

LAW OFFICES OF
DEBEVOISE & LIBERMAN

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WASHINGTON, D.C. 20036
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November 16, 1982

APPEAL OF INITIAL FOIA DECISION

82-A-25E(82-457)

Rec'd 11-17-82

Mr. William J. Dircks
Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Appeal From Initial FOIA Decision FOIA Request 82-457

Dear Mr. Dircks,

Pursuant to 10 C.F.R. § 9.11(a), we hereby appeal the NRC's denial of Freedom of Information Act Request 82-457.

On September 23, 1982, Debevoise & Liberman filed a request under the Freedom of Information Act (5 U.S.C. § 552) (FOIA) and NRC regulations (10 C.F.R. Part 9) which sought copies of all NRC memoranda regarding "proposed revisions to regulatory requirements and guidance (including Regulatory Guide 1.133) pertaining to loose parts monitoring." On October 15, 1982, Mr. J.M. Felton, Director of the Division of Rules and Records in the Office of Administration, transmitted certain documents in response to our request and indicated that a search for additional documents was being conducted. Subsequently, in an October 28, 1982 letter, Mr. Felton informed us that access to certain materials was being denied. (A list of the six documents withheld is enclosed as Appendix A). The basis given for withholding these documents is that they allegedly contain "information which constitutes advice, opinions and recommendations of the staff," which is protected by exemption 5 of the Act (5 U.S.C. § 552(b)(5)) and 10 C.F.R. § 9.5(a)(5).

We believe that the NRC has provided insufficient justification for its reliance upon exemption 5 of the FOIA to avoid disclosure of these six documents. The descriptive titles with which we have been provided offer no clue as to why these documents warrant characterization as "predecisional" and "deliberative" materials subject to executive privilege.¹ There is no indication that these documents reflect a clear "process" leading to a final decision on these regulatory issues,² or that they reveal opinion and consultations "so candid and personal in nature

¹ Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

² Vaughn v. Rosen, 523 F.2d 1136, 1146 (D.C. Cir. 1975).

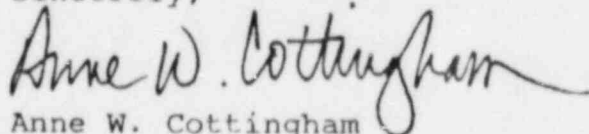
that public disclosure is likely in the future to stifle honest and frank communication within the agency. . . ."3 Finally, the fact that some of the relevant discussions in these documents presumably focus upon the modification of regulatory guidance, rather than the modification of actual regulations, could remove at least some of these materials from coverage under this exemption.

Accordingly, it is possible that a re-examination of the documents withheld will reveal that in denying access to this material the Commission failed to comply with its obligation to read this exemption "as narrowly as consistent with efficient Government operation."<4 It is also possible that only parts of the documents are privileged, and that those portions containing factual information should properly be disclosed.⁵

Given the narrow scope of exemption 5, agencies should resolve all questionable or borderline claims of executive privilege in favor of the individual seeking the information. Such an approach is more consistent with the strong public policy in favor of disclosure which underlies the FOIA. It is also the approach mandated by 10 C.F.R. § 9.9(a), which stipulates that even material which falls under an exemption to the Act must be provided if the production or disclosure of such material "is not contrary to the public interest and will not adversely affect the rights of any person. . . ."

We would appreciate your prompt response to this appeal within the 20 working days afforded by 10 C.F.R. § 9.11(b), so that we may, if necessary, proceed on a timely basis to the next step leading to the production of this material.

Sincerely,


Anne W. Cottingham

Enclosure
AWC:brh

³ Coastal States Gas Corporation, 617 F.2d at 866.

⁴ Id. at 868, citing S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

⁵ Environmental Protection Agency v. Mink, 410 U.S. 73, 87-89 (1973).

LAW OFFICES OF
DEBEVOISE & LIBERMAN

1200 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20036
TELEPHONE (202) 857-9800

September 23, 1982

FREEDOM OF INFORMATION
ACT REQUEST

FOIA-82-457

Rec'd 9-27-82

Mr. J. M. Felton
Director
Division of Rules and Records
Office of Administration
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

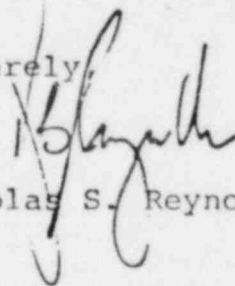
Re: Freedom of Information Request

Dear Mr. Felton:

Pursuant to the Freedom of Information Act (5 U.S.C. §552) and NRC Regulations (10 C.F.R. Part 9), Debevoise & Liberman requests copies of all memoranda regarding proposed revisions to regulatory requirements and guidance (including Regulatory Guide 1.133) pertaining to loose parts monitoring.

We would appreciate your prompt response to this request within the ten working day period afforded by 10 C.F.R. Part 9.

Sincerely,



Nicholas S. Reynolds

NSR/er

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

October 28, 1982

Nicholas S. Reynolds, Esquire
Debevoise & Liberman
1200 Seventeenth Street, N.W.
Washington, DC 20036

IN RESPONSE REFER
TO FOIA-82-457

Dear Mr. Reynolds:

This is in further response to your letter dated September 23, 1982, in which you requested, pursuant to the Freedom of Information Act, copies of all memoranda regarding proposed revisions to regulatory requirements and guidance, pertaining to loose parts monitoring.

The documents listed on Appendix A all contain information which constitutes advice, opinions and recommendations of the staff. This information is being withheld from public disclosure pursuant to Exemption (5) of the Freedom of Information Act (5 U.S.C. 552(b)(5)) and 10 CFR 9.5(a)(5). These documents are being withheld in their entirety.

Pursuant to 10 CFR 9.9 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 persons responsible for this denial are the undersigned and Mr. Harold R. Denton, Director, Office of Nuclear Reactor Regulation.

This denial may be appealed to the Commission's Executive Director for Operations within 30 days from the receipt of this letter. As provided in 10 CFR 9.11, any such appeal must be in writing, addressed to the Executive Director for Operations, 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."

This completes NRC's action on your request.

Sincerely,

A handwritten signature in cursive script, appearing to read "John M. Felton", is written over the typed name.

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

Enclosure: Appendix A

82-1100512
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Appendix A

1. Memo for Victor Stello from Harold Denton, "Loose-Part Detection Program - CRGR Briefing", March 3, 1982.
2. Memo for S. H. Hanauer, from L. S. Rubenstein, "CRGR Briefing on Loose-Parts Detection Program", May 6, 1982.
3. Memo for L. S. Rubenstein from S. H. Hanauer, "Review of CRGR Briefing on Loose-Parts Monitoring Program", May 28, 1982.
4. Memo for L. Rubenstein from Darrell G. Eisenhut, "CRGR Briefing on Loose-Parts Detection Program", June 16, 1982.
5. Note for Carl Berlinger/Larry Phillips from L. S. Rubenstein, "CRGR Briefing Package on LPMS", August 20, 1982.
6. Memo for Victor Stello from Harold R. Denton, "CRGR Briefing on Loose-Parts Detection Program", undated.