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KIRKPATRICK, LOCKHART, HILL, CHRISTOPHER & PHILLIPS

A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

1900 M STREET, N. W.

WASHINGTON, D. C. 20036

TELEPHONE (202) 452-7000
CABLE: KIPHI
TELEX 440409 KIPH UI
WRITER'S DIRECT DIAL NUMBER
452-7023

IN PITTSBURGH
KIRKPATRICK, LOCKHART, JOHNSON & HUTCHINSON
1500 OLIVER BUILDING
PITTSBURGH, PENNSYLVANIA 15222
(412) 355-6500

August 17, 1982

APPEAL OF INITIAL FOIA DECISION
82-A-19 C (82-308)
Rec'd 8-20-82

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Subject: Appeal from an Initial FOIA Decision
#FOIA - 82-308

Dear Sir:

This is an appeal pursuant to subsection (a)(6) of the Freedom of Information Act ("FOIA"), 5 U.S.C. §552 and the Nuclear Regulatory Commission's ("Commission") regulations thereunder, 10 C.F.R. §9.11.

On August 5, 1982, we received a letter from Mr. J. M. Felton, Director, Division of Rules and Records, Office of Administration, denying, in total, our FOIA request of July 14, 1982 (copies of FOIA request and denial attached). That request sought two types of documents: (1) documents in which the Commission has "focused on the risks associated with fuel loading and low power operation"; and (2) documents in which the Commission has "chosen a level of emergency preparedness appropriate to assure the health and safety of the public" for fuel loading and low power operation. The Commission makes reference to both types of documents in the summary of public comments which accompany its final rule on the subject of emergency planning and preparedness and low power operation. 47 Fed. Reg. 30232.

Mr. Felton's letter identifies only three responsive documents. As to two of those documents, Mr. Felton's letter claims that they constitute advice, opinions and recommendations of the staff, and thus are exempt from mandatory disclosure under Section 552(b)(5). As to the third document, Mr. Felton's letter claims that it is an

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attorney-client communication containing attorney work-product material, and thus is also exempt from mandatory disclosure under Section 552 (b)(5).

Before commenting on the applicability of the exemption in Section 552 (b)(5) to these documents, we address two threshhold issues. First, it is impossible for us, or for a court, to reach a judgment about the applicability of the claimed exemption, without first receiving a reasonably detailed description of the withheld documents and an explanation of the applicability of the claimed exemption. Our FOIA request asked the Commission to supply just such a description and explanation. Furthermore, the courts have emphatically and uniformly held that agencies must supply requestors with such a description and explanation, as to each withheld document. Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

Notwithstanding the Commission's legal obligation to provide a detailed description and explanation for each withheld document, Mr. Felton's letter and the accompanying appendix fail altogether to describe the three withheld documents. Moreover, rather than explaining the basis for the applicability of the exemption at Section 552(b)(5), Mr. Felton's letter contains a conclusory statement that the materials contain staff advice or attorney work product material. The courts have made it very clear that agencies will not be permitted to withhold documents on the basis of these kinds of conclusory and judgmental claims. Ash Grove Cement Co. v. FTC, 511 F.2d 815, 818 (D.C. Cir. 1975).

Thus, at the outset, we request that we be sent an adequate description and explanation of any responsive documents which the Commission decides to continue to withhold. In the event that we file a law suit in this matter the Commission will, no doubt, be ordered to prepare such an index.

Second, we find it nothing short of incredible that the Commission's staff has identified only three documents which are responsive to our request. If Mr. Felton's letter is accurate, the Commission has only three documents -- one of which consists of five pages and another of which consists of one page -- which address a critical issue of public safety, and an issue about which the Commission has just issued a far reaching, final rule.

Given the inherently suspect nature of this claim, we request that the Commission staff conduct a second search of their records during the appeal period. We ask that the Commission please notify us of the results of that search. We will pay search fees of up to $500.00 for this effort.

