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CENTER FOR LAW
IN THE PUBLIC INTEREST

10951 WEST PICO BOULEVARD
THIRD FLOOR
LOS ANGELES, CALIFORNIA 90064
TELEPHONE: (213) 470-3000

LEGAL STAFF

TIMOTHY B. FLYNN
LUCAS GUTTENTAG
CARLYLE W. HALL, JR.
JOHN R. PHILLIPS
JOEL R. REYNOLDS
FREDRIC D. WOCHER

OF COUNSEL

ROBERT BERKE
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May 12, 1982

Freedom of Information Act Appeal
Secretary to the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

APPEAL OF INITIAL FOIA DECISION

82-A-4C(82-160)
Rec'd 5-14-82

Dear Sir:

This is an appeal pursuant to subsection (a)(6) of the Freedom of Information Act, as amended ("FOIA") (5 U.S.C. § 552). The initial request for information was submitted by David S. Fleischaker, as counsel to the Joint Intervenors in the Diablo Canyon Nuclear Power Plant licensing proceeding (In the Matter of Pacific Gas and Electric Company, Nos. 50-275, 323).

On April 24, 1982, Mr. Fleischaker received a letter from J.M. Felton, Director of the Division of Rules and Records of the Nuclear Regulatory Commission's ("NRC") Office of Administration, granting in part and denying in part a FOIA request of March 22, 1982. Mr. Felton's letter states that the NRC is withholding: (1) a seven-page memorandum regarding a matter "subject to Commission deliberations"; (2) two memoranda providing Office of Policy Evaluation advice regarding then-pending petitions for review of ALAB-644; and (3) the transcripts of Commission meetings held on August 20 and November 12, 1981 during which the question whether to review ALAB-644 was discussed. Nondisclosure of the various memoranda is based on the contention that they are "predecisional documents" exempt from release under exemption 5 of the FOIA (5 U.S.C. § 552(b)(5)); nondisclosure of the transcripts is justified based on exemption 3 of the FOIA (5 U.S.C. § 552(b)(3)) and exemption 10 of the Government In Sunshine Act ("GISA") (5 U.S.C. § 552b(c)(10)).

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The initial decision to refuse release of all of the information and documents requested is erroneous for several reasons. First, category two of the request sought

[a] list of the consultants retained to assist the Commissioners in their consideration of ALAB-644. (Commissioners Gilinsky, Bradford and Roberts mentioned these consultants in their opinions on Commission review of ALAB-644.)

No response to or mention of this request was included in the initial FOIA decision, however, nor was any document released supplying the information sought. Such disregard of a proper request for information does not constitute a valid agency response; certainly, it does not free the agency from its fundamental obligation under the FOIA to disclose the information requested or explain in detail its reasons for failing to do so.

Second, § 552(b) of the FOIA specifically requires agencies to segregate exempt portions of documents so as to make the non-exempt portions available to any person requesting such documents. Neufield v. Internal Revenue Service, 646 F.2d 661, 666 (D.C.Cir. 1981); Mead Data Central Inc. v. U.S. Dept. of Air Force, 566 F.2d 242, 261 (D.C.Cir. 1977). In this instance, however, no attempt has apparently been made to segregate those portions of the documents allegedly containing exempt material or information. Further, there is no indication in the initial decision of the extent to which -- if at all -- exempt and nonexempt information are "inextricably intertwined," such that excision of exempt information would be infeasible. Nor has the agency supplied a specific index in connection with its denial, as is required under Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir. 1973), cert. denied, 415 U.S. 977 (1974). Under such circumstances, nondisclosure of the documents in their entirety is improper.

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Third, although exemption (b)(5) protects some inter-agency memoranda, it does not protect final opinions (NLRB v. Sears Roebuck and Co., 421 U.S. 132, 95 S.Ct. 1504 (1975)) or factual material (Orion Research, Inc. v. Environmental Protection Agency, 615 F.2d 551 (1st Cir.), cert. denied, ____ U.S. ____, 101 S.Ct. 103 (1980)). Particularly relevant here is the principle that a predecisional memorandum loses its exempt status if the agency adopts it or its reasoning in a "final opinion." In Sears, the U.S. Supreme Court explained:

The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, if adopted, will become public is slight. First, when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports . . . [disclosure].

421 U.S. at 161, 95 S.Ct. at 1521. Accord, Bristol-Myers Co. v. Federal Trade Commission, 598 F.2d 18, 24-25 (D.C.Cir. 1978). In this instance, the memoranda denied were cited by Commissioner Roberts in his opinion supporting the Commission's final decision not to review ALAB-644. In explaining his vote against review, he explicitly relied upon

my evaluation of the opinion and various analyses prepared to assist the Commission in its decision by the Office of General Counsel, the Office of Policy Evaluation, and by seismic consultants specially hired by the Commission for this task. All of the groups listed above recommended that the Commission not review ALAB-644.

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Separate View of Commissioner Roberts, at 1 (emphasis added). As in Sears, the agency now has no valid interest in suppressing documents explaining the reasons for its refusal to grant review of ALAB-644.

Fourth, FOIA exemption (b)(3) provides no basis for withholding the requested transcripts in the absence of a statute (other than 5 U.S.C. § 552b) specifically exempting them from disclosure. In his letter denying release, Mr. Felton cited no such statute, and we can only assume, therefore, that his reliance upon exemption (b)(3) was misplaced.

Finally, in the event that the Commission continues to believe that any of the information covered by the instant request is exempt under the FOIA, we urge the Commission to release such information on the ground that the public interest requires release. The Joint Intervenor's interest in the document requested stems not from idle curiosity, but from the intervenors' participation in the Diablo Canyon licensing proceeding for almost a decade. Without exception, the documents withheld relate to the issue of primary and unique importance in that proceeding -- the seismic safety of the facility -- and they arise out of the contentions raised by the Joint Intervenor's in the early 1970's and litigated continually since that time. Consistent with the fundamental purpose of the FOIA, release of the documents would serve to elucidate the basis for the Commission's actions with respect to those claims and would contribute to the broadest public understanding of and confidence in the Commission's ultimate disposition of them. Continued secrecy regarding the requested documents risks the contrary result of undermining public confidence in the Commission and drawing into question its reasons for denying review.

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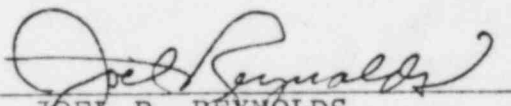
We look forward to receiving your answer to this appeal within 20 working days. We request that the Commission's response be as detailed as possible in order to facilitate our determination of the need for further action.

Very truly yours,

JOEL R. REYNOLDS, ESQ.
JOHN R. PHILLIPS, ESQ.
Center for Law in the Public
Interest
10951 West Pico Boulevard
Los Angeles, California 90064

DAVID S. FLEISCHAKER, ESQ.
P.O. Box 1178
Oklahoma City, Oklahoma 73101

By


JOEL R. REYNOLDS

Attorneys for Joint Intervenors
SAN LUIS OBISPO MOTHERS FOR
PEACE

SCENIC SHORELINE PRESERVATION
CONFERENCE, INC.

ECOLOGY ACTION CLUB
SANDRA SILVER
GORDON SILVER
ELIZABETH APFELBERG
JOHN J. FORSTER

JR:av

cc: Diablo Canyon Service Lise