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November 23, 1981

APPEAL OF INITIAL FOIA DECISION

81-A-18C(81-397)

Rec'd 11-27-81

Secretary  
Nuclear Regulatory Commission  
Washington, D.C. 20555

RE: Appeal From Initial FOIA  
Decision #FOIA-81-397

Dear Sir:

This is an appeal of your partial denial of the request for documents filed by the Natural Resources Defense Council, Inc., (NRDC) pursuant to the Freedom of Information Act, 5 U.S.C. §552(a)(6). On November 5, 1981, that request was denied in part in a letter from J.M. Felton.

NRDC requested copies of documents relating to NRC's decision to reconsider its rule exempting NRC regulation of "military or foreign affairs functions" from the requirements of formal adjudications. Mr. Felton denied access to five documents, relying on exemption 5 (5 U.S.C. §552(b)(5)) as either predecisional advice or advice from an attorney concerning an item "then subject to Commission deliberations."

As you are aware, a requester obviously does not have the ability to review denied documents to allow it to argue that the denial is improper. Therefore, courts have placed the burden "specifically...on the Government" to establish that the withheld material is exempt from requirement of

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11/27..To OGC to Prepare Response for SECY's Signature..Date due:  
Dec 29...Cpys to: Chm,Cmrs,PE,EDO...81-2388 FOIA Appeal #81-A-18C

disclosure, and that this burden cannot be met by "sweeping and conclusive citation of an exemption":\*/

Thus, we require that when an agency seeks to withhold information it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply. Id.

This letter fails to make that detailed justification. We insist that your reply to this appeal comply with the ruling in Mead Data.

Further, we believe that, upon your review of the denied documents, you will agree that they should be released. Documents #1 and 2, denied as "predecisional advice", are dated "12/2/80" and "12/8/81". Obviously, the second date is incorrect. If it is properly dated "12/8/80", that would place both documents substantially before reconsideration of the military functions rule was begun. The Commission has represented to the D.C. Circuit Court of Appeals that it did not begin its reconsideration of this rule until August 3, 1981, when the Commission was at full strength, or at the earliest July 1, 1981, when the new Chairman was confirmed.\*\*/ If this is true, then documents dated prior to that time are not predecisional in that they are not part of any on-going

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\*/Mead Data Central, Inc. v. U.S. Department of the Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977).

\*\*/NRC Response in Opposition..., dated Oct. 30, 1981, p 3,n.2 (attached as Appendix A).

"deliberative process". Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975). Instead, they can only be "postdecisional," relating to the implications of the NRC's decision on June 26, 1980 to issue the military functions rule in the first place. As such, the documents are not covered by FOIA exemption 5. Id. See also Parke Davis & Co. v. Califano, 623 F.2d 1,6 (6th Cir. 1980).

Similarly, the documents denied as legal advice regarding an action "then subject to Commission deliberations" (Docs. #3-5) contain two memoranda dated 11/3/80 (#3) and 3/5/81 (#5), both prior to the Commission's "deliberative process" on the reconsideration decision. In addition, to the extent that the Commission intends to rely on "attorney-client" privilege to bar disclosure, please be advised that you are required to establish that the document was "communicated to or by an attorney as part of a professional relationship in order to provide [the Agency] with advice on the legal ramifications of its actions." Mead Data, 566 F.2d at 243. You must also establish that the information is confidential. "If the information has been or is later shared with third parties, the privilege does not apply." Id.

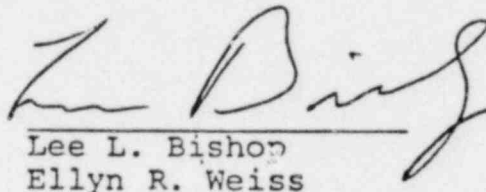
Finally, as many documents containing NRC legal advice were publicly revealed in response to an earlier request by NRDC, it does not seem reasonable to contend that disclosure of these documents would inhibit the Commission's actions.

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Given the purpose of the FOIA, which is to open agency processes to public scrutiny, we request that you reconsider your initial denial, and release the withheld memoranda.

As provided by statute, we expect a reply to this appeal within 20 days.

Very truly yours,



Lee L. Bishop  
Ellyn R. Weiss

Attorneys for NRDC