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August 8, 1990

APPEAL OF INITIAL FOIA DECISION

Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

APPEAL OF INITIAL FOIA DECISION
90A36E (89-540)
Rec'd 8-15-90

RE: Appeal of FOIA 89-540

TO Executive Director for Operations:

This is an appeal pursuant to subsection a(6) of the Freedom of Information Act as amended (5 U.S.C. 552), of the actual denial of the Commission to release documents requested on December 15, 1989.

By letter dated August 6, 1990, John Philliss, for Donnie H. Grimsley, Director, Division of Freedom of Information and Publications Services, informed us that Appendix(es) M, N, & O are being withheld from disclosure in their entirety or in part, pursuant to FOIA Exemption 5, because the information consists of interagency or intraagency records that are not available through discovery litigation. Applicable Privilege: Deliberative Process: Disclosure of predecisional information would tend to inhibit the open and frank exchange of ideas essential to the deliberative process. Where records are withheld in their entirety, the facts are inextricably intertwined with the predecisional information. There also are no reasonably segregable factual portions because the release of the facts would permit an indirect inquiry into the predecisional process of the agency; and Attorney Work product privilege.

We believe we are entitled to the release of the documents being withheld.

We expect your response to this appeal within 20 working days of your receipt so that we can determine whether to pursue this matter further in the courts.

Thank you for your consideration of this appeal.

Sincerely,

Linda L. Bauman
Linda L. Bauman
FOIA Coordinator

9102050308 900808
PDR FOIA
BAUMAN89-540 PDR



RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) REQUEST

FOIA - 87-540

RESPONSE TYPE

FINAL PARTIAL

DATE AUG - 6 1990

DOCKET NUMBER(S) (if applicable)

REQUESTOR

Harde, Billie Pirner

PART I - AGENCY RECORDS RELEASED OR NOT LOCATED (See checked boxes)

- No agency records subject to the request have been located.
- No additional agency records subject to the request have been located.
- Requested records are available through another public distribution program. See Comments Section.
- Agency records subject to the request that are identified on Appendixes _____ are already available for public inspection and copying in the NRC Public Document Room, 2024 L Street, N.W., Washington, DC 20555.
- Agency records subject to the request that are identified on Appendixes 2120 are being made available for public inspection and copying in the NRC Public Document Room, 2024 L Street, N.W., Washington, DC, in a folder under this FOIA number and requester name.
- The nonproprietary version of the proposal(s) that you agreed to accept in a telephone conversation with a member of my staff is now being made available for inspection and copying at the NRC Public Document Room, 2024 L Street, N.W., Washington, DC, in a folder under this FOIA number and requester name.
- Agency records subject to the request that are identified on Appendixes _____ may be inspected and copied at the NRC Local Public Document Room _____ in the Comments Section.
- Enclosed is information on how you may obtain access to and the charges for copying records placed in the NRC Public Document Room, 2024 L Street, N.W., Washington, DC.
- Agency records subject to the request are enclosed.
- Records subject to the request have been referred to another Federal agency(ies) for review and direct response to you.
- You will be billed by the NRC for fees totaling \$ _____.
- In view of NRC's response to this request, no further action is being taken on appeal letter dated _____ No.

PART II - A - INFORMATION WITHHELD FROM PUBLIC DISCLOSURE

- Certain information in the requested records is being withheld from public disclosure pursuant to the exemptions described in and for the year as stated in Part II sections B, C, and D. Any released portions of the documents for which only part of the records is being withheld are being made available for public inspection and copying in the NRC Public Document Room, 2024 L Street, N.W., Washington, DC, in a folder under this FOIA number and requester name.

COMMENTS

SIGNATURE DIRECTOR, DIVISION OF FREEDOM OF INFORMATION AND PUBLICATIONS SERVICES

John Phelps

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PART B B - APPLICABLE EXEMPTIONS

Records subject to the request that are described on the enclosed Appendixes *M, N, O* are being withheld in their entirety or in part under the Exemptions and for the reasons set forth below pursuant to 5 U.S.C. 552(b) and 10 CFR 9.17(a) of NRC Regulations.

