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October 30, 1992

BY HAND DELIVERY

Mr. James M. Taylor
Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

APPEAL OF INITIAL FOIA DECISION

92A12E (FOIA 92-88)
Rec'd 11-2-92

Re: APPEAL FROM AN INITIAL FOIA DECISION

Dear Mr. Taylor:

Pursuant to the Freedom of Information Act (the FOIA or the Act), 5 U.S.C. § 552 (1982), and the regulations of the Nuclear Regulatory Commission (the NRC or the Commission), 10 C.F.R. § 9.65(b), we hereby appeal the Commission's determination by its letter dated September 30, 1992 to deny access to certain documents in responding to a Freedom of Information request. This relates to a Freedom of Information Act (FOIA) request forwarded to your office on February 21, 1992 and which was given the designation FOIA 92-88. In that filing we requested:

1. All documents, other than the NRC Augmented Inspection Team (AIT) report forwarded to Arizona Public Service (APS) on April 19, 1989 and the Diagnostic Evaluation Team (DET) Report forwarded to APS on March 16, 1990, which discuss, evaluate, analyze or otherwise address the causes of the 1989 outages at Palo Verde Units 1, 2, and 3; and the basis for the NRC Confirmation of Action letters issued on March 3, 1989; March 7, 1989; March 28, 1989; June 28, 1989; and December 24, 1989 that addressed the Palo Verde Units. This request includes, but is not limited to, documents which address the causes of the shutdown resulting in the 1989 outages at all three Palo Verde Units and the causes of the 1989 outages exceeding the formally or informally scheduled or planned outage durations.

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2. All transcripts, tapes or other record of interviews conducted during or in support of the NRC Augmented Inspection Team's review of the March 3, 1989 trip of Palo Verde Unit 3. The AIT review was reported in an AIT report forwarded to APS on April 9, 1989.

3. All transcripts, tapes or other record of interviews conducted during or in support of the Diagnostic Evaluation Team's review of Palo Verde performance. The DET review was reported in a DET report transmitted to APS on March 16, 1990.

On September 30, 1992 your office indicated in a partial response to our request that the following documents, identified in Appendix H, had been found exempt under Exemption 5 of the Act:

RECORDS TOTALLY WITHHELD


| <u>NUMBER</u> | <u>DATE</u> | <u>DESCRIPTION & EXEMPTION</u> |
|---------------|-------------|---|
| 1. | Undated | PV DET Operations Section (11 pages) EX. 5 |
| 2. | Undated | Potential Root Causes for PV Performance Problems (12 pages) EX. 5 |
| 3. | Undated | Evaluation Outline (49 pages) EX. 5 |
| 4. | 11/10/89 | PVNGs, Diagnostic Evaluation Observations, QP (18 pages) EX.5 |
| 5. | 12/05/89 | Summary of Observations (6 pages) EX. 5 |
| 6. | 12/07/89 | PV Maintenance Evaluation Plan (19 pages) EX. 5 |
| 7. | Undated | PV Diagnostic Evaluation Plan for Quality Programs (25 pages) EX. 5 |
| 8. | Undated | 3.6 Engineering Design & Technical Support (46 pages) EX.5 |
| 9. | 1989 | Notes by Marty Virgilio (18 pages) EX. 5 and Outside Scope |

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The Commission's denial of these nine documents fails to conform with basic requirements set forth in the Freedom of Information Act. For the reasons stated in the following Attachment, the nine documents stated above which are within the definition of documents requested in our 92-88 FOIA request should be provided in their entirety. In accordance with 10 CFR § 9.29(b), we understand a response to this appeal is required within 20 working days following NRC receipt of this appeal. If the documents are not released within the period for responding to FOIA appeals as delineated in 10 CFR §9.29(b), we understand that in accordance with 10 CFR §9.29(c)(3), the NRC failure to release the requested documents would be final agency action appealable to federal district court.

Sincerely,



Bradley W. Jones

I. DISCUSSION

The Commission's denial of access to the requested documents, in its entirety, fails to satisfy certain basic requirements of the Act. First, the Commission has unlawfully withheld nonprivileged information, predicated upon an improper, unsubstantiated assertion of the intra-agency memorandum exemption of the Act, discussed below.

