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

April 14, 1983

The Honorable Morris K. Udall, Chairman
Subcommittee on Energy and the Environment
Committee on Interior and Insular Affairs
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Your letter of December 7, 1982 expressed concern about the processing of a Freedom of Information Act (FOIA) request submitted to the NRC by Mr. Thomas Applegate. That request sought disclosure of all agency records related to a final report of the NRC Office of Inspector and Auditor (OIA) regarding the NRC Office of Inspection and Enforcement (IE) investigation into alleged construction deficiencies at the Zimmer Nuclear Power Plant. I set forth below the background of this particular incident as described by NRC's Office of the General Counsel (OGC) in consultation with OIA. The accounts offered by participants differ in several respects as noted below. These differences have been explored during the course of discovery in a lawsuit on the same issue -- Applegate v. NRC, D.D.C. No. 82-1829 (filed June 30, 1982). In this letter, I will also address the questions raised in your March 2, 1983 letter on the same subject.

Since at least June 1980, OIA has operated under a policy that directs that drafts and background documents be removed from the numbered investigative case files upon completion of an OIA report. Only materials essential to the understanding of final reports are maintained in the case files. Drafts, interview notes, and miscellaneous, non-essential documents are to be removed from case files. Such documents may be retained by OIA personnel for personal use. Originally, OIA personnel were told that documents retained for personal use could be kept in either the individual's office or at home. According to the Director, OIA, the primary impetus for the policy in June 1980 was the discovery that in many instances OIA investigators were utilizing the case files as a storage receptacle for all types of handwritten notes and various drafts of proposed outgoing reports and correspondence. The Director of OIA felt that this situation was wasteful from the standpoint of clerical filing time and reduced storage capability. In addition, he saw no useful purpose in maintaining such material. Removing drafts is not unique to OIA. I informed Congressman Markey on March 24, in response to questions about the draft of a Region V report, "[i]n accordance with our normal practice once the final report was issued the draft report was discarded. . . ." Further, the OIA policy reflects the desire to avoid the diversion of staff resources from investigative duties to processing FOIA requests for material which does

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not represent a final agency position. The OIA memorandum on this subject is enclosed as Enclosure D.

The particular situation outlined in your letter concerns OIA's processing of an FOIA request for documents about one of its Zimmer investigations. OIA conducted two separate Zimmer investigations relevant to this discussion. OIA's investigation "Adequacy of IE Investigation 50-358/80-09 at the William H. Zimmer Nuclear Power Station" (the OIA Zimmer report, OIA file 81-18) was initiated in December 1980 and a final report issued August 7, 1981. The scope of this investigation, as defined by the Chairman in a December 15, 1980 memorandum, was quite specific. OIA was to determine whether the Office of Inspection and Enforcement staff had conducted an adequate investigation of Mr. Thomas Applegate's allegations. At the same time, IE was directed to further investigate certain new safety issues raised by Mr. Applegate (see Enclosure E, Ahearne memorandum to Cummings dated December 15, 1980). A second file, File 81-39, was opened in May 1981 to address matters relating to the latter issue, aspects of which OIA was investigating. The former investigation was largely an internal personnel and practice matter, while the latter was largely an external licensee performance matter. The separate construction defect investigation has since been transferred to NRC's Office of Investigations and remains ongoing. As the investigation into the adequacy of the IE investigation drew to a close, there was substantial public and congressional interest in the results of the OIA work.

Although there had been previous contacts by telephone between the Director, OIA and journalists, Mr. Applegate, and Mr. Thomas Devine of the Government Accountability Project (GAP), regarding the public release of the OIA Zimmer report (OIA file 81-18), one of the first written requests for the report was by Mr. Douglas Lowenstein of Cox Newspapers in September 1981. In connection with Mr. Lowenstein's request, which sought documents regarding the report in addition to the report itself, OIA case file 81-18 was examined and found to contain, in addition to the expected final documents, various draft generations of final documents. Also in connection with this request, David Gamble, then an OIA investigator, prepared a list of documents which he believed were subject to this FOIA request. The listed documents fell into several categories:

- final documents which were at that time contained in the OIA case files;
- documents which belonged in one or the other of the two OIA case files but at that time had not yet been filed;
- various draft generations of final documents which were at that time contained in case file 81-18; and

- various draft generations of final documents which were at that time in the staff member's possession and not in OIA case files.

In a telephone conversation with OIA, Mr. Lowenstein subsequently indicated that his interest was limited to the August 1981 OIA Zimmer report and to related documents generated after that report. Those documents were released and the matter ended. Given the requester's self-imposed limitations on his request, it was not necessary to consider the FOIA status of the documents on Mr. Gamble's list. However, the Lowenstein FOIA request did reveal to the Director, OIA that his June 1980 policy with regard to the handling of draft materials was not being followed. After completing action on the Lowenstein request, OIA management reminded the staff of the policy regarding retention of drafts and background materials in official files. All investigative case files were reviewed and draft material removed. OIA staff members who wished to retain this information were directed to remove it from agency premises. This was a modification to the June 1980 policy and was itself discussed in a subsequent meeting with the OIA staff.

