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March 21, 1983

APPEAL OF INITIAL FOIA DECISION
83-A-6 C (83-46)
Rec'd 3-23-83

Secretary of the Commission
United States Nuclear Regulatory Commission
Washington, D.C. 20555

APPEAL FROM INITIAL FOIA DECISION/FOIA-83-46

Dear Mr. Secretary:

This is an appeal pursuant to the Freedom of Information Act, as amended (5 U.S.C. Section 552) ("FOIA"), and the Commission's implementing regulations, 10 CFR Sections 9.3 - 9.16.

On January 25, 1983, I wrote to the Commission on behalf of the Natural Resources Defense Council, Inc. and the Sierra Club ("Petitioners"), and requested a copy of the transcript of that portion of the Commission's meeting of January 5, 1983, relating to the Commission's consideration of the exemption request under 10 CFR Section 50.12 for the Clinch River Breeder Reactor (the "CRBR") (Docket No. 50-537). A copy of this request letter is attached at Tab A. Thereafter, on February 25, 1983, we received a letter (dated February 22) from Mr. J.M. Felton, Division of Rules and Records, Office of Administration of the Commission, denying the request for such documents. A copy of Mr. Felton's letter is attached at Tab B.

The basis specified for the denial of Petitioners' request was that "the transcript. . .is exempt in its entirety from mandatory public disclosure under Exemption 10 of the Government in the Sunshine Act." The letter goes on to state the "meeting focused on Commission adjudication related to ongoing litigation" and, accordingly, the transcript was "being withheld in its entirety", in reliance upon Exemption 10 of the Government in the Sunshine Act, 5 U.S.C. Section 552b (c)(10) (the "Sunshine Act") and Exemption 3 of FOIA, 5 U.S.C. Section 552(b)(3).

3/23..To OGC to Prepare Response for Signature of SECY...Date due: April 5..Cpys to: RF, EDO...83-1598

50-537

In accordance with the Commission's regulations, 10 CFR Section 9.11, and the terms of Mr. Felton's letter of February 22, Petitioners are now prosecuting this appeal. As set forth below, the transcript at issue on this appeal relates to Commission deliberations in a proceeding which heretofore the Commission had considered entirely in public session. Simply because it was revisiting the merits of the matter on remand from a court in no way can justify the closing of a meeting under the Sunshine Act. Accordingly, withholding the transcript is unlawful and unwarranted and the decision against disclosure should be reversed.

(a) Statement of Facts

The proceeding leading to the Commission's meeting of January 5, 1983, was commenced in November, 1981, when the United States Department of Energy and its co-applicants, the Tennessee Valley Authority and Project Management Corporation (collectively, "Applicants"), filed a request for an exemption from the Commission's licensing procedures under 10 CFR Section 50.12 to allow Applicants to commence site preparation activities for the CRBR prior to the issuance of an LWA or a Construction Permit. At each stage of this proceeding, until this January, the Commission reached its procedural and substantive decisions in open meetings.

Following the filing of the request, the Commission considered the procedural issues it raised on two occasions in open session, first on December 9, 1981, and then, following a public hearing on these issues, on December 16, 1981. It did so even though the procedures to be adopted by the Commission were themselves at issue and had the potential for leading to litigation.

On December 24, 1981, the Commission issued a Memorandum and Order (CLI-81-35), establishing procedures for considering the merits of Applicants' request. The Commission determined to consider the request, outside the context of the CRBR licensing, in an informal proceeding not subject to the Commission's rules of practice (10 CFR, Part 2, Subpart G). The Commission determined that no adjudicatory hearing need be held and that it would proceed instead to consider the exemption request in a legislative-type hearing process. At that time, the Commission did not consider it necessary to close any part of its deliberative process.

When it came to considering the merits of Applicants' exemption request the Commission reached its decisions in public session. On March 1, and again on March 5, 1982, the Commission met in open meetings to consider the merits of the request. On March 5, it voted publicly to deny the application. This decision was embodied in an Order issued March 16 (CLI-82-4).

Subsequently, Applicants, on May 14, 1982, filed a request for reconsideration. Again, the Commission met in open session (on May 17) to consider that request, dividing evenly on whether to reconsider and thus letting its prior Order stand. See Order (CLI 82-8), dated May 18, 1982.

