

PDR-016



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

May 21, 1984

OFFICE OF THE
SECRETARY

J. Patrick Hickey, Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

IN RESPONSE REFER
TO 84-A-28(83-685)

Dear Mr. Hickey:

This is in response to your February 10, 1984 Freedom of Information Act ("FOIA") appeal of the Nuclear Regulatory Commission's ("NRC" or "Commission") failure to respond to your request in FOIA-83-685 for the transcript of a June 7, 1983 interview of James B. McCarten.

The Commission has decided to grant your appeal in part. Most of the transcript is being released and a copy is enclosed. However, public disclosure of certain portions of the transcript could interfere with ongoing enforcement proceedings regarding the Zimmer Nuclear Power Plant. These portions of the transcript (listed in Part I of the Appendix to this letter) are being withheld under Exemption 7(A) of the FOIA, 5 U.S.C. 552(b)(7)(A), and the Commission's regulations, 10 CFR 9.5(a)(7). 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). Additionally, since there is a grand jury proceeding regarding Zimmer, this information is being withheld under Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3), and the Commission's regulations, 10 CFR 9.5(a)(3). Fund For Constitutional Government v. National Archives and Records Service, 656 F.2d 856 (D.C. Cir. 1981) (Fed. R. Crim. P. 6(e) is an Exemption 3 statute).

Several portions of the transcript contain identities of confidential informants and identities of FBI agents. Disclosure of identities of confidential informants would breach promises of confidentiality and could hinder the agency's ability to conduct future investigations. Therefore, portions of the transcript (listed in Part II of the Appendix) revealing the identities of these informants are being withheld under Exemption 7(D) of the FOIA, 5 U.S.C. 552(b)(7)(D), and the Commission's regulations, 10 CFR 9.5(a)(7). Founding Church of Scientology v. Regan, 670 F.2d 1158 (D.C. Cir. 1981). Disclosure of the names of the FBI agents involved in the investigation would constitute an unwarranted invasion of the privacy of those agents and would not further any public interest. Accordingly, the portions of the transcript (listed in Part III.A of the Appendix) revealing the identities of FBI agents are being withheld from public disclosure pursuant to Exemption 7(C) of the FOIA, 5 U.S.C. 552(b)(7)(C), and the Commission's regulations, 10 CFR 9.5(a)(7). Lesar v. Department of Justice, 636 F.2d 472, 487 (D.C. Cir. 1980).

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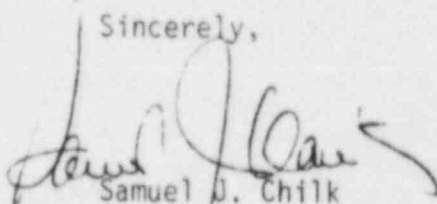
The portions of the transcript listed in Part III.B of the Appendix contain information identifying an individual associated with unproven allegations of misconduct. Disclosure of the identity of that individual would constitute an unwarranted invasion of that person's privacy with no outweighing benefit to the public interest. Fund for Constitutional Government, supra. Accordingly, these portions of the transcript are being withheld under Exemption 7(C).

Your appeal notes that Thomas Devine of the Government Accountability Project and the Cleveland Plain Dealer apparently have obtained copies of the transcript that you requested. Prior to this release of the attachment by the Commission, however, there have been no authorized releases of this transcript. Unauthorized disclosures of agency documents do not constitute a waiver of the agency's right to officially withhold the document in whole or in part. Safeway Stores v. FTC, 428 F. Supp. 346, 347 (D.D.C. 1977).

Accordingly, pursuant to 10 9.15(a), the NRC has determined that the withheld material is exempt from public disclosure and that such disclosure would be contrary to the public interest. The NRC therefore has determined that the deleted portions of the transcript should continue to be withheld.

This letter represents final agency action on your FOIA appeal of February 10, 1984 concerning the transcript of the interview of James B. McCarten. Judicial review of this decision is available in a Federal district court in the district in which you reside, or in the District of Columbia.

