



407

October 3, 1983

SECY-83-407

POLICY ISSUE

(Notation Vote)

For:

The Commission

From:

James A. Fitzgerald
Assistant General Counsel

Subject:

FOIA APPEAL ON HARTMAN CORRESPONDENCE

Discussion:

On May 26, 1983 Harry Voigt requested copies of the correspondence between Chairman Palladino and the Department of Justice (DOJ) concerning the DOJ's investigation of alleged falsification of leak rate tests at Three Mile Island, Unit 2. On September 15, 1983, the NRC identified three letters responsive to Mr. Voigt's request and released all but three sentences or portions thereof in those documents. Those three sentences were withheld under Exemption (7)(a).

Mr. Voigt coincidentally filed suit over the agency's inaction on his request on the same day the initial response was issued. Mr. Voigt has informed us that he intends to pursue the lawsuit over the withheld portions. In addition, on September 19 Mr. Voigt appealed the partial denial to the Commission. In that appeal Mr. Voigt argued that the deleted portions could not be properly withheld under Exemption (7), and that the response failed to take into account that the letters had been discussed in a newspaper

CONTACT:
Rick Lev, OGC
4-1465

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

9404010238 930608
PDR FOIA
GILINSK92-436 PDR

4/67

article. Finally, Mr. Voigt requested a copy of the letter of May 27, 1983, from the Director, OIA to Assistant Attorney General Jensen, and any related correspondence.¹

believe that

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²Mr. Richards, Deputy Assistant Attorney General in the Criminal Division, referred us to Mr. Reynolds for a release determination. Mr. Reynolds in turn referred us to Mr. Flannagan.

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⁵Rule 6(e) reads in pertinent part as follows: "A grand juror, ... an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules."

The Supreme Court explained the rationale for grand jury secrecy as follows:

First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as inducements. There also would be a risk that those about to be indicted would flee or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

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James A. Fitzgerald
Assistant General Counsel

Attachments:

1. FOIA Appeal
2. Initial Response
3. Marked up Version of Requested Documents
4. Draft Appeal Letter

Per request of OGC, Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Friday, October 7, 1983.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Wednesday, October 5, 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.

DISTRIBUTION:

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Attachment 1

LEBOEUF, LAMB, LEIBY & MACRAE

A MEMBERSHIP INCLUDING PROFESSIONAL CORPORATIONS

1333 NEW HAMPSHIRE AVENUE, N.W.

WASHINGTON, D. C. 20036

202-457-7500

TELEX: 440274

TELECOPIER: 202-457-7543

202-457-7511

LEBOEUF, LAMB, LEIBY & MACRAE (UK)
47 BERKELEY SQUARE
LONDON W1X 3DB, ENGLAND

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336 FAYETTEVILLE STREET MALL
P. O. BOX 750
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150 STATE STREET
ALBANY, NY 12207

3 MADISON AVENUE
NEW YORK, NY 10022

6 REARNS BUILDING
126 SOUTH MAIN
LAKE CITY, UT 84101

111 REDUOT AVENUE
UTHPORT, CT 06490

please

September 19, 1983

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

Re: Appeal from an Initial FOIA Decision

Dear Mr. Chilk:

This is an appeal from an initial decision by the Office of Administration on a Freedom of Information Act request I submitted on May 26, 1983. As you may be aware, a civil action was filed in this regard on September 15, 1983, since the Commission had taken no action on my request within the time prescribed by the statute and regulations. The case is Voigt v. U.S. Nuclear Regulatory Commission, Civil No. 83-2726 (D.D.C.)

Pursuant to the FOIA and the Commission's regulations, I hereby appeal the partial denial of my request. According to the letter ruling I received, portions of the documents I requested have been withheld on the theory that they represent investigatory records compiled for law enforcement purposes the release of which would interfere with enforcement proceedings. 10 C.F.R. § 9.5(a)(7)(i) (1983). Given the substantial portions of the correspondence in question that have been released, I respectfully suggest that the isolated additional portions that have been withheld would not, if released, interfere with enforcement proceedings, and I ask that the Commissioners specifically review the action of the Office of Administration from this perspective. I would also ask that the Commission identify the enforcement proceedings with which release would interfere, in the event it declines

Hon. Samuel J. Chilk
September 19, 1983
Page Two

to order complete release, and the date that ongoing investigation" commenced. In this connection, to the extent that the second paragraph of Chairman Palladino's May 27, 1983 letter to Assistant Attorney General Jensen indicates that the Commission's investigation was not at that time in progress, I would suggest that it is improper to attempt to retrofit an after-commenced investigation to documents generated and requested before that time.

