NUDOCS

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

AUG 31 1989

David K. Colapinto, Esquire
Kohn, Kohn and Colapinto, P.C.
526 U Street, NW
Washington, DC 20001

Re: Appeal of Initial FOIA Decision, FOIA-89-47 (FOIA-89-A-22)

Dear Mr. Colapinto:

This responds to your letter of July 7, 1989, in which you appealed a June 8, 1989 denial by Donnie H. Grimsley of your request for a fee waiver for records requested in your Freedom of Information Act request dated January 25, 1989. Mr. Grimsley's June 8, 1989 letter provided you the documents requested because you had agreed in your letter of March 1, 1989, to pay the charges of $134.36 if your request for a fee waiver was denied.

This is to inform you that, pursuant to 10 C.F.R. 9.29(c)(2), I hereby sustain, in full, the decision to deny your appeal of the initial denial of your fee waiver in your request FOIA-89-47. I have made this decision after careful review of the record. Your request does not meet the requirements of 10 C.F.R section 9.41 regarding requests for waiver or reduction of fees.

In the initial denial decision, your request for records pertaining to the "revocation of "confidentiality" on January 23, 1989 by ...Executive Director for Operations" with respect to your clients and "requests for information ... which ... concerns ... [your clients] and/or their respective allegations about CPSES" (the Comanche Peak Steam Electrical Station), was found to relate primarily to matters of personal interest to your clients. It did not contain any significant information on matters of interest to the public, nor did the disclosure add appreciably to information on the subject already in the public domain, particularly since many of these records were newspaper articles. Upon review of the reasons for the initial denial and of your reasons in support of fee waiver, against the criteria set forth in 10 C.F.R. section 9.41, I have determined that the denial decision should be upheld. The reasons you have offered do not satisfy the requirements of the statutory fee waiver standard, namely, that they contribute significantly to the public understanding of the operations or activities of government and not be primarily in the commercial interest of the requester. The reasons upon which this decision rests are set forth below.

The records released contained no revelations concerning the policy or procedure involved in decisions to revoke grants of confidentiality. The January 23 letter itself described the documents which relate to such decisions, including the Commission's Statement of Policy on Confidentiality, 50 Federal Register 48506 (November 25, 1985) and NRC Manual Chapter Appendix 0517, "Management of Allegations," Part II, page 22, which implements the Commission's Statement of Policy. These expressly provide for revocation of confidentiality by the Executive Director for Operations, indicate the procedure of notifying the confidential source of the intention to revoke confidentiality and provide an opportunity to object to such action. This procedure was followed in the case

of your clients, who were advised (through their attorneys) by letter of October 3, 1988, that revocation was being considered, based on the fact that the substance of the technical concerns obtained under the confidentiality agreements with your clients had already been made public. In accordance with prescribed procedures, an opportunity to object within ten days was provided.

By letter of October 9, 1988, you requested an extension of time to obtain copies of transcribed interviews with your clients so that you could advise them properly. You were provided these copies under cover of our letter dated October 31, 1988 and notified that, since your October 9 letter failed to provide any information which would persuade us to reverse our intention to revoke, you were granted an additional ten days within which to provide such information. You were advised that failure to provide such information would result in revocation. In a telephone conversation on November 14, 1988, more time was requested to respond, which resulted in yet another extension to November 28, 1988. No further response was received on behalf of your clients, thus, the letter of January 23, 1989 confirms the revocation action taken in the matter.

With respect to the particular records subject to this FOIA request, only one of the 21 documents released to you under this request concerned the revocation decision, and this was merely a draft of the January 23, 1989 letter. It was essentially the same as the final letter you received and contained nothing of additional public significance. A brief description of the other documents disclosed under FOIA-89-47 may illustrate the basis for the determination that the public was availed of no significant information as a result of release of these documents.

1) letter from the Citizens Association for Sound Energy concerning a Notification of Potentially Significant Information at CPSES

2) memo on Delegation of Authority

3) note concerning your 10/9/88 response on proposed revocation

4) letter concerning Allegations of Design and Construction Deficiencies

5) excerpt from minutes of Allegation Review Committee meeting

6) 5 conversation records

7) 8 newspaper articles

8) duplicate of one of above newspaper articles with annotations

9) duplicate of one of above conversation records with stamped annotations

The fundamental source of information in the area of grants and revocations of confidentiality is contained in published regulations and directives which are publicly available, as you were advised by the letter of January 23, 1989. As you also are aware, a large number of the records subject to this request, the

newspaper articles, resided in the public domain and in fact, were available freely without resort to the FOIA process. While perhaps of some interest to your clients regarding their individual concerns, none of the records released shed new light on the process of revocation nor any novel information about third party requests on your clients' allegations about CPSES. Under the circumstances, I am unable to identify any significant contribution to the public understanding of the operations or activities of the government in this area. I will respond point by point to the arguments you have raised in correspondence.

I. Information would be used to "further the public policy of granting and protecting confidentiality for whistleblowers and other witnesses who testify about ... matters of public concern." (Colapinto/Kohn letter of January 25, 1989)

I conclude that no such benefit could be achieved in this case because the records released do not contain any useful information on this issue which is not already freely available to the public in NRC regulations and directives.

II. (1) Information would be used for intervention in licensing proceedings by one client and (2) in a whistleblower case pending before the Secretary of Labor by another client. (3) The information also would be used to support a motion to set aside an agreement made on behalf of one of the clients by his former counsel and (4) to review the process utilized in revocation. (Colapinto letter of March 30, 1989)

The first three of these reflect essentially personal interests, while the last, if supported by the documents, might reach the stature of public interest. However, the records released contain nothing to illuminate this process beyond the procedures described in the published regulations and directives. Notwithstanding the newspaper articles on the subject, you contend that there has been very little public exposure on the subject of revocation outside of the NRC regulations and "the public's understanding will only be enhanced if [your clients] and their attorneys receive a fee waiver for the requested material on this subject." With or without a fee waiver, publication of these records would do virtually nothing to enhance the public's understanding of the revocation process, compared to the prior level of understanding existing on the subject, as the records provide no new insights into the process.