In July of 1982 there was yet a third round of consideration of Applicants' request. Applicants filed a new request on July 1, 1982. On July 9, 1982, the Commission met in open session and determined to set the request down for hearing, adopting the same informal procedures as it had adopted earlier. Order, dated July 9, 1982. Thereafter, following a legislative-type hearing on the merits, the Commission proceeded, in open session, to decision. On August 5, 1982, it voted 3-1 to approve the exemption request, and that decision was subsequently embodied in a Memorandum and Order issued by the Commission on August 17, 1982 (CLI 82-23).

Petitioners on August 19, 1982, filed a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit seeking review of the Commission's grant of the exemption request. On December 7, 1982, the Court of Appeals handed down a decision remanding the matter to the Commission to reconsider whether there were "exigent circumstances" warranting extraordinary licensing relief under 10 CFR Section 50.12 for the CRBR.

On December 10, the Commission issued an order establishing procedures for reconsideration. The Commission's December 10 order stated:

> The proceeding shall be an informal proceeding conducted by the Commission. The parties will be given the opportunity to present views and argument for consideration by the Commission itself. Moreover, we believe that the Court's opinion does not require or even contemplate adjudicatory hearing on this issue.

The Commission asked the parties to file supplemental statements on "exigent circumstances." The Commission's procedural approach on remand, therefore, was no different than its earlier procedural approach to consideration of the merits - an "informal" proceeding only was to be held.

When it met in December to consider the procedures on remand, the Commission for the first time determined that the merits of Applicants' exemption request should be considered in closed session. It voted on December 9 to close its discussion of the merits on remand on the grounds that "this discussion. . . is reasonably expected to involve information possibly related to Commission's strategy in litigation", citing Exemption 10 to the Sunshine Act. The General Counsel of the Commission also signed a certification that the meeting "may be closed to the public pursuant to 5 U.S.C. Section 552b(c)(10) and 10 CFR Section 9.104(a)(10)."

The meeting of January 5, 1983 was in fact closed to the public. At that meeting, the Commission voted to reaffirm its earlier finding that a licensing exemption pursuant to 10 CFR Section 50.12 was warranted. That decision was embodied in a Memorandum and Order (CLI-83-1) which was issued January 6, 1983. This FOIA request for the transcript of the January 5 meeting followed.

(b) Exemption 10 of the Sunshine Act Cannot Properly Be Applied to the Transcript of the Commission's Meeting of January 5, 1983

In his letter of February 22, 1983, denying Petitioners' FOIA request, Mr. Felton relied exclusively on Exemption 10 to the Sunshine Act to deny Petitioners access to the transcript. He stated that the meeting in question "focused on Commission adjudication related to ongoing litigation", and further explained that the "public exposure of such deliberations would be contrary to the well established principal [sic] that the mental process of the Commission are [sic] not subject to probing." Exemption 10 to the Sunshine Act, however, is plainly inapplicable to the transcript in question.

Exemption 10 to the Sunshine Act, 5 U.S.C. Section 552b(c)(10), exempts from the open meeting requirement of the Sunshine Act those meetings which

> [S]pecifically concern that agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for hearing.

The Commission's implementing regulations, for their part, provide an exemption for those meeting which

> Specifically concern the Commission's issuance of a subpoena, or the Commission's participation in a civil action or proceeding or an action or proceeding before a state or federal administrative agency, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct or disposition by the Commission of a particular case of formal agency adjudication, pursuant to 5 U.S.C. 554 or otherwise involving a determination on the record after an opportunity for a hearing pursuant to Part 2 or similar provisions.

10 CFR Section 9.104(a)(10).

The history of the Sunshine Act leaves no doubt as to its intent to constrain an agency's ability to close its meetings to public scrutiny. It establishes a general presumption that meetings must be open. H.R. Rep. No. 94-880 (Part I), 94th Cong., 2d Sess., 3,8 (1976) (the "House Report"); S. Rep. 94-354, 94th Cong., 1st Sess. 19,20,33 (1975) (the "Senate Report"). See Common Cause v. Nuclear Regulatory Commission, 674 F.2d 921, 928-929 (D.C.Cir. 1982)("Common Cause"). Indeed, the United States Court of Appeals for the District of Columbia Circuit has stated that the open meeting requirement of the Sunshine Act is "sweeping, unqualified and mandatory", Pacific Legal Foundation v. Council on Environmental Quality, 636 F.2d 1259, 1265 (D.C.Cir. 1980), and has emphasized, "Exceptions to the Sunshine Act's general requirement of openness must be construed narrowly." Common Cause, 674 F.2d at 932; House Report at 2; Senate Report at 11 (agencies must "conduct

