

NEVADA NUCLEAR WASTE TASK FORCE, INCORPORATED
Non-profit Public Advocacy

c/o Judy Treichel
Executive Director
4587 Ermine Court
Las Vegas, NV 89147-5178

Phone: 702-248-1127
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APPEAL FROM INITIAL FREEDOM OF INFORMATION ACT DECISION

February 10, 2012

Via Email, Facsimile
and Federal Express
FOIA Privacy Act Officer
U.S. Nuclear Regulatory Commission
Mail Stop T-5 F11
Washington, D.C. 20555-0001

FOIA/PA REQUEST
Case No.: 2012-0002A
Date Rec'd: 2-13-12
Specialist: Donna
Related Case: 2011-0363

Re: Freedom of Information Act Appeal: NRC FOIA/PA-2011-00363

Dear FOIA/PA Officer:

The purpose of this letter is to appeal a final United States Nuclear Regulatory Commission (NRC) determination sent to me in correspondence dated January 12, 2012 by Donna L. Sealing, Freedom of Information Act and Privacy Act Officer.

This "Freedom of Information Act Appeal" is being sent to you by email, facsimile, and Federal Express. A copy of NRC's January 12, 2012 determination letter is attached hereto (as Exhibit A). The response letter stated that it was a final determination that may be appealed within 30 days of receipt to your office. My original request is also attached (Exhibit B).

Background

A Freedom of Information Act (FOIA) request for videotapes of senior technical staff members was sent by facsimile by the Nevada Nuclear Waste Task Force (Task Force) on September 26, 2011. These tapes were referred to in a memorandum from Catherine Haney, Director of the Office of Nuclear Material Safety and Safeguards, sent to the Nuclear Regulatory Commissioners on February 4, 2011 and were also noted in a statement by Catherine Haney to the Committee on Energy and Commerce Subcommittee on Environment and the Economy, House of Representatives on June 24, 2011.

An acknowledgement, dated September 27, 2011 was received by the Task Force showing the assigned number for the request, the name of the assigned FOIA specialist –

Deborah Dennis, and an explanation of fees. Over the next four months there was a series of e-mails and unusual phone calls regarding this request, and finally a determination that was highly unsatisfactory. The following is a chronology of events:

In early October, 2011, Ms. Dennis notified me that the videotapes I had requested were actually ten DVDs and I would be required to pay \$467.38 for them. She sent a Statement of Estimated Fees (Exhibit C) showing that the fee was for ten hours of search time (the first two of which were free) and the duplication of ten DVDs. I faxed Ms. Dennis my credit card information and required identification on the same day to cover the charge.

On October 13, 2011 Ms. Dennis notified me by email that the program office would like to set up a conference call to discuss my (the Task Force) request. A call was arranged for Monday, October 17. Just before the call was to be held on October 17, I was notified by Ms. Dennis that she was home sick and the call would have to be rescheduled. A short time later I received a phone call from Janet Kotra, of the program office. She said that she was calling because we had known each other for a long time and she wanted to find out if they could provide transcripts instead of the DVDs because some of the people were uncomfortable about the release of the discs. She said that her interview was about 40 minutes long, she thought. I told her that I had paid for ten DVDs and I assumed that that represented ten interviews and that's what I wanted. She said that she understood and we agreed to talk again when the conference call occurred.

The conference call occurred on Wednesday, October 19. Speaking for the program office was King Stablein. He said that he wanted a clarification of exactly what I wanted from the videos because he wanted me to have what we wanted but also to protect the privacy of the people being interviewed. He suggested making transcripts. I refused saying I knew that there were 10 DVDs because the FOIA office had confirmed that and accepted payment for them. I said that Cathy Haney had stated that the videos were made for knowledge capture and that was what I wanted. King replied that he had reviewed them but not thoroughly and that their position was that some of the content on the tapes, if it had to be provided, would be done so in a transcript rather than an actual tape. Ms. Dennis finished the call by saying that Mr. Stablein and his staff would further review the discs and they would determine with the General Counsel's office how the privacy issues would be handled in the final response to the Task Force request.

