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June 7, 1982

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APPEAL OF INITIAL FOIA DECISION  
82-APE (82-176)

Rec'd 6-8-82

HAND DELIVERED

Mr. William J. Dircks  
Executive Director for Operations  
Nuclear Regulatory Commission  
7735 Old Georgetown Road  
Bethesda, MD 20016

Re: Appeal From Initial FOIA Decision  
(FOIA 82-176)

Dear Mr. Dircks:

We are in receipt of a letter dated May 28, 1982, from Mr. J.M. Felton, granting in part and denying in part our FOIA request of April 5, 1982. This is an appeal from denial of certain documents as noted in Mr. Felton's letter, as well as an appeal that all other documents requested, but still under review, be disclosed immediately.

Mr. Felton's letter indicates that he is denying disclosure of three items under exemption 5 of the Freedom of Information Act (5 U.S.C. 552(b)(5)) and 10 CFR 9.5(a)(5) of the NRC's regulations because the documents in question contain advice, opinions, and recommendations of the NRC staff. However, Mr. Felton's reliance upon exemption 5 does not appear, from the face of his letter, to be warranted. We are therefore appealing for disclosure of two of the above-mentioned items.

The first denial that this letter appeals concerns a 13-page "note" to V. Stello from H.R. Denton regarding a "systems interaction pilot program." Mr. Felton's letter offers no reason for non-disclosure other than citation to FOIA exemption 5 and the applicable NRC regulation. Mere citation to exemption 5 is insufficient, and, without further explanation, non-disclosure of the note is unjustified. See Vaughn v. Rosen, 484 F.2d. 820, 826-828 (D.C. Cir. 1973) cert. denied, 415 U.S. 977 (1974).

Mr. William J. Dircks  
June 7, 1982  
Page Two

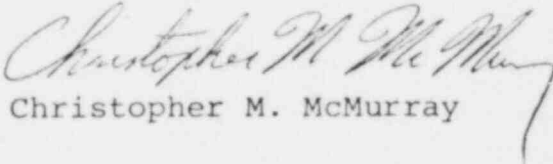
Furthermore, if the note contains statements of policy or interpretations subsequently adopted by the NRC, then the note should be disclosed. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153-154 (1975); Schwartz v. IRS, 511 F.2d. 1303, 1305 (D.C. Cir. 1975). Finally, Mr. Felton's statement that no portion of the letter is segregable lacks sufficient particularity to support his decision. Mead Data Central v. Dept. of Air Force, 566 F.2d. 242, 260-261 (D.C. Cir. 1977).

The second denial that this letter appeals concerns the Interim Guidance File. That file contains material relevant to development of Interim Guidance applied in planned systems interactions evaluations at several near-term OL plants. Nowhere does the letter indicate any attempt on the part of the NRC to segregate disclosable portions of those files. Thus, the NRC has not met the requirements of 5 U.S.C. 522(b). EPA v. Mink, 410 U.S. 73 (1973). Furthermore, Mr. Felton's letter states that the files have been distributed to outside technical assistance contractors. Such disclosure to third parties must be considered a waiver of any privilege of non-disclosure, thus denying any justification for withholding the files under exemption 5.

Finally, it is our understanding that four documents subject to our request are still under review. The FOIA provides that an agency's initial determination with regard to disclosure must be made within ten working days under 5 U.S.C. 552 (a) (6) (A) (i). One extension of an additional ten working days is permissible under 5 U.S.C. 552 (a) (6) (B). Our request was hand-delivered to the NRC on April 5, 1982. Even with an extension, the NRC should have reviewed and made determinations regarding disclosure of all documents in our request by May 3. It is evident that the NRC's delinquency in determining the disclosability of the above four documents is unwarranted and contrary to law. We must, therefore, treat the NRC's unreasonable delay as a denial of our request and thus appeal for immediate disclosure of the four documents without further delay.

Under the terms of the FOIA, we expect a reply within twenty days. However, given the NRC's extreme untimeliness in meeting our request, we believe that immediate attention and reply to this appeal is required.

Yours truly,

  
Christopher M. McMurray



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

Docket No. 50-322

May 28, 1982

Christopher M. McMurray, Esquire  
Kirkpatrick, Lockhart, Hill  
Christopher & Phillips  
1900 M Street, N.W.  
Washington, DC 20036

IN RESPONSE REFER  
TO FOIA-82-176

Dear Mr. McMurray:

This is in further response to your letter dated April 5, 1982 and several telephone conversations with Ms. Carol Ann Reed, of my staff, in which you requested pursuant to the Freedom of Information Act (FOIA), eight categories of documents.

The documents listed on Appendix A to this letter are enclosed.

The two documents and files listed on Appendix B to this letter 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 because they contain advice, opinions and recommendations of the staff.

