



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

PDR (A1-37)

OCT 3 - 1990

Mr. Richard Condit
Mr. Mick Harrison
Government Accountability Project
25 E Street, N.W., Suite 700
Washington, D.C. 20001

IN RESPONSE REFER
TO FOIA-90-294

Dear Messrs. Condit and Harrison:

This is in final response to your letter dated June 26, 1990, in which you requested, pursuant to the Freedom of Information Act (FOIA), copies of seven categories of records regarding handling of nuclear coatings by Texas Utilities.

The records identified on the enclosed Appendix J are already publicly available in the NRC Public Document Room, 2120 L Street, N.W., Washington, D.C.

With regard to category seven of your request, in accordance with U.S. Department of Justice guidance and FOIA case law, the NRC will neither confirm nor deny the existence of agency records when it receives a third-party request under the FOIA for agency records regarding allegations by a named individual or records on named individuals who are the subjects of investigations. The exceptions are: (1) when the third-party subject of a request has provided the requester with a written, notarized waiver of his or her privacy rights, which in turn is provided to the NRC with regard to the FOIA request; (2) when the NRC is aware of the third-party subject's death; (3) when the NRC is aware of official public confirmation by the Federal Government that the third-party subject was or is the subject of a federal investigation related to NRC activities; or (4) when the third-party subject has publicly disclosed his or her contacts with the NRC. In the absence of any of the above exceptions, the U.S. Department of Justice has advised the NRC to neither confirm nor deny the existence of such agency records and to claim Exemption (7)(C) of the FOIA as the legal basis for this action.

Accordingly, category seven of your request is denied pursuant to Exemption (7)(C) of the FOIA (5 U.S.C. 552(a)(7)(C)) and 10 CFR 9.17(a)(7)(iii) of the Commission's regulations.

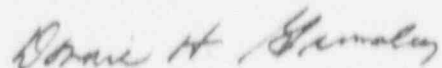
You should make no assumptions based on this response letter as to whether the NRC maintains agency records within the scope of your FOIA request.

Messrs. Condit and Harrison -2-

Pursuant to 10 CFR 9.25 of the NRC's regulations, it has been determined that this denial is in the public interest. The person responsible for the denial of the request is the undersigned.

This denial may be appealed to the NRC's Executive Director for Operations within 30 days from the receipt of this letter. As provided in 10 CFR 9.29, 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."

Sincerely,



Donnie H. Grimsley, Director
Division of Freedom of Information
and Publications Services
Office of Administration

Enclosure: As stated

APPENDIX J

RECORDS MAINTAINED AMONG PDR FILES

<u>NUMBER</u>	<u>DATE</u>	<u>DESCRIPTION</u>
1.	3/1/89	Letter to W. J. Cahill from R. F. Warnick forwarding Inspection Report 50-445/89-04 & 50-446/89-04 (44 pages) AND 8903130521
2.	4/12/89	Letter to W. J. Cahill from R. F. Warnick forwarding Inspection Report 50-445/89-15 & 50-446/89-15 (17 pages)
3.	3/28/90	Letter to W. J. Cahill from R. F. Warnick forwarding Inspection Report 50-445/90-07 & 50-446/90-07 (51 pages)



June 26, 1990

Mr. D. Grimsley, Director
Division of Rules and Records
Office of Administrative and Resource Management
United States Nuclear Regulatory Commission
Washington, D.C. 20555

FREEDOM OF INFORMATION
ACT REQUEST

FOIA-90-294

Rec'd 6-27-90

BY FIRST CLASS MAIL

FREEDOM OF INFORMATION ACT REQUEST

Dear Mr. Grimsley:

We would appreciate your prompt personal handling of this request, as it involves documents on critical issues relating to the investigation of the transport, distribution and disposal of nuclear coatings and related materials by Texas Utilities. Pursuant to the Freedom of Information Act, 5 U.S.C. §552, as amended, the Government Accountability Project hereby requests the following records (as the term "records" is defined in Appendix A):

(1) All records generated in connection with the inquiry, review, investigation, inventory, and inspection of the use, storage, disposal, sale, handling, salvaging, and surplussing of Texas Utilities' nuclear coatings and related materials between January 1, 1937 and the present. This information should include, but not be limited to, any violations of industry standards or of regulations issued by the NRC or other agencies.