III. Grant of intervention status for the client concerned and the fact that hearings were held by a Senate subcommittee on the subject of settlement agreements at CPSES, as well as an NRC letter notifying licensees that agreements not contain any restrictions on providing information to the NRC lead you to conclude that the public would benefit greatly from the information. (Colapinto letter of May 22, 1989)

You refer to extraneous documents in an attempt to convince us that the issue rises to the appropriate level of public interest, however this misses the point. You appear to be confusing public interest quality in the subject matter, to the extent any exists, with the public interest aspect of the actual records. The question of entitlement to fee waiver must be examined against the records themselves, not the public interest-worthiness of the subject matter in the abstract.

IV. It is absurd for NRC to argue that "granting and revocation of confidentiality to whistleblowers is unrelated to issues of "significant" regulatory concern," given NRC's reliance on self-reporting of safety concerns by utilities and their employees, with attendant questions about confidentiality. (Colapinto letter of July 7, 1989)

It should be understood unequivocally that there is no question such issues are legitimate matters of regulatory concern. In making this statement, the initial denial decision did not mean to imply that such matters are purely personal and therefore, of no regulatory significance; only that these specific records did not raise any significant public issues, as no meaningful information of interest to the public was introduced thereby.

V. Although some of the requested records are already in the public domain, primarily newspaper articles, release of these documents still contributes to the public understanding of granting and revocation of confidentiality, since reviewing these documents is instructive as to the criteria relied upon in making the revocation decision. (Colapinto letter of July 7, 1989)

This is speculative and has no foundation in fact. Indeed, without some external writing offering analysis of such records as newspaper articles or providing a rationale related to them, these documents are no more than a compilation of individual news items on the subject and offer virtually no insight into the procedural process.

VI. NRC regulations regarding confidentiality are so obscure that anything which adds to the public understanding of the revocation process should qualify for fee waiver. (Colapinto letter of July 7, 1989)

On the contrary, it is considered that the regulations are intelligible, clear and specific. Again, it was these very regulations which were relied upon in arriving at the decision to revoke confidentiality. They are both the crux of the determination and the key thereto. Your desire to find explanations outside the regulation does not make it so. You are not entitled to a fee waiver whenever it is conceivable that records could exist which meet the public interest standard but only when such records actually exist. The relief you seek cannot be granted based upon hypothetical circumstances.

VII. The initial denial decision ignores the issue that the fee waiver request was based in part upon the fact that the information would be used in a scholarly study by clients' counsel, published authors and experts in the field of whistleblower protection law. (Colapinto letter of July 7, 1989)

This expertise and intended use has not been challenged by the NRC. As a matter of fact, this position has been accepted at face value and the NRC has not assumed any posture that the fact you are pursuing private litigation vitiates this intended purpose. Notwithstanding, where there is nothing of import to publish, it makes little difference what the qualifications of the recipients of the records are or what the mode of communication will be, since there still is nothing of general interest to communicate. Mere status as scholars does not confer an unconditional right to fee waiver, nor does intended use for a scholarly purpose, without consideration of whether the material lends itself to such a use and would accomplish the desired objective with respect to the public interest test. Thus, your allegation that it was an abuse of discretion to impose fees when the information would be used

by bonafide legal scholars for public interest purposes, and not for personal gain or profit, is not persuasive.

VIII. Search charges in this case were assessed under the standard for "commercial use," and resulted in excessive and unwarranted fees. (Colapinto letter of July 7, 1989)

You were not charged as a commercial user in this case. Since your request did not fall into any of the other specific categories (educational and non-commercial scientific institution and news media requests), your request was treated under the heading of "all other requesters," as provided in the applicable OMB guidance on fee schedules. You were, therefore, provided two full hours of search time and 100 pages of reproduction free of charge, unlike a commercial use requester, who would have been billed the full direct costs of the search and review and would have paid for all time and reproduction expenses involved.

Since your reasons cannot withstand scrutiny at this threshold level, the points you have raised concerning other aspects of the proposed dissemination are moot. These include: the size and nature of the public to whose understanding a contribution will be made, the relative qualifications of the requester to disseminate the information in a way which will contribute to the public understanding, the intended means of dissemination, whether it will be provided free of charge to the public and whether the requester has any commercial or private interest in the records sought.

My decision to deny your appeal may be summed up by the fact that these records do not meet the tests concerning contribution to the public understanding of government operations. Although the records relate to government operations indirectly, they are not meaningfully informative concerning the procedures involved in that activity, nor do they contribute any significant, new information to the existing public record on the subject. Additionally, the records released scarcely could be said to contribute to the understanding of the two interested parties involved, regarding the subject procedure, much less that of the general public, since the records yielded nothing new or interpretative about the revocation process.

In consideration of the foregoing, your appeal is denied. As a result of my denial of your fee waiver appeal, the charge of $134.36 is reaffirmed. This decision is a final agency action within the meaning of 10 C.F.R. section 9.29(c)(3). Please be advised that, in accordance with 5 U.S.C. section 552(a)(4)(B), judicial review of this decision is available in a District Court of the United States in the district in which you reside or have your principal place of business or in the District of Columbia.

Sincerely,

Hugh L. Thompson

Hugh L. Thompson, Deputy Executive Director
for Nuclear Materials Safety, Safeguards
and Operations Support