Second, in denying access to the entire documentation by the bare assertion of the intra-agency memorandum exemption from the disclosure obligations imposed by the Act, without providing any analysis of the applicability of the exemption claimed as the basis for the denial, the NRC failed both (1) to demonstrate that its decision to withhold the requested information was reasonable; and (2) to satisfy its burden of proving that the exemption was properly claimed.

Third, by categorically denying access to the entire documentation, without attempting to release reasonably segregable portions of any non-exempt material, the Response fails to satisfy the additional requirement set forth in the Act that agencies release responsive documents, even where a valid exemption applies, to the maximum extent possible.

Thus, the NRC has failed to produce information that has properly been sought pursuant to a FOIA request and failed to demonstrate that the claimed exemption was properly invoked. Each of these shortcomings will be discussed in turn below,

following a brief analysis of the policy underpinnings of the FOIA.

A. The FOIA's Public Disclosure Purpose

The Freedom of Information Act was enacted to increase citizens' access to government records, and was intended specifically to remedy the defects that had emerged in the predecessor to the FOIA, Section 3 of the Administrative Procedure Act.^{1/} Congress concluded that Section 3 had become riddled with "loopholes which allow[ed] agencies to deny legitimate information to the public."^{2/} Indeed, Section 3 had failed to achieve its original disclosure goals, in practice functioning "more as an excuse for withholding than a disclosure statute."^{3/}

Courts that have addressed the fundamental objectives of the FOIA have endorsed the broad, remedial purpose of this legislation.^{4/}

1/ 5 U.S.C. § 10002 (1964).

2/ S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) ("S.Rep. 813"); see also H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5 (1966) ("H.R. Rep. 1497"), reprinted in 1966 U.S. Code Cong. & Admin. News 2418, 2422.

3/ S. Rep. 813 at 3, (cited with approval Environmental Protection Agency v. Mink, 410 U.S. 73, 79 (1973); Bristol-Myers Co. v. Federal Trade Comm'n, 424 F.2d 935, 938 (D.C. Cir.) ("Bristol-Myers"), cert. den., 400 U.S. 824 (1970); see also H.R. Rep. 1497 at 5-6.

4/ See Environmental Protection Agency v. Mink, 410 U.S. at 80 ("Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily (continued...)

1. Structure of the Act

The Act includes two operative subsections relevant to this appeal of the FOIA Officer's determination to withhold portions of the requested information. Subsection (a) of the Act describes five classes of information that are subject to the disclosure provisions of the Act. Subsection (b) specifies nine narrow categories of information that are exempted from the disclosure provisions of the Act.^{5/} The Act requires that the disclosure obligations of Subsection (a) must yield to the exemptions set forth in Section 552(b), where applicable.^{6/}

The legislative history of the Act plainly demonstrates, however, that these specific categories of exempt information are to be narrowly construed. In considering the appropriate balance

^{4/} (...continued)
from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands"). See also Rabbitt v. Dep't of the Air Force, 383 F. Supp. 1065, 1068 (S.D.N.Y. 1974) ("Rabbit"), citing with approval La Mort v. Mansfield, 438 F.2d 448, 451 (2d Cir. 1971) (the policy of the Act is "to increase significantly the public availability of agency records"); Bristol-Myers 424 F.2d at 938 ("[b]efore 1967, the Administrative Procedure Act contained a Public Information section 'full of loopholes which allow[ed] agencies to deny legitimate information to the public.'").

^{5/} Exemption 5 states that the disclosure requirements do not apply to documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a part other than an agency in litigation with the agency" 5 U.S.C. § 552(B) (1982).

