



OFFICE OF THE
SECRETARY

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

July 6, 1984

PDR-016

William S. Jordan III, Esq.
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2001 S Street, N.W.
Suite 506
Washington, DC 20009

IN RESPONSE REFER
TO 83-A-38-83-478

Dear Mr. Jordan:

This is in response to your December 28, 1983 Freedom of Information Act (FOIA) appeal of the decision by the Nuclear Regulatory Commission ("NRC" or "Commission") in FOIA-83-478 to withhold three SECY papers and the transcripts of three closed Commission meetings in which the restart of Three Mile Island, Unit 1 ("TMI-1") was discussed. The Commission regrets the delay in the response to your appeal. Since your appeal involved transcripts of meetings at which TMI-1 restart was discussed, this delay was necessary due to the pendency of the lawsuit Philadelphia Newspapers, Inc. v. NRC, (No. 83-1698, February 10, 1984, motion for clarification denied May 16, 1984), which involved the applicability of Exemption (10) of the Government in the Sunshine Act to TMI-1 restart meetings. The transcripts have now been released in their entirety as a result of the Philadelphia Newspapers case. The Commission has determined that the remaining documents are exempt from mandatory public release and that their release would be contrary to the public interest. Accordingly, your appeal is denied in part.

The justification for this denial is as follows:

1. SECY-83-268

These documents were prepared in response to an FOIA request (FOIA-83-320) and contain the Office of the General Counsel's (OGC) legal advice to the Commission on whether the Commission should release the transcripts of fifteen closed Commission meetings in which TMI-1 restart was discussed. Included is OGC's proposed response for the Commission to the requester. Since these documents are predecisional and contain recommendations and opinions on legal matters, they are withholdable under Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), and the Commission's regulations, 10 C.F.R. 9.5(a)(5). Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975).

Disclosure of the factual information contained in these documents would reveal OGC's evaluation of which facts are important to the legal

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decision on release of the transcripts. Thus, the factual contents of these documents need not be released. Russell v. Department of the Air Force, 682 F.2d 1045 (D.C. Cir. 1982). Explanation of these facts is not required either. Clearly, explaining or identifying which facts have been withheld would reveal the decisional process sought to be protected by the withholding of the entire document. An agency need not explain which facts have been withheld "if such a detailed justification . . . would itself compromise the secret nature of potentially exempt information." Mead Data Control, Inc. v. U.S. Department of the Air Force, 566 F.2d 242, 260-61 (D.C. Cir. 1977).

Releasing the legal advice to the Commission of the Commission's principal advisors would inhibit future candid communications between those advisors and the Commission. Such communications are necessary for the Commission to properly discharge its responsibilities. Thus, exposing this legal advice to public scrutiny is not in the public interest. For the above reasons, therefore, SECY-83-268 is being withheld in its entirety.

2. SECY-83-281

This document is a memorandum from the Office of Policy Evaluation ("OPE"), the Commission's advisor on policy matters, to the Commission analyzing the schedule for the resolution of TMI-1 restart issues. It contains advice and recommendations on how and when to make a decision regarding TMI-1 restart. Many of the procedural options discussed in this document are dependent upon the resolution of various substantive matters. Thus, disclosing this document would reveal substantive as well as procedural options under consideration in a pending adjudication. Release of such a predecisional document would be premature and cause confusion. The document is protected from disclosure under Exemption 5. Coastal States Gas Corp. v. Department of Energy, 612 F.2d 854, 866 (D.C. Cir. 1980). The facts contained in this paper are inextricably intertwined with the analysis and recommendations. Thus, the document is withholdable in its entirety. Ryan v. Department of Justice, 617 F.2d 781, 790-91 (D.C. Cir. 1980).

Disclosure of this document is not in the public interest. Not only would it be premature and cause confusion as to the agency's actions regarding TMI-1 restart, it would also inhibit future honest and frank recommendations from the Commission's policy advisors to the Commission. Such recommendations are necessary to ensure the proper quality of agency decisions. For the above reasons, NRC is continuing to withhold SECY-83-281 in its entirety.