their deliberations in public to the greatest extent possible"). 1/

With respect to the "litigation" exemption, it is immediately apparent that the only possible ground for closing the meeting was that it involved "the agency's participation in a civil action or proceeding." 2/ Both the Senate and House Reports confirm that this language should be narrowly construed. Indeed, both focus particularly on the need to protect discussions relating to decisions to institute a lawsuit, or refer a case to the Justice Department for prosecution, rather than on the need to protect all discussions which may incidentally touch on matters in litigation. See House Report at 12-13; Senate Report at 25-26. Both reports suggest, moreover, that only a discussion focused on strategy decisions in litigation, rather than the general substantive issues in dispute, would falll within the exemption. Thus, the Senate Report states that, when an agency is "only discussing...a legal point", opening a meeting to the public may be appropriate. Senate Report at 26. And commentors on the Sunshine Act have repeatedly noted that this exemption is limited in scope, primarily related to agency decisionmaking about whether and, if so, how to proceed in litigation. Note, The Federal "Government in the Sunshine Act": A Public Access Compromise, 29 U. Fl. L. Rev. 881, 909-910 (1977); Note, Government in the Sunshine Act: Opening Federal Agency Meetings, 26 Am. U. L. Rev. 154, 190 (1976). Plainly, the January 5 meeting involved much more than decisions relating the prosecution of litigation and thus the exemption could not properly be invoked.

1/ Quite apart from the inapplicability of Exemption 10, it should be noted the Sunshine Act mandates that a "discussion must be open where the public interest so requires." House Report at 3. Given the importance of the CRBR project and the public controversy surrounding its licensing approval, it is hard to postulate a more appropriate case for the Commission to act in public session. On this ground alone, the closure decision was in error.

2/ We scarcely need note that the "adjudication" in this case was emphatically not carried out under the terms of 5 U.S.C. Section 554, and it did not otherwise involve a determination on the record after an opportunity for hearing. The other enumerated grounds for exemption are likewise inapplicable on their face.

Even if one were to construe the Sunshine Act's tenth exemption to extend to any discussions bearing on litigation strategy, such an interpretation cannot be relied upon to shield consideration of the merits of a pending proceeding before the Commission. It can only be considered ironic that in his denial letter Mr. Felton mentions the need to avoid "public disclosure" of the "mental process of the Commission", for it is precisely the purpose of the Sunshine Act to make that mental process subject to public view. Common Cause, 674 F.2d at 929. As the D.C. Circuit stated, "Congress deliberately chose to forego the claimed advantages of confidential discussions of agency heads at agency meetings." Id. See also Senate Report at 17 ("their [agencies'] deliberative process can be appropriately exposed to public scrutiny in order to give citizens an awareness of the process and rationale of decisionmaking").

The notion the the Sunshine Act's requirements can be avoided any time the Commission is considering a matter on remand, or a matter which is subject to pending litigation, is, in any event, nonsensical. In this proceeding, it was obvious at every stage of the Commission's deliberations through August, 1982, that litigation was not only likely but almost certain if the Commission acted to grant Applicants' exemption request. At every stage, therefore, presumably considerations of litigation strategy were relevant, if not to the merits of the action, at least to the wording of the Commission's orders. Nonetheless, the Commission did not and could not close any of its meetings during that period. And the mere existence of pending litigation, and a remand for reconsideration, cannot reasonably distinguish one discussion on the merits (that of January 5) from earlier discussions on the merits. The merits of the exemption request, which must form the basis for the Commission's decision, simply are not subject to any exemption under the Sunshine Act, regardless of when the discussion takes place.

Finally, even if there were some need to discuss litigation strategy at the Commission's meeting of January 5, and that discussion could have been held in closed session, the Commission was not relieved of its obligation, in the first instance, to try to bifurcate the meeting, limiting closed portions to the maximum extent possible, and, in the second instance, at least to release those portions of the transcript which relate to the merits and are reasonably segregable from deliberations relating to litigation strategy. The Court of Appeals for the District of Columbia Circuit has emphasized in the strongest terms the need to

limit in camera decisionmaking. In Common Cause, the Court stated,

> Even if a portion of a...meeting may lawfully be closed because that part of the discussion is protected by a specific exemption, the Commission may not close the entire meeting. Congress declared that meetings should be open to the fullest extent possible. We therefore reject the Commission's contention that the Sunshine Act does not require an agency to segregate exempt discussions into a closed portion of the meeting.

Common Cause, 674 F.2d at 936, n.46 (citations omitted). And, in Pan American World Airways v. CAB, 684 F.2d 31, 35-36 (D.C.Cir. 1982), the D.C. Circuit expressed "in no uncertain terms our condemnation" of the Civil Aeronautics Board in its decision to close an entire meeting because of a belief that some exempt material would be discussed. Closing the entire January 5 meeting, and withholding the entire transcript of that meeting, including those portions of the transcript which relate to the merits, cannot be justified.

