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The Honorable Samuel J. Chilk
The Secretary of the Commission
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

APPEAL OF INITIAL FOIA DECISION
90A30C (90-206)
Rec'd 6-25-90

Re: Appeal From Initial FOIA Decision (FOIA-90-206)

Dear Sir:

This is an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (a)(6), of (a) the Nuclear Regulatory Commission's ("NRC" or "Commission") Partial Response dated May 18, 1990 and (b) its final FOIA Decision dated May 22, 1990, each of which denies, in part, my FOIA request dated May 3, 1990, (U.S.N.R.C. FOIA-90-206). 10 C.F.R. § 9.29(a) (1990). Copies of the request and the NRC's partial and final decisions are attached hereto.

I. BACKGROUND

The May 3, 1990 FOIA request to the NRC sought one copy of, among other records, the Commissioners' notation vote sheets on SECY-89-247 relating to the agency actions regarding the Shoreham Nuclear Power Station ("vote sheets") (specification (b)) and "documents referred to within SECY-89-247 which have not yet been placed in the Public Document Room" (specification (c)).

The Partial Response dated May 18, 1990, stated that there were no records corresponding to specification (c) U.S.N.R.C. FOIA-90-206, Part II.A (May 18, 1990).

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On May 22, 1990, John C. Hoyle, Assistant Secretary of the Commission, denied the specification (b) request for the vote sheets solely on the basis of Exemption 5, contending that the withheld records were part of the "deliberative process" specifying that the disclosure of this "predecisional" information would tend to inhibit the open and frank exchange of ideas. U.S.N.R.C. FOIA-90-206, Part II.B.5 (May 22, 1990).

II. RECORDS SOUGHT ON APPEAL

By this appeal, we seek the release of (1) the specification (b) records listed in Appendix B of Part II.B. of the Final Response (dated May 22, 1990) as records 1, 2, 3, and 4, and (2) records responsive to specification (c), including but not limited to the request from Commissioner Roberts referred to in the "SECY NOTE" to SECY-89-247 and any Commission Staff Office Comments (also referred to therein).

III. THE VOTE SHEETS MUST BE RELEASED UNDER FOIA AND MAY NOT VALIDLY BE PROTECTED BY THE DELIBERATIVE PROCESS EXEMPTION.

A. FOIA Mandates Release of the Vote Sheets

FOIA specifically states that agencies "shall make available for inspection and copying" all agency decisional opinions, including concurring and dissenting opinions, and all agency statements of policy and interpretations. 5 U.S.C. § 552(a)(2)(A)&(B) (1988) (emphasis added).

The Commissioners' approval and adoption of SECY-89-247 with concurrences and dissent in those vote sheets (a) addressed and effectively denied the Section 2.206 Requests filed in July, 1989 on behalf of the Shoreham-Wading River Central School District ("School District") and Scientists and Engineers for Secure Energy ("SE₂"), which sought, inter alia, to stay NRC permission for steps in the decommissioning of the Shoreham Nuclear Power Station ("Shoreham") pending issuance of a final Environmental Impact Statement pursuant to 10 C.F.R. Part 51 (1990) and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4221 et seq; and (b) established the NRC interpretation of, and policy for, its NEPA responsibilities under Part 51 of its regulations with respect to the proposal to decommission Shoreham.

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As an integral part of both the Commission's final decision on the School District and SE₂ Section 2.206 Requests and its final opinion and order on the NRC's NEPA obligations with regard to the decommissioning of the Shoreham plant, the vote sheets, which constitute the Commission decision and the individual Commissioners' concurring and dissenting opinions, should have been placed in the NRC's Public Document Room ("PDR") along with SECY-89-247 and the corresponding Staff Requirements Memorandum ("SRM") in accordance with the terms of Sections 552(a)(2)(A)&(B) of FOIA.^{1/}

Since the decision rendered in this instance, which may only be fully understood with reference to SECY-89-247 and the corresponding vote sheets and the SRM, represents a statement of the Commission's "general policy" and/or an "interpretation[] of general applicability formulated and adopted by the agency," it should also have been published in the Federal Register as required by FOIA's automatic disclosure provision. 5 U.S.C. § 552(a)(1)(D) (1988). The Commission's adoption of an

^{1/} On September 20, 1989, the NRC placed in the Public Document Room the Staff Requirements Memorandum dated August 25, 1989 which gave notice to the NRC Staff of the Commission's approval of the proposal contained in SECY-89-247 through the vote sheets. The Commission failed to fully meet its FOIA responsibilities, however, because it neglected to release either SECY-89-247 or the vote sheets which include concurring and dissenting opinions (all of which is crucial to an understanding of what was decided) and must, therefore, also be released under FOIA Section 552(a)(2)(A).

