



January 23, 2018

CASE NO: NRC-2018-000327

DATE REC'D: 02/06/2018

Victor M. McCree, Executive Director for Operations
c/of Freedom of Information Act and Privacy Act Officer
U.S. Nuclear Regulatory Commission
Washington, DC 20555
BY EMAIL: foia.resources@nrc.gov

SUBJECT: *Appeal of Initial FOIA Decision FOIA/PA-2016-00558*

Dear Mr. McCree:

On behalf of the Beyond Nuclear, and pursuant to the Freedom of Information Act ("FOIA") (5 U.S.C. § 552 et seq.) and U.S. Nuclear Regulatory Commission ("NRC") FOIA regulations 10 C.F.R. § 9.29, I am writing to appeal the NRC's constructive denial of the majority of records identified by NRC as responsive to FOIA request FOIA/PA-2016-00558 (filed July 1, 2016). After more than a year and a half – far beyond the 30 working days established by 10 C.F.R. § 9.25(a) and the FOIA as the absolute maximum time for a FOIA response -- the NRC has disclosed only 271 pages out of the 651 to 1,235 pages it has identified as responsive. As discussed below, the NRC has presented no credible excuse for this egregious delay. Therefore, we request that you order the immediate release of the remainder of the requested documents.

I. Beyond Nuclear's FOIA Request and NRC's Non-Response.

Beyond Nuclear's FOIA Request. On June 30, 2016, Beyond Nuclear asked the NRC for the following records:

- 1) All communications to and from U.S. Nuclear Regulatory Commission (NRC) Office of Nuclear Reactor Regulation (NRR) and the Japan Lessons Directorate (JLD) dated between June 2, 2014 to June 21, 2016 regarding Exelon Generation's June 2, 2014 "Request for Extension to Comply with NRC Order EA-2013-109 Order Modifying Licenses Regard to Reliable Hardened Containment Vent Capable of Operation Under Severe Accident Conditions" and the NRC decision regarding "Relaxation of the Schedule Requirement for Order EA-13-109" dated November 16, 2015 for the Oyster Creek nuclear generating station;
- 2) All communications to and from Brett Titus NRC/NRR between June 2, 2014 to date regarding Exelon Generation's June 2, 2014 "Request for Extension to Comply with NRC Order EA-2013-109 Order Modifying Licenses Regard to Reliable Hardened Containment Vent Capable of Operation Under Severe Accident Conditions" and the NRC decision regarding "Relaxation of the Schedule Requirement for Order EA-13-109" dated November 16, 2015 for the Oyster Creek nuclear generating station.

Letter from Paul Gunter, Beyond Nuclear to NRC re: Beyond Nuclear FOIA Request Pertaining to the Oyster Creek atomic power station's "Extension to Comply" with U.S. Nuclear Regulatory

Commission Order EA 2013-109 Phase 1 upgrade to Severe Accident Capable Hardened Containment Vent (June 30, 2016).

The NRC acknowledged receipt of the letter on July 1, 2016 and docketed it as FOIA/PA-2016-00558. Letter from Nina Argent, NRC, to Paul Gunter, Beyond Nuclear (July 1, 2016).

Partial Responses to Date and Continual Delay of Completion. Shortly after receiving Beyond Nuclear's FOIA request, the NRC informed Beyond Nuclear that its response would be completed by mid-August 2016, *i.e.*, within the 30-day maximum time period allowed by 10 C.F.R. § 9.25(a). *See* E-Mail Chronology, A to this FOIA Appeal: NRC E-mail (2) (Jul. 1, 2016). By mid-August, however, the NRC had produced no documents. Instead, as aptly described by the NRC in subsequent e-mail correspondence, NRC began a long process of "continual" delay. NRC E-mail (20) (Jan. 27, 2017). Thus, August 2016 turned to September 2016 (NRC E-mail (5) (Sept. 2, 2016)), and September 2016 turned to October 2016. NRC E-mail (11) (Sept. 21, 2016). By January 2017, the target date had shifted to February 2017. NRC E-mail (18) (Jan. 26, 2017).

By July 1, 2017 – the anniversary of Beyond Nuclear's FOIA request – the NRC had produced not a single record. Finally, on July 7, 2017, the NRC produced ten documents totaling 106 pages in its First Interim Response. (The First Interim Response is included here as Attachment B.) While the NRC had attributed the "continual delay" to the process of "sorting through a lot of duplicative records" (NRC E-Mail (20) (Jan. 27, 2017)), 49 pages – almost half – were duplicates. *See* Index of Documents Produced by NRC in First and Second Interim Response to FOIA/PA-2016-00558, Attachment C to this FOIA Appeal. The largest document – a 34-page submission by the licensee – was not only produced in duplicate, but constituted a public document that had been posted six months before on the NRC's public web-based Agency wide Documents Access and Management System (ADAMS). *See* Attachment C, Document 2 and Document 8: Letter from Exelon to the NRC re: Supplemental Response to Request for Additional Information Regarding Request for Extension to Comply with NRC Order EA-13-109: Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions (TAC No. MF4352) (Nov. 25, 2014) (ADAMS Accession No. ML14329A263, posted December 3, 2014 at 04:29PM EST). *See also* Attachment A, Beyond Nuclear E-mail (41) (Jul. 7, 2017).