The action of the Office of Administration also fails to take into account the fact that this correspondence has previously been released, as shown by the newspaper article appended to my initial request. In this connection, I request that the Commission advise me in detail as to the date and circumstances of that release, and indicate why this material should be available to a newspaper and not to me.

Finally, I request a copy of the correspondence from the Director, Office of Inspector and Auditor, to Assistant Attorney General Jensen, referred to in the last paragraph of Chairman Palladino's letter to Mr. Jensen dated May 27, 1983. Any response from Mr. Jensen and any related correspondence is also respectfully requested.

In view of the pendency of the civil action noted above, I would be grateful for an early ruling.

Very truly yours,

Harry E. Voigt
Harry E. Voigt

cc: Richard P. Levi, Esq.

Attachment 2

NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

September 15, 1983

release

DOCKET NO. 50-289

Mr. Harry H. Voigt
Le Boeuf, Lamb, Lieby & MacRae
1333 New Hampshire Avenue, NW
Washington, DC 20036

IN RESPONSE REFER
TO FOIA-83-285

Dear Mr. Voigt:

This is in response to your letter dated May 26, 1983, in which you requested, pursuant to the Freedom of Information Act, copies of correspondence between Chairman Palladino and the Department of Justice (DOJ) regarding DOJ's investigation(s) of alleged falsification of reactor coolant system leak rate tests at the Three Mile Island Nuclear Generating Station.

Appendix A is a list of three letters which are subject to your request. Portions of documents two and three are investigatory records compiled for law enforcement purposes and are being withheld from public disclosure pursuant to Exemption (7)(A) of the Freedom of Information Act (FOIA) (5 U.S.C. 552(b)(7)(A)) and 10 CFR 9.5(a)(7)(i) of the Commission's regulations, because disclosure of the information would interfere with an ongoing investigation.

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, Washington, DC 20555, and should clearly state on the envelope and in the letter that it is an "Appeal from an Initial FOIA Decision."

This completes NRC's action on your request.

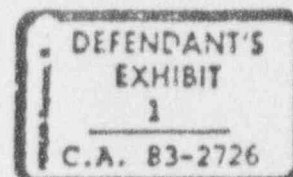
Sincerely,

J. M. Felton

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

Enclosure: As stated

CO 7 10 13 1983



APPENDIX A

1. 5/27/83 Letter to the Honorable D. Lowell Jensen from Nunzio J. Palladino.
2. 4/11/83 Letter to the Honorable William French Smith from Nunzio J. Palladino.
3. 5/17/83 Letter to the Honorable Nunzio J. Palladino from D. Lowell Jensen.

ATTACHMENT 3

MAY 17 1983

Honorable Nunzio J. Palladino
Chairman
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Chairman Palladino:

We are in receipt of your letter dated April 11, 1983, regarding the possible restart of the Three Mile Island ("TMI") Unit 1 nuclear facility. Your letter reflects concern over the length of time the Department of Justice has investigated allegations concerning possible criminal wrongdoing at the TMI Unit 2 nuclear facility. Your letter states that the Department's pending investigation is relevant to the Nuclear Regulatory Commission's ("NRC") decision on whether to allow resumption of operations at TMI Unit 1, because the allegations being investigated by the Department relate to the "competence and integrity of TMI management." You request that the Department complete its investigation by May 15, 1983, so that the NRC may (i) carefully assess the significance of any indictments resulting therefrom; or (ii) seek the Department's assistance in obtaining the grand jury records so that it may complete its own inquiry into the same allegations.

Your letter raises a number of issues which we would like to address. It will be helpful to address such issues in the context of a history of the TMI investigation, our joint participation therein, and communications between our two agencies as to the NRC's parallel inquiry into some of the same allegations.

In April, 1980, the Department of Justice commenced a grand jury investigation into the so-called Sarban allegations following a referral of the matter from the NRC.

As is normal in grand jury matters where an agency wishes to conduct its own parallel inquiry to determine whether potential civil remedies are appropriate, the Department requested the NRC to curb its investigative efforts somewhat for a limited period of time to

is not correct to state, however, that the Department prevented the NRC from pursuing its inquiry into the so-called Manning allegations. In May, 1980, the Department requested that the NRC not proceed immediately with further interviews of TMI Unit 2 employees.)