(2) All records regarding all on site inspections of the Comanche Peak Steam Electric System plant between August 1, 1987 and December 31, 1987.

(3) All records regarding the technical specifications for nuclear coatings and related materials used at Comanche Peak between January 1, 1987 and the present, including all records regarding mixing and application procedures and safety and handling precautions.

(4) All records regarding hazards involved when nuclear

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coatings and related materials have exceeded their shelf life and regarding which, if any, materials have in fact exceeded their shelf life while stored at Comanche Peak.

(5) All records regarding circumstances under which the NRC will approve of the extension of the shelf life of nuclear coatings and related materials.

(6) All records of any communications between Texas Utilities, its agents or contractors and the NRC regarding nuclear coatings and related materials between January 1, 1987 and the present.

(7) All records regarding former Comanche Peak employee Linda Porter.

This request is continuing, and is intended to cover all records generated on or after the date of this request until the date it has been completely fulfilled by NRC. This request includes all commission records responsive to this request which have ever been within the commission's custody or control, whether such records currently exist in commission, contractor, or subcontractor "working," investigative, special, retired, or other files or at any location, including "Do Not File" files, and documents located in the offices, desks and homes of NRC investigators and their staffs. We request that all relevant records be produced with the administrative or filing pages and information intact, and to be supplied copies of any and all "see reference" cards, abstracts, search slips, including search slips used to process this request, and file covers.

If any records covered by this request have been destroyed and/or removed, or are destroyed and/or removed after receipt of this request, please provide all surrounding records, including but not limited to a list of all records which have been destroyed and/or removed, a description of the actions taken, relevant dates, and individual, office and/or department-wide policies and/or justifications for the action(s).

Should you or your advisors deem any part of this request to cover exempt materials, we also request that you review all sections of the document for any segregable parts, as required under Founding Church of Scientology v. Bell, 603 F.2d 945, 950-951 (D.C. Cir. 1979). Please "black out" excised portions rather than "white out" or "cut out" such portions.

For any documents or portions of documents that you might deny due to specific FOIA exemption(s), please provide a Vaughn index itemizing and describing the documents or portions of documents withheld. The index should provide a detailed justification of your grounds for claiming such an exemption, in explaining why each exemption is relevant to the document or

portion of document withheld. See, e.g., Vaughn v. Rosen, 484 F.2d 820, (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

The Government Accountability Project (GAP) requests that you waive any fees associated with this request because waiver "is in the public interest because furnishing the information can be considered as primarily benefiting the general public." 5 U.S.C. §552(a)(4)(A). Disclosure of the above-requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government. Finally, disclosure of the above-requested information is in no way connected with any commercial interest of the requesters. GAP is a non-profit, non-partisan public interest organization concerned with honest and open government. GAP has no commercial interests. We are requesting the above information as part of an investigation of whether or not environmental and transportation laws have been violated by Texas Utilities, its contractors or agents. We are also inquiring into the status of the investigation by appropriate government agencies.

The Government Accountability Project is designated as a 501(c) (3) tax-exempt organization under the IRS code, and is a group dedicated to assuring open accountable government and protecting the rights of public and private employee whistleblowers. Since the information obtained will be disseminated to the public by GAP through the media or state and federal agencies, we request that all copying and search fees be waived.

To aid you in your analysis of our requested fee waiver, we provide the following additional information --

- (i) the use proposed for the documents and whether we will derive income or other benefit from such use;

GAP proposes to use the documents to inform Congress and the press about the underlying facts, and those facts may be published in a special report. The information will also be used in reports to Congress, the media, Texas officials and to any and all interested parties. GAP will not derive profit income or other commercial benefit from such use. Such profit or benefit is not permitted under our charter. All such reports receive wide circulation at minimal charge, in order to cover the costs of reproduction, staffing and mailing.

- (ii) a statement of how the public will benefit from such use and from the release of the requested documents;

The public will benefit from use of the requested documents because it has a vested interest in seeing public officials comply with the law. In order for the public to make an educated

and informed decision about whether the government is proceeding to protect their best interests in its continuing oversight of environmental protection and transportation safety issues, the public needs information such as would be provided by the requested records.

(iii) if the specialized use of the documents or information is contemplated;

GAP would like to inform you that no specialized use of these documents is contemplated.

