

Case No.: 2014-0235

Date Rec'd: 5/5/14

Specialist: Sterens

Related Case: 2013-0264

FOIA Resource

From: Lawrence Criscione (b)(6)
Sent: Sunday, May 04, 2014 11:21 PM
To: Ash, Darren; FOIA Resource
Cc: Dean.Hubbard@duke-energy.com; Jim Riccio ; dickmangrum@wgog.com; smith1jd@westinghouse.com; econnor@greenvillenews.com; Tespink@tva.gov; (b)(6); Hicks, Susan; Monninger, John; Pascarelli, Robert; Boska, John; McCarthy, James; Dingbaum, Stephen; Woodward, Robert; Dave Lochbaum ; Jeff Ruch ; Tom Devine (b)(6)
Subject: FOIA Request for Records Concerning the Removal of ML13084A022 from the Public Domain
Attachments: 2013-0264-FinalResponse.pdf; 2013-0264-Appendix B.pdf; 2013-0264-Appendix C.pdf; 2013-0023A.PDF; Update for FOIA Appeal 2013-009A_without Enclosures.pdf

Mr. Ash,

Please treat this email as a request for records under the Freedom of Information Act.

On June 14, 2013 I requested the following records under the Freedom of Information Act:

- All internal NRC correspondence concerning the public distribution of ML13084A022, the decision to remove it from the public domain, and the decision to justify that removal by claiming Duke Energy requested it be withheld under 10 CFR § 2.390.
- All NRC correspondence with Duke Energy concerning ML13084A022.
- All NRC correspondence with members of the public concerning ML13084A022.
- Any and all affidavits pertaining to the supposed Duke Energy 10 CFR § 2.390 request for withholding of ML13084A022.
- The version of ML13084A022 sent by NRR to Jim Riccio of Green Peace.
- The current version of ML13084A022.

The NRC assigned tracking number 2013-0264 to that request on Monday, June 17, 2013. On July 26, 2013 I appealed that request because it had been 32 working days and I still had not received a response. That appeal was captured as 2013-0023A and is attached to this email.

On Wednesday, August 7, 2013 I received a Final Response from the NRC for FOIA 2013-0264. That response came in the form of three PDF files which are attached to this email.

Per 10 CFR § 9.25 I had 30 days in which to make an appeal to FOIA 2013-0264. Those 30 days have long since expired.

For reasons detailed in the paragraphs below, I do not believe that an adequate search was done under FOIA 2013-0264 for records pertaining to the following:

- All internal NRC correspondence concerning the public distribution of ML13084A022, the decision to remove it from the public domain, and the decision to justify that removal by claiming Duke Energy requested it be withheld under 10 CFR § 2.390.
- All NRC correspondence with Duke Energy concerning ML13084A022.
- Any and all affidavits pertaining to the supposed Duke Energy 10 CFR § 2.390 request for withholding of ML13084A022.

Since the time allotted to appeal FOIA 2013-0264 has passed, please process this email as a new FOIA request.

On March 25, 2013 John Boska distributed a 33-slide Power Point Presentation to Thomas Spink of the Tennessee Valley Authority, Eric Connor of The Greenville News, John Smith of Westinghouse, Dick Mangrum of WGOG, and Jim Riccio of Greenpeace. Additionally, Colleen Payne of South Carolina picked up a hard copy of this slide show during the subsequent public meeting. On slide 18 of that presentation, there was a slide containing a generic cross-sectional drawing of the Lake Jocassee Dam. About the same time, the NRC added this slide presentation to its external website as ML13084A022.

On March 29, 2013 John Boska noted to Dean Hubbard that there a few minor errors in his slide presentation. Dean fixed two typos and sent the new presentation to John so that the NRC could update the presentation linked to on its public website. Slide 18 was still retained in this updated presentation.

The generic cross-sectional drawing of the Lake Jocassee Dam contained on slide 18 is the same drawing which had been redacted from a version of the NRC's "Generic Failure Rate Evaluation for Jocassee Dam" (ML100780084) that had been released to David Lochbaum under FOIA 2013-0008 and to me under FOIA 2013-0126. On April 11, 2013 I appealed the redactions made to the documents released under FOIA 2013-0126. That appeal is attached to this email.

In that April 11, 2013 appeal, I noted that the generic cross-sectional drawing of the Lake Jocassee Dam that was the sole redaction to ML100780084 was currently being publicly displayed on the NRC's website as ML13084A022.

On April 22, 2013 Robert Pascarelli of NRR/DORL sent the following email to the ADAMS administrators:

From: Pascarelli, Robert
Sent: Monday, April 22, 2013 12:33 PM
To: ADAMS IM
Cc: Boska, John; Monninger, John
Subject: change in public availability of slide package

On 03/25/2013, Duke Energy provided the staff with a slide presentation (ML13084A022) that we placed in ADAMS as publically available. Duke Energy subsequently informed the NRC that one of the slides contained SUNSI information (slide 18). Please change the profile of this document to non-publically available. Thank you.

