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June 23, 1988

HAND DELIVERED

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

APPEAL OF INITIAL FOIA DECISION
88-A-34E(88-63)
Rec'd 6-28-88

Re: Appeal from Initial FOIA Decision
Freedom of Information Act Appeal, Case No. 88-68

Gentlemen:

This is an appeal pursuant to the Freedom of Information Act, as amended ("FOIA"), 5 U.S.C. § 552, and the Nuclear Regulatory Commission's (the "NRC") regulations thereunder, 10 C.F.R. Part 9.11, et seq., made on behalf of our client, Suffolk County, Long Island, New York.

Background of Appeal

On January 27, 1988, Suffolk County filed the attached FOIA request with the NRC ("FOIA Request"), seeking copies of all records, including preparatory materials, contemporaneous notes, post-meeting discussions or analyses, and information submitted by the Long Island Lighting Company ("LILCO"), relating in any way to a January 14, 1988, meeting involving NRC employees, officials, agents or representatives (including Messrs. Reis, Johnson, Scoto, and Olmstead) and representatives of LILCO (Messrs. Earley, Frielicher, Reveley, and Irwin) concerning matters relating to the Shoreham Nuclear Power Station. Suffolk County also sought copies of all records, not served via the service list in 50-322-OL-03, 05, or 06 dockets, relating in any way to any other communications during the period March 1987 to the present between LILCO, including any person acting for or on behalf of LILCO, and NRC employees, officials agents or representatives, which concerned LILCO's request to operate Shoreham at 25 percent power, any Federal Emergency Management Agency review of revisions to LILCO's emergency plan, and any proposed procedures of LILCO's emergency plan.

After a request for a clarification of our request, the NRC, by a letter dated April 8, 1988, under the signature of the

Executive Director for Operations
June 23, 1988
Page 2

Director of Division of Rules and Records, provided us with a response releasing three documents in their entirety and completely denying one record. We filed our first appeal on May 3, 1988 stating specifically that the NRC had not responded to the first part of our request seeking any materials, contemporaneous notes, post-meeting discussions or analyses, and information submitted by LILCO relating in any way to a January 14, 1988 meeting between LILCO representatives and NRC employees, officials, agents or representatives. On May 13, 1988 the NRC responded with a 1 page document and on May 26, 1988 we received a final response consisting of another one page document and a complete denial of a 19 page attachment. Specifically, in that response we were advised that: (i) a 19 page document relating to Shoreham was completely exempt from disclosure pursuant to "Exemption 5"; and (ii) NRC would neither confirm or deny the existence of any responsive documents.

NRC's May 26, 1988 response is procedurally and substantively inadequate to meet NRC's burden under FOIA. Accordingly, Suffolk County files this appeal, seeking the following relief:

1. That the NRC conduct a new search for responsive materials and fully document its search and its procedures for maintaining materials responsive to Suffolk County's request;
2. That the NRC provide Suffolk County with a Vaughn Index covering all responsive, withheld materials; and
3. That the NRC release all responsive material.

The NRC Must Conduct a New Search and Provide Affidavits Describing the Search and its Result

The NRC, like all federal agencies, is required to conduct a conscientious, comprehensive and complete search of all of its files in response to a FOIA request, such as that made by Suffolk County, which, "reasonably describes", the materials that are sought. 5 U.S.C. § 552(a)(3). The courts have repeatedly emphasized that federal agencies have a "firm statutory duty" to make good faith and reasonable efforts to locate all reasonably described materials. Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 837 (D.C. Cir. 1979). See also, Cerveny v. Central Intelligence Agency, 445 F. Supp. 772, 775 (D. Colo. 1978), and Goland v. Central Intelligence Agency, 607 F.2d 339, 353 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980).

Executive Director for Operations
June 23, 1988
Page 3

In the instant case it is not conceivable that there are no materials in the NRC's possession or control that relate to the January 14, 1988 meeting between LILCO and NRC representatives and that the only materials since March 1987 relating to any communication between the NRC and LILCO including LILCO's request to operate Shoreham at 25 percent power would consist of a total of six documents. It is our experience that a decision by the NRC as to whether or not Shoreham should operate at 25 percent power would generate substantial amounts of correspondence, records and other materials well in excess of the amount of material reflected in the partial release or, presumptively, encompassed within the withheld material. Accordingly, we request that the NRC staff conduct a second search of their records during the appeal period and notify us of the results of that search.

Suffolk County also requests that the NRC provide Suffolk County with sworn affidavits signed by all NRC officials who have had substantive involvement with the January 14, 1988 meeting between NRC and LILCO representatives and, as well, sworn affidavits from NRC officials who have had substantive involvement in the NRC's response to the FOIA Request or to this appeal. These affidavits should attest to the following:

1. The nature of the officials' duties and responsibilities regarding the response to Suffolk County's FOIA request or appeal;
2. A description of the officials' understanding of the NRC's system for collecting, retaining and retrieving materials related to matters which are the subject of the FOIA Request;
3. A description of the nature and result of their search for responsive materials.

Recently, the D.C. Court of Appeals has emphasized that an agency bears the burden of establishing that it has conducted a reasonable search.

The agency bears the burden of establishing that any limitations on the search they undertake on a particular case comport with its obligation to conduct a reasonably thorough investigation. It seems to us clear that the burden of persuasion on this matter is properly imposed on the agency.

