



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

FOIA + Direct Appeal

OFFICE OF THE  
COMMISSIONER

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MEMORANDUM FOR: Chairman Palladino  
Commissioner Gilinsky  
Commissioner Ahearne  
Commissioner Roberts

FROM: James K. Asselstine *[Signature]*

SUBJECT: RESPONSE TO UDALL LETTER RE: APPLGATE FOIA REQUEST

I believe that the proposed reply to Congressman Udall's letter of December 7, 1982 is not entirely responsive -- particularly to questions (4) and (5). We should add a paragraph which specifically responds to the concerns expressed in those questions. Also, after talking to both the Director of OIA and OGC attorneys, it is clear to me that the Director of OIA used poor judgment in handling Applegate's FOIA request. I propose that we notify him of this fact in writing, and note in the Udall letter that we have done so.

In my view, there are three areas in which the Director of OIA clearly exercised poor judgment in handling Applegate's request. First, his decision not to identify the interview was clearly in error. That document was generated during the development of the 81-18 file, a copy was retained in that file, and at least some of comments related to the subject of the OIA report on I&E's investigation of Applegate's allegations of construction defects at Zimmer. Second, his decision not to identify draft documents, which had been brought to

his attention and which were within the FOIA request, was also erroneous. As OGC has advised, the weight of the evidence in this case indicates that these draft documents were still subject to some agency control at the time of the Applegate request and therefore should have been identified. Third, he failed to ensure that his office coordinated with and obtained the concurrence of OGC on these decisions.

As a result of the mishandling of Applegate's request, the integrity of the agency's FOIA process was needlessly placed under suspicion. A federal district court, in denying the NRC's motion for a protective order, expressed strong suspicion about whether the NRC had made a good faith effort to comply with the law:

"A careful review of the record indicates that absent the filing of this suit, repeated proddings of the plaintiff, and an independent investigation by Congressman Udall, the Nuclear Regulatory Commission ('NRC') might not have conceded to possessing, let alone disclosing, some or all of the documents requested by plaintiffs. Moreover, plaintiff asserts, and has submitted some evidence of an effort by the NRC to remove prior to release the documents requested. (Applegate v. NRC, D. Ct. for District of Columbia, 82-1829, Jan 19, 1983).

Further, in an effort to limit the damage caused by the failure to identify the documents, the NRC released documents which it otherwise would have been legally entitled to withhold.

An additional circumstance which confirms my view that OIA's processing of the request was unsatisfactory is the notification by OGC

*So did Ray III*

that OIA has found additional documents which fit within Applegate's request and which have not been identified as required by FOIA. (Memo, Chopko to Combs, "Revision to Proposed Response Applegate/Udall letter - CR-83-4A," February 25, 1983.) This agency represented to Applegate and the court that we had after two searches identified all documents even arguably responsive to the FOIA request. I find it incredible that OIA is, after three searches, still discovering documents not previously identified. Our already weakened credibility can only be further damaged as a result of these latest disclosures.

I propose that we notify the Director of OIA in writing that we feel he exercised very poor judgment in handling the Applegate FOIA request. We should make it clear that we expect him to ensure that in the future his office will be in full compliance with FOIA, and that his office will obtain the concurrence of OGC on such decisions. If the Director were a lawyer, and thus could be presumed to know the law, or if we could be certain that he directed the removal of documents from OIA offices after the receipt of the FOIA request, I would suggest much more stringent measures. A memorandum stating our judgment that he did not manage the situation properly is the least we can do in the circumstances.

I also suggest we add the following as the next to last paragraph on page 10 of the draft letter to Congressman Udall:

*Extans in transcript*

The Commission has concluded that the NRC's response to the Applegate FOIA request was not well managed. The Commission has taken several actions to help ensure that a similar situation does not recur. The Commission has notified the Director of OIA in writing that he exercised very poor judgment in his handling of the FOIA request. The Commission has directed the management of OIA to ensure that, in the future, that office will be in full compliance with FOIA. We have further directed OIA management to ensure that future responses to such FOIA requests will be coordinated with OGC. In addition, the Commission has directed OGC to prepare an agency-wide policy on records retention and disposal with reference to NRC's FOIA obligations, and to provide legal advice to any Commission-level office (including OIA) processing a FOIA request.

In the event that a majority of the Commission is unwilling to take action, I will have an addition to the Udall response to reflect my views.

Attachment:

Draft memo to J.J. Cummings

cc: James J. Cummings, OIA

D R A F T

MEMORANDUM FOR: James J. Cummings, Director  
Office of Inspector and Auditor

FROM: Nunzio J. Palladino

SUBJECT: APPLGATE FOIA REQUEST

The Commission has reviewed the processing of the recent FOIA request from Mr. Thomas Applegate seeking disclosure of documents related to a final report of your office regarding the I&E investigation of alleged construction deficiencies at Zimmer. We have concluded that the NRC's response was not well managed. In particular, we believe that several of the decisions made in this case exhibited very poor judgment on your part.

Your decision not to identify the interview, even though that document was generated as part of the 81-18 file and a copy was retained there, was clearly in error. Your decision not to identify draft documents, which were brought to your attention and which were within the FOIA request, was also erroneous. That failure to identify *why* documents needlessly cast suspicion on the integrity of the agency's process. Further, you failed to ensure that OIA coordinated with and obtained the concurrence of OGC when making these decisions. Finally, the fact that, after repeated searches, OIA is still *JIS* identifying new documents that were within the Applegate FOIA request indicates poor management of OIA's FOIA process.

In the future you should ensure that your office coordinates such decisions with OGC, and that your office is fully in compliance with FOIA. We trust that such a situation will not arise again.