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JOHN LAMBERSKI

January 26, 1996

96-A-02 C [95-420]
Rec'd 1-30-96

Office of the Secretary
U. S. Nuclear Regulatory Commission
Washington DC 20555

Re: Appeal from Initial FOIA Decision - FOIA 95-420

Dear Sir:

In accordance with 10 C.F.R. § 9.29, I hereby appeal the NRC's January 11, 1996 First Partial Response to FOIA Request No. 95-420. The January 11 Partial Response (hereinafter the "Initial Decision"), a copy of which is enclosed, partially denied FOIA 95-420, submitted on October 6, 1995 (copy also attached). The record partially withheld constitutes a portion of a memorandum to S. Ebner from J. Vorse re: Request for Investigation No. RII-91-10, dated August 17, 1992, identified on Appendix B to the Initial Decision.

The Initial Decision states that complete disclosure of the requested records was being denied based on Exemption 5: "The Deliberative Process: Disclosure of predecisional information would tend to inhibit the open and frank exchange of ideas essential to the deliberative process...."

FOIA Exemption 5 shields from disclosure those documents normally privileged in civil discovery, including documents protected by the common law predecisional or deliberative process privilege. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 N.R.C. 190, 197 (1994) citing Jordan v. Department of Justice, 591 F.2d 753, 772 (D.C. Cir. 1978). "The deliberative process privilege is unique to the government and protects inter- and intraagency communications 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" Vogtle, supra, 39 N.R.C. at 197 quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975).

1/31...to OGC to Prepare Response for SECY's Signature.....Date due: Feb 14...
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The deliberative process privilege applies only to information that is (1) predecisional and (2) deliberative. Vogtle, supra, 39 N.R.C. at 197 citing Petroleum Information Corp. v. Department of Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992). Communications are deliberative if they reflect a consultative process, i.e., they relate to the process by which policies are formulated. Vogtle, supra, 39 N.R.C. at 198. However, factual material that does not reveal the deliberative process and is not inextricably intertwined with the opinion portion is not shielded by the privilege. Id. citing Norwood v. FAA, 993 F.2d 570, 577 (6th Cir. 1993). In Vogtle, supra, the Commission ordered the disclosure of those portions of an OI investigative report which constituted factual information. 39 N.R.C. at 199-200.

The memorandum partially withheld by the Initial Decision is an August 17, 1992 report from the Region II OI Field Office Director to the Regional Administrator concerning an investigation that was closed on September 14, 1992. See September 14, 1992 memorandum from J. Vorse to S. Ebner identified on Appendix A to the Initial Decision. The portions of the August 17 memorandum which have been disclosed indicate that the memorandum was reporting factual information. A numerical listing of eleven facts begins on page one following the statement: "The facts already developed in this matter are as follows: . . ." The information withheld from disclosure on pages three and four may very well be more of the same factual information. Exemption 5 does not allow the NRC to withhold from disclosure such factual information.

Moreover, given that the memorandum in question is three and one-half years old and that the investigation was closed in 1992, it appears that disclosure of the remainder of the August 17 memorandum cannot reasonably be viewed as injurious to the consultative functions of the government. Absent such injury, the memorandum should be disclosed. See Sears, supra, 421 U.S. at 149.

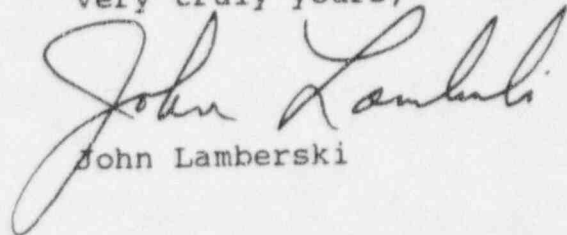
I respectfully request the Secretary to carefully review the August 17, 1992 memorandum identified on Appendix B of the Initial Decision to determine the appropriateness of the claim that FOIA Exemption 5 permits the NRC to withhold portions of that memorandum from disclosure. If the Secretary decides that

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the Initial Decision should be upheld, I request a full explanation of the rationale for denying the requested records under Exemption 5.

If you have any questions concerning this appeal you may contact me by mail or by phone at the address and phone number listed above.

Very truly yours,



John Lamberski

Enclosures