* * *

For all the reasons set forth above, Petitioners submit the requested transcript is not properly covered by exemptions (b)(3) of FOIA and 10 of the Sunshine Act, and 10 CFR Sections 9.5(a)(3) and 9.104(a)(10), and that you should overrule the decision to withhold the information.

If you choose instead to continue to withhold some or all of the material which was denied in our initial request to the Commission, we ask that you provide a justification for the denial in accordance with 10 CFR Section 9.11(c)(1).

As provided in FOIA and in the regulations of the Commission, 10 CFR Section 9.11(b), we will expect to receive a reply to this administrative appeal letter within 20 working days.

Sincerely,

Eldon V.C. Greenberg

Counsel to Natural Resources Defense Council, Inc. and the Sierra Club

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By Hand

January 25, 1983

Patricia G. Norry
Director
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

FREEDOM OF INFORMATION ACT AND SUNSHINE ACT REQUEST

Dear Ms. Norry:

Pursuant to the Freedom of Information Act, 5 U.S.C. Section 552, as amended ("FOIA"), the Government in the Sunshine Act, 5 U.S.C. Section 552b, and the Commission's regulations implementing such statutes, 10 C.F.R. Part 9, Subparts A and C, I am writing on behalf of the Natural Resources Defense Council, Inc., and the Sierra Club to request a copy of the transcript of that portion of the Commission's meeting of January 5, 1983, relating to the Commission's consideration of the exemption request under 10 C.F.R. Section 50.12 for the Clinch River Breeder Reactor (Docket No. 50-537).

Because of the general public interest in the Clinch River Breeder Reactor, I believe that furnishing the transcript requested "can be considered as primarily benefiting the general public", within the meaning of 10 C.F.R. Section 9.14a(b). Consequently, I believe that any applicable fees for reproduction should be reduced or waived as permitted under FOIA and the Commission's implementing regulations. However, if you determine otherwise, I advise you now that I agree to pay the reasonable costs for copying such transcript.

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If you determine some or all of the transcript is exempt from release, I would appreciate you stating which exceptions you believe cover the material you are not releasing. Further, if you determine that some portions of the transcript are exempt, I ask that you make available the remainder thereof, to the extent that those portions determined to be exempt are "reasonably segregable" as provided in FOIA and the Sunshine Act.

As provided for in FOIA and in 10 C.F.R. Section 9.9, I will expect to receive a reply within ten (10) working days. If you have any questions concerning this request, please contact me by telephone to expedite consideration of this matter.

Very truly yours,

Eldon V.C. Greenberg

Counsel to the Natural Resources Defense Council, Inc. and the Sierra Club

cc: Sheldon Trubatch
George Edgar
Leon Silverstrom
Lewis E. Wallace
James Cotham
William E. Lantrip
William B. Hubbard

NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

February 22, 1983

2/25 mtg

Eldon V. C. Greenberg, Esquire
Galloway & Greenberg
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Washington, DC 20006

IN RESPONSE REFER
TO FOIA-83-46

Dear Mr. Greenberg:

This is in response to your letter dated January 25, 1983 in which you requested, pursuant to the Freedom of Information Act and the Government in Sunshine Act, a copy of the transcript of the January 5, 1983 meeting relating to the Commission's consideration of the exemption request for the Clinch River Breeder Reactor (CRBR).

The substantive determination under both Acts is governed by the Sunshine Act exemptions. The transcript has been reviewed and it has been determined that it is exempt in its entirety from mandatory public disclosure under Exemption 10 of the Government in Sunshine Act. The January 5, 1983 meeting focused on Commission adjudication related to ongoing litigation, in particular, the Supplemental Decision on exigent circumstances in response to the D.C. Circuit Court's Order of December 7, 1982. Not only do Commission deliberations of this nature benefit from the uninhibited exchange of ideas and opinions, but the public exposure of such deliberations would be contrary to the well-established principal that the mental process of the Commission are not subject to probing. Accordingly, the transcript is being withheld in its entirety pursuant to Exemption 10 of the Government in the Sunshine Act (GISA) (5 U.S.C. 552b(c)(10)) and Exemption 3 of the FOIA (5 U.S.C. 552(b)(3)).

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 the denial is Mr. John C. Hoyle, Assistant Secretary of the Commission.

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, 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,

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

8303230206