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November 6, 1992

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

APPEAL OF INITIAL FOIA DECISION

92A13E(92-409)

Rec'd 11-12-92

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. § 9.63(b), we hereby appeal the determination by D. Grimsley, Director, Division of Freedom of Information and Publications Services and J. Snizek, Deputy Executive Director, NRR, by their letter dated October 8, 1992 denying access to certain records relating to NRC Senior Management Meeting discussions of Palo Verde Nuclear Units. This relates to a Freedom of Information Act (FOIA) request forwarded to your office on August 13, 1992 and which was given the designation FOIA 92-409. In that filing we requested:

All documents, as defined above, which describe summarize or otherwise memorialize discussions and/or presentations at the "Senior Management Meetings" held from 1988 through 1990, which included any references to the Palo Verde Nuclear Units. By "Senior Management Meetings" this request means those meetings of senior NRC personnel held to discuss, evaluate and/or reach a determination on what nuclear facilities would be included or be recommended to the Commission for inclusion on the NRC "Watch List". This "Watch List", announced approximately every six months, is also known as the "Problem Plant List" or the "Problem Facilities List".

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In response to our FOIA request, Mr. Grimsley in collaboration with Mr. Snizek asserted that NRC's policy is not to disclose predecisional information about plants discussed at Senior Management Meetings but not placed on NRC's watch list. The Commission's denial of the requested documents is not consistent with the Commission's past practice with respect to other FOIA's requesting the same types of documents. Moreover, the Commission fails to conform with basic requirements set forth in the Freedom of Information Act. We address both of these points below. For the reasons discussed above, records sought in our 92-409 FOIA request should be provided in their entirety. Accordingly, we appeal the denial of the requested records.

A. Past NRC Release of Similar Documents

The NRC, as detailed below, has waived any right to utilize Exemption 5 and prevent disclosure of the requested documents, by previously providing the requested documents in response to FOIA requests. Waiver of agency memorandum exempt from disclosure under FOIA can occur when communications are disclosed to private individuals or nonfederal agencies. Chilivis v. Securities & Exchange Commission, 673 F.2d 1205, 1211 (11th Cir. 1982); Shell Oil Co. v. I.R.S., 772 F. Supp. 202, 209 (D.Del. 1991); Mead Data Central, Inc. v. Dept. of Air Force, 566 F.2d 242, 253 (D.C. Cir. 1977) ("[if] the information has been or is later shared with third parties, the privilege does not apply"); Education Instruction, Inc. v. Dept. of Housing and Urban Development, 471 F. Supp. 1074, 1081 (D.Mass. 1979), aff'd, 649 F.2d 4 (1st Cir. 1981) ("where an authorized disclosure is not necessary to effect the purposes of the document, any claim of an exemption under Section 5 as to that document is waived"); North Dakota v. Andrus, 581 F.2d 177, 179 (8th Cir. 1978) (the federal government, by voluntarily surrendering agency records, waived its right to assert at a later time that the same records were exempt from disclosure under the deliberative process privilege).

NRC waiver of its memorandum exemption from disclosure under FOIA occurred when it disclosed to other private individuals the same requested material. Specifically, in response to FOIA request 89-306 of July 10, 1989, the NRC released to the requester, Colleen N. Amoruso, in December 1989, the results of the NRC Senior Management Meeting held May 17-18, 1989 regarding Palo Verde Units. In addition, the NRC released Senior Management Meeting minutes regarding the Brunswick Steam Electric Plant in FOIA request 89-307 which was also requested by Ms. Amoruso. Therefore, because of the NRC's prior disclosure of NRC

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Senior Management Meeting minutes, its denial of our FOIA request is inconsistent with past NRC practice and thus precludes the NRC from claiming that such documentation is exempted under FOIA and not subject to disclosure.

B. The Deliberative Process

An examination of the proper application of Exemption 5 indicates that the Commission's prior release of similar records was appropriate, and that practice should be followed in response to our current request. Two requirements must be met to invoke the deliberative process privilege of FOIA. The document must be "predecisional," that is, prepared in order to assist agency decision makers in arriving at its determination and that the document be "deliberative," that is, actually related to a process by which policies are formulated. N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 153-54 (1975); Hopkins v. U.S. Dept. of Housing and Urban Development, 929 F.2d 81 (2nd Cir. 1991); Local 3, Intern. Broth. of Elec. Workers, AFL-CIO v. N.L.R.B., 845 F.2d 1177, 1180 (2nd Cir. 1988) ("agency documents will be exempt from disclosure under the Freedom of Information Act if they are predecisional and deliberative, in other words, indicative of agency's thought process . . . [p]urely factual material not reflecting agency's deliberative process is not protected"). A document may be predecisional and still not fall within the confines of Exemption 5 if it is not a part of the deliberative process. Formaldehyde Institute v. Department of Health and Human Services, 889 F.2d 1118 (D.C. 1989) (while the two criteria are not mutually exclusive, neither are they coterminous in their reach).