Ms. Dennis sent me an email on November 7, 2011 saying that the program office had been instructed to proceed with processing my request for the DVDs effective that day. They still had an argument about the privacy issue but the OGC would have to concur. She told me to check with her in a couple of weeks. Later that day I faxed the FOIA office and OGC a letter recapping what had occurred so far with the request and payment for the ten DVDs and I included a statement made just a few days earlier by NRC Chairman Jaczko regarding the videotaped interviews and the intention to allow public use of them.

Throughout November and December, 2011 I sent email messages to Ms. Dennis asking for updates on the progress on my FOIA request. The reply to each request was that the OGC was continuing to review and/or edit the DVDs.

On January 14, 2012 I received the response package (Exhibit A) from the FOIA office, dated January 12. It contained five DVDs and Response sheets noting that information had been withheld from one disc under Exemption 5, Deliberative process. The Denying Official was Catherine Haney. There were also two appendices. Appendix A listed the names of four people interviewed whose records had been released in their entirety and Appendix B listing one interview that was released in part.

On January 18, 2012 I emailed Ms. Dennis and Cathy Haney and asked why I had only received five DVDs after being told there were ten and after paying for ten DVDs plus ten hours of search time. And I also asked how many redactions had been made from the Appendix B disc – the interview with Bret Leslie. I explained that in order to determine if I would appeal the response, I would need to know why the information had been redacted. Two days later, on January 20, Ms. Dennis replied that: 1) I would receive a full refund but she did not say why. 2) "It was determined that the information removed falls under deliberative privilege, and this type of information is not available through discovery during any ongoing litigation. This is boiler plate language from the FOIA statute and Department of Justice guidance and is not an acknowledgement of any ongoing or pending litigation." 3) OGC determined that the redacted comments by Mr. Leslie fall under the deliberative process, and are therefore exempt from disclosure and she listed the amount of time that was removed in each of three edits. No mention was made of the subject matter withheld or what deliberation or decision was involved.

On January 25, 2011 I emailed Cathy Haney again requesting more complete information in order to determine the basis of an appeal if I decided to make one. She replied the same day asking me to give her a few days to get an answer. The next day Ms. Dennis wrote to say that there had only been five interviews, not ten and that the full refund was because nothing they did exceeded the \$25 minimum allowed. (This is odd since I was charged and paid almost \$500.) She also said that the edits were "deliberative process" and that there was no "pending litigation." I never received any further answer from Catherine Haney. Again, I was not told what deliberation or what decision justified any claim of privilege concerning this "knowledge capture" interview.

Grounds for Appeal.

The response to this FOIA is deficient for the following reasons:

1) ***Requested records were not provided:*** I requested all videotapes referred to by Catherine Haney, and later referenced by Chairman Jaczko, that had been made for knowledge capture through interviews with departing and other senior technical staff members. My initial communication from Deborah Dennis, the FOIA specialist assigned to the Task Force request, informed me that the interviews were contained on ten DVDs and the costs for those was \$467.38 which I paid. For more than three months following the acknowledgement of ten DVDs I exchanged numerous emails and had multiple phone calls where the existence of the ten discs was discussed and no question was ever raised about the number or the cost associated with search and duplication of them. During a telephone conversation with Janet Kotra on October 17 and again on an October 19, 2011 conference call I clearly noted the number of discs and what I had paid for them. King Stabilein alluded to the fact that he had done a cursory (not thorough) review of them noting what had and.

had not been discussed. There was no mention of there being fewer than ten discs. For more than two months following those telephone conversations, the program office and the Office of the General Counsel were reportedly reviewing and editing the DVDs and no one said that there were only half as many as had been reported and paid for. When the determination/response finally was received on January 14, 2012 there were just the five discs and no explanation of why I was told there were ten and charged for the duplication and search time for ten. It was only after I inquired about the discrepancy that I was surprisingly told that a full refund would be made. In a subsequent email Ms. Dennis said that there had only been five, not ten interviews and that the cost had gone from \$467.38 to less than \$25.00. Knowledge capture of the program office senior technical staff would surely involve more than five people. I cannot prove what I did not receive but it certainly appears that all requested records were not provided.

