

APPEAL OF INITIAL FOIA DECISION

GOVERNMENT ACCOUNTABILITY PROJECT
Institute for Policy Studies
1901 Que Street, N.W., Washington, D.C. 20009

83-A-13C (83-77)
Rec'd 6-23-83 (202) 234-9382

June 16, 1983

Mr. Samuel J. Chilk
Executive Secretary
Office of Admin.
Nuclear Regulatory Commission
Washington, D.C. 20555

Re: FOIA 83-77

Dear Mr. Chilk:

This is an appeal pursuant to subsection (a) (6) of the Freedom of Information Act (FOIA), 5 USC 552, of Mr. J.M. Felton's partial denial of the February 8, 1983 FOIA request submitted by Ms. Lynne Bernabei on behalf of the Government Accountability Project (GAP). More specifically, we appeal the denial of documents withheld pursuant to exemption 7(A) as identified in Appendix E of the May 16 letter. We further appeal the failure to identify relevant agency records obtained during the investigation for the report entitled "Zimmer-NPS Allegations Regarding the Presence of Bechtel Representatives prior to November 1982" (Zimmer Bechtel Report). The Zimmer Bechtel Report is identified in the May 16 letter as document #1, Appendix E.

The records identified and withheld pursuant to exemption 7(A) appear to consist of agency reports and memoranda responding to allegations that arose from a GAP investigation. GAP's client the Miami Valley Power Project (MVPP) charged that Cincinnati Gas and Electric Company (CG&E) and the Bechtel Corporation communicated about the Zimmer nuclear power station before the dates disclosed by CG&E to the NRC. Although these records are being withheld because disclosure "would interfere with enforcement proceedings," GAP is not aware of any open enforcement proceedings on the allegations. Indeed, the documents released already indicated conclusively that the Office of Investigations had found no merit to the charges.

If the case on CG&E's communications with Bechtel has been closed and no enforcement proceeding is contemplated, exemption 7(A) does not apply. The 1974 amendment to the FOIA was aimed specifically at eliminating exemption 7 from matters relating to closed files. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978); Coastal States Gas Corp. v. Department of Energy, 617 F. 2d 854 (D.C. Cir. 1980). In short, if the NRC has finished its proceedings GAP is entitled to and seeks the investigative basis for the finding of no false statements.

Even if enforcement action is still under consideration, the records should be released. The courts have held that there is no harm to enforcement proceedings when potential defendants already have access to the information. Coastal States Gas Corp. v. Department of Energy, 617 F. 2d at 870; Education/Instruccion Inc. v. HUD, 471 F. Supp. 1074 (D. Mass. 1979). If CG&E and Bechtel

Mr. Samuel Chilk
June 16, 1983
Page 2

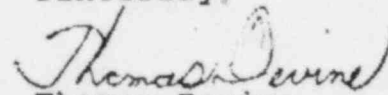
communicated with each other prior to the date they disclosed, they must have been aware of it. At a minimum, government must demonstrate the ways that disclosure will interfere with the proceeding at issue. The burden of specificity is intensified when the target already has access to the contents. Campbell v. Department of Health and Human Services, 682 F. 2d 256 (D.C. Cir. 1982). To date, there has been no attempt to explain how disclosure of the OI findings would interfere with anything.

GAP further appeals the failure to identify any documents gathered during the OI probes into the charge of false statements. These records are covered by the original request as "concerning" and "related to" the NRC's communications with CG&E and Bechtel. The request includes all relevant agency records, including drafts reports.

If these documents are to be withheld, they must be indexed and the decision justified. Vaughn v. Rosen, 484 F. 2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), Applegate v. NRC, No. 82-1829 (D.D.C. May 24, 1983). It is inconceivable that OI made its investigative conclusions without an investigative file and draft reports.

As provided in the Act, we will expect to receive a reply to this administrative appeal within twenty working days.

Sincerely,


Thomas Devine
Legal Director

GOVERNMENT ACCOUNTABILITY PROJECT

Institute for Policy Studies

1901 Que Street, N.W., Washington, D.C. 20009

(202) 234 9382

February 8, 1983

FREEDOM OF INFORMATION
ACT REQUEST

FOIA-83-77

Rec'd 2-15-83

Director
Office of Administration
Nuclear Regulatory Commission
Washington, DC 20555

To Whom It May Concern:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, I request a copy of all documents mentioning, concerning, related or referring to contacts between the Nuclear Regulatory Commission ("NRC"), including but not limited to NRC Region III staff, and the Cincinnati Gas & Electric Company or the Bechtel Corporation or any Bechtel company concerning a third party audit or third party review of the Zimmer Nuclear Power Plant. "Contact" means in this context any oral or written communication, discussion, telephone call, meeting, or other coincidence of persons.

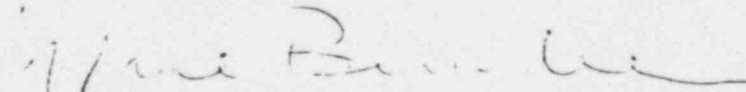
If any documents responsive to this request existed at one time but no longer exist, please identify all such documents and the reason(s) for their removal or destruction, or describe the circumstances under which such documents ceased to exist.