However, in October, 1981, a Criminal Division attorney advised Mr. James Cummings of the NRC that the NRC should feel free to proceed with interviews of any of those employees, except three specifically named individuals. Mr. Cummings was advised further that those three individuals could be interviewed by the NRC at any time after early November, 1981. As far as the NRC, the NRC has declined to interview the TMI Unit 2 employees and has not pursued its inquiry into the matter.

The Department's investigation unfortunately has encountered unavoidable delays, which due to the strictures of Rule 6(e), Federal Rules of Criminal Procedure, we are not at liberty to fully explain to the NRC. However, it is not correct to state that the investigation was at a total standstill for a 15-month period from late 1981 to early 1983. Further, although the investigation has not proceeded as smoothly as we would have liked, it has not been delayed because of lack of interest or effort. We can assure you that the investigation is being pursued in a diligent manner and will continue to be until its conclusion. However, we must advise you that because of the complexity of the matter and the number of witnesses who must testify before the grand jury, the investigation will not be completed by May 1984.

The allegations involved in the Department's investigation have long been known by the NRC, since they either (i) have been made publicly; (ii) arose during the NRC's own investigation prior to referral of the matter to the Department of Justice; or (iii) relate to matters regulated by the NRC and which have been the subject of NRC consideration in the past. Moreover, because of the length of time which has passed since the commencement of the TMI investigation and the NRC's belief that such an inquiry bears on its decision concerning restart of TMI Unit 1, the Department reiterates its position of October 1981 that the NRC may proceed with its own inquiry in whatever manner it deems appropriate, in accordance with its procedures. Accordingly, the continuing nature of the Department's investigation should not impede the NRC's ability to address and resolve the restart issue.

There is one further matter raised in your letter we would like to address. Your letter indicates that at the conclusion of the Department's investigation the NRC will request our

assistance in conducting grand jury records to aid in its own
investigation. The Department's interest in seeking release of those
records to the NRC is a matter which must await the end of the
investigation. As has been mentioned in the past, release of
grand jury materials to the NRC poses significant legal problems
under Rule 6(e), Federal Rules of Criminal Procedure. That
rule imposes a general rule of secrecy on grand jury
proceedings, with certain delineated exceptions. None of such
exceptions may apply to the NRC's desire to have access to
grand jury materials to aid in its own administrative inquiry.
See, e.g., United States v. Bates, 627 F.2d 339 (D.C. Cir.
1980) (Federal Trade Commission investigation into alleged
violations of the Shipping Act not "wholly unrelated to or in
connection with a judicial proceeding," the only possibly
applicable disclosure exception set forth in Rule 6(e)); In re
Grand Jury Proceedings, 309 F.2d 440 (D.C. Cir. 1962) (Federal
Trade Commission investigation held administrative and not
within the scope of any Rule 6(e) disclosure exception); In re
Grand Jury Matters, 495 F. Supp. 127 (E.D. Pa. 1980) (same for
Mine Safety and Health Administration adjudicatory proceeding).

As previously indicated, the allegations under
investigation by the Department are known to the NRC, and
therefore your Agency is in a position to assess their health
and safety significance. In the event the focus of the
investigation is expanded to include other allegations, we will
be careful to bring to your attention any information
indicating a potential threat to health or safety. Should that
information be developed before the grand jury, the Department
will seek a court order, pursuant to Rule 6(e) and the inherent
authority of the court to supervise the grand jury, for
disclosure of such information to the NRC for use in connection
with its safety enforcement responsibilities. There is
judicial precedent granting the court, which supervises grand
jury proceedings, discretion to make disclosures of matters
occurring before the grand jury to proper authorities under
circumstances demonstrating a compelling public interest. See
In re Special February, 1975 Grand Jury, 662 F.2d 1232
(7th Cir. 1981), cert. granted, 102 S. Ct. 2955 (1982);
In re Biaggi, 478 F.2d 489 (2d Cir. 1973); In re Report &
Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219
(D.D.C. 1974); In re Bullock, 103 F. Supp. 633 (D.D.C. 1952).

concerns raised in your letter of April 1, 1965. If you have any additional questions or concerns please do not hesitate to contact us.