^{6/} See generally H.R. Rep. No. 1497, at 9 ("All of the preceding subsections of S. 1160 -- requirements for publication of procedural matters and for disclosure of operating procedures, provisions for court review, and for public access to votes -- are subject to the exemptions from disclosure specified in subsection [(b)]").

between the public interest in full disclosure and the governmental interest in assuring that frank and candid discussions within the agencies not be unduly inhibited, the Senate Report observed that, while it was not "an easy task to balance the opposing interest, . . . it is not an impossible one either. . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."^{7/}

As will be discussed below, courts that have spoken to the scope of Exemption 5 have ruled consistently that the Act contemplated a cautious approach to the withholding of documents on the strength of this provision.^{8/} As one court observed, "[t]he legislative plan [of the FOIA] creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed."^{9/}

As we will demonstrate below, however, the FOIA Officer's attempt to invoke Exemption 5 in this case constitutes far broader an interpretation of that narrow exception from the FOIA's disclosure provisions than could possibly be supported by the plain language of the statute, its legislative history or any judicial analysis of that provision.

^{7/} S. Rep. 813 at 3 (emphasis added).

^{8/} See e.g., Environmental Protection Agency v. Mink, 410 U.S. at 80, quoting S. Rep. 813 at 3.

^{9/} Bristol-Myers 424 F.2d at 938 (emphasis added).

2. The Factual versus Deliberative Content Distinction

The Supreme Court has observed that "[v]irtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policymaking processes on the one hand, and purely factual, investigative matters on the other."^{10/}

The legislative history accompanying the original language of this provision, which was applicable only to internal memoranda "relating to the consideration and disposition of adjudicatory and rulemaking matters,"^{11/} supports the factual versus deliberative content distinction drawn by these courts.^{12/}

^{10/} Environmental Protection Agency v. Mink, 410 U.S. at 89, citing with approval Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971); Grumman Aircraft Eng. Corp. v. Renegotiation Bd., 425 F.2d 578, 582 (D.C. Cir. 1970); Bristol-Myers Co. v. Federal Trade Comm'n, 424 F.2d 935 (D.C. Cir. 1970); International Paper Co. v. Federal Power Comm'n, 438 F.2d 1349, 1358-59 (2d Cir. 1971), cert. den., 404 U.S. 827 (1971); General Services Admin. v. Benson, 415 F.2d 878 (9th Cir. 1969), aff'g 289 F. Supp. 590 (W.D. Wash. 1968); Long Island R. Co. v. United States, 318 F. Supp. 490, 499 n.9 (E.D.N.Y. 1970); Consumers Union v. Veterans Admin., 301 F. Supp. 796 (S.D.N.Y. 1969), appeal dismissed as moot 436 F.2d 1363 (2d Cir. 1971); Olsen v. Camp, 328 F. Supp. 728, 731 (E.D. Mich. 1970); Reliable Transfer Co. v. United States, 53 F.R.D. 24 (E.D.N.Y. 1971).

^{11/} Section 3(c) of S. 1666, 88th Cong., 2d Sess. (1964), introduced in 110 Cong. Rec. 17,086.

^{12/} As for the Supreme Court has observed, this original formulation of the intra-agency memorandum exemption was attacked for failing adequately to protect documents dealing with general policy matters not relating to a particular adjudication or rulemaking proceeding. See Environmental Protection Agency v. Mink, 410 U.S. at 90 n.17; see also Hearing on S. 1666 and S. 1663 before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess.

(continued...)

This indication of Congressional intent compels the conclusion that the Act contemplated protecting from disclosure only policy discussions, and not accumulations of factual or investigative data. Indeed, as discussed below, where discrete factual portions of the document can be severed from the protected portions, the Act does not permit an agency to withhold the entire document -- rather, a redacted version must be released, thus permitting access to the non-exempt factual portions thereof.

If the requested documents include any factual narrative, then that portion of the document would not acquire the privilege that Exemption 5 bestows upon policy discussions embodied in intra-agency communications. Similarly, the Commission could not invoke this exemption if the information redacted constitutes a body of Commission "secret law" with respect to sanctions in enforcement actions. As noted below, however, a meaningful appeal of the denial and redactions on that basis has been thwarted by the absence of an appropriate explanation for the Commission's action.