3. SECY-83-299

This document consists of OGC's legal analysis and recommendations to the Commission concerning the Decision by the Director of the Office of Inspection and Enforcement denying a request by Rockland County for an immediate shutdown of the Indian Point nuclear power plants. Also in this paper is OGC's review of a motion by the New York Public Interest Research Group for Reconsideration of the Commission's June 10, 1983 decision not to take enforcement action regarding the Indian Point facility. A three-page draft Order is attached to these analyses. Since these documents are predecisional and express opinions on legal and policy matters, they are withholdable under the "deliberative process" privilege of Exemption 5, Vaughn v. Rosen, supra, 5 U.S.C. 552(b)(5), and the Commission's regulations, 10 C.F.R. 9.5(a)(5). In addition, these documents were prepared in anticipation of litigation. Thus, the documents also are being withheld under the attorney work-product privilege of Exemption 5. FTC v. Grolier Inc., 103 S. Ct. 2209 (1983); Coastal States Gas Corp., supra, 617 F.2d at 864-866. The facts contained in these documents reflect OGC's opinion as to which facts are most important for the Commission's decision. Thus, disclosure of these facts would reveal the deliberative process and the document may be withheld in its entirety. Russell v. Department of the Air Force, supra.

For the reasons outlined above with respect to SECY-83-268 and SECY-83-281, disclosure of these documents is not in the public interest. Thus, the NRC has decided to continue to withhold SECY-83-299 and the draft Order in its entirety.

As previously stated, the NRC is not required to explain which facts have been withheld. Furthermore, the FOIA does not require the release of a predecisional document simply because the recommendations contained therein were adopted by the agency. Predecisional documents that are otherwise exempt from disclosure must be released only if the predecisional recommendations were expressly adopted in the final decision. Afshar v. Department of State, 702 F.2d 1125, 1142-43 (D.C. Cir. 1983). There was no express adoption in this case. Thus, the FOIA does not compel disclosure of these documents.

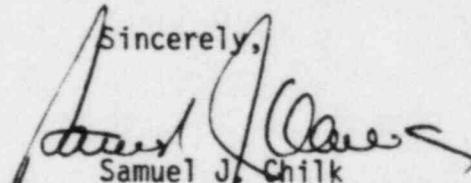
4. Transcripts of Closed Commission Briefings on TMI-1 Restart (Attachment to SECY-83-305) and Investigations and Possible Enforcement Actions at TMI-1 (Attachments to SECY-83-306 and SECY-83-307).

On June 4, 1984, the Commission publicly released these transcripts. These transcripts have been placed in the NRC Public Document Room, 1717 H Street, N.W., Washington, D.C.

Pursuant to 10 C.F.R. 9.5(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. Thus, the NRC has determined that the three SECY papers should continue to be withheld.

This letter represents the final agency action on your FOIA appeal of the initial decision in FOIA-83-478. Judicial review of the decision is available in a federal district court in which you reside, or in the District of Columbia.

Sincerely,



Samuel J. Chilk
Secretary of the Commission

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

Ellyn R. Weiss, Esquire
Union of Concerned Scientists
1346 Connecticut Avenue, NW
Suite 1101
Washington, DC 20036

IN RESPONSE REFER
TO FOIA-83-478

Dear Ms. Weiss:

This is in response to your letter dated August 15, 1983, in which you requested, pursuant to the Freedom of Information Act, copies of the following SECY papers:

1. SECY-83-268
2. SECY-83-271
3. SECY-83-278
4. SECY-83-281
5. SECY-83-299
6. SECY-83-305
7. SECY-83-306
8. SECY-83-307

In response to your request, we are making available in the NRC Public Document Room copies of SECY-83-271, 83-278, and portions of five other SECY papers as listed on Appendix A and as discussed below.

