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APPEAL OF INITIAL FOIA DECISION
82-A-13C (82-236)
Rec'd 7-12-82

July 9, 1982

Mr. Samuel J. Chilk
Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

SUBJECT: FOIA-82-236--Appeal from an Initial FOIA Decision

Dear Mr. Chilk:

On May 17, 1982, Mr. Steven C. Sholly of the Union of Concerned Scientists requested by letter (attached) that ten categories of documents be placed in the NRC Public Document Room pursuant to the Freedom of Information Act, 5 U.S.C. §552. In the Commission's "further response" to that request (attached), dated June 22, 1982, and signed by J. M. Felton, a document identified as "A Memorandum dated February 25, 1981, to M. Chopko, from J. A. Martin, Jr., Subject: Comments On Your Brief, Re: 15 Minute Warning (4 pages)" was withheld from public disclosure pursuant to Exemption Five of the Freedom of Information Act (FOIA), 5 U.S.C. §552(b)(5) and 10 CFR §9.5(a)(5). Mr. Felton's June 22 letter asserts only that the withheld document "contains information which constitutes a legal work product" and that it is therefore exempt from disclosure under exemption five.

Exemption five exempts from the disclosure requirements of FOIA:

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

5 U.S.C. §552(b)(5). It is clear that this exemption comprehends, among other things, the attorney work-product privilege, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154 (1975). However, preparation by an attorney does not necessarily qualify a document as "work product," Bristol-Meyers Co. v. FTC, 598 F. 2d 18, 28 (D.C. Cir. 1978). To qualify under the work product exemption, material must have been prepared "with an eye to litigation," Sterling Drug, Inc. v. Harris, 448 F. Supp. 1019 (D.C. N.Y. 1980). The Supreme Court has held:

7/12...To OGC To Prepare Reply for Commission Review & Signature of SECY...Date due: August 9...Cpys to: RF, EDO...82-0723.

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Whatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy.

NLRB v. Sears, supra, at 154.

The document being withheld here apparently comments on a brief that was submitted during litigation in which NRC was a party, and so could possibly constitute "work product" within the intent of the exemption. However, the very sparse description of the withheld document in the NRC's denial and the fact that the withheld memorandum was not written by an attorney and is dated February 25, 1981--two weeks after the date of the brief which it is our belief is being commented upon--cast doubt on the applicability of the work-product exemption to the withheld document.

The unadorned assertion that the withheld document "contains information which constitutes a legal work product" is not by itself sufficient justification for refusing to disclose the entire document:

(W)hen 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 the withheld document to which they apply. See Pacific Architects and Engineers, Inc. v. Renegotiation Board, 505 F. 2d 383, 385 (1974); Vaughn v. Rosen, 484 F. 2d 803, 826-28 (1973), cert. denied, 415 U.S. 977 (1974); Cuneo v. Schlesinger, 484 F. 2d 1086 (1973), cert. denied, 415 U.S. 977 (1974); Schwartz v. IRS, 511 F.2d 1303, 1307 (1975).

Mead Data Central, Inc. v. U.S. Dept. of the Air Force, 566 F. 2d 242, 251 (D.C. Cir. 1977). The bald assertion that a document "contains" work product does not begin to satisfy these requirements.

In addition, FOIA exemptions should be narrowly construed, "in such a way as to provide the maximum access consonant with the overall purpose of the Act." Vaughn v. Rosen, 484 F. 2d 820, 823 & n. 11 (D.C. Cir. 1973). Congress was aware that an overbroad interpretation of exemption five could nearly nullify the disclosure mandate of the FOIA and indicated that it should be applied "as narrowly as consistent with

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efficient Government operations." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1956); see H. R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). Mead Data v. Air Force, supra, at 252, n. 16. Pursuant to this general principle of narrow construction, exemption five has been interpreted not to apply to essentially factual material, Bristol-Meyers Co. v. FTC, 424 F. 2d 935, 939 (D.C. Cir. 1970), cert. denied, 400 U.S. 824 (1970), EPA v. Mink, 410 U.S. 73 (1973). Factual matter must be disclosed if it is segregable from an otherwise exempt memorandum, EPA v. Mink, supra, at 9, Associated Dry Goods Corp. v. NLRB, 455 F. Supp. 802, 809, (S.D. N.Y. 1978).

NRC has not provided the "detailed justification" required to withhold the document in question. It is not apparent that a memorandum, written by a non-attorney, concerning a brief which was filed two weeks earlier, was prepared "in contemplation of litigation." It certainly cannot set forth an attorney's "theory of the case and litigation strategy." It is our understanding that the author of the document in question, Mr. Martin, is a member of the NRC's technical staff. This fact makes it substantially more likely that the subject of the memo concerns factual or technical aspects of the brief being commented upon, rather than the mental impressions or thought processes the privacy of which are at the crux of the attorney's work-product privilege.

NRC has not indicated whether there are segregable factual portions of the document which could be disclosed, nor has it explained that the factual and deliberative material are inextricably intertwined, and thus wholly exempt from disclosure. That the denial states the document "contains" matter which constitutes work product also suggests that the document does not consist wholly of work product.

We appeal the NRC's initial FOIA decision to the extent that we request, in the alternative:

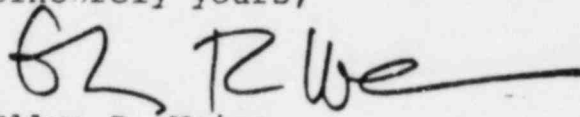
1. that the document in question be disclosed in its entirety; or
2. that segregable factual portions be disclosed together with the required "detailed justification" for portions which continue to be withheld; or

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3. that if NRC persists in withholding the entire document, it provide the "detailed justification" therefor as required by Mead Data v. Air Force, supra, and the cases cited therein.

Sincerely yours,


Ellyn R. Weiss

Enclosures

DT:law