1. The withheld information is properly classified pursuant to Executive Order (EXEMPTION 1)
 2. The withheld information relates solely to the internal personnel rules and procedures of NPC. (EXEMPTION 2)
 3. The withheld information is specifically exempted from public disclosure by statute indicated. (EXEMPTION 3)
 - Sections 141-147 of the Atomic Energy Act which prohibits the disclosure of Restricted Data or Formerly Restricted Data (42 U.S.C. 2161-2165)
 - Section 147 of the Atomic Energy Act which prohibits the disclosure of Unclassified Safeguards Information (42 U.S.C. 2167)
 4. The withheld information is a trade secret or commercial or financial information that is being withheld for the reason(s) indicated. (EXEMPTION 4)
 - The information is considered to be confidential business (proprietary) information.
 - The information is considered to be proprietary information pursuant to 10 CFR 2.790(d)(1).
 - The information was submitted and received in confidence pursuant to 10 CFR 2.790(d)(2).
 5. The withheld information consists of interagency or intraagency records that are not available through discovery during litigation. (EXEMPTION 5) Applicable Privilege
 - Deliberative Process: Disclosure of predecisional information would tend to inhibit the open and frank exchange of ideas essential to the deliberative process. Where records are withheld in their entirety, the facts are inextricably intertwined with the predecisional information. There also are no reasonably segregable portions because the release of the facts would permit an indirect inquiry into the predecisional process of the agency.
 - Attorney-Work Product Privilege: (Documents prepared by an attorney in contemplation of litigation.)
 - Attorney-Client Privilege: (Confidential communications between an attorney and his/her client.)
 6. The withheld information is exempted from public disclosure because its disclosure would result in a clearly unwarranted invasion of personal privacy. (EXEMPTION 6)
 7. The withheld information consists of records compiled for law enforcement purposes and is being withheld for the reason(s) indicated. (EXEMPTION 7)
 - Disclosure could reasonably be expected to interfere with an enforcement proceeding because it could reveal the scope, direction, and focus of enforcement efforts, and thus could possibly allow them to take action to shield potential wrongdoing or a violation of NRC requirements from investigators. (EXEMPTION 7(A))
 - Disclosure would constitute an unwarranted invasion of personal privacy. (EXEMPTION 7(C))
 - The information consists of names of individuals and other information the disclosure of which could reasonably be expected to reveal identities of confidential sources. (EXEMPTION 7(D))
- OTHER

PART B C - DENYING OFFICIALS

Pursuant to 10 CFR 9.25(b) and/or 9.25(c) of the U.S. Nuclear Regulatory Commission 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 are those officials identified below as denying officials and the Director, Division of Freedom of Information and Publications Services, Office of Administration and Resources Management, for any denials that may be appealed to the Executive Director for Operations (EDO).

DENYING OFFICIAL	TITLE-OFFICE	RECORDS DENIED	APPELLATE OFFICIAL	
			SECRETARY	EDO
<i>Paul E. Bird</i>	<i>Director, Office of Personnel</i>	<i>Appendices M and N</i>		<input checked="" type="checkbox"/>
<i>Robert D. Martin</i>	<i>Regional Administrator, Region IV</i>	<i>Appendix O</i>		<input checked="" type="checkbox"/>

PART B D - APPEAL RIGHTS

The denial by each denying official identified in Part B C may be appealed to the Appellate Official identified in that section. Any such appeal must be in writing and must be made within 30 days of receipt of this response. Appeals must be addressed as appropriate to the Executive Director for Operations or to the Secretary of the Commission, 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."

APPENDIX L

1. 5/1/89 Letter from M. J. Fox to Dressler re: Your Supplemental Request of April 17, 1989 in Kelly and Caldwell matters. (2 pages)
2. 5/9/89 Letter from Fox to Dressler re Supplemental Information Request of April 21, 1989 in Caldwell and Kelly Adverse Action. (2 pages)
3. 6/8/89 Memo from Fox to Brown. (1 page)
4. 7/6/89 Letter from Tobias to Fox. (1 page)
5. 7/24/89 Routing and Transmittal Slip with attachment. (pages)
6. 8/10/89 Letter from Fox to Dressler re: Information Request Response dated July 25, 1989, Kelly Adverse Action. (2 pages)

APPENDIX M

DOCUMENT PARTIALLY WITHHELD

NUMBER	DATE	DESCRIPTION
1.	Undated	Handwritten notations on the typed note which is dated 11/23/88 - Deleted - Exemption 5.

NOTE: The 11/23/88 typed portion of this record has already been addressed in the previous response dated 4/16/90.

