



May 7, 1985

POLICY ISSUE
(Notation Vote)

SECY-85-159

For: The Commissioners
From: Martin G. Malsch
Deputy General Counsel
Subject: FOIA-84-A-78C (APPEAL OF FOIA-84-795)
Purpose:

Background: By letter dated October 9, 1984, Nina Bell of the Nuclear Information and Resource Service requested copies of the following documents under the FOIA:

- transcripts of Commission meetings in June, July and August on emergency planning and earthquakes at Diablo Canyon;
- SECY-84-70;
- SECY-84-291; and
- drafts of CLI-84-12 and related documents.

CONTACT:
C. Sebastian Aloat, OGC
634-3224

8603140333 860115
PDR FOIA
RYANB5-409 PDR

B/15

In a partial response dated October 26, 1984 (copy attached as Attachment 1), the agency released attachments A-H to SECY-84-291. All other responsive documents were withheld under exemption 5 of the FOIA as pre-decisional documents reflecting advice and recommendations. The October 26 letter did not, however, respond to Bell's transcript request. By letter dated November 5, 1984, Bell appealed. A copy of the appeal appears as Attachment 2.

In December 1984, Bell joined as a plaintiff in SLOMP v. NRC, D.D.C. No. 84-3884, an action seeking to force the disclosure of the Commission's Diablo Canyon transcripts. During the pendency of the SLOMP case, Bell's appeal was held in abeyance. On February 20, 1985, the SLOMP case was dismissed when the Commission authenticated (minus one page) a copy of the transcripts in plaintiff's possession which had been leaked to a third party. In light of the dismissal of the SLOMP case, Bell's appeal has been re-activated.

Martin G. Malsch
Martin G. Malsch
Deputy General Counsel

Attachments as stated

Commissioners comments or consent should be provided to
SECY by c.o.b. Wednesday, May 22, 1985.

Commission Staff Office comments, if any, should be
submitted to the Commissioners NLT Wednesday, May 15,
1985, with an information copy to SECY. If the paper is
of such a nature that it requires additional time for
analytical review and comment, the Commissioners and the
Secretariat should be apprised of when comments may be
expected.

DISTRIBUTION:
Commissioners
OGC
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ELD
SECY

ATTACHMENT 1

OCT 26 1984

Ms. Nina Bell
Assistant Director
Nuclear Information and Resource Service
1346 Connecticut Avenue, NW, 4th Floor
Washington, DC 20036

IN RESPONSE REFER
TO FOIA-84-795

Dear Ms. Bell:

This is in response to your letter dated October 9, 1984, in which you requested, pursuant to the Freedom of Information Act (FOIA), four categories of documents regarding the Diablo Canyon Nuclear Power Plant.

Copies of the documents listed on enclosed Appendix A are being placed in the NRC (PDR).

Documents 1 through 3 listed on enclosed Appendix B contain the predecisional legal analyses, opinions, and recommendations of the Office of the General Counsel for the Commissioners' consideration of the effects of earthquakes on emergency planning for the Diablo Canyon Nuclear Power Facility. These documents are being withheld from public disclosure pursuant to Exemption (5) of the FOIA (5 U.S.C. 552(b)(5)) and 10 CFR 9.5(a)(5) of the Commission's regulations. Document 4 of Appendix B, contains the predecisional advice, opinions, and recommendations of the Office of Policy Evaluation to the Commissioners regarding the effects of earthquakes on emergency planning for the Diablo Canyon Nuclear Power Plant and is being withheld from public disclosure pursuant to Exemption (5) of the FOIA (5 U.S.C. 552(b)(5)) and 10 CFR 9.5(a)(5) of the Commission's regulations. The withheld documents do not contain any reasonably segregable factual portions, and their release would tend to inhibit the open and frank exchange of ideas essential to the deliberative process. The documents are being withheld in their entirety.

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 documents 1 through 3 is Mr. James A. Fitzgerald, Assistant General Counsel, Office of the General Counsel. The person responsible for the denial of document 4 is Mr. John E. Zerbe, Director, Office of Policy Evaluation.

OFFICE						
USERNAME						
DATE						

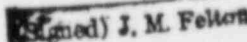
Ms. Nina Bell

-2-

This 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."

The NRC has not completed its review of the documents subject to items 1 and 4 of your request. We will respond as soon as that review is completed.