Bob Pascarelli, Chief
Plant Licensing Branch II-1
Division of Operating Reactor Licensing
Office of Nuclear Reactor Regulations

Bob's email states that someone from Duke Energy "*informed the NRC that one of the slides contained SUNSI information*". Note that if this is the case (which I do not believe is so) then such correspondence from Duke Energy to the NRC would have fallen under FOIA 2013-0264 and should have been provided to me as part of that response. There were, however, no emails provided as part of the response to FOIA 2013-0264 covering the time frame from Dean Hubbard's March 29, 2013 update of the two typos through Bob's April 22, 2013 email.

I believe that following my April 11, 2013 appeal, NRR/DORL contacted Dean Hubbard of Duke Energy and instructed him to re-submit his March 25, 2013 slide presentation and to request that it be withheld from public disclosure per 10 CFR § 2.390.

10 CFR § 2.390 is a regulation that permits utilities to request that information be withheld from the public in order to protect proprietary information. Please note who is supposed to be doing what under 10 CFR § 2.390:

1. The utility makes the determination that they would like information withheld from the public

2. The utility requests of the NRC that the NRC not release the information and states in an affidavit that the information is proprietary
3. The NRC reviews the utility's affidavit and determines whether or not there is merit to withhold the information

In my opinion, it is a serious breach of the public's trust for the NRC to instruct a utility to request information be withheld under 10 CFR § 2.390. The NRC is supposed to ensure the regulation of nuclear reactor plants is open and transparent to the public. However, 10 CFR § 2.390 recognizes that sometimes a utility's right to protect proprietary information overrides the right of the public to transparency. But what 10 CFR § 2.390 does not allow is for the NRC to misuse 10 CFR § 2.390 to direct a utility to request withholding of information which the NRC wants to keep from the public domain but which the utility wants to publicly share.

If Duke Energy wants to brag about the design of the Lake Jocassee Dam, then who are we to stop them? Who are we to tell them that they cannot share a diagram showing a generic cross section of their dam? It is not classified information. It is not Safeguards. There is no federal statute preventing them from disclosing it. Who are we to tell them they cannot disclose it? Who are we to claim they want it withheld under 10 CFR § 2.390 when they obviously do not?

Duke Energy wishes to use their generic cross-sectional diagram of the Lake Jocassee Dam to show to the public that it has a "Low Erodibility Classification". And they have every right to use this diagram in that manner. We, on the other hand, need to defend our application of Exemption 7(F) for redacting that diagram from ML100780084 for if we cannot defend that redaction then we must admit that there was no reason to designate ML100780084 (i.e. the Generic Failure Rate Evaluation for Jocassee Dam Risk Analysis) as "Official Use Only - Security-Related Information" and to withhold it from the public for nearly three years.

Susan Hicks responded to Bob's April 22, 2013 email on behalf of ADAMS IM. In her response she states:

Before we can process your request to withdraw a document(s) from the ADAMS Public Library (WBA), we need written authorization and justification (an e-mail message is fine) from a Division Director or above in the originating or responsible organization. This requirement is documented in an August 26, 2002, memo from Stuart Reiter, Chief Information Officer, to all NRC Office Directors and Regional Administrators. See ML022340277. Please have the appropriate Division Director or above send the authorization and justification to the e-mail address ADAMS 1M. If you have been given the authority required by ML022340277, have those manager(s) provide us with the delegation.

The red highlighting in the above quote is not in the original. Note that Susan Hicks requests one of two things:

- Written authorization and justification from a Division Director or above in the originating or responsible organization
- Documentation of the delegation of the authority required by ML022340277

Both of the above records fall within the scope of FOIA 2013-0264 (i.e. *All internal NRC correspondence concerning the public distribution of ML13084A022, the decision to remove it from the public domain, and the decision to justify that removal by claiming Duke Energy requested it be withheld under 10 CFR § 2.390*), yet no such records were provided in the response.

In an April 22, 2013 email, Jim McCarthy of the NRC's Computer Security Office informed Bob Pascarelli that "CSIRT will perform all necessary information spill reporting", however any such reporting was not provided as part of the response to FOIA 2013-0264.

Per the Freedom of Information Act, please provide me the following documents:

- All records pertaining to the removal of ML13084A022 from the public domain.

- Include all emails, internal memos, external written correspondence, notes of phone conversations, meeting minutes, and similar records.
- Specifically include records between March 29, 2013 and April 23, 2013 showing the supposed communication in which Duke Energy "informed the NRC that one of the slides contained SUNSI information (slide 18)."
- Specifically include any written authorization from a Division Director or above to remove ML13084A022 from the public domain
- Specifically include any documentation that was provided to ADAMS IM to show the delegation of the authority required by ML022340277
- Specifically include any "information spill reporting" performed by the Computer Security Office.
- Specifically include any and all records that fell under the scope of FOIA 2013-0264 yet were not included in your August 7, 2013 response
- You may specifically exclude all records provided under your response to FOIA 2013-0264

I live in (b)(6) but work in (b)(6). Please do not send any records or correspondence to my home in (b)(6). Please provide all correspondence electronically to (b)(6). If there is a record I must receive as a hard copy, please call me at (b)(6) and I will come by the FOIA office and retrieve it.

Thank you,
Larry
Lawrence S. Criscione, PE
(b)(6)