It would appear, however, that the above requested documents, and most conspicuously document number 5 (Summary of Observations), are observational and thus factual in nature. Therefore, these documents which concern matters witnessed by an

12/ (...continued)
202-03 (1963). Nevertheless, the original language provides valuable insight into the ultimate goal sought to be achieved by this provision.

NRC inspector should be found as factual incidents vice "recommendations on policy issues" and excluded under Exemption 5. Moreover, NRC's current withholding is inconsistent with past NRC practice with respect to some of these documents. Specifically, in response to FOIA request 89-306, July 12, 1989, NRC released a preliminary outline of the plan for conducting a Diagnostic Evaluation that is similar to documents 3, 6, and 7 of FOIA request 92-88. Such documents also do not reflect agency views on policy matters and should not be withheld under Exemption 5.

B. The Commission Failed to Analyze the Applicability of the Exemption Claimed in the Response Letter

The FOIA imposes a weighty burden upon agencies to justify any decision to withhold documents subject to the disclosure provisions of the Act. Indeed, subsection (a)(4)(B) of the Act expressly provides that "the burden is on the agency to sustain its action" in denying access to information requested pursuant to the FOIA. Further, as the court stated in Mead Data Central Inc. v. United States Department of the Air Force, "the burden which the FOIA specifically places on the Government to show that the information withheld is exempt from disclosure cannot be satisfied by the sweeping and conclusory citation of an exemption.^{13/}

^{13/} 566 F.2d 242, 251 (D.C. Cir. 1977) (emphasis added). See also, Schwartz v. I.R.S., 511 F.2d 1303, 1307 (D.C. Cir. 1975); Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973), cert.

(continued...)

Thus, it is well-established that, whenever an agency determines to withhold documents that are the subject of the FOIA request, the agency must:

[P]rovide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.^{14/}

And, in order to provide the requester with a meaningful opportunity to pursue an administrative appeal of an agency's initial determination to claim a particular exemption, the agency must give this detailed explanation of its assertion of exemptions under FOIA in its initial letter denying a FOIA request.^{15/}

^{13/} (...continued)
den., 415 U.S. 977 (1974); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 861, 868 (D.C. Cir. 1980) (agency, in order to satisfy its burden of substantiating a claim of exemption, must set out, for example, the identity of the parties who authored and received the document, and whether the document was from subordinates to superior officials).

^{14/} Mead Data Central v. United States Dep't of the Air Force, 566 F.2d at 251 ("Mead Data Central") (emphasis added); see also Rose v. Department of the Air Force, 495 F.2d 261 (2d Cir. 1974), aff'd, 425 U.S. 352 (1976); Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d 653, 657 (9th Cir. 1980); Founding Church of Scientology, Inc. v. National Security Agency, 610 F.2d 824, 830 (D.C. Cir. 1979); Schwartz v. Internal Revenue Service, 511 F.2d 1303, 1307 (D.C. Cir. 1975); Pacific Architects & Engineers, Inc. v. Renegotiation Board, 505 F.2d 383, 385 (D.C. Cir. 1974); Fisher v. Renegotiation Board, 473 F.2d 109, 112 (D.C. Cir. 1972); Mobil Oil Corp. v. Federal Trade Comm'n, 406 F. Supp. 305, 309 (S.D.N.Y. 1976).

^{15/} Cf. Mead Data Central, 566 F.2d at 251.

In this instance, the NRC failed to provide the required detailed explanation in its Response Letter. Indeed, this response did not even indicate which part of the request was being denied. The FOIA Officer's failures in that regard thus might constitute a deprivation of the right effectively to contest the denial of access to the requested documents.

Moreover, similar requested documents have been provided in the past in their entirety by other divisions within the Commission. For example, the Commission's Appendix's B and D responses included memos to J.M. Taylor and J.B. Martin, respectively, regarding the Commission's Diagnostic Evaluation Team Report. In addition, the Commission provided handwritten notes regarding containment isolation valve problems and steam bypass valves and emergency operating procedures at Palo Verde in Appendix B of FOIA request 92-087 of August 28, 1992. Therefore, prior disclosure pertaining to the same types of disclosed material would further preclude the Commission from denying the documentation found in Appendix H of FOIA request 92-88.