The Commission's release of only the SRM was a hollow gesture to FOIA's disclosure requirements in that the SRM merely indicated that some decision had been made but failed to offer more than a SECY reference number as a clue to what the details of that decision actually were. The SRM continually makes reference to the SECY without explaining its content. Staff Requirements Memorandum to EDO from Secretary Chilk on SECY-89-247 - Shoreham Status and Developments dated August 25, 1989 at 1. Almost eight months later, the Commission revealed a further portion of the substance of its secret decision by including the SECY with a pleading filed in Shoreham-Wading River Central School District et. al. v. U.S.N.R.C. et al., No. 90-1241 (D.C. Cir. filed May 7, 1990). However, the Commission still needs to expose to the light of public and judicial scrutiny the remaining facet of its tripartite decision in this case: the vote sheets.

"interpretation of general applicability"^{2/} on the issue of the NRC's NEPA responsibilities in cases where premature (prior to the end of a facility's useful life) decommissioning has been proposed and the related issue of when decommissioning should be considered to have begun in such cases required automatic disclosure under the terms of FOIA.

Finally, FOIA also requires, upon proper request, release of records not placed in the PDR or published in the Federal Register. 5 U.S.C. § 552(a)(3) (1988). A proper request has been made in this case, and as shown below, no exemption applies. Thus, three independent FOIA release provisions mandate release of the vote sheets in this instance.

B. Exemption 5 Is Not Applicable In This Case

The courts have established, as a fundamental premise of FOIA, that records must be released unless they squarely fall within an exemption. E.g., Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 868 (D.C. Cir 1980) ("We reemphasize the narrow scope of Exemption 5 and the strong policy of the FOIA that the public is entitled to know what its government is doing and why") ("Coastal States").

In one of the most recent D.C. Circuit cases addressing the standards to be applied in determining the validity of an agency's decision to withhold a document under Exemption 5, the court stated that "[t]he law speaks clearly on this issue. An agency may withhold a document under Exemption 5 when it is both predecisional and deliberative." Formaldehyde Institute v. Department of Health and Human Services, 889 F.2d 1118, 1120 (D.C. Cir. 1989) (emphasis added); see also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-53, 95 S.Ct. 1504, 1516-17, 44 L.Ed. 29 (1975) ("Sears"); Senate of Puerto Rico v. U.S. Department of Justice, 823 F.2d 574, 585-86 (D.C. Cir. 1987); Arthur Andersen & Co. v. Internal Revenue Service, 679 F.2d 254, 257 (D.C. Cir. 1982); Coastal States, 617 F.2d at 866 ("we look to whether the document is 'predecisional' - whether it was generated before the adoption of agency policy - and whether the document is

^{2/} The generally applicable nature of the decision to adopt the approach described in SECY-89-247 is borne out by the fact that the SRM states that "Chairman Carr requested the staff to take comparable actions with respect to the Rancho Seco Facility." Staff Requirements Memorandum to EDO from Secretary Chilk on SECY-89-247 - Shoreham Status and Developments dated August 25, 1989 at 3.

'deliberative' - whether it reflects the give and take of the consultative process" (emphasis original)); Jordan v. U.S. Department of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978) ("two prerequisites must be met . . . the document must be 'predecisional' [and] the communication must be 'deliberative'") ("Jordan"). Thus, before the notation vote sheets may legitimately be withheld under the deliberative process privilege, the NRC must demonstrate that they are both "predecisional" and part of the agency's "deliberative" process. Neither requirement is met in this case.

1. The Vote Sheets Are Not Predecisional

A "predecisional" document has been defined by the Supreme Court as one "prepared in order to assist an agency decisionmaker in arriving at his decision," Renegotiation Board v. Grumman Aircraft, 421 U.S. 168, 184, 95 S.Ct. 1491, 1500, 44 L.Ed.2d 57, and has been defined quite simply by the D.C. Circuit as one "generated before the adoption of an agency policy." Coastal States, 617 F.2d at 866 (emphasis original). The agency decisionmakers, the Commissioners in this case, prepared the vote sheets as an explanation of and qualification of their votes.^{3/} Their comments were recorded at the same moment they were adopting the agency policy. Even if vote sheets are circulated among Commissioners so as to assist undecided Commissioners in reaching their decisions, at the moment the vote sheets are submitted to the Secretary, the vote sheets cease to be "predecisional"; rather they constitute both the decision itself and the individual Commissioners explanation of their votes. Thus, the vote sheets are not predecisional, but rather are the decisionmaking vehicle containing both each Commissioner's vote