APPENDIX N
 DOCUMENTS BEING WITHHELD IN THEIR ENTIRETY
 EXEMPTION 5

NUMBER	DATE	DESCRIPTION
1.	5/17/89	Routing and Transmittal Slip from H. Meadows to B. Brown with attachment (2 pages)
2.	2/24/89	Typed and Handwritten notes (4 pages)
3.	2/27/89	Typed and Handwritten notes (2 pages)
4.	4/18/89	Draft letter with handwritten notations (5 pages)
5.	4/24/89	Handwritten note (1 page)
6.	4/24/89	Handwritten note (1 page)
7.	6/13/89	Handwritten note (1 page)
8.	6/13/89	Handwritten note (1 page)
9.	Undated	Forms (2 pages)

APPENDIX D
DOCUMENTS BEING WITHHELD IN THEIR ENTIRETY
EXEMPTION 5

NUMBER	DATE	DESCRIPTION
1.	11/9/88	Analysis of OIA Report (5 pages)
2.	Undated	Draft Analysis of OIA Report (5 pages)
3.	Undated	Draft Analysis of OIA Report (3 pages)

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December 15, 1989

SENT BY FACSIMILE
FREEDOM OF INFORMATION ACT REQUEST

Donald Grimsley,
Director, Division of Rules and Records
Office of Administration
and Resources Management
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

FREEDOM OF INFORMATION
ACT REQUEST

FOIA-89-540

Rec'd 12-15-89

Freedom of Information Officer
Nuclear Regulatory Commission
611 Ryan Plaza Drive, Suite 1000
Arlington, TX 76011

TO WHOM IT MAY CONCERN:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, I request copies of any and all transcripts, testimony, agency records and information, including but not limited to notes, letters memoranda, drafts, minutes, diaries, logs, calendars, tapes, summaries, interview reports, procedures, instructions, allegation summary sheets, interim and/or final reports, status reports, computer disks, and any and all other records relevant to and/or generated in connection with:

THE JIM KELLY ARBITRATION HEARING CONDUCTED DURING THE WEEK OF DECEMBER 11 - 15, 1989, IN REGION IV HEADQUARTERS. THIS REQUEST INCLUDES ANY AND ALL DEPOSITIONS AND TRANSCRIPTS OF TESTIMONY CONDUCTED WITH RESPECT TO THIS MATTER, AND ANY AND ALL INVESTIGATIONS, MEMORANDUMS, REPORTS, NOTES OF DISCUSSIONS, MINUTES OF MEETINGS, AND ANY AND ALL OTHER WRITTEN MATERIAL WITH RESPECT TO SAME.

The information and records subject to this request will be used to inform and educate the public and concerned citizens about the agency's activities regarding the NRC's operation and conduct of business in regards to their employees.

This request includes all agency records as defined in 10 C.F.R. 9.3 (a) (b) and the NRC Manual, Appendix 0211, Parts 1.A.2 and A.3 (approved October 8, 1980) whether they currently exist in the NRC official "working" investigative or other files, or at

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any other location, including private residences.

If any records, as defined in 10 C.F.R. 9.3 (a) (b), and the NRC Manual, supra., and covered by this request have been destroyed, and/or removed, after this request, please provide all surrounding records, including but not limited to a list of all records which have been or are destroyed and/or removed, a description of the actions(s) taken relevant to, generated in connection implementing the action(s).

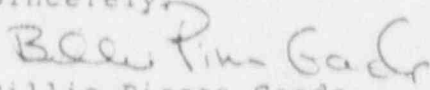
We are requesting this information as part of an ongoing monitoring project of the NRC's efforts to protect public health and safety at and near nuclear power plants.

We request that fees be waived, because "finding the information can be considered as primarily benefitting the general public" 5 U.S.C. 552 (a) (4) (a). I work regularly with public interest non-profit, non-partisan organizations concerned with honest and open government, and especially in assuring that the truth is made public about the nuclear plants across the country, and the conduct of the NRC management in this regard.

For any documents or portions that you deny due to a specific FOIA exemption, please provide an index itemizing and describing the documents or portions of documents withheld. The index should provide a detailed justification of your grounds for claiming each exemption, explaining why each exemption is relevant to the document or portion of the document withheld. This index is required under Vaughn v Rosen (I), 484 F2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

We anticipate a complete or partial response to this request within ten working days, as required by the FOIA.

Sincerely,


Billie Pirner Garde

BPG/11b

In determining the maximum reasonable penalty the Merit Systems Protection Board will consider the following factors:

- (1) The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- (3) the employee's past disciplinary record;
- (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
- (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- (7) consistency of the penalty with any applicable agency table of penalties;
- (8) the notoriety of the offense or its impact upon the reputation of the agency;
- (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- (10) potential for the employee's rehabilitation;
- (11) mitigating circumstances surrounding the offense such as unusual job tension, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.