March 3, 1983

APPEAL OF INITIAL FOIA DECISION
83-A-3E(83-1)
Rec'd 3-7-83

Mr. William J. Dircks
Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

APPEAL FROM AN INITIAL FOIA DECISION

Dear Mr. Dircks:

By this letter I am appealing the initial decision made by J.M. Felton, Director, Division of Rules and Records in response to my Freedom of Information Act request dated December 28, 1982 (FOIA-83-1), copy attached. The portion of this initial decision in question is that denying the disclosure of Documents 4 and 5 (as listed in Appendix A of the decision) in their entirety because they are purportedly exempt under 5 USC 552(b)(5). The persons responsible for this determination are Mr. Felton and Mr. Harold R. Denton.

5 USC 552(b)(5) exempts 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." This provision has been interpreted by the courts to be far more narrow than an initial reading would indicate. See, e.g., Stokes v Hodgson, 347 F Supp 1371 (1972). Also, the burden of proof is upon the agency relying on Exemption 5 of FOIA. Tabcor Sales Clearing, Inc. v Department of Treasury, 471 F Supp 436 (1979). Claims of exemption can only be upheld if they are appropriately advanced and supported by the agency. Freeman v Seligson, 405 F2d 1326 (1968).

Only certain types of memorandums are exempt under 5 USC 552(b)(5). Those containing purely factual material are not exempt; see Environmental Protection Agency v Mink, 410 US 73 (1973); General Services Administration v Benson, 415 F2d 878 (1969); Bristol-Myers Co. v Federal Trade Commission, 424 F2d 935 (1970); Consumers Union of United States v Veterans Administration, 310 F Supp 796 (1969).

Furthermore, to be exempt from disclosure, documents must be part of the decision-making process; i.e., they must be both predecisional and deliberative in nature. Falcone v Internal Revenue Service, 478 F Supp 385 (1979). "Predecisional" means that the document must actually be antecedant to the adoption of agency policy, and "deliberative" means that it must be related to the process by which policies are formulated. Jordan v Department of Justice, 591 F2d 753 (1978). "Predecisional" memorandums must not be confused with post-decisional communications, which serve to explain decisions already made. Bristol-Myers, supra. Also, in order to be truly classified as predecisional, the documents should reflect personal opinions of an individual writer in the agency rather than the policy of the agency as a whole. Coastal States Gas Corp. v Department of Energy, 617 F2d 854 (1980). Further, documents drafted prior to a decision, but then adopted as an agency's final opinion, are not deliberative and are not protected from disclosure. Falcone, supra.

The phrase "available by law to a party other than an agency in litigation with the agency" has been construed to mean any hypothetical party in some type of litigation with the agency. Anchorage Bldg. Trades Council v Department of Housing and Urban Development, 384 F Supp 1236 (1974); Consumers Union, supra. The "law" referred to means the discovery provisions of the Federal Rules of Civil Procedure (not the agency's rules of practice). Shakespeare Co. v United States, 389 F2d 772 (1968). Of course, FRCP 26(b) is interpreted broadly in the interest of full discovery. Hickman v Taylor, 329 US 495 (1947). (The most notable exemption in Rule 26(b) is the work-product doctrine.) Moreover, when an agency has adopted material in an otherwise exempt document as the basis of a non-exempt decision, the adopted material loses its immune status, since such exemption is statutory exception to other sections of 5 USC 552 (e.g., 5 USC 552(a)(2)) which require disclosure. United States v J.B. Williams Co., 402 F Supp, 796 (1975).

Finally, the FOIA was intended to benefit the public generally, and it is the effect on the public that must be weighed in ordering disclosure. Consumers Union, supra. It has even been held that documents normally exempt under 5 USC 552(b)(5) should be released unless it is determined that such disclosure will result in demonstrable harm to the public interest. Shlakman, 64 FCC2d 947 (1977). The ultimate purpose of 5 USC 552(b)(5) is to prevent injury to the quality of the agency decision-making process. Natural Resources Defense Council, 2 DOE 80,128.

Given this legal background, one must compare the NRC's initial decision regarding FOIA-83-1 with the law. In order to justify the denial of Documents 4 and 5 in their entirety, the NRC must make a positive showing that: the material withheld is not merely factual; it is both predecisional and deliberative; it would not be available through discovery pursuant to FRCP 26(b) to any party in litigation with the NRC; and, it is not in the public interest to disclose the material, or its disclosure would harm the NRC's decision-making process.

The undersigned maintains that these criteria have not been met by the NRC and cannot be met, and, therefore, the disclosure of the documents is mandated.

In examining the documents made available under FOIA-83-1, it is apparent that the NRC's decisions regarding the handling of the turbine missile issue for the Perry Nuclear Power Plant OL application have already been made and are merely being withheld for disclosure in the SSER. Thus, they cannot be said to be predecisional. Furthermore, the motive behind these decisions appears not to be the safety of the public, but, rather, reducing the regulatory burden on licensees and avoiding time-consuming independent analyses of the turbine missile problem by the NRC Staff. In this circumstance, public disclosure of the documents is mandated under 5 USC 552(a)(2)(B) and (C), and under the principle given in Shlakman (supra). Indeed, public disclosure of this information would improve the quality of the NRC's decision-making process by making it more responsive to the public interest, rather than the private interests of licensees.

In fact, it appears that the NRC Staff is even withholding vital information from the ACRS. Suffice it to say that such behavior is inconsistent with the American tradition of highly valuing the public's right to know. It has been held that Exemption 5 of the FOIA involves balancing of the government's right of privilege and the public's right to know. Agencies should not be required to "operate in a fishbowl," and the public dealing with agencies should not have to "operate in a darkroom." American Mail Line Ltd. v Gulick, 411 F2d 696 (1969). On the other hand, one cannot help but recall an old saying that sunshine (cf. Sunshine Law) is the best natural disinfectant, phenol the best chemical disinfectant, and publicity the best moral disinfectant. Having witnessed the parade of regulations, decisions, and policies made by the NRC in the past 2 years, the undersigned opines that the NRC is flirting too closely with the promotion of nuclear energy, an activity forbidden by the Energy Reorganization Act of 1974, and that a little sunshine and publicity is needed to rectify this situation and to return the NRC to its statutory role as a protector of the public interest in which the public can have confidence.

Thus, it must be concluded that the documents requested in FOIA-83-1 must be provided in accordance with the laws of the United States.

Sincerely,

Susan L. Hiatt

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