



POLICY ISSUE (Notation Vote)

November 16, 1983

SECY-83-467

COMMISSION LEVEL
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For: The Commissioners
From: James A. Fitzgerald
Assistant General Counsel
Subject: FOIA APPEAL 83-A-33C REGARDING TMI RESTART
DOCUMENTS

Purpose: To recommend

Discussion:

On August 16, 1983, Ms. Michelle Adato, Legislative Research Assistant for the Union of Concerned Scientists (UCS), requested pursuant to the Freedom of Information Act (FOIA) that four categories of documents dealing with the restart of Three Mile Island Unit 1 (TMI-1) be placed in NRC's Public Document Room (FOIA 83-479).

The NRC issued four partial responses to this request. UCS appeals the September 29, 1983 withholding under Exemption 5 of SECY-82-472 and its enclosures in their entirety, and the alleged failure to respond to a request for correspondence between Commissioner Roberts' office and General Public Utilities (GPU).

Contact:
Richard P. Levi, OGC, 41465

9309240012 930428
PDR FOIA
GILINSK92-436 PDR

Information in this record was deleted
in accordance with the Freedom of Information
Act, exemption 5
FOIA- 92-436

9/70

UCS in its appeal seems to accept the withholding of SECY-82-472 itself and Enclosure 1 to that paper, a 26 page draft Commission order. However, UCS questions the withholding of Enclosure 2 (List of Hardware to be Installed or Modified Prior to Restart (one page)), and Enclosure 3 (Summary of Gilinsky's Office Items (3 pages)). UCS maintains that the NRC failed adequately to describe and justify the withholding of these two items.


Analysis

OGC believes

EX.
5

64.
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Recommendation:


James A. Fitzgerald
Assistant General Counsel

Attachments:

1. Proposed letter denying appeal
2. Withheld Documents
3. FOIA Appeal (10/28/83)
4. Original Partial Denial (9/29/83)
5. Original Partial Denial (11/1/83)
6. Original FOIA Request (8/16/83)

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Friday, December 2, 1983.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, November 25, 1983, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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WASHINGTON, D.C. 20006

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TELEPHONE
(202) 833-9070

October 28, 1983

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

APPEAL OF INITIAL FOIA DECISION

83-A-~~32~~²²C (83-47)
Rec'd 11-1-83

Subject: Appeal from and Initial FOIA Decision
FOIA-83-479

Dear Mr. Dircks:

This is an appeal on behalf of the Union of Concerned Scientists from partial denials of a request for information under the Freedom of Information Act. I have enclosed a copy of the original request, which was filed by Michelle Adato of UCS by letter of August 16, 1983. I have also enclosed a copy of the Commission's response of September 29, 1983, denying any access to ~~SECY-83-472~~⁸².

UCS appeals the complete denial of access to ~~SECY-83-472~~⁸². UCS also appeals the effective denial of Item 4 of Ms. Adato's request, which related to correspondence between Commissioner Roberts or his staff and General Public Utilities. I address these appeals in turn below.

1. ~~SECY-83-472~~⁸²

The Commission's response of September 29, 1983, described ~~SECY-83-472~~⁸² as containing four parts. The first two involve specific advice and appear to be legitimately exempt from disclosure. The third and fourth parts are

(3) Enclosure 2, List of Hardware to be Installed or Modified Prior to Restart (1 page); and (4) Enclosure 3, Summary of Gilinsky Office Items (3 pages).

The third part appears to be simply a compilation of factual information that is clearly segregable from the remainder of the document. It is not at all clear what the fourth part is, and the Commission has given no explanation that would justify denying its release under the FOIA.

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William J. Dircks
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The Commission invokes Exemption 5 on the premise that the release of the factual portion of the withheld information, presumably parts 3 and 4, "would reveal a predecisional evaluation of facts in the restart proceeding." The Commission has failed, however, to provide an explanation or justification for this position. If part 3 simply informs the Commission of the hardware that will be installed or modified prior to restart pursuant to staff or Board orders, for example, that information is public knowledge, although it may be difficult to compile, and the fact that the public is aware that the Commission has been informed of those facts would in no way interfere with or affect the Commission's deliberative process. On the other hand, if these are installations or modifications that the Commission is considering in addition to those required by the staff or the licensing boards, or if the list indicates that the Commission is considering requiring less than the staff or boards may have required, the revelation of those facts may affect the Commission's decisionmaking process. Thus, the Commission's right to rely upon the exemption depends upon the precise nature of the factual material and its role in the decisionmaking process. Even if the Commission may consider the facts as it makes its decision, it must disclose those facts beforehand unless there is a real possibility that disclosure would harm the deliberative process.

