be as detailed as possible in order to better enable us to evaluate the need for further legal action.

Sincerely,



Robert R. Belair  
Christopher B. Hanback



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

March 24, 1981

OFFICE OF THE  
SECRETARY

Christopher B. Hanback, Esq.  
Hill, Christopher and Phillips, P.C.  
1900 M Street, N.W.  
Washington, D.C. 20036

In Response Refer to  
FOIA-81-84

Dear Mr. Hanback:

This is in response to your letter dated March 4, 1981, in which you requested, pursuant to the Freedom of Information Act, all documents relating to the Commission's February 20, 1981 Order in the Diablo Canyon physical security proceeding. I am pleased to provide you with the enclosed February 20, 1981 Memorandum that I wrote to Leonard Bickwit, Jr., the Commission's General Counsel. That document is already in the Commission's public document room.

The remaining documents pertaining to this matter which are listed in the enclosed Appendix consist of pre-decisional advice, opinions and recommendations, and draft orders. This information is being withheld from public disclosure pursuant to Exemption (5) of the Freedom of Information Act and 10 CFR 9.5(a)(5). Pursuant to the Commission's regulations, it has been determined that the information withheld is exempt from production or disclosure and that its production or disclosure is contrary to the public interest. The person responsible for the denial of documents 1 and 2 is Leonard Bickwit, Jr., General Counsel. Richard Salzman, Chairman of the Atomic Safety and Licensing Appeal Board that is hearing the Diablo Canyon case, has denied document 3. I have denied the remainder of the documents. The denying officials recognize the basis for your interest in the document. However, we believe that your need for the documents is outweighed by the need for candid and complete deliberations among the Commissioners, between them and their respective staffs and their principal advisors -- deliberations which would be impeded if subject to full disclosure.

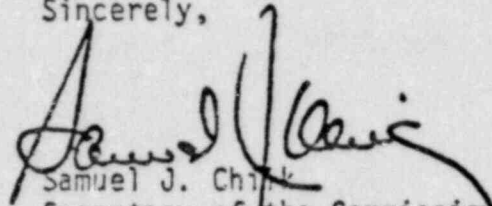
I wish to advise you that there is no correspondence between the NRC staff and Pacific Gas and Electric Company regarding the Appeal Board's December 30 Memorandum and Order and no documents relating to whether the NRC staff would appeal that Order.

With respect to the documents being denied, distribution within the NRC was quite limited. One copy of each was provided to each Commissioner, the General Counsel, and to me. No other office received copies of these documents either prior to or following issuance of the Commission's decision.

*Encl of 8104020552 (3pp)*

To the extent your request has been denied, you may appeal to the Commission within 30 days from the receipt of this letter. Any such appeal must be in writing, addressed to me, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, and should state on the envelope and in the letter that it is an "Appeal From an Initial FOIA Decision."

Sincerely,



Samuel J. Chalk  
Secretary of the Commission

Enclosure:  
As stated

Appendix

1. SECY-81-76, "Review of an Appeal Board Decision Involving Attorney Conduct in Physical Security Proceedings," from Leonard Bickwit, Jr. to the Commission, dated 1/28/81
2. Memo fm Bickwit to Comm. re SECY-81-76, dated 2/12/81
3. Memo fm Richard Salzman to James Fitzgerald re protected information, dated 2/13/81
4. An undated handwritten memo to Commissioner Bradford from Bill Clements
5. Commissioner Bradford's response sheet re: SECY-81-76, dated 1/30/81
6. Handwritten note to Commissioner Bradford from Bill Clements re SECY-81-76, dated 2/12/81
7. Memo to the Commissioners from Bill Clements re SECY-81-76, circulating Comm. Bradford's dissenting views, dated 2/19/81
8. Handwritten note to Commissioner Bradford from Bill Clements re SECY-81-76, dated 2/20/81
9. An undated document containing Comm. Bradford's handwritten modifications to his separate views in SECY-81-76
10. Commissioner Hendrie's note and Donald Hassell's note on L. Bickwit memo of 2/12/81
11. Memo from Donald Hassell to Commissioner Hendrie re SECY-81-76, dated 2/2/81
12. Commissioner Hendrie's Response Sheet for SECY-81-76, dated 2/2/81
13. Commissioner Ahearne's vote on SECY-81-76, dated 2/4/81
14. Commissioner Ahearne's vote on SECY-81-76, dated 2/12/81
15. Commissioner Ahearne's vote on SECY-81-76, dated 2/19/81
16. Memo fm Vicki Harding to John Ahearne re SECY-81-76, dated 1/30/81
17. Commissioner Gilinsky's response sheet on SECY-81-76, dated 2/4/81



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

February 20, 1981

OFFICE OF THE  
SECRETARY

MEMORANDUM FOR: Leonard Bickwit, Jr., General Counsel  
FROM: Samuel J. Chilk, Secretary  
SUBJECT: STAFF REQUIREMENTS - AFFIRMATION SESSION 81-7, 3:15 P.M., FRIDAY,  
FEBRUARY 20, 1981, COMMISSIONERS' CONFERENCE ROOM, D. C. OFFICE  
(OPEN TO PUBLIC ATTENDANCE)

I. SECY-81-76 - Review of an Appeal Board Decision - Diablo Canyon Nuclear Power  
Plants 1 & 2 (ADJUDICATORY ISSUE--Affirmation)

The Commission by a vote of 2-1\*, (Commissioner Bradford dissenting) approved an Order affirming the Appeal Board decision with respect to the conduct of attorneys in this proceeding. Commissioner Bradford's dissenting views are attached to the Order. (OGC)

(Subsequently, the Secretary signed the Order.)

cc:  
Chairman Ahlne  
Commissioner Gilinsky  
Commissioner Hendrie  
Commissioner Bradford  
Commission Staff Offices  
Public Document Room

\*Commissioner Gilinsky recused himself from this aspect of the case.

Dupe of 81-76-747