Sincerely,

 J. M. Felton

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

Enclosures: As stated

DISTRIBUTION

DRR Rdg
DRR Subj
PGNorry
ECShomaker
PDR
MSweeney
LRobinson
SDIsaacs
MTenaglia

*CONCURRED BY PHONE

OFFICE	ADM:DRR	ADM:DRR	ADM:DRR	OGC	OPE		
SURNAME	SDI SDIsaacs/sh	LRobinson	JMFelton	*MSweeney	*MTenaglia		
DATE	10/24/84	10/26/84	10/26/84	10/25/84	10/26/84		

Appendix A

1: Attachments A - H to SECY-84-291

- Attachment A - 11/3/80 Memo for John McConnell from Brian K. Grimes re: Request for FEMA Assistance to Review Effects of Earthquake and Volcanic Eruption on State/Local Emergency Plans
- Attachment B - 11/24/80 Letter to Bart D. Withers from R. A. Clark re: Effect of Volcanic Eruption on Emergency Responses at Trojan Nuclear Plant
- Attachment C - 12/23/80 Letter to Bart D. Withers from Neale V. Chaney re: Revise Emergency Plan with Respect to the Effects of Volcanic Eruptions from Mount St. Helens
- Attachment D - 2/7/83 Letter to Bart D. Withers from Robert A. Clark re: Volcanic Eruptions Around Trojan
- Attachment E - 4/23/81 Letter to Robert A. Clark from Bart D. Withers re: Trojan Radiological Emergency Plan Evacuation Analysis Report
- Attachment F - 9/83 Various Tables--Initiating Condition and Emergency Action Levels
- Attachment G - Letter to William Dircks from Lee M. Thomas re: Local Plans Related to the Trojan Commercial Nuclear Power Station dated 7/6/82
- Attachment H - 2/23/83 Memo for Dave McLoughlin from W. H. Mayer re: Findings and Determinations for Portland General Electric's Trojan Nuclear Power Plant

APPENDIX B

1. February 10, 1984

SECY-84-70, February 10, 1984 memorandum to the Commissioners from H. Plaine, General Counsel, Subject: Consideration of the Complicating Effects of Earthquakes on Emergency Planning at Diablo Canyon, 6 pp.; Attachment 1, paper entitled "OGC Analysis," 9 pp; Attachment 2, June 22, 1982 memorandum to the Commissioners from W. Dircks, EDO, Subject: Emergency Planning and Natural Hazards, 2 pp.; enclosure to Attachment 2, paper entitled "Basis for Consideration of Natural Hazards in Emergency Planning," 5 pp.; Attachment 3, January 13, 1984 memorandum to N. Palladino from W. Dircks, EDO Subject: Emergency Planning and Seismic Hazards, 6 pp.; Attachment 4, draft commission order, 3 pp.

2. July 18, 1984

SECY-84-291, July 18, 1984 memorandum to the Commissioners from H. Plaine, General Counsel, Subject: Diablo Canyon - Commission Decision on the Need to Consider the Complicating Effects of Earthquakes on Emergency Planning, 13 pp.; Attachment 1, paper entitled "Analysis, Views of the Parties and OGC's Analysis of Them," 24 pp.

3. August 3, 1984

Memorandum to the Commissioners from M. Malsch, Deputy General Counsel, Subject: Diablo Canyon - Order on Effects of Earthquakes on Emergency Planning, 1 p; Attachment, draft commission order, 11 pp.

4.

Attachment 2 to SECY-84-291, OPE comments regarding consideration of earthquake effects on emergency planning for the Diablo Canyon facility, 3 pp.

ATTACHMENT 2



Nuclear Information and Resource Service

1346 Connecticut Avenue NW, 4th Floor, Washington, D.C. 20036 (202) 296-7552

November 5, 1984

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

James A. Fitzgerald
Assistant General Counsel
Office of the General Counsel
Nuclear Regulatory Commission
Washington, D.C. 20555

John E. Zerbe, Director
Office of Policy Evaluation
Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Appeal from an Initial FOIA Decision
FOIA 84-795

Dear Sirs:

This letter is an appeal of the partial denial of a request made by the Nuclear Information and Resource Service (NIRS) pursuant to the Freedom of Information Act, 5 U.S.C. 552(a)(6), and NRC regulations at 10 CFR 9.11. The hand-delivered request, dated October 9, 1984, asked for:

1. All transcripts of closed Commission meetings held during June, July, and August of 1984 concerning the complicating effects of earthquakes on emergency preparedness at the Diablo Canyon plant;
2. SECY-84-70;
3. SECY-84-291; and
4. Copies of all drafts of the Commission's final order CLI-84-12, and closely related documents.