A few days later, on July 11, 2017, the NRC issued a Second Interim Response, consisting of an additional 103 documents totaling 165 pages. (The Second Interim Response is Attachment D to this FOIA Appeal.) Of these 103 documents, the vast majority (87) consisted of one-or-two-page e-mails without substantive content. Many confirmed meeting appointments. Others served as covers for other more substantive documents identified as attachments. However, these substantive attachments were not included among the released documents; nor were they identified as withheld documents or publicly available documents. These omitted documents include, for instance, "calculations" regarding "seismic capability of the existing 8-inch vent line inside the RB [reactor building] and hydrogen concentration in the main stack" and a "seismic evaluation white paper." *See* Attachment C, Document 15 and Document 28; Attachment D at Global Pages 5 and 22, respectively.

Around the same time it issued the Second Interim Response, the NRC stated that it expected to complete its final response to Beyond Nuclear's FOIA request "by either the end of July or in early mid-August" of 2017, assuming there were "no disagreements" about the release of documents. Attachment A, NRC E-mail (44) (Jul. 10, 2017). At that point, the final set of documents, consisting of "only 380 pages," was "before NRR for their second review." NRC E-mail (45) (Jul. 11, 2017). Throughout the rest of 2017, however, no third and final FOIA response was forthcoming.

Instead, through the first three weeks of November 2017, the NRC repeatedly represented in e-mails that the remainder of its FOIA response was under review by various parties, including the licensee, the Office of Nuclear Reactor Regulation (NRR), and the Office of General Counsel (OGC). See Attachment A, NRC E-mail (42) (Jul. 10, 2017); NRC E-mail (44) (Jul. 10, 2017); NRC E-mail (45) (Jul. 11, 2017); NRC E-mail (48) (Jul. 19, 2017); NRC E-mail (51) (Jul. 20, 2017); NRC E-mail (53) (Aug. 9, 2017); NRC E-mail (54) (Aug. 21, 2017); NRC E-mail (55) (Sept. 7, 2017); NRC E-mail (57) (Oct. 24, 2017); and NRC E-mail (59) (Nov. 21, 2017). Since November 21, 2017, the NRC has been completely silent.

Over Half of Responsive Pages Not Produced. Based on the NRC's estimates of the number of pages of documents that are responsive to Beyond Nuclear's FOIA request, *NRC has yet to produce over half the pages it has identified as responsive*. Initially, the NRC stated that 1,200 pages of documents were responsive. Attachment A, NRC E-mail (11) (Sept. 21, 2016). A year later, the NRC increased the estimate slightly while noting that the documents included "a lot of duplicate records." NRC E-mail (20) (Jan. 27, 2017) (estimating 1,235 pages); NRC E-mail (38) (Jul. 6, 2017) (stating that an original count of "1,234" pages would be reduced after "de-duplicating"). On July 11, 2017, however, after producing a total of 271 pages in the First and Second Interim Responses, the NRC stated that the number of pages remaining to complete the entire FOIA response was 380. NRC E-mail (45) (Jul. 11, 2017). Thus, the number of pages the NRC has yet to produce is greater than the number produced so far.

II. Argument

Over a year and a half after the deadline for completing its response to Beyond Nuclear's FOIA request, the NRC has yet to produce more than half of the pages of documents it has identified as responsive. NRC has offered no credible excuse for its egregious non-compliance with the FOIA's deadlines. Beyond Nuclear's document request was simple and clear. As demonstrated by the attached E-mail Chronology (Attachment A), Beyond Nuclear went out of its way to be cooperative with the agency. Further, the NRC experienced no apparent delay in identifying responsive documents, identifying the universe of documents subject to the FOIA within weeks of receiving Beyond Nuclear's request. In fact, as discussed above, the number of remaining pages subject to Beyond Nuclear's FOIA request may be under 400, a very manageable number.

Of greatest concern to Beyond Nuclear is the fact that released documents refer to more substantive records – *i.e.*, seismic "calculations" and a seismic "white paper" – that are still being withheld by the agency. These references indicate that NRC possesses, but effectively refuses to disclose, information that would make the agency accountable for its decision to excuse Exelon from post-Fukushima reforms designed to protect the public from the risks of reactor accidents.



Instead of making a prompt determination on whether they must be released, the NRC sent them into an endlessly circling whirlpool of internal reviews.

The FOIA does not countenance such obstruction. The NRC's failure to timely respond to FOIA request FOIA/PA-2016-00558 constitutes a constructive denial of the request. 5 U.S.C. § 552(a)(6)(C)(i) ("Any person making a request to an agency for records shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit of this paragraph.") Here, the NRC's noncompliance with FOIA is so extreme that the agency appears to mock both FOIA and its public purpose of ensuring transparency and open government. To correct the agency's noncompliance and assure Beyond Nuclear and the general public of the NRC's good faith, we request that you order the immediate and complete production of all of the documents responsive to Beyond Nuclear's request.

Thank you very much for your prompt attention to this administrative appeal. We look forward to receiving your response within 20 working days, as required by 10 C.F.R. § 9.29(d). In the meantime, please call me at 240-393-9285 if you have any questions regarding this request. Please be advised that if we have not received your decision within the regulatory and statutory time limit, we will treat your non-response as a constructive denial for purposes of seeking judicial relief.

Sincerely,

Diane Curran

Counsel to Beyond Nuclear

Cc: Paul Gunter, Beyond Nuclear