Sincerely,


Samuel J. Chilk
Secretary of the Commission

Enclosures:

1. Appendix
2. Transcript

APPENDIX

I. Material withheld under Exemption 7(A):

Page 44	Lines 13-15
Page 45	Lines 5-6
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II. Material withheld under Exemption 7(D):

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III. Material withheld under Exemption 7(C):

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B.	Page 68	Lines 5, 6, 7, 8, 9, 10, 11
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November 23, 1983

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BY HAND

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FREEDOM OF INFORMATION
ACT REQUEST

FOIA-83-685
Rec'd 11-23-83

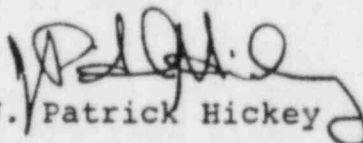
Dear Mr. Grimsley:

In accordance with the Freedom of Information Act, I hereby request the NRC to provide a copy of the following document now in its possession:

Transcript of a June 7, 1983 interview of James B. McCarten, former Region III OIA Investigator, which was an Exhibit (H) to the July 12, 1983 Report to the Chairman on Allegations of Thomas Applegate Concerning Conduct of the Office of Inspector and Audit.

We would appreciate your efforts to expedite this request.

Very truly yours,


J. Patrick Hickey

~~844-274169~~

ZIMMER ZAPPED AGAIN

NRC's Man On The Spot Accused Of Lying, Lawsuit Threatened

BY KENNEDY MAIZE

The sorry saga of the Zimmer nuclear project continues. Charging a coverup, the Government Accountability Project on Wednesday called on James Keppler, the Nuclear Regulatory Commission's Region 3 Administrator, to reject Cincinnati Gas and Electric Co.'s proposed quality verification plan at the Zimmer plant or face a lawsuit. GAP lawyer Thomas Devine, acting for his client, the Miami Valley Power Project, said that his request was based on a 1983 affidavit from James McCarten, Keppler's lead agent during 1981 investigations. McCarten charged Keppler with a pattern of lying about problems at Zimmer.

McCarten accused Keppler of censoring investigation reports so that their substance was deleted, of refusing to stop work at the project in April 1981, when it became obvious the project was in deep trouble (construction was suspended in November 1982), and of impeding a Justice Department criminal investigation by withholding information. McCarten resigned in protest in 1982.

McCarten's charges were made last June in an interview with Administrative Law Judge Helen Hoyt, who was reviewing NRC's performance in the convoluted and trouble-

led Zimmer proceeding. As a result of the Hoyt report, NRC chief auditor James Cummings was removed from his job, but Hoyt made no recommendations about Keppler.

McCarten said in the Hoyt interview that Keppler had "knowingly" provided false statements to the public on whether there were hardware problems at Zimmer. GAP's Devine charges that McCarten's deposition makes it clear that Keppler was "aware since January 1981 that the Zimmer quality assurance breakdown was caused by CG&E's refusal to permit its contractor to build the plant to minimum nuclear industry and legal standards." NRC and the utility have thrown most of the blame for Zimmer at constructor H.J. Kaiser, which was inexperienced in nuclear power projects.

The Miami Valley Power Project boycotted a public meeting Wednesday on the utility's quality plan because of Keppler's 1981 actions. "That deception," Devine charged, "which was designed to maintain CG&E's control over Zimmer when such a decision was indefensible, has continued for three years."

Devine called on Keppler to reject one approach to the problems at Zimmer, accepted by the NRC in December, and to delay action on CG&E's plan to verify the quality of

construction (abbreviated PVQC) at Zimmer. Devine also asked that Keppler: 1) "require completion of the independent design review and the PVQC successively, before allowing the Continuation of Construction Plan to begin;" 2) require quality control reinspection of 100 percent of the plant's hardware; and 3) implement a public oversight plan.

The Miami Valley Power Project "submits these recommendations without any faith that they will be seriously considered," Devine wrote. "As a result, MVPP is no longer willing to accept the NRC's decisions as the final word on Cincinnati's safety. MVPP is conducting a detailed review of the PVQC with whistleblowers, in order to create a record for submission to the commission....If necessary, MVPP will take the matter to court for injunctive relief and to appeal any adverse commission decision."

Devine criticized the utility's PVQC as "a promise to develop a program, rather than a completed proposal that can be evaluated. The plan is too premature to merit serious consideration." He claimed that it is further "biased by CG&E's control. CG&E's 'reform' institutionalizes the unacceptable bias in Bechtel's cost estimate—a forecast which explicitly assumed that potential violations...would neither have any impact on plant hardware nor require any corrective action, including every case where the hardware is buried or inaccessible.