2) *Incorrect Assertion of FOIA Exemption 5:* According to the description of Exemption 5, it covers records that are not available through discovery during litigation. However, when I asked Ms. Dennis and Ms. Haney about this, Ms. Dennis said that there was no pending litigation. She correctly pointed out that the Deliberative process box had been checked as well and she explained that the release of the information would tend to inhibit the open and frank exchange of ideas but, even though I asked, I was not told the topic of conversation, subject or reason for the redaction.

3) *Inadequate Description:* The only information I could get from Ms. Dennis regarding the redactions on the DVD with Bret Leslie's interview is the length of time of each of the three edits. An NRC determination was made that the information edited was not subject to the FOIA due to deliberative process privilege. I was not told the topic of the deliberation or what decision was under consideration or even that any decision was under consideration. There is no way to make a connection to the claimed privilege. Moreover, there is no information provided upon which you, the reviewing authority, can judge the validity of the claim of deliberative process privilege.

While the clock was running toward the deadline for the filing of this appeal, Catherine Haney asked that I wait a few days so that she could get me an answer regarding the justification for the redactions in the Leslie interview. She never sent a reply. Despite repeated requests, NRC and the denying official Catherine Haney, refused to respond to the critical question of:

- (a) What was the nature or subject of what was cut out of the Leslie disc;
and
- (b) why was it deliberative of a decision; and
- (c) what decision?

The information requested in this FOIA was knowledge capture through interviews with senior technical staff. There is nothing privileged about knowledge capture nor would an interview lead to any imaginable decision (such that disclosure would create a "chilling effect" on open discussion).

Conclusion

The Nevada Nuclear Waste Task Force seeks to obtain the full and complete collection of videotapes and/or DVDs containing the interviews of the departing and other.

senior technical staff of the program office. If there were/are fewer than the ten that I was told existed and that I paid for, a complete explanation should be made regarding the months of communication, said to be about ten DVDs if in fact there were only half that number, as well as clarification of how the cost for the discs went from \$467.38 to less than \$25.00.

All interviews must be provided with no redactions unless an exemption exists that is legally justified and thoroughly explained.

Sincerely,


Judy Treichel,
Executive Director

Attachments:

- Exhibit A: Determination letter – four pages
- Exhibit B: Task Force original FOIA request – 1 page
- Exhibit C: Statement of Estimated Fees – 1 page

Exhibit A

NRC FORM 464 Part I (4-2011)		U.S. NUCLEAR REGULATORY COMMISSION		FOIA/PA	RESPONSE NUMBER
RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) / PRIVACY ACT (PA) REQUEST				2011-0363	1
				RESPONSE TYPE <input checked="" type="checkbox"/> FINAL <input type="checkbox"/> PARTIAL	
REQUESTER Elaine Grossman				DATE JAN 12 2012	
PART I. -- INFORMATION RELEASED					
<input type="checkbox"/> No additional agency records subject to the request have been located.					
<input type="checkbox"/> Requested records are available through another public distribution program. See Comments section.					
<input type="checkbox"/> APPENDICES Agency records subject to the request that are identified in the listed appendices are already available for public inspection and copying at the NRC Public Document Room.					
<input type="checkbox"/> APPENDICES Agency records subject to the request that are identified in the listed appendices are being made available for public inspection and copying at the NRC Public Document Room.					
<input type="checkbox"/> Enclosed is information on how you may obtain access to and the charges for copying records located at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD 20852-2738.					
<input checked="" type="checkbox"/> APPENDICES A&B Agency records subject to the request are enclosed.					
<input type="checkbox"/> Records subject to the request that contain information originated by or of interest to another Federal agency have been referred to that agency (see comments section) for a disclosure determination and direct response to you.					
<input type="checkbox"/> We are continuing to process your request.					
<input type="checkbox"/> See Comments.					
PART I.A -- FEES					
AMOUNT * <input type="checkbox"/> You will be billed by NRC for the amount listed.		<input type="checkbox"/> None. Minimum fee threshold not met.			
\$ <input type="checkbox"/> You will receive a refund for the amount listed.		<input type="checkbox"/> Fees waived.			
* See comments for details					
PART I.B -- INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE					
<input type="checkbox"/> No agency records subject to the request have been located.					
<input checked="" type="checkbox"/> Certain information in the requested records is being withheld from disclosure pursuant to the exemptions described in and for the reasons stated in Part II.					
<input checked="" type="checkbox"/> This determination may be appealed within 30 days by writing to the FOIA/PA Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Clearly state on the envelope and in the letter that it is a "FOIA/PA Appeal."					
PART I.C COMMENTS (Use attached Comments continuation page if required)					
The Incoming FOIA request can be located in ADAMS at accession number ML11270A020.					
SIGNATURE - FREEDOM OF INFORMATION ACT AND PRIVACY ACT OFFICER <i>Donna L. Sealing</i>					