Executive Director for Operations
June 23, 1988
Page 4

McGehen v. Central Intelligence Agency, Slip Op. pp. 10-11 (D.C. Cir. 1983). See also, Weisberg v. Department of Justice, 543 F.2d 300, 311 (D.C. Cir. 1976); and Ott v. Levi, 419 F. Supp. 750, 752 (E.D. Mo. 1976).

NRC Must Provide Suffolk County with an Adequate Vaughn Index

The NRC must provide to Suffolk County an adequate Vaughn Index for all responsive material which is partially or fully withheld. A proper Vaughn Index must: identify the number of pages comprising the record and identify the type of record (e.g., letter, memorandum, issue paper, etc.); state the full names and job titles or positions of all authors, to the extent indicated in the record; state the date of the record, to the extent indicated in the record; state the full names and job titles or positions of all addressees, to the extent indicated in the record; state the full names and job titles or positions of any additional persons to whom the record was circulated or made available, to the extent indicated in the record; provide a detailed description, set forth in manageable segments, of the entire content of each withheld record or portion thereof; and provide an explanation of the NRC's determination that all or a particular part of a record is covered by the claimed exemption. Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. '73), cert. denied, 415 U.S. 977 (1974). See also, Dellums v. Powell, 642 F.2d 1351, 1359 (D.C. Cir. 1980).

The Court of Appeals for the D.C. Circuit has indicated that a Vaughn Index should be prepared not only for judicial appeals but, as well, for administrative appeals.

We agree with Mead Data that the objective of the Vaughn requirements, to permit the requesting party to present its case effectively, is equally applicable to proceedings within the agency.

Mead Data Central, Inc. v. United States Department of the Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977). By this standard, the reference to the withheld and allegedly exempt responsive materials in the NRC's May 26, 1988 letter is grossly inadequate. The May 26 letter does not indicate the number of documents which have been withheld; does not identify the authors or addressees; does not describe the documents in any manner whatsoever; and does not identify or explain the specific exemption claimed for the withholding of each such document.

Executive Director for Operations
June 23, 1988
Page 5

In the absence of even a remotely adequate Vaughn Index, Suffolk County cannot respond substantively to the merits of the NRC's exemption claims. Therefore, Suffolk County reserves the right to file a supplemental appeal with the NRC after Suffolk County's receipt of an adequate and legally proper Vaughn Index.

The Exemption Claim

The exemption in 5 U.S.C. § 552(b)(5) permits an agency to withhold material that contains information which reflects a pre-decisional, deliberative process. In order to invoke the (b)(5) exemption an agency must show that: (1) the withholding only covers records or parts of records which contain information that reflects a pre-decisional, deliberative process, (2) the records would not be available to a party in litigation with the agency; and (3) the withholding is necessary to protect a valid agency interest such as fostering creative debate and discussion, or avoiding publication of misleading or unadopted theories, or protecting the integrity of defendants' decision-making process. Tax Reform Research Group v. Internal Revenue Service, 419 F. Supp. 415, 422 (D.D.C. 1976); National Labor Relations Board v. Sears Roebuck & Co., 421 U.S. 132, 148-153, 95 S. Ct. 1504, 44 L.Ed.2d 29 (1975); Renegotiation Board v. Grumman Aircraft Engineering Corporation, 421 U.S. 168 185-190, 95 S.Ct. 1941, 44 L.Ed.2d 57 (1975); Sterling Drug Inc. v. Federal Trade Commission, 450 F.2d 698, 704-708 (D.C. Cir. 1971).

Without an adequate index we are handicapped in evaluating whether all parts of all of the documents that are responsive to our request can be sheltered by this exemption. However, the NRC has not met its burden of specifying, explaining and justifying the application of this exemption to each withheld document. Furthermore, we remind the NRC that the (b)(5) exemption is not available to protect final legal opinions, or documents that record or explain an agency's final decision. NLRB v. Sears Roebuck and Co., 421 U.S. at 153-54, 95 S. Ct. at 1518.

Segregable, Non-exempt Portions of the Withheld Documents Must be Released

We also request that the Department review each withheld document to segregate exempt and non-exempt material, and to release the latter. In the instant case, the Department has evidently made no effort whatsoever to distinguish the exempt from the non-exempt material within a record and release the

Executive Director for Operations
June 23, 1988
Page 6

latter. Instead, the Department has denied many responsive documents in their entirety without explanation.

Conclusion

In summary, we find it difficult to believe that so many responsive records are exempt either partly or entirely and we further submit that the NRC has not met its burden under the claimed exemption at Section 552(b)(5) to justify this extraordinary withholding.

We expect to receive an answer to this appeal within 20 working days of the NRC's receipt of this appeal, as required by 10 C.F.R. § 9.29(b).

The undersigned will pay charges for search time and copying fees as provided by 10 C.F.R. §§ 9.33 and 9.35, respectively. If search and copying to be incurred by the undersigned will exceed \$2,000, please notify Naima Said at telephone number 778-9149 before this sum is exceeded.

Finally, we request that the NRC's response be as detailed as possible in order to better enable our client to determine the need for further legal action.

Sincerely,

Robert R. Belair by FJ

Robert R. Belair