



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

January 6, 2014

IN RESPONSE REFER
TO FOIA/PA-2013-00009A
(FOIA/PA-2013-0126)

Mr. Lawrence Criscione

(b)(6)

Dear Mr. Criscione:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to your April 11, 2013, e-mail to the Freedom of Information Act/Privacy Act officer. You appealed the agency's April 11, 2013, response letter to your February 12, 2013, Freedom of Information Act (FOIA) request (FOIA/PA-2013-0126) for a copy of five specified records. Specifically, you appealed the NRC's decision to withhold portions of three records under FOIA Exemption 7(F).

Acting on your appeal, the NRC has reviewed the three records specified in your appeal, and has decided to grant your appeal in part and deny your appeal in part. The NRC is granting your appeal with regard to Agencywide Documents Access and Management System (ADAMS) Accession Nos. ML101900305 and ML111460063, as the agency has decided to release those two records in their entirety. The NRC is denying your appeal with regard to ADAMS Accession No. ML100780084, and is continuing to withhold the redacted information under FOIA Exemption 7(F).

You asserted in your appeal that the Exemption 7(F) redaction in ADAMS Accession No. ML100780084 was not proper because nothing in the records indicates that the information was compiled for law-enforcement purposes, nor is there anything that would indicate that disclosure could reasonably be expected to endanger the life or physical safety of an individual. Additionally, you claim that the withheld information pertains to "safety risks [that] are present due to the risks of natural disasters and latent engineering/construction flaws and have nothing specifically to do with terrorist activities." You also noted in your appeal letter that the same figure that has been withheld in ADAMS Accession No. ML100780084 was included in slides that Duke Energy presented at a public meeting on March 25, 2013 and were posted on the NRC's public website (ADAMS Accession No. ML13084A022).

As you point out in your appeal, FOIA Exemption 7(F) may be used to withhold information compiled for law enforcement purposes that, if disclosed, could reasonably be expected to endanger the life or physical safety of an individual. The term "law enforcement purposes" has been interpreted broadly by federal courts to include the enforcement of civil matters and regulatory proceedings.¹ As to the endangerment finding required for Exemption 7(F), courts will defer to an agency's assessment of danger within limits.² Furthermore, of particular relevance to this appeal, two federal district court cases have upheld agencies' use of Exemption 7(F) to withhold flooding-related information from public disclosure.³

The information withheld in ADAMS Accession No. ML100780084 was compiled for law enforcement purposes because this document was prepared by technical staff within the NRC's Office of Nuclear Reactor Regulation analyzing an issue related to a licensee's compliance with the regulations that the NRC has established to implement the Atomic Energy Act (AEA). Under the AEA, the NRC is charged with establishing and enforcing regulations necessary to protect the public health and safety, as well as the common defense and security. Disclosure of the withheld information could reasonably be expected to endanger the life or physical safety of any individual because, if disclosed, the withheld information is expected to be useful to potential adversaries interested in executing an attack or other malevolent act affecting the Jocassee Dam and those living near the dam, and release of this information could thus reasonably be expected to endanger the life or physical safety of the residents living downstream from the Jocassee Dam.

Moreover, the NRC has not waived its ability to withhold this information under Exemption 7(F). The NRC inadvertently posted the slides with the figure that you mentioned in your appeal letter on its public website. Promptly after discovering this inadvertent disclosure, the NRC withdrew the slides with this figure from its public website and made these slides non-publicly available. In addition, the NRC posted a revised version of these slides with a note on the slide that previously contained the diagram stating "Diagram removed due to security sensitive information" (accessible using ADAMS Accession No. ML13123A204). The NRC has thus taken the proper actions to rectify this mistake and to appropriately protect this information both in these slides and in ADAMS Accession No. ML100780084.

¹ *E.g.*, *Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C. Cir. 2002); *Mapother v. DOJ*, 3 F.3d 1533, 1540 (D.C. Cir. 1993).

² *E.g.*, *Amuso v. DOJ*, 600 F. Supp. 2d 78, 101 (D.D.C. 2009); *Levy v. U.S. Postal Serv.*, 567 F. Supp. 2d 162, 169 (D.D.C. 2008).

³ See *PEER v. U.S. Section, Int'l Boundary & Water Comm'n*, 839 F. Supp. 2d 304, 328 (D.D.C. 2012); *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1320–1322 (D. Utah 2003).

L. Criscione

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This is the NRC's final decision. As set forth in the FOIA (5 U.S.C. § 552 (a)(4)(B)), you may seek judicial review of this decision in a district court of the United States in the district in which you reside or have your principal place of business. You may also seek judicial review in the district in which the agency's records are located or in the District of Columbia.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. B. Ash', with a long horizontal line extending to the left.

Darren B. Ash
Deputy Executive Director for Corporate
Management and Chief Freedom of Information
Act Officer
Office of the Executive Director for Operations

Enclosure:
As stated

**APPENDIX
RECORDS ALREADY AVAILABLE IN THE PDR**

<u>NO.</u>	<u>ACCESSION NO.</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)</u>
1.	ML13039A084	03/15/10	Generic Failure Rate Evaluation for Jocassee Dam (15 pages) Exemption 7F
2.	ML101900305	07/19/10	Identification of a Generic External Flooding Issue Due to Potential Dam Failures (9 pages)
3.	ML111460063	04/29/11	Oconee Nuclear Site, Units 1, 2, and 3, Response to Confirmatory Action Letter (CAL) 2-10-003 (16 pages)