

KIRKPATRICK, LOCKHART, HILL, CHRISTOPHER & PHILLIPS

A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

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June 27, 1984

WRITER'S DIRECT DIAL NUMBER

(202) 452-7023

APPEAL OF INITIAL FOIA DECISION

84-A-51C (84-250)

84A-52C (84-267)

Rec'd 6-28-84

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

Subject: Appeal from initial FOIA decision
in FOIA-84-250 and 84-267

Dear Mr. Dircks:

This is an appeal under the Freedom of Information Act, 5 U.S.C. Section 552 ("FOIA") and the Nuclear Regulatory Commission's ("NRC") Regulations thereunder, 10 C.F.R. Section 9.11(a), made on behalf of our client, Suffolk County ("Suffolk").

Background of This Appeal

On May 29, 1984 we received two letters, each dated May 23, 1984, from Mr. J.M. Felton, Director of the NRC's Division of Rules and Records, Office of Administration, partially denying Suffolk's FOIA request of April 4, 1984 (FOIA-84-250) and Suffolk's related FOIA request of April 9, 1984 (FOIA-84-267).

Suffolk's request of April 4th sought access to all written materials in the possession or control of the NRC relating to communications of NRC officials with officials of other federal agencies or with officials of the Long Island Lighting Company ("LILCO") or with third parties relating to LILCO or the Shoreham Nuclear Power Plant ("Shoreham"); as well as all materials relating to the Regional Assistance Committee's ("RAC") review of LILCO's transition plan for offsite response to a radiological emergency at Shoreham; and all materials relating to that part of a memorandum from Chairman Nunzio J. Palladino to the NRC Commissioners dated March 20, 1984 concerning licensing delays at Shoreham.

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The April 9th request sought access to all materials in the possession or control of the NRC relating to the NRC's establishment of a new licensing board to preside in the Shoreham licensing proceeding and relating to the notice of oral argument dated March 30, 1984 on LILCO's supplemental motion for a low power operating license.

As of April 25, 1984, we had failed to receive a written response from the NRC. Accordingly, on that date we filed appeals. Furthermore, on May 4, 1984 we filed a petition requesting expedited treatment for Suffolk's FOIA requests. Subsequently, on May 4, May 8, May 18, May 21, and May 23, the NRC released documents which are responsive to Suffolk's requests.

However, under cover the NRC's letter of May 23, 1984 relating to FOIA 84-250 the NRC withheld 35 responsive documents in their entirety (identified in NRC Appendix K). At the same time, the NRC identified 4 documents which are in the possession or control of the NRC, but which the NRC has, nonetheless, referred to the Federal Emergency Management Agency ("FEMA") for their review. In withholding the 35 documents the NRC relied upon the FOIA's exemption at 5 U.S.C Section 552(b)(5) which permits agencies to withhold materials which are pre-decisional and which embody the agency's deliberative process.

The NRC's letter regarding FOIA request No. 84-267 withheld 4 responsive documents in their entirety (identified in NRC Appendix B). The NRC also based this withholding on the Exemption at Section 552(b)(5).

Relief Requested

Suffolk's appeal seeks the following relief:

1. That the NRC conduct a new search for material responsive to Suffolk's FOIA requests and that the NRC fully describe its search in sworn affidavits provided to Suffolk;
2. That the NRC provide Suffolk with a proper Vaughn Index;
3. That the NRC review all of the material withheld under Appendix K and release segregable portions of that material;
4. That the NRC immediately release the document identified as document No. 35 in Appendix K because the NRC has waived any privilege that it may have had to withhold this document; and

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5. That the NRC take responsibility for the production of responsive documents held by the NRC which were originated by FEMA.

The NRC Must Conduct a New Search and Provide Affidavits Describing the Search

The NRC, like all federal agencies, is required to conduct a conscientious, comprehensive and complete search of all of its files in response to an FOIA request, such as that made by Suffolk, which "reasonably describes" the materials which are sought. 5 U.S.C. Section 552(a)(3). Federal courts have repeatedly emphasized that federal agencies have a "firm statutory duty" to make good faith and reasonable efforts to locate all reasonably described materials. Founding Church of Scientology v. National Security Agency, 620 F.2d 824, 837 (D.C. Cir. 1979).