In addition, we ask that all of the officials responsible for the Commission's response to our request and appeal, including Mr. Felton, Mr. Dennis K. Rathbun, Mr. Guy H. Cunningham and Mr. Michael T. Jamgochian, sign sworn affidavits attesting to: (1) the nature of their duties and responsibilities regarding the Commission's final rule on emergency preparedness and low power operation; (2) the nature of their duties and responsibilities regarding our FOIA request and appeal; (3) the nature of their search for responsive documents; and (4) the results of that search, including a specific identification of responsive documents. In the event that we file a law suit in this matter, responsible officials will, no doubt, be required to submit a sworn statement as to those issues. Ott v. Levi, 419 F. Supp. 750, 752 (E.D. Mo. 1976).

Even in the absence of an adequate identification, description and explanation of the withheld documents, the staff's denial of our FOIA request raises several questions.

First, there is certainly reason to question whether any of the withheld documents qualify for the exemption in Section 552(b)(5). That exemption protects an agency's deliberative, predecisional process from disclosure.

However, these documents may not be deliberative at all, because they may represent a scientific, technical analysis of low power risks and emergency planning. The courts have consistently rejected agency claims that scientific and technical analyses are part of the deliberative, policy making process protected by Section 552(b)(5). Sterling Drug Inc. v. Harris, 488 F. Supp. 1019, 1028, 1029 (S.D. N.Y. 1980), and Park Davis Co. v. Califano, 623 F.2d 1, 6 (6th Cir. 1980).

In addition, it is possible that the withheld documents are not predecisional. They may represent and embody the Commission's final decision, as reflected in its final rule. Staff documents which justify, explain or embody final agency action cannot be protected under Section 552(b)(5). Washington Research Project v. Dept. of HEW, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963. Of course, the cursory and conclusory description and explanation of the withheld documents provided by Mr. Felton makes it impossible for us, or for a court, to make a final judgment about the real nature of the withheld documents.

Second, Mr. Felton's letter states that there are no factual or otherwise segregable portions of the withheld memoranda that are not included as parts of the public record in the Diablo Canyon, McGuire and San Onofree proceedings. The Freedom of Information Act expressly requires agencies to make available "any reasonably segregable portion of a record after deletion of the portions which are exempt." Section 552(b). The courts have directed agencies to make the non-exempt portions of all documents available unless the exempt and non-exempt information is inextricably intertwined such that: (1) excision would impose significant costs on the agency; and (2) would produce an edited document of little value. Neufeld v. I.R.S., 646 F.2d 661, 666 (D.C. Cir. 1981).

Thus, it is irrelevant that the non-exempt portions of the withheld documents are already on the public

record. Furthermore, given the number and length of the withheld documents it is hard to believe that the excision of allegedly exempt material could cause the Commission significant costs.

Third, even assuming that all or parts of the withheld documents are exempt, the Commission should exercise its discretion to release the information because the public interest would be served by such release. Both the courts and the Attorney General have urged agencies to bear in mind that disclosure of agency records is the foremost goal of the FOIA and that, accordingly, agencies should consider the public interest to be served in the release of exempt materials (Memorandum for Heads of all Federal Departments and Agencies, from William French Smith, May 4, 1981).

In this case, the public interest is especially compelling. The Commission has issued a final rule regarding a subject that has a profound effect upon public health and safety. In issuing this rule the Commission has publicly and expressly assured the public that it has "focused on the risks associated with this level of operation and has chosen a level of emergency preparedness appropriate to assure the health and safety of the public at that stage". 47 Fed. Reg. 30232. All that our request seeks is the disclosure of those documents which embody the Commission's identification of risks and selection of a level of emergency preparedness.

Disclosure of these documents, if they exist, is manifestly in the public interest. Disclosure may promote public confidence in the Commission's decision and, in any event, will encourage and educate the public debate on an issue of legitimate and accute importance to the public. In this kind of circumstance, an agency should exercise its discretion to make even exempt documents available. General Services Administration v. Benson, 415 F.2d 878, 880 (9th Cir. 1969).

If, notwithstanding these concerns, the Commission chooses to withhold any responsive documents, please explain why the public interest would not be served by disclosure.

We look forward to receiving your answer to this appeal within 20 working days. The Commission is not entitled to extend this response period by an additional 10 working days because the Commission already took five extra working days to respond to our initial request. As stated, we will pay search and copying fees of up to $500.00. If this amount is to be exceeded, please notify us.

We request that the Commission's response be as detailed as possible in order to better enable us to determine the need for further legal action.

Sincerely,

Robert R. Belair

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