

PDR-016
Cross-
Reference
50-275/323



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

OFFICE OF THE
SECRETARY

October 1, 1982

Joel R. Reynolds, Esq.
John R. Phillips, Esq.
Center for Law in the Public Interest
10951 West Pico Boulevard
Los Angeles, CA 90064

In Response Refer To
FOIA-82-A-4
(FOIA-82-160)

Dear Messrs. Reynolds and Phillips:

This is in response to your May 12, 1982 Freedom of Information Act (FOIA) appeal of the partial denial of access to several documents relating to the Commission's deliberations on Diablo Canyon ALAB-644. The Commission has reviewed the initial determination to withhold these documents and has released a memorandum from Paul C. Jennings to Commissioner Gilinsky and affirmed the withholding of the other documents. Although the Commission could have withheld the Jennings memorandum under Exemption 5 of the FOIA, it has decided as a matter of discretion to make the memorandum public.

The two memoranda from the Office of Policy Evaluation ("Status of Diablo Canyon Seismic Issues" and "ALAB-644: Diablo Canyon Seismic Issues -- Possible Questions to Clarify the Record") contain advice and opinions on Commission procedural options relating to ALAB-644. They are pre-decisional and do not contain a rationale for the Commission's decision not to review ALAB-644. As stated in the letter of April 21, 1982 from J. M. Felton, Director, Division of Rules and Records, the memoranda contain no factual or otherwise segregable portions. Release of the documents may tend to inhibit the flow of advice and opinion to the Commission and could lead to public confusion regarding the options for Commission review and the basis for the Commission's decision not to review ALAB-644. As such, the documents are withholdable pursuant to Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5) and 10 CFR 9.5(a)(5) of the Commission's regulations. Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

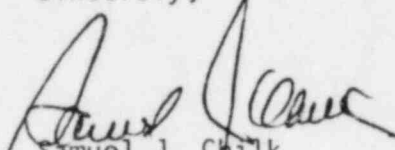
The decision to continue to withhold the transcripts of Commission meetings on August 20 and November 12 is pursuant to Exemption 10 of the Government in the Sunshine Act ("GISA"), 5 U.S.C. 552b(c)(10) which permits withholding of any transcript which deals with the "initiation, conduct or disposition" of a specific agency adjudication. Commission deliberations at these meetings concerned the Diablo Canyon operating license proceeding. Exemption 3 of the FOIA authorizes the non-release of transcripts which, under the GISA, are withholdable. 5 U.S.C. 552(b)(3).

You have also appealed the failure of the NRC to release to you a list of consultants retained to aid the Commission in its consideration of ALAB-644. Our silence in this regard was intended to suggest that no such list exists. The FOIA does not impose on the Commission the obligation to create a document to satisfy a request. Renegotiation Board v. Grumman Aircraft, 421 U.S. 168, 192 (1975).

Your third complaint suggests that the memoranda withheld were not pre-decisional but instead represent final opinions. Specifically, you cite a statement by Commissioner Roberts in which he mentions analyses by seismic consultants. The information that Commissioner Roberts referred to has been released to you as a result of your original request for Office of Policy Evaluation documents. The primary OPE memorandum incorporated the analyses of retained consultants.

This letter represents the final agency action on your FOIA appeal. Judicial review is available in a federal district court in the district in which you reside or have your principal place of business, or in the District of Columbia.

Sincerely,


Samuel J. Chilk
Secretary of the Commission

Attachment:
Memorandum from P. Jennings to
Commissioner Gilinsky

cc: David Fleischaker

DAVID S. FLEISCHAKER

P.O. BOX 1178
OKLAHOMA CITY, OK 73101
405/235-8444

March 23, 1982

Director, Office of Administration
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

FREEDOM OF INFORMATION
ACT REQUEST

FOIA-82-160
Rec'd 3-24-82

Dear Sir:

This is a request under the Freedom of Information Act,
as amended (5 U.S.C. §552).

I write to request a copy of the following documents:

1. All documents prepared or made available by the Office of Policy Evaluation for the Commissioners in connection with their review of ALAB-644, including but not limited to "Memorandum to the Commissioners from Forrest Remick, Subject: Diablo Canyon Design, dated November 12, 1981, with enclosure (referenced in the opinions of Commissioner Gilinsky and Bradford on Commission review of ALAB-644).
2. A list of the consultants retained to assist the Commissioners in their consideration of ALAB-644. (Commissioners Gilinsky, Bradford and Roberts mentioned these consultants in their opinions on Commission review of ALAB-644.)
3. All documents submitted to the Commission by the consultants retained to assist the Commissioners in their consideration of ALAB-644.
4. That part of the transcript from any Commission meetings during which discussions were held on whether the Commission should review ALAB-644.