Sincerely,



D. LOWELL JENSEN
Assistant Attorney General
Criminal Division

The Honorable William French Smith
Attorney General
U.S. Department of Justice
10th & Constitution Avenue NW
Room 511
Washington, DC 20530

Dear Mr. Smith:

There is presently pending before the Commission a decision on whether to allow restart of the Three Mile Island, Unit 1 (TMI-1) nuclear facility. The Department of Justice (DOJ) is currently conducting an investigation which may relate to that decision.

In early 1980 the Nuclear Regulatory Commission (NRC) received allegations from Mr. Harold Hartman, a former Unit 2 control room operator, concerning the falsification of reactor coolant system leak rate tests at TMI-2. The Commission's investigation into this matter was halted in May 1980 at the request of DOJ, which subsequently initiated its own investigation into this matter. [The DOJ investigation is still open but our understanding is that there was no substantive investigation conducted by the DOJ between November 1981 and February 1983, and apparently no information has been developed beyond what was available in 1980.]

The Hartman allegations touch upon the competence and integrity of TMI management, perhaps the most significant issue the Commission must address in deciding whether to allow restart of TMI-1. We are rapidly approaching the point where failure to resolve these allegations may delay that decision.

Unit 1 is shut down and is undergoing repairs, but the licensee currently estimates that it will be able to resume operation by July 15, 1983. Resumption of operation, however, cannot occur unless and until the Commission issues a decision authorizing restart. The Commission therefore strongly urges you to expedite the DOJ investigation and attempt, if at all possible, to complete it prior to May 15, 1983.

TO BE
RELEASED
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release

The Honorable William French Smith
Attorney General
U.S. Department of Justice
10th & Constitution Avenue NW
Room 511
Washington, DC 20530

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TO BE RELEASED

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11-25

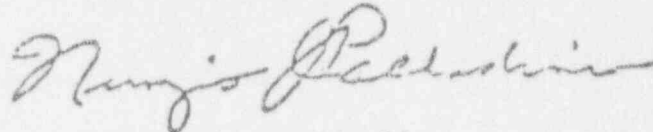
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The NRC will continue to provide technical assistance to the DOJ investigation. If criminal indictments follow from the DOJ investigation, the Commission will carefully assess the significance of such indictments. Even if indictments do not result, the Commission, in order to discharge its responsibility to inquire fully into this matter, will request your assistance in obtaining the grand jury records to aid in its own inquiry.

Commissioner Roberts would not have sent this letter. The letter attempts to place all responsibility for the delay in the completion of the Hartman investigation on DOJ. In the absence of written documentation, it is unclear to Commissioner Roberts that this assignment of responsibility is proper. Moreover, the letter's attempt to assign responsibility is unlikely to encourage DOJ to cooperate with the NRC.

In order to make a timely decision on the course of action NRC must pursue to resolve the Hartman issue, we would appreciate some indication within the next two weeks as to whether DOJ will complete the investigation by May 15, 1983.

Sincerely,



Nunzio J. Palladino

May 31, 1983

The Honorable D. L. Jensen
Assistant Attorney General
Criminal Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Jensen:

Your May 17, 1983, letter to Chairman Palladino raises a number of questions with respect to the communications between our two agencies which I would like to address.

First, you state that "...the Department requested the NRC to curb its investigative efforts somewhat for a limited period of time to maximize the effectiveness of the grand jury proceedings." At several meetings with Department attorneys in late April 1980, the NRC was clearly and unambiguously requested to stop (emphasis added) all phases of its investigation into the Hartman allegations so as not to possibly impinge on the Department of Justice's (DOJ) investigation.

Second, your letter goes on to state "It is not correct to state, however, that the Department prevented the NRC from pursuing its inquiry into the so-called Hartman allegations." In this regard the NRC recognized from the outset that the DOJ did not have authority to literally prevent the NRC from pursuing its inquiry into the Hartman allegations. However, it is correct to state that at meetings in April 1980, Department attorneys vigorously objected to NRC continuing the investigation. Department attorneys made it quite clear that if NRC did not accede, then DOJ would consider such a decision to be tantamount to hindering/impeding their investigation.

Third, your letter states "However, in October 1981 a Criminal Division attorney advised Mr. James Cummins of the NRC that the NRC should feel free to proceed with interviews of any of those employees, except three specifically identified individuals. Mr. Cummins was advised further that those three individuals could be interviewed by the NRC at any time after November 1981." I disagree.