The Commission's failure to include Palo Verde on the Commission's "watch list" is not pre-decisional in nature. In N.L.R.B. v. Sears, Roebuck & Co., the Court held that the decision of the General Counsel of the NLRB not to file an unfair labor practice complaint constitutes final action in the adjudication of a case.^{1/} The Court also found that "the line

^{1/} 421 U.S. 132, 153-54 (1975). The Court found that a decision to dismiss a charge is a decision in a case and therefore an adjudication. Id. at 158. Adjudication is defined under the Act as an "agency process for the formulation of an order." 5 U.S.C. § 551(7). An "order" is defined as "the whole or part of a final disposition, whether affirmative [or] negative . . ." 5 U.S.C. § 551(6). Thus, because the NRC's Senior Management Meeting records explain the reasons for the "final
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between predecisional documents and postdecisional documents may not always be a bright one. Indeed, even the prototype of the postdecisional document--the 'final opinion'--serves the dual function of explaining the decision just made and providing guides for decisions of similar or analogous cases in the future." Sears, 421 U.S. at 152 n.19.

Reasoning that "[t]he probability that an agency employee will be inhibited from freely advising a decision maker for fear that his advice, if adopted, will become public is slight," the Court concluded that an agency's explanation of its final action is inconsistent with the deliberative process privilege. Sears, 421 U.S. at 161 (emphasis in original); See also, Safecard Services, Inc. v. Securities & Exchange Commission, 926 F.2d 1197, 1203 (D.C. Cir. 1991) ("SEC's decision not to file an injunctive action against a particular entity would, like the General Counsel in Sears, seem to constitute final agency action"). The Court went on to explain that:

[f]irst, when adopted, the reasoning becomes that of agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than the agency's final 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]

...

Id.

The Supreme Court's decision in N.L.R.B. v. Sears, Roebuck & Co., rendered two independent consequences: first, it made the memorandum of the General Counsel explaining his decision, and any document adopted by, or expressly incorporated into, that memorandum, subject to the affirmative disclosure requirements of 5 U.S.C. § 552(a); and second, it removed the General Counsel's memorandum and any incorporated document from the scope of the deliberative process privilege." Safecard Services, Inc., 926 F.2d at 1203-04 (citing Sears, 421 U.S. at 153-54).

1/ (...continued)
disposition," namely, placing or not placing a nuclear power plant on the Commission's watch list, the records obviously qualify as an "opinion," and are subject to disclosure.

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In Bristol-Meyers Co. v. F.T.C., the court overturned the district court's decision and asserted that Sears established the general principal that:

action taken by the responsible decision maker in an agency's decision-making process which has the practical effect of disposing of a matter before the agency is "final" for purposes of FOIA. If such action is accompanied by a written explanation of the decision maker's reasoning, that explanation constitutes a "final opinion" and must be disclosed.

598 F.2d 18, 25 (D.C. Cir. 1978) (emphasis added). Thirteen years later, the court in Safecard Services, Inc. held that:

any portion of the minutes recounting a Commissioner's explanation of why he or she voted in a particular way could not be considered pre-decisional, any more than would that Commissioner's separate written opinion accompanying the agency's final order. Additionally, if, in explaining its collective decision, the Commission expressly adopts or incorporates any element of a Commissioner's or a staff member's prior oral or written discussion of the matter, those incorporated portions of earlier minutes or documents would no longer qualify as pre-decisional.

926 F.2d at 1205. Similarly, any records, including documents pertaining to the NRC's Senior Management Meetings, associated with the Commission's decision not to take action by placing Palo Verde on the NRC's "watch list" would also be subject to disclosure and not be included within the deliberative process privilege under Exemption 5.

Also, in denying our FOIA request, the NRC at a minimum failed to carry its burden of providing a description of "the document's contents as well as how the documents related to the agency's decision-making process, to establish that it is a pre-decisional part thereof." Bristol-Meyers Co. v. F.T.C., 598 F.2d 18, 28 n.20 (D.C. Cir. 1978); Safecard Services, Inc., 926 F.2d at 1204. The NRC is also required to explain how decisions to place nuclear plants on the NRC watch list are reached and "the role that staff discussion and memoranda play in such decisions;

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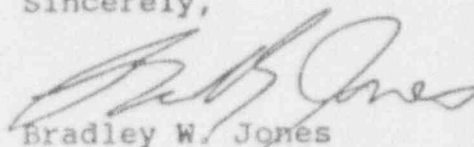
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the manner in which such decisions are memorialized and explained; and whether such decisions are treated, in later agency decision making, as precedents." Id.

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

Sincerely,



Bradley W. Jones