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PDR

Director, Office of Administration
March 23, 1982
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If you determine that some or all of the documents are exempt from release, I would appreciate your advising me as to which exemption(s) you believe covers the materials which you are not releasing.

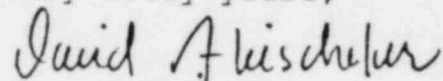
I am prepared to pay reasonable costs for locating the requested documents and reproducing them.

As you know, the amended Act permits you to reduce or waive the fees if it "is in the public interest because furnishing the information can be considered as primarily benefiting the public." I believe that this request plainly fits that category and ask you to waive any fees.

If you have any questions regarding this request, please telephone me at the above number.

As provided for in the amended Act, I will expect to receive a reply from within ten (10) working days.

Very truly yours,



David S. Fleischaker
Counsel to the
Joint Intervenors

DSF:jm
cc: Diablo Canyon Service List



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

April 21, 1982

David S. Fleischaker, Esquire
P.O. Box 1178
Oklahoma City, OK 73101

IN RESPONSE REFER
TO FOIA-82-160

Dear Mr. Fleischaker:

This is in response to your letter dated March 23, 1982 in which you requested, pursuant to the Freedom of Information Act, four categories of documents regarding ALAB-644.

A copy of the documents listed on Appendix A is enclosed.

The Commission discussed whether to review ALAB-644 on August 20 and November 12, 1981. These discussions represent an integral element in the Commission deliberations concerning the Diablo Canyon licensing adjudication. Release of these transcripts would tend to inhibit Commission deliberations of this nature. As such, they are exempt from mandatory public release pursuant to Exemption 10 of the Government in Sunshine Act. There are no segregable portions of either transcript which are responsive to your request. In view of the above, the Commission has determined that the public interest does not compel release of these transcripts at this time. Accordingly, they are being withheld in their entirety pursuant to Exemption 10 of the GISA (5 U.S.C. 552b(c)(10)) and Exemption 3 of the FOIA 5 U.S.C. 552(b)(3).

The documents listed on Appendix B are being withheld. Document 1 is a 7-page memorandum containing the author's advice, analysis and opinions regarding a matter subject to Commission deliberations. Documents 2 and 3 are each 3-page memoranda which provided the Office of Policy Evaluation (OPE) advice and opinions on Commission procedural options for disposing of then-pending petitions for review of ALAB-644. Disclosure of these documents would tend to inhibit open and frank communication essential to the deliberative process. As such, they are pre-decisional documents exempt from mandatory public release pursuant to Exemption (5) of the Freedom of Information Act (5 U.S.C. 552(b)(5)) and 10 CFR 9.5(a)(5) of the Commission's regulations. There are no factual or otherwise segregable portions of these documents.

Pursuant to 10 CFR 9.15 of 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 the transcripts

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PDR

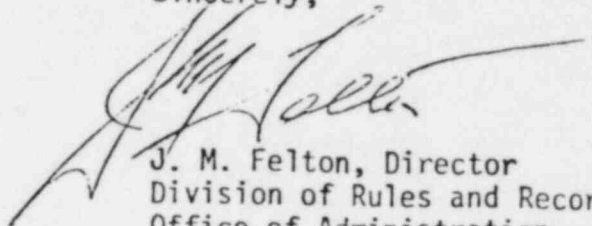
David S. Fleischaker, Esquire

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and document 1 is Mr. Samuel J. Chilk, Secretary of the Commission. The person responsible for the denial of documents 2 and 3 is Mr. Forrest J. Remick, Director, Office of Policy Evaluation.

This denial may be appealed to the Commission within 30 days from the receipt of this letter. Any such appeal must be in writing, addressed to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should clearly state on the envelope and in the letter that it is an "Appeal from an Initial FOIA Decision."

Sincerely,

A handwritten signature in dark ink, appearing to read "J. M. Felton", is written over the typed name and title.

J. M. Felton, Director
Division of Rules and Records
Office of Administration

Enclosures: As stated

Appendix A

1. Memo from Forrest J. Remick to the NRC Commissioners, November 5, 1981, "Analysis of ALAB-644: Diablo Canyon Seismic Issues".
2. Memo from Forrest J. Remick to the NRC Commissioners, November 12, 1981, "Diablo Canyon Design Spectrum".

Appendix B

1. 10/5/81 Memo to Commissioner Gilinsky from Paul C. Jennings, Consultant, regarding the development of earthquake resistant design criteria for major projects such as nuclear power plants.
2. 9/22/81 Memorandum to NRC Commissioners from Forrest J. Remick, "Status of Diablo Canyon Seismic Issues".
3. 11/18/81 Memorandum to NRC Commissioners from Forrest J. Remick, "ALAB-644: Diablo Canyon Seismic Issues -- Possible Questions to Clarify the Record".