SECY-83-268 is a four page memorandum dated July 5, 1983, to the Commissioners from James A. Fitzgerald, Assistant General Counsel, SUBJECT: Transcript Review of TMI-1 Restart Meetings (FOIA-83-320); attachment (1), four page undated draft letter to Jim Detjen, the Philadelphia Inquirer, from Joseph H. Felton, NRC; Appendix A, one page list of closed Commission meetings re: TMI-1 Restart; Appendix B, released excerpts of transcripts; attachment (2) June 2, 1983, one page letter to NRC from Jim Detjen. A copy of attachment 2 and Appendix A and B of attachment 1 is being placed in the PDR (See document 7 of Appendix A). The memorandum and draft letter contain predecisional legal advice, opinions, and recommendations of the Office of the General Counsel to the Commissioners on responding to an FOIA request. The withheld documents do not contain any reasonably discernible factual portions which are not already a matter of public record included in Packet no. 50-289. Furthermore, the particular factual portions of the documents are exempt from release because release of the facts would reveal a predecisional evaluation of which facts are important. (See RUSSELL v. Department of the Air Force, 2 GDS 81.123 (D.C. Cir. 1981); aff'd, 602 F.2d 1045 (D.C. Cir. 1982).) Because the

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withheld documents reflect the predecisional process between the Commissioners and the Office of the General Counsel, the memorandum and draft letter are exempt from mandatory disclosure pursuant to Exemption 5 of the Freedom of Information Act (5 U.S.C. 552(b)(5)) and 10 CFR 9.5(a)(5). Release of the documents would tend to inhibit the open and frank exchange of ideas essential to the deliberative process.

SECY-83-281 is a three page memorandum with a two page enclosure, from John E. Zerbe, Director, Office of Policy Evaluation, to the Commission dated July 13, 1983. The memorandum provides an analysis of options regarding TMI-1 restart. The enclosure contains a draft schedule for resolution of certain TMI-1 restart issues. This analysis and draft schedule were originated as part of the Commission's deliberative process to resolve certain issues involved in the TMI-1 restart proceedings. The draft schedule and analysis are predecisional. The facts contained in the analysis are inextricably intertwined with the views, evaluations, and suggestions contained in the analysis. Release of this document (SECY-83-281) would reveal a predecisional evaluation of which facts are important. Therefore, this document is exempt from mandatory disclosure pursuant to Exemption (5) of the Freedom of Information Act (5 U.S.C. 552(b)(5)) and 10 CFR 9.5(a)(5). There are no reasonably segregable factual portions, consequently the document is being withheld in its entirety.

SECY-83-299 is a seven page memorandum dated July 25, 1983, to the Commissioners from Martin G. Malsch, Deputy General Counsel, SUBJECT: Motion for Commission to Reconsider June 10 Decision Not to Take Enforcement Action in Indian Point; Review of Director's Decision on 2.206 Requests by Rockland County; attachment (1), three page draft order; attachments (2)-(7). The memorandum and draft order contain the predecisional legal analysis, opinions, and recommendations of the General Counsel's Office to the Commissioners on reconsidering the Commission's July 10, 1983, decision not to take enforcement action against the Indian Point licensees, and on reviewing the June 29, 1983, Director's decision not to shutdown the Indian Point facility. The withheld documents contain no reasonably segregable factual portions which are not already a matter of public record included in Docket Nos. 50-247 and 50-286. Furthermore, the particular factual portions of the documents are exempt from release because release of the facts would reveal a predecisional evaluation of which facts are important. (See Russell v. Department of the Air Force, 275 F.2d 87, 123 (D.D.C. 1981), aff'd, 682 F.2d 1045 (D.C. Cir. 1982).) Because the withheld documents reflect the predecisional process between the Commissioners and the Office of the General Counsel, the memorandum and draft order are exempt from mandatory disclosure pursuant to Exemption (5) of the Freedom of Information Act (5 U.S.C. 552(b)(5)) and 10 CFR 9.5(a)(5).

Release of the documents would tend to inhibit the open and frank exchange of ideas essential to the deliberative process. For these reasons, these documents are being withheld in their entirety. Attachments (2) through (7) are being placed in the PDR (See document 3 on Appendix A).

SECY-83-305 is a one page memorandum dated July 28, 1983, to the Commissioners from James A. Fitzgerald, Assistant General Counsel. A copy is being placed in the PDR (See document 4 on Appendix A). The attachment to SECY-83-305 is the June 21, 1983, transcript (67 pages) of a closed Commission meeting regarding the discussion of TMI-1 Restart. The statutory authority for withholding this information is Exemptions (5) and (10) of the Government in the Sunshine Act (5 U.S.C. 552b(c)(5) and (10)).

