

June 3, 2015

IN RESPONSE REFER TO:
FOIA/PA-2015-0027A
(FOIA/PA-2013-0262)

Mr. Lawrence Criscione
1412 Dial Court
Springfield, IL 62704

Dear Mr. Criscione:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to your email dated May 3, 2015, in which you appealed the agency's April 13, 2015, response to your June 11, 2013, Freedom of Information Act (FOIA) request (FOIA/PA-2013-0262).

You raised six issues in your appeal, each of which I will address in turn. First, you raised the concern that you had not received a response to the July 26, 2013, appeal that you filed with regard to this same FOIA request. In that appeal (FOIA/PA-2013-0022A), you contested the agency's lack of response to your FOIA request. The agency was in the process of finalizing the response to FOIA/PA-2013-0022A when it received your May 3, 2015, letter. The agency provided you with a response to FOIA/PA-2013-0022A on May 5, 2015. Consequently, this aspect of your appeal is now moot.

Second, you pointed out in your appeal that a page was missing from a June 3, 2013, email included in the response to your FOIA request. We have determined that a few pages were inadvertently omitted from the response to your request due to an oversight during the processing of the response (in particular, from the June 3, 2013, email referenced in your appeal, as well as an April 4, 2013, email and an April 9, 2013, email). Corrected versions of those emails are being provided with this appeal response. We also discovered that, due to an oversight during the processing of your request, several documents identified during the processing of your request were inadvertently not included in the April 13, 2015, response. These documents are now being disclosed to you. Some of these documents are being provided with redactions, whereas others are identified in a list of documents being withheld in their entirety. I have provided an explanation of the basis for withholding this information under Exemption 5 subsequently in this letter (as part of the discussion of your sixth issue).

Third, you indicated that the response to your request contained "ovals drawn to cover up information" without citing a FOIA exemption. The ovals, boxes with the word "blank," and boxes that were included in the response to your request without citing a FOIA exemption appeared as a result of an error during the processing of your response. During the processing of a FOIA response, individuals from different offices typically add notes in pencil to records to coordinate and communicate with each other (for example, to indicate that a record should be referred to another office for consultation). It is standard practice for these penciled-in notes, which are not part of the original record, to be erased before the records are provided to the

FOIA requester. That way, the requester receives the records without any alterations. The ovals and boxes in the response to your request were added to electronically “erase” the penciled-in notes that were added during the processing of the response, but the outlines of the ovals and boxes inadvertently were not removed prior to sending the response to you. Simply stated, these ovals and boxes do not cover any information included in the original version of these records.

Fourth, you challenged the “outside of scope” and “non-responsive” redactions contained in three emails provided in the response to your request. You argued that there was “no need to narrowly define the scope to exclude reference to [your] own FOIA requests and appeals” and that this information should not be redacted when it “would otherwise be released (i.e., when no FOIA exemption applies to [it]).” In response to your concern, we have decided to release as a matter of discretion some of the information previously redacted on this basis.¹ We are continuing to withhold some information contained in two of these emails; release of that information could reasonably be expected to result in foreseeable harm and, in any event, the information does not pertain to the topics identified in your FOIA request and thus is outside the scope of your request.

Fifth, you asserted that the Exemption 5 redactions included in the response to your request were made “without any attempt at segregation.” In response to this concern, we have determined that some information in two emails could be segregated and released. Revised versions of these emails are being provided with this appeal response.

Sixth, you stated as a general matter that you “disagree[d] with the agency’s abuse of FOIA exemption 5” and provided a more specific challenge to the Exemption 5 redactions included in a particular record provided in the response to your request. With regard to that particular record (the November 15, 2012, submittal to the FOIA office), you argued that the withheld information was not predecisional because “this submittal was what the Office of the Chairman decided to release” under FOIA and thus reflected a decision made by the Office of the Chairman. You also noted that you did not see how disclosure of this information “would tend to inhibit the open and frank exchange of ideas essential to the deliberative process.”