Document 1 of Appendix B is a internal Advisory Committee on Reactor Safeguards' rough draft of a Committee letter, the disclosure of which would tend to inhibit the staff's development of advisory opinions. There are no segregable portions of this document.

Mr. Curran Roller visited the Reliability and Risk Assessment Branch (RRAB) on April 22-23, 1982, to review their files and select documents for reproduction. Mr. Roller was advised, prior to his review of the files, by Mr. James Conran, RRAB, that an effort had been made to indicate those documents which were not available for review because they were covered by an exemption in the FOIA. Mr. Roller was further advised that the possibility existed that not all withholdable documents had been identified and that it was possible that he might review and select documents for reproduction that should not have been made available to him and which would be denied pursuant to the appropriate FOIA exemption. Mr. Roller agreed to this condition prior to starting his review. This type of situation has occurred with respect to Document 2 of Appendix B. It has been determined that document 2 should be withheld from public disclosure for the reasons stated in the third paragraph above. There are no segregable portions of this document.

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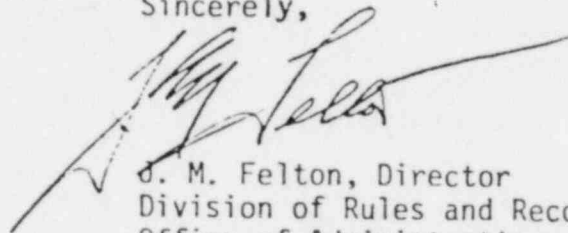
The Interim Guidance Files contain material relating directly to the development of the Interim Guidance to be applied in the planned "pilot" systems interaction evaluations to be performed at several near-term OL plants. Excluded materials include all drafts of Interim Guidance prepared by the Systems Interaction Staff and all contractor input to those drafts, as well as all comments on Interim Guidance Drafts both from within NRC or from contractors. None of this material has been made available publicly to date, and has been distributed only limitedly within NRC and to technical assistance contractors. This material is excluded as predecisional relating to pending important policy decisions.

Pursuant to 10 CFR 9.9 and 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 persons responsible for the denial of document 2 and the Interim Guidance Files listed on Appendix B are the undersigned and Mr. Harold Denton, Director, Office of Nuclear Reactor Regulation. The person responsible for the denial of document 1 on Appendix B is Mr. John Hoyle, Advisory Committee Management Officer.

The denials by Mr. Denton and myself may be appealed to the Executive Director for Operations within 30 days from the receipt of this letter. 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." The denial by Mr. Hoyle may be appealed within 30 days to the Commission and should be addressed to the Secretary of the Commission.

There are five additional documents subject to your request which are still under review. As soon as our review is completed we will advise you of our determination.

Sincerely,



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

Enclosures: As stated

Appendix A

<u>Description</u>	<u>Date</u>	<u>Pages</u>
<u>Item 1</u>		
1. Memo for W. M. Morrison from F. Schroeder, re: Proposed Rulemaking Review Request Comments	2/19/80	1
2. Memo for John W. Gilray from Walter P. Haass re: QA Programmatic Improvement Considerations	Undated	3
3. Memo for Bernard Rusche from Demetrios L. Basdekas re: Your Memorandum to me Dated December 17, 1976 on the Staff Discussion of Safety Issues NO. 22 Through 27.	12/20/76	9

Appendix A

<u>Description</u>	<u>Date</u>	<u>Pages</u>
<u>Item 2</u>		
1. Memo for D. A. Ward from Richard Major re: Proposed Summary Of The February 3, 1981 Subcommittee On Plant Features Important To Safety	2/17/81	10
2. Memo for D. A. Ward from Richard Major re: Proposed Summary Of The February 3, 1981 Subcommittee On Plant Features Important To Safety	2/17/81	10
3. Memo for D. A. Ward from Richard Major re: Proposed Summary Of The February 3, 1981 Subcommittee On Plant Features Important To Safety	2/17/81	10
4. Letter to William J. Dircks from Milton Plesset re: Cascading Failures In Nuclear Plants	8/12/80	2
5. Memo for W. Kerr from D. Fischer re: Subcommittee on Electrical Systems Meeting Of July 22, 1981	7/27/81	7
6. Memo for Gary Zech from R. Savio re: March 25, 1981 Electrical Systems Subcommittee Meeting	3/5/81	26
7. Memo for D. Ward from R. Major re: Tentative Schedule For The ACRS Subcommittee Meeting On Plant Features Important To Safety - February 3, 1981- Washington, DC	1/26/81	4
8. Note to J. Conran from R. Major transmitting 3/20/81 memo to ACRS members and staff from J. M. Jacobs regarding actions, agreements and assignments made during 251st ACRS meeting, March 12-14, 1981	3/25/81	3