SECY-83-306 is a one page memorandum dated July 28, 1983, to the Commissioners from James A. Fitzgerald, Assistant General Counsel. A copy is being placed in the PDR (See document 5 on Appendix A). The attachment to SECY-83-306 is the March 30, 1983, transcript (93 pages) of a closed Commission meeting regarding a briefing on investigation and possible enforcement actions pertaining to TMI-1. The statutory authority for withholding this information is Exemptions (5) and (7) of the Government in the Sunshine Act (5 U.S.C. 552b(c)(5) and (7)).

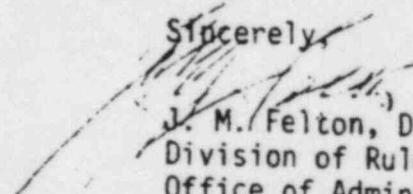
SECY-83-307 is a one page memorandum dated July 28, 1983, to the Commissioners from James A. Fitzgerald, Assistant General Counsel. A copy is being placed in the PDR (See document 6 on Appendix A). The attachment to SECY-83-307 is a June 6, 1983, transcript of a closed Commission meeting regarding pending investigations at TMI-1. The statutory authority for withholding this information is Exemptions (5) and (7) of the Government in the Sunshine Act (5 U.S.C. 552b(c)(5) and (7)).

Pursuant to 10 CFR 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 person responsible for the denial of SECY-83-281 is Mr. John E. Zerbe, Director, Office of Policy Evaluation. The person responsible for the partial denial of SECY-83-268, 83-299, 83-305, 83-306 and 83-307 is Mr. James A. Fitzgerald, Assistant General Counsel.

The denial may be appealed to the Commission within 30 days from the receipt of this letter. Any such appeal must be in writing, addressed to the Secretary of the Commission, 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."

This completes NRC's action on your request.

Sincerely,


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

Enclosures: As stated

APPENDIX A

1. SECY-83-271

SUBJECT: DECISION IN UNION OF CONCERNED SCIENTISTS V. NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA, U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT NO. 82-2000 - 33 PAGES (DATED: JULY 5, 1983)

2. SECY-83-278

SUBJECT: THREE MILE ISLAND, UNIT 1 (TMI-1) STATUS - 41 PAGES (DATED: JULY 11, 1983)

3. SECY-83-299

SUBJECT: MOTION FOR COMMISSION TO RECONSIDER JUNE 10 DECISION NOT TO TAKE ENFORCEMENT ACTION IN INDIAN POINT; REVIEW OF DIRECTOR'S DECISION ON 2.206 REQUESTS BY ROCKLAND COUNTY (ATTACHMENTS) (2)-(7) (45 PAGES)

4. SECY-83-305

SUBJECT: REVIEW OF TRANSCRIPT OF JUNE 21, 1983 COMMISSION MEETING ON TMI-1 RESTART - 1 PAGE (DATED: JULY 28, 1983)

5. SECY-83-306

SUBJECT: REVIEW OF MARCH 30, 1983 COMMISSION MEETING ON INVESTIGATION AND POSSIBLE ENFORCEMENT ACTION (TMI-1) - 1 PAGE (DATED: JULY 28, 1983)

SEC. 83-307

SUBJECT: REVIEW OF TRANSCRIPT OF JUNE 6, 1983 COMMISSION MEETING ON PENDING INVESTIGATIONS AT TMI-1 - 1 PAGE (DATED: JULY 28, 1983)

7. SECY-83-268

ATTACHMENT 1 - APPENDIX A: LIST OF CLOSED COMMISSION MEETINGS RE: TMI-1 RESTART - 1 PAGE

ATTACHMENT 2 - APPENDIX B: RELEASED EXCERPTS OF TRANSCRIPTS - 34 PAGES

ATTACHMENT 3 - JUNE 8, 1983 LETTER TO NRC FROM JIM DETJEN - 1 PAGE