RESPONSE TO FREEDOM OF INFORMATION
ACT (FOIA) / PRIVACY ACT (PA) REQUEST

2011-0363

JAN 12 2012

APPENDICES
B

PART II.A -- APPLICABLE EXEMPTIONS

Records subject to the request that are described in the enclosed Appendices are being withheld in their entirety or in part under the Exemption No.(s) of the PA and/or the FOIA as indicated below (5 U.S.C. 552a and/or 5 U.S.C. 552(b)).

- ☐ Exemption 1: The withheld information is properly classified pursuant to Executive Order 12958.
- ☐ Exemption 2: The withheld information relates solely to the internal personnel rules and practices of NRC.
- ☐ Exemption 3: The withheld information is specifically exempted from public disclosure by statute indicated.
- ☐ Sections 141-145 of the Atomic Energy Act, which prohibits the disclosure of Restricted Data or Formerly Restricted Data (42 U.S.C. 2161-2165).
- ☐ Section 147 of the Atomic Energy Act, which prohibits the disclosure of Unclassified Safeguards Information (42 U.S.C. 2167).
- ☐ 41 U.S.C., Section 253b, subsection (m)(1), prohibits the disclosure of contractor proposals in the possession and control of an executive agency to any person under section 552 of Title 5, U.S.C. (the FOIA), except when incorporated into the contract between the agency and the submitter of the proposal.
- ☐ Exemption 4: The withheld information is a trade secret or commercial or financial information that is being withheld for the reason(s) indicated.
- ☐ The information is considered to be confidential business (proprietary) information.
- ☐ The information is considered to be proprietary because it concerns a licensee's or applicant's physical protection or material control and accounting program for special nuclear material pursuant to 10 CFR 2.390(d)(1).
- ☐ The information was submitted by a foreign source and received in confidence pursuant to 10 CFR 2.390(d)(2).
- ☐ Disclosure will harm an identifiable private or governmental interest.
- ☒ Exemption 5: The withheld information consists of interagency or intraagency records that are not available through discovery during litigation. Applicable privileges:
- ☒ Deliberative process: Disclosure of predecisional information would tend to inhibit the open and frank exchange of ideas essential to the deliberative process. Where records are withheld in their entirety, the facts are inextricably intertwined with the predecisional information. There also are no reasonably segregable factual portions because the release of the facts would permit an indirect inquiry into the predecisional process of the agency.
- ☐ Attorney work-product privilege. (Documents prepared by an attorney in contemplation of litigation)
- ☐ Attorney-client privilege. (Confidential communications between an attorney and his/her client)
- ☐ Exemption 6: The withheld information is exempted from public disclosure because its disclosure would result in a clearly unwarranted invasion of personal privacy.
- ☐ Exemption 7: The withheld information consists of records compiled for law enforcement purposes and is being withheld for the reason(s) indicated.
- ☐ (A) Disclosure could reasonably be expected to interfere with an enforcement proceeding (e.g., it would reveal the scope, direction, and focus of enforcement efforts, and thus could possibly allow recipients to take action to shield potential wrong doing or a violation of NRC requirements from investigators).
- ☐ (C) Disclosure could constitute an unwarranted invasion of personal privacy.
- ☐ (D) The information consists of names of individuals and other information the disclosure of which could reasonably be expected to reveal identities of confidential sources.
- ☐ (E) Disclosure would reveal techniques and procedures for law enforcement investigations or prosecutions, or guidelines that could reasonably be expected to risk circumvention of the law.
- ☐ (F) Disclosure could reasonably be expected to endanger the life or physical safety of an individual.