3/ The EDO Procedures Manual explains that Notation Vote SECY papers "are acted upon by individual Commissioners through Notation Vote Sheets which are distributed with the paper." NRC EDO Procedures Manual, III-5 (emphasis added). The sample vote sheet included in the EDO Procedure Manual at IV-16 calls for each Commissioner to indicate whether they "approve," "disapprove," "abstain," are "not participating," or "request discussion." The fact that a Commissioner may "request discussion" implies that solitary Commissioners consider the proposal outlined in the SECY and cast their vote and record their comments in isolation. Further support for this understanding of the process comes from the fact that, an open meeting would be the proper place for the Commissioners' "deliberations" on an issue. See Government in the Sunshine Act, 5 U.S.C. §§ 551-552(b), 556, 557 (1988).

and his contemporaneous explanation therefor, if any. Memoranda or communications designed to explain a decision or opinion are not privileged. See Sears, 421 U.S. at 148-54, 95 S.Ct. at 1515-18 and cases cited therein; Jordan, 591 F.2d at 774; Exxon v. Federal Trade Commission, 466 F. Supp. 1088, 1098 (D.D.C. 1978) ("Exxon"). In fact, the Supreme Court has termed opinions explaining the decision and providing guides "the prototype of the post-decisional document". Sears, 421 U.S. at 152 n. 19, 95 S.Ct. at 1517 n. 19 (emphasis added).

In Exxon, the U.S. District Court for the District of Columbia specifically determined that, when a federal agency utilizes the notation vote process, the votes cast by agency commissioners, as well as the written opinions accompanying these votes, may not be withheld under FOIA Exemption 5:

The Court also finds that the reason recorded in the Blue Minutes for the vote of one of the Commissioners is not entitled to the protection of the deliberative process privilege. If a Commissioner chooses to explain his part in a final decision of the Commission contemporaneously with the taking of such a decision this explanation is not pre-decisional and therefore is not covered by the privilege protecting the deliberative process.

Exxon, 466 F. Supp. at 1098 (citation omitted; emphasis added). The Exxon District Court decision squarely mandates disclosure of the vote sheets: the votes and the contemporaneous concurring or dissenting opinions ("comments") written by each NRC Commissioner constitute a portion of, and explanation of, the final decision.^{4/} Also see 10 C.F.R. § 9.21(c)(1)&(2) (1990).

The D.C. Circuit has firmly adopted this disclosure requirement for the release of explanations of agency decisions and opinions, including the commissioner's explanations of his decisions. See Taxation With Representation v. I.R.S., 646 F.2d 666, 681-84 (D.C. Cir. 1981) (memoranda explaining agency rulings and decisions are subject to disclosure); Coastal States, 617 F.2d. at 868.

4/ The Government did not cross-appeal this decision when Exxon appealed other portions of this case and, therefore, acquiesced in it. See Exxon Corp. v. F.T.C., 663 F.2d 120 (D.C. Cir. 1980).

Even the NRC's own EDO Procedures Manual refers to the notation vote sheets as a "final decision," recorded by the Secretary and sent to the Staff along with the Staff Requirements Memorandum for implementation. NRC EDO Procedures Manual, Ch. III at 5 and Ch. IV at 10. The vote sheets and all concurring and dissenting opinions contained therein are sent to the Staff "for information," and those vote sheets therefore constitute "instructions" to the Staff qualifying or shading the approval or disapproval given. Such "instructions" may not be withheld. Coastal States, 617 F.2d. at 868 ("instructions to staff explaining the reasons for a decision" must be disclosed).

The vote sheets, if not disclosed, would form exactly the kind of "secret agency law" which Congress and the courts have found intolerable. The Supreme Court left no doubt that an agency must release all documents which illuminate the basis of an agency's decision:

The public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted. These reasons, if expressed within the agency, constitute the 'working law' of the agency and have been held by the lower courts to be outside the protection of Exemption 5.

Sears, 421 U.S. at 152-53, 95 S.Ct. at 1517 (citations omitted).

This disclosure requirement reflects the "strong congressional aversion to 'secret [agency] law' . . . and represents an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law.'" Sears, 421 U.S. at 153, 95 S.Ct. at 1518. The vote sheets are in fact a source of "secret agency law."^{5/} The notation vote sheets are distributed to and relied upon by the

^{5/} It is particularly relevant to note that the records which the Supreme Court required to be released in Sears were memoranda decisions of the NLRB General Counsel declining to file an enforcement complaint and the related Advice and Appeals Memoranda. 42 U.S. at 155-56, 95 S.Ct. at 1519. The vote sheets sought here are the Commissioners' decision (votes) and their concurring and dissenting opinions on the NRC decision declining enforcement orders ("immediately effective orders") sought by the School District and SE₂ under 10 C.F.R. § 2.206 (1990). Therefore, Sears controls the instant FOIA request and dictates release of the vote sheets.

Staff to fully define the subtleties of the agency decision. NRC EDO Procedures Manual, Ch. IV at 8. The vote sheets help to fully define the precise contours of the final decision and, together with the adopted SECY and the Staff Requirements Memorandum, provide the complete description of the final order which the NRC Staff is to implement in ministerial fashion.

