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March 27, 1984

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

APPEAL OF INITIAL FOIA DECISION
84-A-36E(84-47)
Rec'd 4-2-84

RE: APPEAL FROM AN INITIAL FOIA FEE WAIVER DECISION
(FOIA 84-47)

Dear Sir:

By letter dated January 17, 1984, we made an initial Freedom of Information Act (FOIA) request on behalf of our client, John F. Long, for certain records of the Nuclear Regulatory Commission (NRC). (See Attachment "A"). In our letter, we asked that all search and duplication costs be waived, and provided a substantial record in support of our fee waiver request.

Before making the above-referenced FOIA request to the NRC, we thoroughly examined all records on file at the Local Public Document Room (LPDR) here in Phoenix (i.e., the Business, Science and Technical Section of the Phoenix Public Library), and were unable to locate any of the records we were seeking. In addition, after receiving our FOIA request, Nina Toms, the NRC FOIA case officer who handled our request, caused a separate check to be made of the records on file at the Phoenix LPDR for responsive materials. In a telephone conversation with the undersigned on January 25, 1984, Ms. Toms informed us that it was her determination that the records requested were not available locally. In sum, it was clear at the time the NRC began processing our request that the responsive documents had not been made available locally.

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Although we were in frequent contact with Ms. Toms during the processing of our request, we were never informed at any point that we could avoid fees by having responsive documents sent directly to the Phoenix LPDR instead of to us. As it was, the response to our request was mailed to us 11 days after the response date of February 2, 1984, assigned by the NRC FOIA case officer, Ms. Toms. (See enclosed response letter by J. M. Felton, dated February 13, 1984, at Attachment "B"). As an aside, it should be pointed out that a response mailed to the LPDR instead of directly to us would presumably not have been available to us until much later, resulting in an even greater transgression of the ten-day response period mandated by the Act.

A quick review of the above-referenced Felton letter of February 13, 1984, will reveal that Mr. Felton had ignored our fee waiver request and decided to bill us for reproduction costs. In fact, nowhere in his letter does Mr. Felton even mention our fee waiver request.

At our insistence, Mr. Felton finally agreed to make a formal, written determination on our request for a waiver of fees. His determination was set forth in his letter of February 27, 1984. (See Attachment "c"). Incredibly, despite the fact that he had been informed by the undersigned as well as by Ms. Toms that the responsive records were not available in the Phoenix LPDR, Felton denied our request for waiver of fees citing 10 C.F.R. 9.14a(g). Section 9.14a(g) provides:

The NRC will not waive the reproduction costs for documents located or made available in the NRC Public Document Room or a local public document room in the absence of a compelling reason to do so.

In a telephone conversation with the undersigned Felton explained that because the NRC planned to make the documents responsive to our request available at the Phoenix LPDR, he felt that Section 9.14a(g) was applicable in this case. The arbitrary and capricious nature of his decision and reasoning should be glaringly apparent.

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In the first instance, the language of Section 9.14a(g) must refer to documents "located or made available in... a local public document room" at the time a given FOIA request is made. Otherwise, the NRC would never waive reproduction fees; it could simply send documents responsive to each FOIA request to the LPDR as well as to the requester, and charge the requester reproduction fees. Obviously, such a result flies in the face of the clearly expressed intention of Congress that fees be waived if furnishing the information requested can be considered as primarily benefiting the public. 5 U.S.C. 552(a)(4)(A). Despite Mr. Felton's logic, Congress did intend that fees be waived in certain cases.

To illustrate the totally arbitrary and unjust nature of the fee waiver decision in this case, it is helpful to review the following facts:

1. Before making our request we determined that responsive documents were not available in the LPDR; the NRC FOIA case officer reached the same conclusion before processing our request.
2. We made a formal request for waiver of all fees and provided a substantial record to support that request.
3. At no time during the processing of our request were we informed by the NRC that we could avoid duplication costs by having the responsive documents sent directly to the LPDR.
4. Because the NRC was not aware that the requested documents had not been made available in the LPDR, those documents would not now be available to the local public but for our FOIA request.

Mr. Felton's observation in his letter of February 27, 1984, that the responsive records had been sent to us directly instead of to the LPDR because we had stated that we wanted the records as soon as possible, is totally specious. In the first instance, as noted above, we were never given the option of

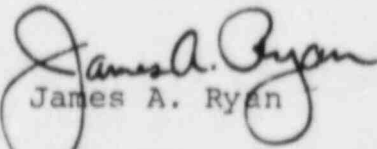
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avoiding costs by having the records sent directly to the LPDR instead of to us. Secondly, although we, like all FOIA requesters, were in a hurry to receive responsive records, we never asked for a response period any shorter than the ten-day period mandated by the Act. Thirdly, the responsive documents in this case were not even mailed to us until eleven days after the ten-day response period had expired.

Finally, the incomprehensible manner in which the fee waiver decision has been handled in this case is illustrated by one additional example. Please note that in Mr. Felton's letter of February 27, 1984, he stated that he was forwarding two additional records responsive to our request to the Phoenix LPDR. He was asked to do so by the undersigned after he had explained his rationale for not waiving reproduction costs associated with documents provided earlier. In other words, we asked Felton not to send the final two documents to us, but to send them instead to the LPDR. Incredibly, despite the wording of his letter and despite our request that he not send the documents to us directly, the final two responsive documents were included as enclosures to Felton's letter to us of February 27.

For all of the foregoing reasons, it is clear that the denial of our request for a waiver of fees by J. M. Felton was totally arbitrary and capricious. We request, therefore, a reversal of that denial and a waiver of all fees associated with FOIA request 84-47.

Very truly yours,


James A. Ryan

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attachments