Wyoming: Ups & Downs

After a sluggish start, reports Wyoming state geologist Gary Glass, 1983 turned out to be not so bad a year for energy production. In his year-end report, Glass notes that oil and gas drilling picked up late in the year in the Cowboy State, and natural gas production during the first seven months was running eight percent above last year. Oil production is running about one percent below 1982.

Glass reports that coal production was running slightly ahead of the 108 million tons mined in 1982. But if coal finishes ahead of '82, says Glass, "it won't be by much. Although reported monthly deliveries to power plants are 5.5 percent above [1982], unreported tonnages, which are mostly industrial and small power plant contracts, are expected to fall short of the 4.8 million tons in that category in 1982."

The worst performance came from uranium. Union Carbide, the state's oldest major producer of refined uranium oxide, announced in November it would close its Gas Hill mines and mill complex, which has been operating since 1960. It's the 14th uranium mine closure in Wyoming since 1979, reports uranium geologist Ray Harris. The state still has five operating mines and mills, down from 17 in 1978.

Utilities Urged To Show Mercy

Texas Railroad Commission chairman Mack Wallace has called on 60 gas utilities in the state to give customers more time to pay their gas bills if they need it. "Texans across the state endured the severest winter weather in more than 50 years and because of the severity of the cold some may have difficulty in paying their December bills," noted Wallace in a letter to the utilities' chief operating officers. "I would recommend that customers who request extra time be granted as much time as is reasonable. Termination of service should be avoided wherever possible."

New Whey To Make Methane

A California dairy products processing plant will install a \$3.2-million anaerobic digester system to produce methane from whey—a by-product of the cottage cheese and cheese products that are made at the plant. The methane will be more than enough to fuel the Foremost Dairies plant at Leemoore, which handles 63 million gallons of milk products a year. The new system uses European technology and will be the first of its kind in the U.S. Design work on the system was carried out by Favaro Consultants & Construction, a New York firm. The new plant is expected to start operating in June.

NRC accused of Zimmer cover-up

FROM FIRST PAGE

tell me that the plant is 100% inspected, every construction module was bought off (checked by NRC) and yet you are telling me it is not built right?

"How did it happen? How can I go to the public and say we have completely inspected the plant it is 93% complete, but it is a mess?"

McCarten said Keppler was told by another NRC official, "Our construction program is flawed."

McCarten told the internal inquiry that he and others found systematic flaws in the records that assure the plant is built safely and in the construction itself.

He said investigators compared engineering drawings with installations and found discrepancies. They discovered reports of improper construction were changed or thrown away and materials designed to meet safety specifications were replaced by materials of lesser quality.

"The strongest tool the inspector has to tell the utility that something is wrong, the nonconformance report, was thrown away because when these guys wrote stuff, it identified big generic problems, and the utility didn't want to deal with them because it meant big money and it meant not getting licensed," McCarten testified.

Public relations was at play also according to McCarten. Many NRC people were concerned Applegate would get credit if they said there were wide-ranging problems, McCarten said.

"They said, 'Your findings are going to make Applegate look like a hero,'" he said. "After hearing that for two weeks, I just said 'So what?' and Keppler adopted that position, you know, who cares? It comes out in the end where he looks good. So what?"

McCarten and others were pushing in 1981 to get Zimmer closed, so problems could be resolved, but he said he was told, "We can't shut down a plant that

is 93% inspected and 93% complete. It would make us look bad. The boss (Keppler), can't shut it down."

He said NRC instead was trying to get the quality of construction reconfirmed.

"It was a nice, convenient way for them to dodge the issue of an internal inquiry into why Region III (the Midwest) failed to inspect it, a stop work order which would make Applegate look like a hero. One of the reasons given was they said they (Zimmer) would never get back up again, they were so screwed up," McCarten said.

Beyond this, McCarten was nervous because other investigators had told him the chief of the Office of Inspector and Auditor, James Cummings, had come to the Zimmer site early in 1981 to "quash the investigation."

McCarten said Cummings never told him that, but said, "He (Cummings) had a conversation with me which I thought was funny. He said, 'You know, your boss, Jim Keppler, has a real problem with Zimmer.'"

Cummings took a year's leave of absence last year. NRC denied the leave had any connection with his Zimmer involvement.