The Commissioners all individually cast their notation votes and submit them to the Secretary, a member of the Staff, in making the Commission decision. The Secretary's ministerial acts in counting votes and reporting the tally and qualifications have no bearing on the finality of the order, but only implements the decision already reached. Moreover, the vote sheets qualify the individual Commissioners' approval of the SECY proposal and are, in fact distributed to the staff "for information." NRC EDO Procedures Manual, Chapter IV at 8. Thus, they are an integral part of the final decision.

The function of the SRM is to report the Commissioners' votes and qualifications. In addition, the SRM prepared in this instance, not only quotes Commissioner Curtiss' vote sheet at some length, but also expressly notes that "[a]dditional comments are attached to the Commissioners' vote sheets, as previously provided to you [i.e., the staff]." Staff Requirements Memorandum to EDO from Secretary Chilk on SECY-89-247 - Shoreham Status and Developments dated August 25, 1989 at 3 (emphasis added).

Because the SRM refers to and relies on the vote sheets, they forfeit any pre-decisional character they might have otherwise and the NRC's right to claim the deliberative process privilege is thereby lost. See Sears, 421 U.S. 132, 161, 95 S.Ct. 1504, 1521-22, 44 L.Ed.2d 29 (1975) ("we hold that, if an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5" (emphasis original); Coastal States, 617 F.2d 854, 866 (D.C. Cir. 1980) ("even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally as the agency position on an issue or is used by the agency in its dealings with the public").

Thus, any theory which purports to characterize the vote sheets as predecisional and therefore exempt, is unavailing because even if the vote sheets can be characterized as such, the

express reference to the vote sheets in the SRM functions to deny the NRC the right to claim the Exemption.^{6/}

2. The Vote Sheets Are Not Part of a Deliberative Process

Nor can the NRC properly characterize the vote sheets as part of the deliberative process. See Coastal States, 617 F.2d at 868. In fact, the purpose of a notation vote, as stated in the NRC EDO Procedures Manual, is to address matters which do not require a Commission decision at a meeting in order that "decisions may be arrived at more quickly". NRC EDO Procedures Manual, Ch. III at 5 (emphasis added). The vote sheets, including their "comments," establish and explain the decision, they are not a "deliberative" activity.

The policy considerations outlined in Coastal States, which must be present before an agency can justifiably withhold documents as part of an agency's deliberative process have no applicability in this case:

[Exemption 5] serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

^{6/} Nor may the NRC legitimately withhold the vote sheets from a court upon review of the agency's "final order" because the vote sheets constitute "the findings or report upon which [the final order] is based" and/or "proceedings before the . . . officer[s] concerned" which must be forwarded to the court in accordance with 28 U.S.C. § 2112(b) (1988). Thus the vote sheets would be part of the "record" of the "final order" to be filed in Court on a petition for review of that order; they could not be treated by the agency as confidential documents. Id.; 28 U.S.C. § 2346 (1988).

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617 F.2d at 866 (emphasis added): see also, Jordan, 591 F.2d at 772-74. First, the vote sheets and their comments are not a recommendation from a subordinate to a superior, but rather a decision from superiors, the Commissioners, to their subordinates, the Staff, for implementation.¹⁷ Second, the Staff policy recommended in SECY-89-247 has not only been formally adopted, but also implemented, and hence there is no danger of premature disclosure. Finally, rather than misleading the public, the vote sheets will elucidate and explain the actions authorized by the Commissioners (including each Commissioner's qualifications of and "ultimate reasons" therefor) pursuant to the proposals in SECY-89-247.

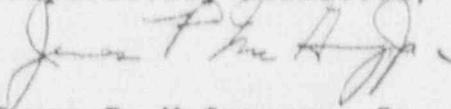
IV. THE SPECIFICATION (C) DOCUMENTS MUST BE RELEASED

Our search of the PDR has not located any of the records responsive to specification (c), namely, the request from Commissioner Roberts referred to in the "SECY NOTE" to SECY-89-247 and any "Commission Staff Office comments" also referred to therein. SECY-89-247 at 7. Unless it is claimed with specificity that those records do not exist, the partial response constitutes denial of those records without basis in the FOIA, and therefore, those records must be furnished.

V. CONCLUSION

For the foregoing reasons, you should reverse the decision denying release of the requested records. I would appreciate your expediting the consideration of this appeal and I will expect to receive your decision within twenty (20) working days as required by FOIA and NRC regulations. 10 C.F.R. § 9.29(b) (1990).

Respectfully submitted,



James P. McGranery, Jr.

JPM/mbw
Enclosure

7/ The Commission has conceded that vote sheets are given "limited distribution to the staff." Response to Second Motion to Amend Petition, at 3 (D.C. Cir. Docket No. 90-1241, filed June 4, 1990). We infer that "limited" in this context means limited to those Staff officers and employees responsible for implementation.