The first written request by GAP for OIA's Zimmer report was dated October 7, 1981, and was received by OIA after it had resolved the scope of Mr. Lowenstein's request. Both Mr. Lowenstein and GAP received copies of the report and associated post-report documents during the same time period in November 1981. A copy of the report was also sent to the Subcommittee on November 19, 1981. Subsequently, on November 23, 1981, GAP submitted a broader FOIA request on behalf of Mr. Applegate. This request was identified by NRC as FOIA 81-488 (the 488th FOIA request in 1981) and sought drafts and other documents prepared in connection with the final report and the investigation upon which the report was based. In connection with this request, OIA case file 81-18 was again examined and found to contain only final documents. OIA staff members and OIA management had different opinions on whether the interview of Jerry Harpster and the contents of both OIA case files (81-18 and 81-39) needed to be identified. Both issues are dealt with below. Additionally, in connection with this request, it appears that several OIA staff members were questioned about documents responsive to this request. The exact questions which were asked of the staff and their corresponding answers are disputed by the parties concerned. In addition, there is some dispute about whether OIA employees were in fact ordered to remove documents from the agency. What follows, however, is not disputed.

Although the precise means by which Mr. Gamble did so is disputed, it appears that when the GAP request was received, Mr. Gamble brought his previously compiled list of documents to the attention of OIA management. The documents in question are clearly the various documents which were earlier identified by Mr. Gamble in connection with the Lowenstein FOIA request. It further appears that it was determined that the listed documents were already possessed by GAP, were related to the other OIA investigation into the construction defects at Zimmer (file

81-39) and thus were not within the scope of the request or, by operation of OIA's records management policy, were no longer "agency records" subject to the FOIA (preliminary drafts, notes, etc.). Those documents which did not pertain to the subject request were placed in the Zimmer construction-defects file (81-39) and Mr. Gamble took those other documents which no longer were part of the official files home. OGC has been unable to determine with any certainty whether Mr. Gamble was ordered to remove the documents or whether he did so on his own initiative. In any event, removal of those documents was consistent with the OIA policy established immediately subsequent to the Lowenstein FOIA request. In its initial response and on appeal within the agency, OIA indicated there were no drafts or related background documents contained in its official files. The agency's response to GAP thus indicated there were no drafts in "NRC files."

There are two areas of concern here -- the distinction between files (81-18 and 81-39) and the "agency record" status of the removed documents. With respect to the first, except for one document, the "Harpster interview" to be discussed later, OGC believes the distinction between the OIA files (81-18 and 81-39 concerning separate investigations) for purposes of GAP's precise FOIA request was legitimate. Specifically, OGC counseled OIA at that time that the distinction between the files appeared legitimate for purposes of responding to the FOIA request and that the instant request appeared to be limited to the internal investigation file. OGC continues to believe that this distinction was proper. Turning to the second area of concern, in retrospect, OIA should have disclosed initially the existence of drafts and related material which were no longer maintained in the official OIA case files but nonetheless were available for agency use so that the Commission itself could have confronted the question whether such documents remained "agency records" for the purposes of FOIA. If the Commission had then determined that those documents were agency records, they would have been identified and, at that time, could have been withheld under the FOIA. If the Commission had concurred in OIA's position, the documents would have been identified as personal records not subject to the FOIA and therefore not addressed in the response. These events have demonstrated the need for closer coordination between agency offices and OGC on FOIA matters in the future. An apparent failure of the coordination process in this case contributed to the way in which matters were handled initially. In any event, all relevant documents have now been released and we believe the issue is moot in this case as will be explained below.

On June 30, 1982, GAP filed suit in U.S. District Court, on behalf of Thomas Applegate, challenging the NRC's response to this FOIA request. In the course of that lawsuit, OGC obtained copies of the list compiled by and the documents taken home by Mr. Gamble and requested OIA to review them for possible release under the FOIA. Using the Gamble list as a basis for further inquiry, OGC requested OIA to conduct a renewed search for information in all OIA files and to contact all current and

former OIA staff members involved in the OIA Zimmer report. That search produced additional documents not on the list. OIA then determined that all information located in the renewed search and not already in GAP's possession could be released. In addition, the OIA documents on Mr. Gamble's list relating to the separate OIA investigation at Zimmer (file 81-39) and thus outside of the scope of the subject request have now been released in response to a later GAP FOIA request. Minor portions of documents in the construction defect file were withheld by the NRC Office of Investigations because their release would either interfere with the ongoing NRC investigation at Zimmer by identifying prematurely areas of NRC concern or constitute an unwarranted invasion of privacy. In preparing responses to Interrogatories in this lawsuit, additional documents in file 81-18 and other materials were identified to OGC. All NRC documents in case file 81-18 subject to the request and all handwritten notes and draft materials retained by another former OIA employee were released prior to the depositions in this lawsuit on March 3, 1983. Additional handwritten notes which were thought to have been personal but were determined to have been shared with another OIA employee were also released subsequent to the deposition. An FBI report in the file was referred to the Bureau for FOIA processing separate from this request. This completes NRC action with regard to the request.