McCarten testified he was furious in the fall of 1981 because NRC's report on Zimmer's problems "was so watered down and it is so toned down."

"I found instances where the report that was presented to the commissioners was false and contradicted sworn depositions that were attachments to the same report," he said.

Questioned whether statements in the report were false or misleading, McCarten said, "Outright false."

David H. Gamble, also a former NRC investigator, testified at the internal inquiry that he and a third investigator had "quite a tiff with Mr. Cummings" over a memo from NRC's Terry Harpster about his problems in getting NRC

attention to Zimmer construction problems.

That memo and other documents were not in the report, NRC denied they were suppressed.

Gamble said he did not believe there was any cover-up in the Zimmer report. He said Cummings was concerned about the "specter of another Department of Justice takeover."

He said Cummings feared NRC would lose its own investigation because a grand jury would get involved and close records.

Gamble said Victor Stello, who headed the office of inspection and enforcement, in May 1981 asked the staff investigating Zimmer if they felt the plant was built well.

"Stello then replied ... 'Obviously, you must have a feeling because when you walk around you can tell if it is built well or not,'" Gamble said. "There was much guffawing after the meeting

about the possibility of firing the inspection staff and just putting Mr. Stello on a plane and just flying him around to nuclear power plants to look around."

McCarten said, "People had a vested interest in making sure the (1981) report didn't highlight things that NRC had previously approved" which were found to be flawed.

Near the end of his deposition, McCarten was asked about the 1981 report, which accused CG&E of falsifying documents, harassing safety inspectors and conducting a poor quality assurance program. Most of the blame was placed on the chief contractor, Kaiser Engineering Co., but CG&E was fined \$200,000.

McCarten testified that Keppler made a "false report," when he told a news conference that most of the problems were in record-keeping, not in the actual construction.

"I sat in the back of the room, and I knew it was false," he said.

Asked if he thought Keppler knew it was false, McCarten said, "Yes, and I think it has been proven that it is false."

Since then, 70% of the structural steel welds have been found to be flawed, and Keppler has said those welds might cover up more serious problems.

While the inquiry found no violations of NRC regulations, judgments and statements by Keppler, Cummings and Stello were called into question. They could not be reached for comment.

Asked about the allegations officials in the Chicago region office referred to in an early statement by Keppler in response to the findings:

"We are not aware of any substantive information which is omitted from or contradicts statements made" in the 1981 report, Keppler said. He said McCarten was allowed to reread the 1981 report and made no changes.

Keppler said evidence of his aware problems that surfaced to him was not available at the time the 1981 report

Attachment C

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Inspectors accuse NRC of Zimmer cover-up

By James Lawless

Nuclear Regulatory Commission investigators last summer accused the agency of suppressing documents, knowingly releasing false information in 1981 and knowing of construction problems at the Zimmer nuclear power station three years ago.

The investigators' testimony, given at

an NRC internal inquiry, was ordered sealed by the commission. A transcript was obtained by The Plain Dealer.

Cost overruns, construction problems and inadequate records have forced the utilities building the \$1.7 billion plant near Cincinnati to begin plans to convert it to coal even though it is supposedly 97% complete.

Cincinnati Gas & Electric Co., the

building and operating partner, owns Zimmer with Dayton Power & Light and Columbus & Southern Ohio Electric companies.

A federal grand jury is investigating possible criminal violations of NRC regulations, including making false statements. The investigation, which began in June 1982, is focusing on CG&E officials and Zimmer contractors.

"We are not investigating NRC officials at this time," said Ann M. Tracey, U.S. attorney in Cincinnati.

In early 1981, the NRC was pressured into examining allegations by Thomas W. Applegate Jr., a former private detective at Zimmer, and the Government Accountability Project, a private Washington watching group, of serious problems at the nuclear plant.

James B. McCarten, part of the NRC investigative team, testified last summer at the internal inquiry that the test found problems far beyond the Applegate charges.

In the transcript obtained by The Plain Dealer, McCarten said NRC Midwest Regional Administrator James Keppel in early 1981 asked, "How can you give

Continued on Page 16

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

In the matter of:

INTERVIEW OF JAMES B. McCARTEN

Docket No.

CLOSED MEETING

Location: Great Lakes, IL

Pages: 1 - 163

Date: Tuesday, June 7, 1983

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