☐ OTHER (Specify)

PART II.B -- DENYING OFFICIALS

Pursuant to 10 CFR 9.25(g), 9.25(h), and/or 9.65(b) of the U.S. Nuclear Regulatory Commission 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 are those officials identified below as denying officials and the FOIA/PA Officer for any denials that may be appealed to the Executive Director for Operations (EDO).

DENYING OFFICIAL	TITLE/OFFICE	RECORDS DENIED	APPELLATE OFFICIAL		
			EDO	SECY	IG
Catherine Haney	Director, Office of Nuclear Material Safety	See Appendix B	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	and Safeguards		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Appeal must be made in writing within 30 days of receipt of this response. Appeals should be mailed to the FOIA/Privacy Act Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, for action by the appropriate appellate official(s). You should clearly state on the envelope and letter that it is a "FOIA/PA Appeal."

Received 1/14/12

**APPENDIX A
RECORDS BEING RELEASED IN THEIR ENTIRETY**

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/ (PAGE COUNT)</u>
1.	Various	High Level Waste Knowledge Management Videos of a. Phil Justus b. Janet Kotra c. Tim McCartin d. Eugene Peters

received 1/14/12

Re: FOIA/PA-2011-0363

APPENDIX B
RECORDS BEING RELEASED IN-PART

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/ (PAGE COUNT)</u>
1.	1/5/10	High Level Waste Knowledge Transfer Interview of Bret Leslie, Ex. 5

Received 1/14/12

Exhibit B

NEVADA NUCLEAR WASTE TASK FORCE, INCORPORATED
Non-profit Public Advocacy

c/o Judy Treichel
Executive Director
4587 Ermine Court
Las Vegas, NV 89147-5178

Phone: 702-248-1127
Fax: 702-248-1128

September 26, 2011

VIA FACSIMILE

FOIA/Privacy Act Officer
U.S. Nuclear Regulatory Commission
Mail Stop T-5 F11
Washington, D.C. 20555-0001

Re: Freedom of Information Act — Request for Videotapes of Senior Technical Staff Members

To Whom It May Concern:

On February 4, 2011, NMSS Director Catherine Haney wrote a Memorandum to all five Nuclear Regulatory Commission Commissioners. A copy of her Memorandum is attached to this request. On page 2 of her Memorandum, Ms. Haney states that "Departing and other senior technical staff members were interviewed on videotape for knowledge capture and as a future training resource."

Pursuant to the Freedom of Information Act ("FOIA"), 55 U.S.C. 552, the undersigned requests copies of the following:

Any and all interviews on videotape of departing and other senior technical staff members as referred to in Ms. Haney's February 4, 2011 Memorandum.

This request is made on behalf of the Nevada Nuclear Waste Task Force, a non-profit public advocacy organization.

The requesting party is willing to pay up to a total amount of \$1,000 for search time and videotape copying costs without the necessity for further approval. The requesting party has specifically made this request as narrow as possible in order to facilitate expeditious response by NRC.

Thank you for your prompt attention to this request. If you have any questions, please contact me at 702.248.1127.