As noted above, there was one document on Mr. Gamble's list which was responsive to GAP's FOIA request in this case and which clearly remained an agency record -- the report of an interview of Terry Harpster conducted by OIA in March 1981. In that interview, Mr. Harpster commented on certain quality assurance problems at Zimmer but not specifically on the I&E investigation. In July 1981, the Director of OIA determined that the "Harpster interview," although conducted during the OIA review of the I&E investigation, was really relevant to the separate ongoing investigation of construction defects at Zimmer. This conclusion was based in part on the view that Mr. Applegate's allegations were specific and that Mr. Harpster's interview reflected broader problems. In addition, nothing in the Harpster interview pertained directly to OIA's review of the adequacy of Region III's investigation of Mr. Applegate's specific allegations. Accordingly, the Director, OIA instructed that: (a) an informational copy of the Harpster interview be maintained in the 81-18 file; (b) the Harpster interview not be made a part of the 81-18 report; and (c) a copy of the Harpster interview be placed in the 81-39 file and made a part of any report issued in that case. The interview of Harpster was not identified by OIA in connection with GAP's November 23, 1981 FOIA request because the Director had concluded that it was not relevant to file 81-18. It should be noted that Harpster's interview was not removed from the 81-18 file at any time after this decision had been made. In hindsight, there is no dispute that the Harpster interview should have been identified. Even if the Harpster interview had been identified, however, OIA management would have withheld the document under the FOIA at that time. In any event, GAP apparently obtained a copy of the Harpster interview and, in July 1982, attached it to a pleading filed with the Commission in the Zimmer

licensing proceeding. Commission officials determined at that time that acknowledgement of the Harpster interview would not interfere with the continuing investigations at Zimmer. Thus, the Commission officially released it to GAP and the public on August 10, 1982. Finally, OIA has advised us that if a similar situation is presented in the future it will identify such documents in response to the FOIA.

Your letter of March 2, 1983 posed specific questions derived from comments made by Mr. Cummings at the February 22 oversight hearings. Initially, with respect to your concern about responsibility for drafting the Commission's response to your December 7, 1982 letter, the NRC's Office of the General Counsel was assigned primary responsibility for drafting that response. OGC necessarily solicited input from Mr. Cummings and other present and former OIA employees in the course of drafting the response. Mr. Cummings' position on this matter is reflected in the enclosed memoranda, Cummings to OGC, dated January 5 and February 16, 1983, which he requested be provided to your Committee immediately subsequent to his addressing this matter at the February 22 hearings (Enclosures F and G).

In response to your question regarding the manner in which OIA brought the Zimmer matter to the Commission's attention, I refer you to the enclosed memorandum of January 5, 1983, Cummings to Leonard Bickwit, Jr., General Counsel (Enclosure F), to my letter to you dated November 16, 1981 transmitting the OIA Zimmer report and related memoranda, and to the June 10, 1982 testimony of Mr. Thomas Devine on behalf of the Government Accountability Project before the Subcommittee on Energy and the Environment. In short, OIA discussed the Zimmer matter in meetings and related memoranda in the months following the August 1981 OIA Zimmer report.

Mr. Cummings' basis for removing the Harpster interview from the OIA report is discussed above and in the enclosed memorandum of February 16, 1983, Cummings to Martin Malsch, Deputy General Counsel (Enclosure G). Finally, Mr. Cummings did not provide the Harpster interview to any of the Commissioners prior to June 1982.

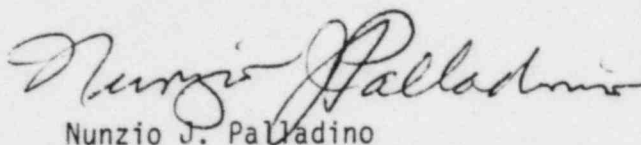
I believe this review responds to your questions. Please be assured I share your concern for compliance with the FOIA.

The Commission intends that all NRC offices will be in full compliance with the FOIA and that all FOIA requests be coordinated with OGC. To that end, the Commission has requested OGC to prepare an agency-wide policy on issues such as coordination of responses, interpretation of the scope of requests, definition of "agency record" and records retention and disposal with reference to NRC's FOIA obligations and to develop procedures to implement the policy as well as to provide legal advice to any Commission-level office processing an FOIA request. In preparing this policy, OGC has been asked to consider the guidance that

already exists in the NRC Manual and to address how to effectively implement the policy.

Additional views of Commissioners Gilinsky and Asselstine, Commissioner Ahearne, and myself are enclosed as Enclosures A, B, and C. We trust this letter responds to your questions on this subject.

Sincerely,



Nunzio J. Palladino

Enclosures:

- A. Additional views of Commissioners
Gilinsky and Asselstine
- B. Additional views of Commissioner
Ahearne
- C. Additional views of Chairman
Palladino
- D. Memo, 6/20/80, Director,
OIA to OIA Staff
- E. Memo, 12/15/80, Ahearne
to Cummings
- F. Memo, 1/5/83, Cummings
to Bickwit
- G. Memo, 2/16/83, Cummings
to Malsch

cc: Rep. Manuel Lujan