That request was partially denied, granted and not responded to on October 26, 1984 by Mr. J. M. Felton. This letter appeals the denial of the following documents:

1. SECY-84-70, February 10, 1984 and four attachments;
2. SECY-84-291, July 18, 1984 and two attachments; and

3. August 3, 1984 Memorandum to the Commissioners from M. Malsch, OGC and one attachment.

This letter also serves notice of appeal for the failure to respond to the request for transcripts of the Commission's meetings as identified above.

In denying the documents, Mr. Felton's letter relied on the exemption for intra-agency memoranda. 5 U.S.C. 552(b)(5). However, given the lack of information in Mr. Felton's denial, it is impossible for NIRS to determine whether the documents withheld fall within that exemption. While the letter states that the denied documents contain "pre-decisional advice, opinions, and recommendations" they are not described with the requisite specificity. Thus, it is impossible to determine whether the exemption was 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 has squarely 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 of an exemption".

Thus, we require that when an agency seeks to withhold information it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply. Mead Data Central, Inc. v. U.S. Department of the Air Force, 566 F.2d 242, 251 (D.C. cir. 1977).

Mr. Felton's letter contains none of the information required by the court in Mead Data. The denied documents listed above are identified only by date, author, recipient, and title. No "detailed justification" is included despite the fact that Section b(5) of the Act does 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, 676-21 (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 was pre-decisional. See e.g. Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 866; Federal Open Market Commission v. Merrill, 443 U.S. at 360 n.23; and NLRB v. Sears, Roebuck & Co., 421 U.S. at 151-53.

The citation of Exemption 5 is, in essence, "executive" privilege, which protects advice, recommendations, and opinions which are part of the deliberative, consultive, decision-making process of government. See NLRB v. Sears, Roebuck & Co., 421 U.S. at 151-53. In Sears, the Court held that memoranda that explained the general counsel's decision not to file complaints are final administrative decisions that must be disclosed, because Exemption 5 does not apply to final opinions or dispositions. According to the D.C. Circuit, "as a general principle * * * action taken by a responsible decision-maker in an agency's decision-making process which has the practical effect of disposing of a matter before the agency is 'final' for purposes of the FOIA." Bristol-Myers v. FTC, 598 F.2d at 25. Without, of course, having seen the documents which have been denied, it can be assumed that they constitute the agency's decision to dispose of the issue of the complicating effect of earthquakes on emergency planning at the Diablo Canyon nuclear plant.

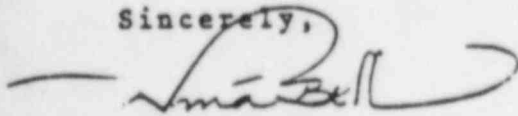
If it is predecisional at the time of preparation but is "adopted formally or informally as the agency position on an issue or is used by the agency in dealing with the public," it ceases to be exempt. Coastal States Gas Corporation v. Department of Energy, 617 F.2d at 866. The Supreme Court recognized a distinction between pre-decisional documents, which are exempted, and post-decisional documents which are not exempted. The Court noted that it would be reluctant to consider "statements of policy and interpretations which have been adopted by the agency" and "instructions to staff that affect a member of the public" to be exempt under Exemption 5. Sears, supra at 151-153. This is consistent with numerous court interpretations that the FOIA's Exemption 5 does not exist to protect an agency's "secret law." The public has a right to know, under the FOIA, how the agency interprets the laws as they are written, in particular emergency planning at Diablo Canyon.

The Felton 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 provides no information as to why exemption b(5) applies to any one of the entire documents, or why non-exempt portions were not disclosed.

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

In addition I would note that the Commission has not yet fully responded to my request. No specific additional period of time has been stated within which a complete response will be provided, as required by NRC regulations 10 CFR 9.9(c) & (d) and 9.13. I urge the Commission to reach a timely decision in this matter taking into consideration the importance of the issues contained within the requested documents.

Sincerely,

A handwritten signature in cursive script, appearing to read "Nina Bell", written in dark ink.

Nina Bell
Assistant Director

cc: File

ATTACHMENT 3