With regard to your general Exemption 5 challenge, the response to your request included information withheld under Exemption 5 based on the attorney work-product privilege, attorney-client privilege, and deliberative process privilege. The attorney work-product privilege protects documents prepared by an attorney in contemplation of litigation. The information withheld as attorney work product in the response to your request includes documents and emails prepared by attorneys within the then-Chairman’s office and the Office of the General Counsel analyzing various issues pertaining to FOIA/PA-2013-0008 and FOIA/PA-2013-0013. These documents and emails were prepared in reasonable anticipation of litigation; in August 2013, Public Employees for Environmental Responsibility filed a lawsuit against the NRC in the U.S. District Court for the District of Columbia, alleging that the NRC had violated FOIA by failing to disclose the same records as those requested in FOIA/PA-2013-0008 and FOIA/PA-2013-0013.

¹ Specifically, we are releasing all of the information redacted on this basis in one email and some of the information redacted on this basis in a second email. These emails still include Exemption 5 redactions for the reasons explained subsequently as part of the discussion of your sixth issue. Revised versions of these emails and associated attachments are being provided with this appeal response.

Accordingly, the NRC is continuing to withhold information protected by the attorney work-product privilege under Exemption 5 and is denying this aspect of your appeal.

The attorney-client privilege protects confidential communications between an attorney and a client of the attorney regarding a legal matter for which the client has sought professional advice. The information withheld as attorney-client privilege in the response to your request includes documents and emails that (1) were transmitted between an attorney within the then-Chairman's office or the Office of the General Counsel and a client or (2) included information from confidential communications between such an attorney and a client. Consequently, the NRC is continuing to withhold information protected by the attorney-client privilege under Exemption 5 and is denying this aspect of your appeal.

To be withheld under the deliberative process privilege, information must satisfy two requirements: (1) the information must be predecisional in nature; and (2) it must be a direct part of the deliberative process. The information withheld based on the deliberative process privilege in the response to your request depicts internal deliberations on the agency's response to FOIA/PA-2013-0008 and FOIA/PA-2013-0013. This information includes recommendations by different offices and shows coordination within and between offices during the deliberative process prior to the agency providing its final response to FOIA/PA-2013-0008 and FOIA/PA-2013-0013. Similarly, the November 15, 2012, submittal mentioned in your appeal represented one step in the deliberative process. As noted on page 2 of the submittal, specific documents were referred to various staff offices for review and no final agency decision had been made at that time.

In addition, release of the information withheld based on the deliberative process privilege, including the November 15, 2012, submittal, would tend to chill the exchange of ideas essential to the deliberative process. During the deliberative process on a sensitive issue, it is critical that individuals and offices feel comfortable collaborating and consulting as appropriate. Releasing preliminary thoughts and recommendations would tend to discourage individuals and offices from engaging in these collaborations and consultations. In addition, allowing public access to internal tracking information regarding FOIA-response deliberations would tend to deter records with such tracking information from being kept at all. Such information, however, facilitates internal agency efforts to promote well-considered and timely deliberations by pertinent offices. Consequently, the NRC is continuing to withhold information protected by the deliberative process privilege, including portions of the November 15, 2012, submittal, under Exemption 5 and is denying this aspect of your appeal.

As set forth in the FOIA (5 U.S.C. 552(a)(4)(B)), you may obtain 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 situated or in the District of Columbia.

I understand that you, as well as staff from the NRC's Office of Information Services, have communicated with the Office of Government Information Services (OGIS) regarding this FOIA request. The 2007 FOIA amendments created OGIS to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. To the extent that you are seeking access to your own records (which is considered a request under the Privacy

Act of 1974), please note that OGIS does not have the authority to handle requests made under the Privacy Act.

You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road—OGIS
College Park, MD 20740
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

Sincerely,

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Enclosures:
As stated