



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

PDR-016

AUG 02 1983

William S. Jordan, III, Esquire  
Harmon & Weiss  
1725 I Street, NW  
Washington, DC 20006

IN RESPONSE REFER  
TO FOIA-83-A-15E  
(FOIA-83-242)

Dear Mr. Jordan:

This is in response to your letter to me dated June 23, 1983, appealing Mr. Joseph Felton's June 14, 1983 initial denial of the Union of Concerned Scientists' request of May 9, 1983. That request specifically asked for a copy of the Institute of Nuclear Power Operations (INPO) report number 82-025, "Review of NRC Report: Precursors to Potential Severe Core Damage Accidents: 1969-1979 A Status Report, NUREG/CR-2497" and any and all documents between and/or among the NRC, the ACRS and members of the INPO Review Team which wrote INPO 82-025. In particular, you appealed the denial of two documents -- the INPO report 82-025 itself and Notes prepared by Stan Kaplan for INPO known as PLG-0243.

Acting on your appeal, I have carefully reviewed the record in this case in light of the considerations which follow, and I have determined that pages A-25, A-39, A-51 and A-130 from INPO Report 82-025 should be released to you because they were presented as viewgraphs to the ACRS in an open meeting on March 9, 1983. I have also determined that the remaining portions of INPO Report 82-025 and all of Report PLG-0243 continue to be exempt from mandatory public disclosure pursuant to Exemption (4) of the Freedom of Information Act (5 U.S.C. 552(b)(4)) and 10 CFR 9.5(a)(4) of the Commission's regulations because these reports contain confidential business (proprietary) information, and that disclosure of such information would be contrary to the public interest. Your appeal with regard to the previously withheld material is, therefore, partially granted and partially denied.

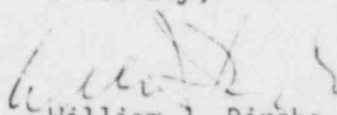
The NRC's ability to protect the public health and safety is significantly enhanced by timely and voluntary submittals and sharing of state-of-the-art nuclear safety and technology information with domestic and foreign organizations and entities. In recognition of this fact, the NRC on May 26, 1981, signed the Memorandum of Agreement Between the Institute of Nuclear Power Operations and the U.S. Nuclear Regulatory Commission. The Memorandum of Agreement has served as a vehicle for timely, efficient and effective sharing of data and information related to the safety of nuclear power plants. The Memorandum of Agreement recognizes the need for the parties to be able to exchange and protect privileged information where such information would not be made available otherwise.

This is the situation with the documents you requested pursuant to the FOIA. The withheld documents were voluntarily provided to the NRC in confidence by INPO to aid an agency function -- Peer Review of NUREG/CR-2497. They were provided in response to a request by Robert Bernero, Director Division of Risk Analysis, Office of Nuclear Regulatory Research, and pursuant to the Memorandum of Agreement. INPO has informed the NRC that the information being withheld is not publicly available; that the information is of the type which is treated as strictly confidential and is provided, as a general rule, only to INPO members and participants; that the documents were provided to the NRC with the understanding that they would be protected as privileged by the Memorandum of Agreement; and that if either of the documents is disclosed, INPO will reassess whether such documents will be provided to the NRC in the future. Under these conditions, the documents are protected from mandatory public disclosure under the alternate test set out in National Parks and Conservation Association v. Morton, 498 F.2d 765, 767 (D.C. Cir. 1974). Under that test, a record can be withheld when disclosure would impair the Government's ability to obtain necessary information in the future. It is clear that a breach of the understanding between the NRC and INPO in this situation would, in the future, inhibit the free flow of information to the NRC. This would, of course, be to the detriment of the public health and safety.

The argument that the NRC can obtain all the information it needs by subpoena is simply not realistic, for compulsory process presumes knowledge of the possible existence of the information needed and knowledge of the entity that may have such information. In addition, the exercise of subpoena power takes time, and therefore the information being sought might be of little value by the time it is finally received.

This determination is a final agency action. As set forth in the Freedom of Information Act (5 U.S.C. 552(a)(4)(B)), judicial review of this decision is available in a district court of the United States in either the district in which you reside, have your principal place of business, or in the District of Columbia.

Sincerely,



William J. Dircks  
Executive Director for Operations