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DIRECT DIAL NO.

857-2929

April 25, 1991

APPEAL OF INITIAL FOIA DECISION

91A11C (90-568)

Rec'd 4-30-91

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

Re: Appeal From Initial FOIA Decision (FOIA-90-568)
(partial)

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 March 26, 1991 ("Partial Response") which denies, in part, my FOIA request dated December 20, 1990, (U.S.N.R.C. FOIA-90-568). 10 C.F.R. § 9.29(a) (1990).

I. BACKGROUND

The December 20, 1990 FOIA request to the NRC sought one copy of, among other records, (a) COMKC-90-19 (dated November 8, 1990) consisting of, or relating to, guidance given to the NRC Staff regarding various issues in one or more stages of the proposal to decommission the Shoreham Nuclear Power Station, and (b) all other records consisting of request for guidance and/or guidance to NRC personnel relating to the proposal to decommission Shoreham in particular and/or Shoreham and one or more of Rancho Seco and Fort St. Vrain, which records (1) were generated after January 1, 1989 and (2) have not yet been placed in the public document room or published in the Federal Register.

The Partial Response identified 22 documents already available in the PDR which are relevant to the request in its Appendix A, furnished an additional 14 documents identified in its Appendix B and, in its Appendix C, described in part 10 documents which were being withheld in whole or part. The

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withholding in part of document C.2 was pre-ised exclusively on the attorney work product privilege portion of Exemption 5. See Partial Response at Part II.B.5.

II. RECORDS SOUGHT ON APPEAL

A. By this appeal, we seek the release of the withheld portions of documents C.2.

B. In addition, we infer from the title of document C.7 ("Monthly Status Report on Decommissioning of Rancho Seco") the existence of such "monthly status" reports on the decommissioning of Rancho Seco and, separately, monthly status reports on the decommissioning of Shoreham from the relevant Regional Administrator to the Director of the Office of Nuclear Reactor Regulation (emphasis added). All such "monthly status" reports are within the scope of our request, yet only a single such report was furnished. Hence, we appeal the silent denial of all such status reports (monthly and otherwise) from the Region to Headquarters as well as any record(s) establishing the requirements for, or related to, reports from Region I and/or V re Shoreham and/or Rancho Seco.

C. Requesters also note the establishment of bi-weekly conferences and/or teleconferences re Shoreham, Rancho Seco, and Fort St. Vrain under the aegis of Mr. Seymour Weiss. Requesters also appeal the silent denials of the agendas and memoranda for, and of, those conferences. The balance of those reports must be furnished.

III. GROUND'S FOR APPEAL

Document C.2 is a handwritten memorandum originated by a member of the Commission's non-legal staff, addressed to four other Commission staff members, including one lawyer, yet the Commission invokes the "attorney work-product privilege" recognizing at the same time that the privilege is limited to "documents prepared by an attorney in contemplation of litigation" (emphasis added). See, Partial Response 90-568 at Part II.B.5. (March 26, 1991) (emphasis added). However, there is nothing in the denial to indicate that the deleted portion of the paper was drafted by NRC legal staff; if it was not drafted by such staff, it cannot possible fall within the attorney work-product privilege and must be released. See, e.g., National Labor Relations Board v. Sears Roebuck & Co., 421 U.S. 132, 154, 95 S.Ct. 1504, 1518, 44 L.Ed.2d 29 (1975); Poss v. NLRB, 565 F.2d

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654, 659 (10th Cir. 1977). Further, even if the deleted portion was written by legal staff, it can only be withheld as attorney work-product if it involves "the attorney's theory of the case and his litigation strategy"; given the nature of this memorandum, we consider it highly unlikely that the deleted portion falls within that privilege. E.g., Sears Roebuck & Co., 421 U.S. at 154, 95 S.Ct. at 1518.

EXEMPTION 5 IS NOT OTHERWISE 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 a recent D.C. Circuit case 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 '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 documents 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.

The NRC also may not be able to properly characterize the records as part of the deliberative process. See Coastal States, 617 F.2d at 868.

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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:

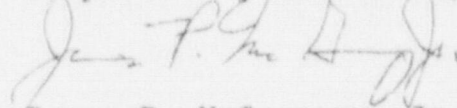
[Exemption 5] serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they 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.

617 F.2d at 6 (emphasis added); see also, Jordan, 591 F.2d at 772-74.

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/jmb
Enclosure