By way of background, on October 13, 1981, I met at Main Justice with Department attorneys Richard, Lippe and Reynolds. This meeting was initiated by me to determine the status of the Hartman matter prior to the Three Mile Island (TMI) restart hearings. Mr. Victor Stello, then Director of NRC's Office of Inspection and Enforcement, was also present at this meeting. NRC was informed as follows:

The Federal Rules of Criminal Procedure regarding grand jury testimony proscribed DOJ from providing any detailed information regarding the case;

In DOJ's opinion the grand jury process had uncovered no new substantive information over and above that which the NRC had found in its preliminary investigation;

The DOJ was not aware of any evidence presented to the grand jury which would indicate any new public health and safety issues not already known to the NRC by virtue of its preliminary investigation;

Department Attorneys expected a decision would be made by November 1, 1981, on whether to continue the DOJ investigation. They further expressed the belief that by this time most, if not all, of the substantive investigation would be completed particularly with respect to grand jury witnesses and NRC could then proceed with its investigation. However, they said they would contact U.S. Attorney Carlton O'Malley, Middle District of Pennsylvania to verify the status of the investigation and to obtain his concurrence with respect to NRC reinstating its investigation;

A DOJ decision not to pursue the investigation any further should not be interpreted by NRC to mean that the DOJ investigation found no evidence of wrongdoing;

If DOJ decided not to pursue this matter then, at NRC's request, DOJ would be willing to petition the court for release of grand jury testimony to NRC. DOJ was pessimistic that the courts would agree to this release; and

DOJ regretted they had not been able to bring this matter to a speedy resolution but were not apologetic for this situation as they felt substantial time and manpower had been devoted to the case.

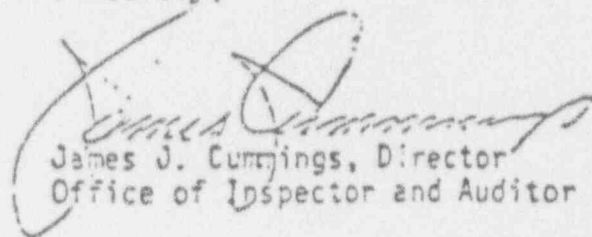
Following the October 13, 1981 meeting, my office called Department attorneys on a regular basis, however, no final decision was forthcoming. Mr. O'Malley's hospitalization, the appointment of a new United States Attorney for the Middle District of Pennsylvania and the reassignment of the case were undoubtedly factors which contributed to this situation. On March 1, 1983, I met at Harrisburg, Pa, with Assistant U.S. Attorney James West. At this meeting I outlined NRC's interest in the overall Hartman allegations and told him that NRC was considering reinstating its investigation. Mr. West was very responsive to NRC's interest in this matter and advised me that his office and the Federal Bureau of Investigation were giving this matter priority attention and that he hoped the case might be resolved by June or July 1983. Mr. West requested that, if possible, NRC not reinstitute its investigation or take any enforcement action in this matter until his office had an opportunity to resolve the matter. Mr. West's request is totally consistent with the position taken by DOJ throughout this investigation. In fact, your May 17 letter is the first notification NRC has received that the Department no longer objects to NRC reinstating its investigation of the Hartman matter.

Finally, putting aside the communications issue, I am concerned that with the exception of Mr. West, no one in the Department, has committed to a prospective completion date for this investigation. This matter was referred to the Department in April 1980 and, to our knowledge, has no complex

interstate aspects or sophisticated criminal schemes to be uncovered, which could reasonably justify an investigative period in excess of three years. The NRC is close to the point where a significant decision must be made with regard to the TMI restart. To ensure this decision is responsible, well reasoned, and in the public's interest, it is desirable that all available data be factored into the agency's decision making process.

I hope this letter clarifies some of the issues and concerns expressed in your letter of May 17, 1983.

Sincerely,



James J. Cummings, Director
Office of Inspector and Auditor

- bcc: Commission (5)
- W. Dircks, EDO
- B. Hayes, OI
- H. Plaine, OGC
- V. Stello, DEEO
- F. Denton, NRR
- G. Cunningham, ELD
- T. Martin, RO I
- R. DeYoung, IE

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FILED	OIA						
DATE	Cummings/Seb/ed						
TIME	6/1/83						

ATTACHMENT 4