C. Exemption 5 Does Not Insulate the Documents in Their Entirety from Disclosure

The Response Letter offered as justification for denying access to the documents described above is a bare assertion of the "intra-agency memorandum" exemption set forth in Subsection (b)(5) of the Act.^{16/} Subsection (b)(5), however, which exempts

^{16/} See, infra n.21 and accompanying text.

from disclosure under the FOIA "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," contemplated the protection solely of confidential intra-agency advisory opinions from public scrutiny. Thus, the Senate Report accompanying the Act offered the following observation as to the intended scope of this exemption:

It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl.' The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation.^{17/}

Judicial application of this provision has focused on whether 'production of the contested document would be 'injurious to the consultative functions of government that the privilege of nondisclosure protects.'^{18/} One court has viewed the policy objectives of Exemption 5 as being designed:

to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or

^{17/} S. Rep. No. 813 at 9 (emphasis added).

^{18/} Environmental Protection Agency v. Mink at 87, quoting Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939, 946 (U.S. Ct. Cl. 1958).

adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.^{19/}

In heeding this important, but narrow, exemption from the disclosure requirements of the Act, courts have thus refused to elevate form over substance, holding that the intra-agency communications exemption does not provide a blanket immunization against the Act's required disclosure upon a bare assertion that the document at issue is in the form of an intra-agency memorandum.^{20/} The NRC's bare assertion of the exemption, however, without any discussion of its applicability in this specific instance, effectively precludes any detailed analysis of the propriety of its assertion to deny access to the documents requested above to their entirety.

^{19/} Coastal States, 617 F.2d at 866.

^{20/} See Stokes v. Brennan, 476 F.2d 699, 703 (5th Cir. 1973) ("[Exemption 5] was not defined as an exception to compelled disclosure in order to authorize an agency to throw a protective blanket over any type of information it might choose by the expedient of casting it in the form of an inter-agency memorandum"); Bristol-Myers Co. v. Federal Trade Comm'n, 424 F.2d 935, 939 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970) ("[Exemption 5] does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memorandum. Purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only 'those internal working papers in which opinions are expressed and policies formulated and recommended'"), quoting Ackerly v. Ley, 420 F.2d 1336, 1314 (D.C. Cir. 1969); see also General Services Admin. v. Benson, 415 F.2d 878, 880-881 (9th Cir. 1969); Rabbitt, 383 F. Supp. at 1068 (relier on and quotes the above language of Bristol-Myers).

D. A Review of NRC Withheld Documents

We will now address individually each of the nine documents mentioned above which were withheld by the Commission. As will be explained below, in addition to containing information already made publicly available, the documents that were withheld are: (1) extremely limited in their descriptions: (2) void of authorship (with the exception of document number 9); and only three of the documents are dated. Nevertheless, the limited information available indicates the inappropriateness of NRC's blanket use of Exemption 5 to withhold these documents from public disclosure.

The first document is comprised of eleven pages and is titled "PV DET Operations Section." Based on this limited description, this document appears to contain information that was already publicly released and/or describes the basis for agency conclusions already available in the Diagnostic Evaluation Report, released over three years ago. It also appears that this document may contain factual data observed by the unidentified author during the DET inspection. There is no basis to conclude that release of this document would hinder or inhibit candid discussions within the NRC. Hence, as discussed above, Exemption 5 is not applicable to this document.

The second document contains 12 pages and is entitled "Potential Root Causes for PV Performance Problems." This document also appears to contain information relating to the over three year old and publicly released DET report. Documents

explaining the basis for final agency actions are not withholdable under Exemption 5. The limited description of the document strongly implies that it contains facts gleaned from inspections by the NRC. These types of factual data are not the type of "policy" related interactions to which Exemption 5 was meant to be applied.

The third document contains 49 pages and is obscurely entitled "Evaluation Outline." This document seems to contain information describing and outlining the 1989 Palo Verde DET report, which is no longer in a pre-decisional mode. Again, there is no indication of any NRC policy considerations and Exemption 5 does not allow withholding of this document. Exemption 5 is not properly used to shield facts gleaned from NRC inspectors and the evaluations of those facts by the NRC Staff.