Based upon the Commission's response, there is no reason to believe that release of this factual information meets this criterion. The Commission has said that the factual information is already available in the public record of the TMI-1 restart proceeding. The Commission must go beyond its bald assertion that its release would "reveal a predecisional evaluation of facts" to explain why that is the case. Mead Data Central, Inc. v. U.S. Department of the Air Force, 566 F.2d 242, 260-61 (D.C. Cir. 1977).

With respect to part 4, the Commission must describe the document beyond reciting the title, which is meaningless to a member of the public. In order to meet its burden of establishing that this material is exempt, the Commission must also explain specifically why the document falls within Exemption 5 or any other exemption that the Commission asserts should apply. At this point, it is not even clear which exemption the Commission relies upon with respect to this part of SECY-83-472.

William J. Dircks
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For these reasons, UCS appeals the complete denial of SECY-83-472. We urge you to order the immediate release of parts 3 and 4 as identified in the Commission's letter of September 29, 1983.

2. Commissioner Roberts' Correspondence with GPU

Item 4 UCS' request sought the following documents:

4. All records of correspondence between Commissioner Roberts (or his staff) and General Public Utilities, during the period of April through August of 1983. Specifically included in this request are letters, memoranda, telephone logs and minutes of meetings.

That request was filed by the Commission on August 17, 1983. The FOIA required a Commission response within 10 days, which was August 27, 1983.

As yet, UCS has received no formal response from the Commission with respect to this request, although the deadline has passed by nearly two months. We are at a loss to understand this violation of the Act since all of these documents are clearly subject to disclosure because they involve contact between Commissioner Roberts or his staff and a party outside the agency. We are deeply concerned at this failure since we believe a full response to this request to be necessary for the public to be able to judge the integrity of the TMI-1 restart decision.

In light of the continuing violation of the FOIA deadline, we consider the Commission to have effectively denied this request. Accordingly, we appeal that denial to you in the hope that you will assure a prompt response.

Thank you. I look forward to receiving your response within 20 working days. I would also be glad to discuss this appeal with you. My telephone number is 833-9070.

Sincerely,


William S. Jordan, III

WSJ/cpk

Rel.



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

SEP 29 1983

Docket No. 50-289

Ms. Michelle Adato
Union of Concerned Scientists
1346 Connecticut Avenue, NW
Suite 1101
Washington, DC 20036

IN RESPONSE REFER
TO FOIA-83-479

Dear Ms. Adato:

This is an additional response to your letter dated August 16, 1983 in which you requested, pursuant to the Freedom of Information Act, four categories of records.

Commission Paper, SECY-82-472, is being withheld in its entirety. This document contains (1) a four-page November 30, 1982 memorandum to the Commissioners from John E. Zerbe, Director, Office of Policy Evaluation (OPE) and Martin G. Malsch, Deputy Director, Office of the General Counsel (OGC) Subject: Draft Order for TMI-1 Restart Immediate Effectiveness Decision; (2) Enclosure 1, a copy of the Draft Order (26 pages); (3) Enclosure 2, List of Hardware to be Installed or Modified Prior to Restart (1 page); and (4) Enclosure 3, Summary of Gilinsky Office Items (3 pages).

The factual content in this Commission Paper is already available in the public record in the TMI Docket File under TMI-1 Restart Proceeding - Category G. The release of the factual portions of the withheld information would reveal a predecisional evaluation of facts in the restart proceeding. Therefore, the document does not contain any reasonably segregable factual portions. The document contains the opinions, advice, and recommendations of the Director of OPE and the General Counsel to the Commissioners concerning the Commission's immediate effectiveness decision in the restart proceeding. It is, therefore, 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) of the Commission's regulations. Release of the document would tend to inhibit the open and frank exchange of ideas essential to the deliberative process. For these reasons the document is being withheld in its entirety.

