

APPEAL OF INITIAL FOIA DECISION

November 26, 1981

Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

81-A-19E(81-436)
Rec'd 11-30-81

RE: Appeal from an Initial FOIA Fee Waiver Decision;
FOIA-81-~~362~~

436

Sir:

I have just received Mr. Felton's denial of Ohio Citizens for Responsible Energy ("OCRE") fee waiver request regarding the above FOIA request of October 26, 1981. As OCRE Interim Representative and member in good standing, I hereby appeal that decision on the grounds enumerated below.

However, in the interest of expedience, I am enclosing along with a copy of this letter I will send to Mr. Felton a check for \$19.50. Because my organization needs the requested documents urgently, I wish that those funds be treated as a bond to cover the production costs of the requested documents in the event OCRE does not triumph on this appeal. OCRE, by sending this money voluntarily is by no means waiving its rights under 10 CFR 9.11 on this denial or any other denial, now or in the future. Please, then, send the requested documents as soon as possible. Should OCRE triumph on this appeal, please refund the "bond."

Grounds of Appeal

1. In his letter of denial Mr. Felton states that "(t)here is a great disparity in the documents requested and the seven contentions granted in the Perry case." I believe that Mr. Felton has confused the nature of the FOIA with that of discovery in an adjudicatory proceeding. With regard to the latter, "(p)arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding..." 10 CFR 2.740 (b)(1). Thus, discovery is limited to those specific matters which are relevant to the proceeding. The FOIA carries no such limitation. See 10 CFR 9.4. OCRE is free to request "any identifiable record" (Id.).

As an explanatory note, OCRE's intervention strategy can be characterized as a vigorous defense and representation of its members--and the public's in general--health and safety interest. And while seven contentions have been granted to date, OCRE is conducting an ongoing investigation and search to uncover other potential flaws anywhere in the Perry design, its construction or its ultimate operation which might adversely impact upon OCRE members. OCRE is using the FOIA as a tool to locate those flaws.

Items 8 and 9 of OCRE's October 26 FOIA request, for example, will aid OCRE's investigation into the potential harmful effects of low level radiation flowing from Perry effluents. The requested documents will help OCRE frame a contention to that effect in the offing.

2. Mr. Felton's letter also states that I had "offered no information to the effect that it (OCRE) is incapable of paying the \$19.50 reproduction cost...." This goes to the ability of a requester to pay for any of the anticipated costs of reproducing or searching for documents and information. 10 CFR 9.14a(c)(5).

Most of OCRE's forty odd members are students at various college campuses in Ohio: There are seven each on the campuses of Cleveland State U. and the University of Dayton; five at Ohio State and four at Bowling Green State U. alone. I myself am a student at the University of Houston. It should be common knowledge that students in general have limited resources. At best, they have parttime, menial jobs at minimum wage, if they work at all.

I am not stating that our group is absolutely "incapable" of paying the fee, as my check to Mr. Felton indicates. I am stating that in general it would be a hardship for OCRE to bear these costs. The funds of our group will go much farther if used in the acquisition of expert testimony or development of valuable exhibits for the Perry proceeding.

Further, this ability to pay is only one factor that the Commission uses to determine "if waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public." 10 CFR 9.14a(e). I ask: If furnishing the requested documents is not considered as primarily benefiting the general public, who is it benefiting? OCRE's interests are synonymous with those of the public. No resident of Northeastern Ohio can legitimately state that he is not concerned about his health and safety given the operation of the Perry plant.

3. Finally, Mr. Felton stated that because the requested documents were "publicly available," OCRE had to meet the compelling reason test for the waiver of fees as outlined in 10 CFR 9.14a(g). OCRE agrees that the compelling reason test is proper here but not that OCRE's rationale did not adequately meet it.

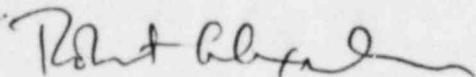
First of all, paragraph (g) was incorporated to deny fee waiver to those requesters who had relatively easy access to the documents and could with due diligence view them. As Mr. Felton indicated the presence of the Perry LPDR in his letter of April 1, 1981 (FOIA-81-114), I agree that our group could easily acquire (copy) those documents found at the Perry LPDR. But as he admits in this latest letter of denial, the requested documents are available in the Washington PDR. OCRE does not, as described in Ground of Appeal number 2 above, have the resources or the personnel to traipse off to Washington, D.C. everytime it identifies a document worthy of further inspection. OCRE has no relatively easy access to those documents held for public inspection in Washington, D.C.

In the alternative, I would strenuously insist that the Commission is estopped from asserting its claim of public availability. The Commission has on two earlier occasions (OCRE FOIA requests dated September 5 and 28, 1981) implicitly said OCRE did meet the compelling reason test under substantially

the same circumstances. The documents requested in those to requests were also publicly available in Washington, D.C. And the rationale offered by my group at those times was similar, if not identical, to the instant request. I would like to know why it is that OCRE met the compelling reason test then but did not now.

Based upon the foregoing three Grounds of Appeal, OCRE's request for waiver of fees should properly be granted. Mr. Felton's denial of that request on November 20, 1981 should be respectfully overturned.

Sincerely,



Robert Alexander
OCRE Interim Representative
2030 Portsmouth St. #2
Houston, TX 77098
(713) 521-3014 (7 am to 7:30am, C.S.T.)

cc: J.M. Felton
Division of Rules and Records
Office of Administration
(with check enclosed as stated)



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

November 20, 1981

Mr. Robert Alexander
OCRE Interim Representative
2030 Portsmouth Street #2
Houston, TX 77098

IN RESPONSE REFER
TO FOIA-81-362 436

Dear Mr. Alexander:

This is in response to your letter dated October 26, 1981 in which you requested that fees be waived for the reproduction of 51 documents which you listed in an attachment to your letter.

We have carefully considered your request and justification along with NRC regulations which prohibit the waiver of reproduction costs for publicly available documents. We have determined that your rationale does not meet the compelling reason test for fee waiver as outlined in 10 CFR 9.14a(g).

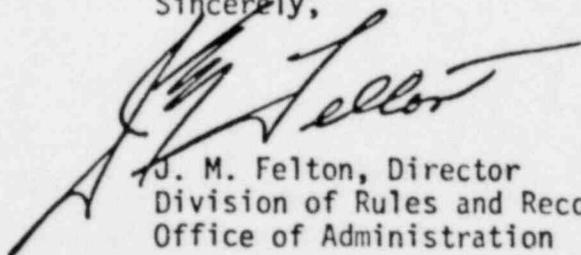
The documents you have requested are available in our Public Document Room (PDR), located at 1717 H Street, N.W., Washington, D.C. 20555.

There is a great disparity in the documents requested and the seven granted contentions in the Perry case. In point of fact, only one of the 51 documents requested even mentions the Perry plant and that document bears no relationship to any of the granted contentions. Further, while you mention that the group you represent is a "bootstrap" operation, you have offered no information to the effect that it is incapable of paying the \$19.50 reproduction cost for the 390 pages of documents.

In light of the above, we feel that the requested fee waiver is not justified. This finding represents an insufficient public benefit presented to warrant the waiver of fees as required by NRC's mandate to evaluate "whether public payment should be made for essentially public benefits", (Attorney General's Preliminary Guidance Memorandum of the 1974 FOIA Amendments, December 11, 1974). The person responsible for this denial is the undersigned.

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, D.C. 20555, and should clearly state on the envelope and in the letter that it is an "Appeal from an Initial FOIA Fee Waiver Decision".

Sincerely,


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

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