Appendix A

<u>Description</u>	<u>Date</u>	<u>Pages</u>
<u>Item 3</u>		
1. Memo for J.P. Murray from E. L. Jordan re: Interpretation Of 10 CFR 50 Appendices A&B Enforceability (A/I F03066579)	12/18/79	1
2. Memo for E. L. Jordan from J. F. Streeter re: Quality Assurance Program Requirements Of Appendices A And B 10 CFR Part 50 (A/I F03066579)	10/23/79	3
3. Routing Slip for Tom Dorian from S. Richardson re: Requesting Comments On Draft Paper	9/24/80	23
4. Memo for Edward L. Jordan from James P. Murray re: Interpretation Of 10 CFR 50 Appendices A & B Enforceability	3/4/80 or 3/5/80	2
5. Memo for W. J. Dircks et. al. from W. M. Morrison re: Proposed Rulemaking Review Request	2/12/80	18
6. Note for S. D. Richardson from Penelope Owens re: Draft Public Announcement On The Applicability Of 10 CFR Part 50, Appendix B to 10 CFR Part 50, Appendix A.	10/6/80	2
7. Routing And Transmittal Slip for Steve Richardson from John Kopeck re: Secy Paper dated June 9 On Quality Assurance Criteria	Undated	5
8. Routing And Transmittal Slip for William Belke from John Kopeck re: A Public Announcement On Proposed Amendments To Clarify Quality Assurance Requirements	Undated	3
9. Routing And Transmittal Slip for T. Rehm from S. D. Richardson re: NRR/IE/ELD Final Comment And Office Concurrence.	12/22/80	25
10. NRR Lessons Learned Recommendations	6/9/79	3
11. Memo for Ray Smith from Harold R. Denton re: Proposed Amendment To 10 CFR Part 50 Appendices A And B To Clarify Quality Assurance Requirements	4/6/81	3
12. Memo for R. B. Minogue from Edson G. Case re: Proposed OSD Task Deletions	7/18/79	1

Appendix A

<u>Description</u>	<u>Date</u>	<u>Pages</u>
<u>Item 3</u>		
13. Request for Additional Information <u>WPPSS-2</u>	Undated	64
14. Routing And Transmittal Slip for Bill Morrison from C. J. Heltemes, Jr.	12/21/77	24
15. Memo to Interoffice QA Task Force from Richard H. Vollmer re: Proposed Regulatory Guide, Nuclear Power Plant Structures, Systems Components And Activities Subject To A Quality Assurance Program	10/16/75	32
16. Memo for F. J. Williams from Donald J. Skovholt re: Regulatory Guide Review Request: 1.XXX, Applicability Of The Quality Assurance Criteria Of Appendix B To Structures, Systems, And Components Of Nuclear Power Plants	8/4/77	3
17. Memo for M. Kehnemuyi from R. C. DeYoung re: Regulatory Guide Review Request: 1.XXX, Applicability Of The Quality Assurance Criteria Of Appendix B To Structures, Systems, And Components Of Nuclear Power Plants	8/5/77	1
18. Memo for V. Benaroya from W. P. Haass re: Revisions To SRP Section To Include Complete Listing Of Safety-Related Items And Applicability Of QA Requirements	3/21/ 78	2
19. Memo for Richard H. Vollmer from Walter P. Haass re: New QAB Positions Proposed For Implementation On Zion 1 & 2 And Indian Points 2 & 3	7/17/80	23
20. Memo for W. M. Morrison from William E. Kreger re: Review Of Request For Proposed Rulemaking	3/4/80	2



APPENDIX A

<u>Description</u>	<u>Date</u>	<u>Pages</u>
<u>Item 5</u>		
1. Note for Mike Greismeyer from Jim Conran re: Staff/PASNY Participation In Subcommittee Report Session On System Interaction... And Related Matters	3/3/82	3

Appendix A

<u>Description</u>	<u>Date</u>	<u>Pages</u>
<u>Item 6</u>		
1. Memo for W. M. Morrison from E. L. Jordan re: Comments On Document P827 Criteria for Determining Requirements For Systems Important To Safety Draft 2 Dated September 11, 1980	Undated	7
2. Memo for E. C. Wenzinger from E. W. Weiss re: IEEE Standard For Classifying Instrumentation Control And Electrical Equipment Important To Safety: Report Of Third Working Group Meeting	10/16/80	4
3. Memo for Morton R. Fleishman from Eric W. Weiss re: Differences Between The Classification Schemes Contained In ANS 52.1 And IEEE P827	10/30/80	11
4. Letter for Allen R. Kasper from Guy A. Arlotto re: Review And Comment On IEEE P827	4/22/81	6

Appendix B

1. Draft 3 of letter to M. S. Plesset from J. Ebersole dated 7/11/80 regarding nuclear accident cascades (15 pages) (See item 2-4 of Appendix A of this letter for committee letter.)
2. Undated/Unsigned note to V. Stello, Jr., from H. R. Denton regarding systems interaction pilot program (13 pages)
3. Interim Guidance Files