(iv) a statement indicating how you plan to disseminate the documents or information to the public;

The information will be disseminated to the public in the form of information provided to Congressional committees, the news media, various other government officials and possibly via distribution of a special report to interested public interest groups and individuals.

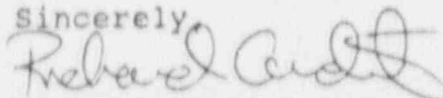
(v) any additional information you deem relevant to your request for a fee waiver.

GAP is clearly entitled to a fee waiver under the amended FOIA fee waiver standard. The fee waiver standard calls for a waiver "if the disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. §552(a)(4)(iii). The legislative history defining this standard is scant because there were no hearings or committee reports created during the legislative process. However, in the absence of Congressional hearings or reports, floor statements by key legislators provide a basis for legislative interpretations. Senators Leahy and Hatch negotiated a floor amendment to the FOIA that included a provision revising the fee waiver standard. Representatives English and Kindness made several changes to the Senate-passed FOIA amendments on behalf of the House, which the Senate accepted with minor revisions. Reps. English and Kindness indicated the fee waiver standard would be met if "the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effect of agency policy or regulations on public health or safety; or otherwise confirms or clarifies data on past or present operations of the government." 132 Cong. Rec. H9464 (October 8, 1986) (Statements of Reps. English and Kindness). This interpretation was accepted by Senator Leahy and has been adopted by at least one court. See, McClellan Ecological Seepage Situation (MESS) v. Carlucci, 835 F.2d 1282, 1284-86 (9th Cir. 1987).

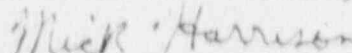
The information CAP has requested meets all of the criteria outlined in the legislators' statements noted above. The information requested pertains to the exercise of authority by DOT, EPA, NRC, and OSHA over hazardous materials distribution, disposal and transportation laws -- areas that need proper accountability. This information would be "new" to the public domain, as the discovery of events taking place near the Comanche Peak Steam Electric Station has been a recent occurrence. In addition, the requested information would "support public oversight" and allow the public to assess the nature, structure and performance of various governmental agencies relating to the Comanche Peak/TU inquiry. Therefore, our fee waiver request squarely falls within the amended FOIA fee waiver provision, 5 U.S.C. §552(a)(4)(iii), and within the legislative history that supports the provision.

We look forward to a response within ten working days of the receipt of this letter. Please call us if we may be helpful to you during your processing of our request. All correspondence should be sent to the Government Accountability Project at the address provided.

Sincerely,



Richard Condit, Esq.



Mick Harrison

cc: (via First Class Mail)
Ms. Juanita Ellis
CASL
1426 South Polk Avenue
Dallas, Texas 75224

APPENDIX

The term "record" as used in this Freedom of Information Act request means the original or a copy of the original and any nonidentical copy, including copies with marks, comments or marginal notations, regardless of original location, of any recorded, written, printed, typed or other graphic material of any kind, variety, character or type, including by way of example but not limited to, the following: agendas; reports; recommendations; transcripts; minutes; charters; books; records; contracts; subcontracts; requests for proposals; proposals; bids; Commerce Business Daily and Federal Register notices; contract modifications; deliverables; drafts; final products; questions; comments; suggestions; agreements; invoices; orders; bills; certificates; deeds; bills of sale; certificates of title; financing statements; instruments; expense accounts; receipts; disbursement journals; tax returns; financial statements; check stubs; promissory notes; resumes; address books; appointment books; telephone logs; worksheets; pictures; income statements; profit and loss statements; deposit slips; credit card receipts; records or notations of telephone or personal conversations; conferences; intraoffice communications; postcards; letters; telex; partnership agreements; catalog price lists; sound, tape and video records; memoranda (including written memoranda of telephone conversations, other conversations, discussions, agreements, acts and activities); manuals; diaries; calendars or desk pads; scrapbooks; notebooks; correspondence; bulletins; circulars; policies; forms; pamphlets; notices; statements; journals; postcards; letters; telegrams; reports; interoffice communications; photostats; microfilm; microfiche; maps; deposition transcripts; drawings; blueprints; photographs; negatives; and any other data, information or statistics contained within any data storage modules, discs, or any other memory devices (including IBM or similar cards for information, data, and programs) or any other information retrievable on storage systems, including computer-generated reports and print-outs.