The fourth document, "PVNGS, Diagnostic Evaluation Observations, QP," consists of 18 pages that obviously include factual information rather than policy discussions. To allow the withholding of the factual observations of trained NRC inspectors where those observations formed the basis of the DET would circumvent the basic principle of FOIA, which is to make the basis for agency actions publicly available. This document clearly contains information that was delineated and expressed in Palo Verde's DET results and is not excluded by Exemption 5.

The fifth document is entitled "Summary of Observations" and contains 6 pages. As with document number 4 this document also appears to contain factual and inspection-related matters which

form the basis for final NRC DET. The factual underpinnings and explanations of final agency positions, particularly those found in documents over three years old and contained within the NRC's publicly available DET, cannot be validly withheld under Exemption 5.

The sixth document is 19 pages long and entitled "PV Maintenance Evaluation Plan." This document, similar to document number 2, seems to contain facts gleaned from inspections by the NRC. It appears that this document contains an accumulation of factual and NRC inspection data that relate to the 1989 DET.

The seventh document is "PV Diagnostic Evaluation Plan for Quality Programs" and consists of 25 pages. Like document number 1, based on the limited description it appears this document contains information that is either already publicly available and/or it provides an explanation of the final agency conclusions as described in the DET. It also appears to contain factual data observed by trained NRC inspectors during the DET inspection. Clearly, release of this document would not hinder or inhibit candid discussions within the NRC and Exemption 5 should not excuse release of this document.

The eighth document, "3.6 Engineering Design & Technical Support" is 46 pages long. The reasons for the release of this document's contents are consistent with the reasons set forth for documents 1 through 7. The title alone suggests that this document is a compilation of factual and inspection data garnered by the NRC to further guide and support the 1989 DET. Again,

release of this document clearly would not hinder or inhibit candid discussions within the NRC.

The last document is cryptically described as "Notes by Marty Virgilio" and contains 18 pages. Mr. Virgilio, who was part of the NRC's DET team, apparently took notes that were of contemporaneous observations relating to his inspection of Palo Verde. These notes either contain information of a factual nature or describe the basis for technical conclusions of the 1989 DET. The notes would explain the basis for the Commission's position finalized in the published DET and cannot be validly withheld under Exemption 5.

E. The Commission Erred in Failing to Release Reasonably Segregable Portions of the Requested Documentation

Even if the requested documents to which access has been denied includes information which is properly exempt from disclosure -- a proposition which is not conceded -- it is clear that the Commission has not satisfied its additional obligation to release any reasonably segregable non-exempt portions of the documents. Subsection (b) of the Act expressly provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."^{21/}

^{21/} 5 U.S.C. § 552(b) (1982). See Environmental Protection Agency v. Mink, 410 U.S. at 91, in which the Court noted:

It appears to us that Exemption 5 contemplates that the public's access to internal memoranda will be governed
(continued...)

Where an agency disputes the severability of factual portions upon an assertion that they are "inextricably intertwined" with the deliberative portions of the document, the agency may, depending on the particular circumstances, either provide detailed affidavits and/or oral testimony to establish that the documents lie beyond the scope of the disclosure obligation, or submit the documents to the court for in camera inspection, enabling the court to determine whether the agency is justified in withholding the documents from the requesting party.^{22/}

In this instance, the Commission has failed to satisfy its obligation to release reasonably segregable portions of the documents which include arguably exempt information. Nor has the Commission provided any justification for withholding the entire documentation. Instead, the agency has offered only a bare assertion of the intra-agency deliberative process exemption. The Commission has thus breached its obligations under the FOIA.

^{21/} (...continued)

by the same flexible, common-sense approach that has long governed private parties' discovery of such documents involved in litigation and Government agencies. And, as noted, that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents.

^{22/} Id. at 93.

II. Conclusion

For all the reasons set forth above, the instant appeal should be granted and the above requested documentation released.