I am requesting these records as part of an ongoing monitoring project concerning the adequacy of the Commission's efforts to protect the public health and safety. Therefore, I request that you waive all search fees and copying fees which may be incurred to answer this request, since it benefits the general public.

The Freedom of Information Act requires that this request be answered within ten (10) days. Failure to answer the request within this period will be considered an effective denial.

Thank you in advance for your attention to this matter.

Sincerely Yours,



Lynne Bernabei
Staff Counsel

LB/mw

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

May 16, 1983

Docket No. 50-358

Ms. Lynne Bernabei
Staff Counsel
Government Accountability Project
Institute for Policy Studies
1901 Que Street, N.W.
Washington, DC 20009

IN RESPONSE REFER
TO FOIA-83-77

Dear Ms. Bernabei:

This is in response to your letter dated February 8, 1983 in which you requested, pursuant to the Freedom of Information Act, copies of all documents mentioning, concerning, related or referring to contacts between the Nuclear Regulatory Commission (NRC), including but not limited to NRC Region III staff, and the Cincinnati Gas & Electric Company or the Bechtel Corporation or any Bechtel company concerning a third party audit or third party review of the Zimmer Nuclear Power Plant.

In a telephone conversation on March 10, 1983 with Mrs. Pappas, of my staff, she informed you we are waiving search and copying fees on the enclosed documents. You also agreed to an extension of time on your request.

The documents as listed on Appendix A have already been made available for public inspection and copying at the NRC Public Document Room (PDR), 1717 H Street, N.W., Washington, DC 20555. There is no fee for inspecting documents at the PDR. The charge for reproducing records located in the PDR is five cents (\$0.05) per page, as specified in 10 CFR 9.14(a).

If you do not wish to visit the PDR to inspect or copy these records, you may obtain copies by calling (634-3273) or writing directly to the PDR. Upon your agreement to pay the copying charges, the PDR will arrange for the record to be copied by a private contractor servicing the PDR. You will be billed by the private contractor for copying charges, plus tax and postage.

Please find enclosed 25 documents as listed on Appendices B, C, and D which pertain to your request.

Portions of documents 1, 2, and 3 as listed on Appendix D are being withheld pursuant to the exemptions cited.

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The three documents as listed on Appendix E are being withheld in their entirety pursuant to the exemption cited.

Information being withheld pursuant to exemption (6) consists of names, addresses, and telephone numbers of references and notes taken during reference checks the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. This information is being withheld from public disclosure pursuant to exemption (6) of the Freedom of Information Act (5 U.S.C. 552(b)(6)) and 10 CFR 9.5(a)(6) of the Commission's regulations.

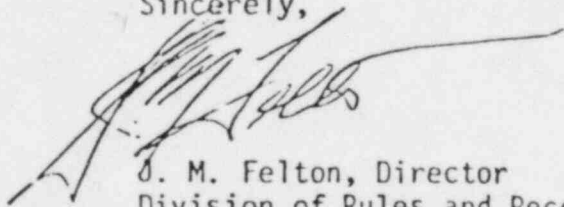
Information being withheld pursuant to exemptions (7)(A) and (C) would interfere with an enforcement proceeding and would also constitute an unwarranted invasion of personal privacy. This information is being withheld from public disclosure pursuant to exemptions (7)(A) and (C) of the Freedom of Information Act (5 U.S.C. 552(b)(7)(A) and (C)) and 10 CFR 9.5(a)(7)(i) and (iii) of the Commission's regulations.

Pursuant to 10 CFR 9.9 and 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 persons responsible for the denial of documents 1, 2, and 3 as listed on Appendix D and document 3 as listed on Appendix E are the undersigned and Mr. James G. Keppler, Regional Administrator, Region III. The person responsible for the denial of documents 1 and 2 as listed on Appendix E is Mr. Ben B. Hayes, Director, Office of Investigation.

The denials by Mr. Keppler and myself may be appealed to the Executive Director for Operations within 30 days from the receipt of this letter. 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". The denial by Mr. Hayes may be appealed within 30 days to the Commission and should be addressed to the Secretary of the Commission.

This completes action on your request.

Sincerely,



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

Enclosures: As stated

Appendix A

Documents In The Public Document Room

1. 11/10/82 Letter Dickhoner to Commissioners - Accession No. 8211150414
2. 11/26/82 Letter w/enclosure Dickhoner to Keppler - Accession No. 8212270434
3. 12/28/82 Letter w/enclosure Keppler to Dickhoner - Accession No. 8301040760
4. 1/10/83 Letter w/enclosure Dickhoner to Keppler - Accession No. 8302010575
5. 1/31/83 Letter w/enclosure Dickhoner to Keppler - Accession No. 8302080169
6. Summary of the document entitled, "Zimmer NPS - Allegations Regarding the Presence of Bechtel Representatives prior to November 1982"
7. 2/11/83 Letter Devine to Dircks w/enclosures - Accession No. 8302170294
8. 1/31/83 Letter to Palladino from Devine w/ attached Affidavit and ltr dtd 1/31/83 to Udall from Devine - Accession No. 8302070522
9. 3/16/83 Memorandum for Keppler, from Hayes, "Zimmer NPS - Allegations Regarding the Presence of Bechtel Representatives Prior to November, 1982" Accession No. 8304040422