Identified as being subject to Item 2 of your request are four draft versions (28 pages) of Section 3 of the Appendix to the draft order. Two phrases from each draft are being withheld from public disclosure because premature disclosure of proposed decisions before they are actually adopted would tend to inhibit the open and frank exchange of ideas essential to the deliberative process and to protect against public confusion by the disclosure of reasons and rationales that were not, in fact, the actual reasons for the agency's actions. These portions

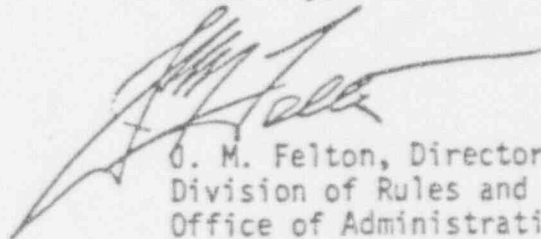
are being withheld pursuant to Exemption 5 of the Freedom of Information Act (5 U.S.C. 552(b)(5)) and 10 CFR 9.5(a)(5) of the Commission's regulations. The releasable portions are being placed in the NRC Public Document Room (PDR) located at 1717 H Street, NW, Washington, DC.

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 this denial is Mr. James A. Fitzgerald, Assistant General Counsel.

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."

The NRC has not completed its review of the remaining documents subject to your request. We will respond as soon as that review is completed.

Sincerely,

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

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

NOV 1 1983

cket No. 50-289

Ms. Michelle Adato
Union of Concerned Scientists
1346 Connecticut Avenue, NW
Suite 1101
Washington, DC 20036

IN RESPONSE REFER
TO FOIA-83-479

Dear Ms. Adato:

This is in final response to your letter dated August 16, 1983 in which you requested, pursuant to the Freedom of Information Act, four categories of records.

The documents listed on Appendix A are being placed in the NRC Public Document Room (PDR) located at 1717 P Street, NW, Washington, DC 20555.

With regard to item 4, of your request, the NRC has located no documents.

This completes action on your request.

Sincerely,

(Signed) J. M. Felton

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

Enclosures: As stated

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w/h: Ex. 5

OFFICE	ADM: DRF-SDI	ADM: DRR	ADM: DRR				
NAME	SDIsaacs/sb.	DHGrimstey	JM Felton				
DATE	10/31/83	10/ /83	10/1 /83				

☆ U.S. GPO 1983-4

OFFICIAL RECORD COPY

1. 10/19/82 Memo to W. J. Dircks from S. J. Chilk; SECY-82-384 -
TMI, Unit 1, NUREG-0787 ITEMS STATUS
2. 1/5/83 Memo to W. J. Dircks from S. J. Chilk; SECY-82-384A -
TMI, Unit 1, NUREG-0737 ITEMS STATUS
3. 12/6/82 Policy Issue - SECY-82-384A
4. 8/16/83 Policy Issue - SECY-82-340

Rel.

UNION OF CONCERNED SCIENTISTS

1346 Connecticut Avenue, N.W. • S. 1101 • Washington, DC 20036 • (202) 296-5600

August 16, 1983

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

FREEDOM OF INFORMATION
ACT REQUEST

FOIA-83-479

Aug '8 8-17-8

Dear Mr. Felton:

Pursuant to the Freedom of Information Act, please make available for public review at the Commission's Public Document Room, at 1717 H Street, Washington D.C., a copy of the following:

1. SECY-82-483, entitled "TMI-1 Restart Certification Status and NUREG-0737 Items Status Update", 12/9/82
2. All other documents, including but not limited to reports, SECY papers, memoranda, analyses, correspondence between General Public Utilities and NRC, minutes from meetings, etc., that contain information on the status of TMI-1 compliance with NUREG-0660 and NUREG-0737 (Action Plan) items. Please include all those prior to and since SECY-82-483.
3. All records of correspondence between the Commissioners, NRC staff, and General Public Utilities, in which exemptions from and extensions for completion of NUREG-0660 and NUREG-0737 items were requested, granted, or denied. Specifically included in this request are all letters, internal staff memoranda, telephone logs and minutes of meetings concerning this topic.
4. All records of correspondence between Commissioner Roberts (or his staff) and General Public Utilities, during the period of April through August of 1983. Specifically included in this request are letters, memoranda, telephone logs and minutes of meetings.

Should there be any questions regarding this request, please do not hesitate to contact me at UCS's Washington, D.C., office at 296-5600. Your cooperation in responding to this request is appreciated.

Sincerely,

Michelle Adato

Michelle Adato

Legislative Research Assistant