Sincerely,



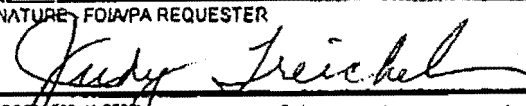

Judy Treichel
Executive Director

Exhibit C

NRC FORM 509 (1-2009)		U.S. NUCLEAR REGULATORY COMMISSION APPROVED BY OMB: 3150-0043 EXPIRES: 11/30/2011		REQUEST NUMBER FOIA/PA - 2011-0363	
		STATEMENT OF ESTIMATED FEES FOR FREEDOM OF INFORMATION ACT (FOIA) REQUEST			
REQUESTER Judy Treichel		NRC CONTACT Deborah Dennis		DATE 10/05/2011	
TELEPHONE 301-415-5704					
<p>Pursuant to the NRC's regulations, 10 CFR 9.40, 52 FR 49350, the NRC notifies a requester when estimated applicable fees exceed \$25.00 or a limit stated in an FOIA request. The estimated fees for processing your FOIA request are noted below. If you wish to re-scope your request to reduce fees, you may telephone the NRC contact identified above to discuss re-scoping the request. Otherwise, please provide a written response on required action noted below. If the NRC does not receive notice from you on re-scoping your request or the required written response within 10 working days from the date of this notice, the NRC will presume that you have no further interest in NRC processing your request and will close the file on your request.</p>					
ESTIMATED FEES					
SEARCH	\$ 450.88	(10 hrs - 2 Free = 8 hrs @ \$56.36)			
REVIEW	\$				
DUPLICATION *	\$ 16.50	(10 DVDs @ \$1.65 ea.)			
TOTAL	\$ 467.38				
<p>* Duplication estimate is based on the assumption that you want copies of disclosed records mailed directly to you. Please specify papercopy or a CD-Rom. If you choose a CD-Rom, the cost will be the cost of the CD-Rom to the NRC. If you prefer, the NRC will make disclosed records available, if appropriate, at the NRC Electronic Reading Room accessible from NRC's web site at http://www.nrc.gov/reading-rm.html. Please note your preference in the Response section below.</p>					
<p><input type="checkbox"/> Please note the comments provided on the attached NRC Form 509A.</p> <p><input type="checkbox"/> Your request for a waiver or reduction of fees does not provide sufficient information under 10 CFR 9.41 for the NRC to make a determination to waive or reduce fees. If you want the NRC to consider this matter further, please submit a written request pursuant to 10 CFR 9.41 within 10 working days from the receipt of this notice.</p>					
REQUIRED ACTION					
<p><input type="checkbox"/> Please agree by signing below to pay fees as high as estimated by signing and dating the Response section of this form and returning the form to the NRC contact identified above at the U.S. Nuclear Regulatory Commission, Washington, DC, 20555-0001, or by fax to (301) 415-5130, within 10 working days from the date of this notice.</p> <p><input checked="" type="checkbox"/> Please provide an advance payment of the estimated fees by one of the methods described on the attached NRC Form 509A within 10 working days from the date of this notice. Any overpayment of fees will be refunded to you.</p>					
SIGNATURE - FOIA/PA SPECIALIST					
RESPONSE					
<p>As required above, I agree to pay fees as high as estimated. I agree to pay estimated search fees even if the NRC conducts an unsuccessful search for responsive records or determines records located are exempt from disclosure. I prefer that copies of disclosed records be provided as stated below:</p>					
<p><input checked="" type="checkbox"/> Mailed directly to me. <input type="checkbox"/> Placed in the NRC Electronic Reading Room.</p> <p><input type="checkbox"/> Paper copy</p> <p><input type="checkbox"/> CD-Rom</p>					
SIGNATURE - FOIA/PA REQUESTER 					DATE 10/05/2011

NRC FORM 509 (1-2009)
PRINTED ON RECYCLED PAPER

Estimated burden per response to comply with this mandatory collection request: 8 minutes. This form is used to notify a requester of the amount of the estimated fees and to obtain the requester's agreement to pay the fees. Send comments regarding burden estimate to the Records and FOIA/Privacy Services Branch (T-5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, or by Internet e-mail to infocollects.resource@nrc.gov, and to the Desk Officer, Office of Information and Regulatory Affairs, NEOB-10202, (3150-0043), Office of Management and Budget, Washington, DC 20503. If a means used to impose an information collection does not display a currently valid OMB control number, the NRC may not conduct or sponsor, and a person is not required to respond to, the information collection.

NEVADA NUCLEAR WASTE TASK FORCE, INCORPORATED

c/o Judy Treichel,
Executive Director
4587 Ermine Court
Las Vegas, NV 89147-5178

Non-profit/Public Advocacy
E-mail: [REDACTED]
Phone: 702-248-1127
Fax: 702-248-1128

Fax Transmittal

Date: February 10, 2012

To: FOIA/Privacy Act Officer
301-415-5130

From: Judy Treichel

Pages including this cover 12

Comments:

Appeal from initial FOIA decision