

November 12, 1984

ATT. 4

William J. Dircks
Executive Director for Operations
US Nuclear Regulatory Commission
Washington, D.C. 20555

Samuel J. Chilk, Secretary
US Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Appeal from an Initial FOIA Decision (FOIA-84-652, Wells Eddleman)

Dear Sirs:

This letter is an appeal of the partial denial of a request made by Wells Eddleman on August 3, 1984, pursuant to the Freedom of Information Act, 5 USC 552(a)(6), and the NRC regulations at 10 CFR 9.11. This request asked for "all minutes, meeting notes, other notes, drafts and other documents underlying, used in preparation of, or prepared in connection with, the Systematic Assessment of Licensee Performance (SALP) reports prepared since 1979" for the H.B. Robinson 2 (Docket 50-261), Brunswick 1 & 2 (Dockets 50-324/325), and Shearon Harris (Dockets 50-400/401/402/403) nuclear plants. That request was partially filled by letters from J.M. Felton on September 14, 1984, and October 19, 1984 (Appendix A). This letter appeals the denial of all of the documents listed in Appendix B of Mr. Felton's letter of October 19.

In denying the Appendix B documents, Mr. Felton's letter relied on the FOIA exemption for intra-agency memoranda, 5 USC 552(b)(5). However given the lack of information in Mr. Felton's denial, it is impossible for Mr. Eddleman to determine whether the documents withheld fall within that exemption. While the letter states that the denied documents represent "the evaluations, opinions, and recommendations of the staff resulting from its assessment of the information," they are not described with the requisite specificity. Thus it is impossible to determine whether the exemption has been properly applied.

As a requestor obviously does not have the ability to review denied documents to allow it to argue that the denial was improper, the D.C. Circuit in Mead Data Central, Inc. v. U.S. Department of the Air Force, 566 F. 2d 242, 251 (D.C. Cir. 1977), held that the burden is "specifically plac[ed] on the Government" to establish that the withheld material is exempt from the requirement of disclosure. Moreover, it held that this burden cannot be met by "sweeping and conclusive citation to an exemption."

Mr. Felton's letter contains none of the information required by the court in Mead Data. The denied documents listed in Appendix B are identified only by title, author, recipient, and in some cases, date. No "detailed justification" is included despite the fact that Section b(5) of FOIA does

8411190341 841113
PDR ADOCK 05000400
G PDR

not provide a blanket exemption for all pre-decisional agency memoranda. The exemption does not apply, for example, to statements of law or policy; statements of final agency action; or statements by agency superiors to subordinates explaining the reasons for decisions. Taxation With Representation v. IRS, 646 F. 2d 666, 676 (D.C. Cir. 1981). It does not apply to instructions to staff that affect a member of the public; an agency's "working" or "secret" law; or positions on issues taken by the agency formally or informally, even if at the time of preparation it could be called "pre-decisional." See e.g. Coastal States Gas Corp v. Department of Energy, 617 F. 2d at 866; Federal Open Market v. Merrill, 443 U.S. at 360; and NLRB v. Sears, Roebuck & Co., 421 U.S. at 151 - 153.

The letter does not identify the specific portions of the documents that allegedly are covered by the exemption. Non-exempt materials must be segregated from exempt materials and disclosed "unless they are inextricably intertwined with exempt portions." Mead Data, supra, at 260. Where an agency decides not to segregate non-exempt material, it must provide a detailed justification of that decision. Id. at 261. Mr. Felton's letter simply states that "the documents contain no reasonably segregable factual portions not already in the public domain," and provides no information as to why exemption (5) applies to the entire document, or why non-exempt portions were not disclosed. A Vaughn index or some other systematic itemized listing of the documents with a detailed justification statement covering each refusal to release the material would be a convenient method of addressing this lack of specificity.

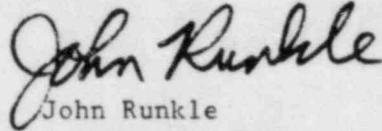
The denial of disclosure of certain of this material is inconsistent in that Mr. Felton's letter of September 14, 1984, made available some of the background documents around the Shearon Harris nuclear plant portion of the most recent SALP (documents 39 through 52 in Appendix A of September 14, 1984). Similar material for the Robinson and Brunswick nuclear plants was withheld in the October 19 letter under exemption (5). It is our further understanding that the agency has released to other FOIA requests background documents relating to various SALP reports; Critical Mass researcher, Richard Udell, was given the entire documentation behind the first SALPs nationwide without exemptions.

Lastly, exemption (5) is discretionary and should not be used to hide material which is relevant and in this case, crucial to other proceedings. Mr. Eddleman is one of the Intervenors in the operating license proceedings for the Shearon Harris Nuclear Power Plant (Docket No. 50-400 OL) and filed a timely request for the SALP material as it played an important part in the litigated contention on the Applicants' ability to safely manage the construction and operation of the nuclear plant. NRC Staff in Region II and Counsel assigned the case were notified by phone and during the hearings on that matter that the material was needed. The first portion of the released material was not timely issued and indeed, was not released until September 14, the last day of the hearing on the management contention. The record in that matter has been closed although the Atomic Safety and Licensing Board panel has allowed us to reopen the record on a showing of relevance to the validity of the final released SALP reports. Furthermore, during the hearing and in prehearing conference calls, NRC Staff witness and NRC Counsel stated that the very material which is the subject of this appeal had been destroyed.

Page 3

Mr. Eddleman urges that you review the withheld documents and decide to disclose them. If you do not make them available, the NRC must provide a detailed justification for the denial of each document or the portions of each document being withheld. We look forward to your response within the twenty working days allowed by law.

Sincerely,



John Runkle
Attorney-at-Law
PO Box 4135
Chapel Hill, NC 27515-4135
919/942-0600
942-7935

Representing Wells Eddleman on this
FOIA Appeal

cc. Service List on the Shearon Harris Nuclear Power Plant
(Docket 50-400 OL)