In this case there is good reason to believe that the NRC has failed to locate and account for numerous responsive documents which should be in the NRC's possession or control. For example, on March 16, 1984 Chairman Palladino met with Judge B. Paul Cotter, Jr., the NRC's Chief Administrative Judge, and with senior members of the NRC's staff, including the Executive Director for Operations, the Director of the Office of Nuclear Reactor Regulations and the Executive Legal Director and their subordinates to discuss, among other things, licensing delays regarding Shoreham. However, the only notes of that meeting thus far accounted for by the NRC are Judge Cotter's notes¹ and notes identified in Appendix K, document No. 35, as Chairman Palladino's "undated draft notes". It is inconceivable that the Chairman of the NRC and its Chief Administrative Judge would have taken notes at this meeting and that the senior NRC staff, let alone their subordinates, would have failed to take notes.

Another example of the NRC's failure to identify relevant documents relates to a February 28, 1984 letter to Commissioner L. Victor Gilinsky from W.J. Catacosinos, Chairman and Chief Executive Officer of LILCO, thanking Commissioner Gilinsky for meeting with Mr. Catacosinos. It is our understanding that Mr. Catacosinos met with each of the NRC Commissioners during the week of February 20th. Mr. Catacosinos undoubtedly wrote to each of the Commissioners -- not just Commissioner Gilinsky -- expressing his appreciation for the opportunity to meet with them. Nevertheless, the only letter which the NRC has accounted for is the February 28, 1984 letter to Commissioner Gilinsky.

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¹ Judge Cotter's notes are identified as documents 17 and 18 of Appendix A in FOIA No. 84-267.

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A third example of potentially overlooked responsive documents relates to the fact that the NRC has not accounted for a single written communication between the NRC and the Department of Energy concerning Shoreham. The Department of Energy has operated its own working group on nuclear emergency evacuation planning which has actively participated in the debate concerning Shoreham emergency evacuation planning. In addition, the Department of Energy has participated actively in other aspects of the debate concerning the licensing of the Shoreham plant. It is simply inconceivable that there is not a single piece of correspondence between the NRC and the Department of Energy in the NRC's possession relating to Shoreham or LILCO.

In Church of Scientology, the D.C. Circuit held that the National Security Agency would have to conduct a new search after an FOIA requester demonstrated that the National Security Agency's first search had overlooked several documents. 620 F.2d at 837, and see, Goland v. Central Intelligence Agency, 607 F.2d 339, 353 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980).

Accordingly, in this case the NRC must conduct a new search. Furthermore the NRC is obligated to describe this search in detailed affidavits. Weisberg v Department of Justice, 543 F.2d 308, 311 (D.C. Cir. 1976); Ott v. Levi, 419 F.2d 750, 752 (E.D.Mo. 1976).

The NRC Must Prepare an Adequate Vaughn Index

A proper Vaughn Index, as the NRC well knows, must identify and describe all withheld material in detail and must specify the statutory basis for the denial and explain why the withholding of the document is justified under this statutory exemption. Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973), cert. denied 415 U.S. 977 (1974); Dellums v. Powell, 642 F.2d 1351, 1359 (D.C. Cir. 1980). Furthermore, agencies have an obligation to produce Vaughn Indexes, not only at trial, but at the administrative stage as well. Shermco Industries, Inc. v. Secretary of the Air Force, 452 F. Supp. 306, 317 (N.D. Tex. 1978), rev'd on other grounds, 613 F.2d 1314 (5th Cir. 1980).

By this standard the indexes which the NRC provided under cover of the May 23 letters are grossly inadequate. The indexes fail to describe any of the withheld documents in detail and fail altogether to explain with particularity why the withholding serves the interests protected by the exemption at Section 552(b)(5). In the event that this matter goes to court, the NRC would be compelled to produce proper Vaughn Indexes. We are hopeful that the NRC will meet its responsibility without such action.

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In the absence of an adequate Vaughn Index, Suffolk cannot respond effectively to the merits of the NRC's claim that all parts of all of the 39 withheld documents are withholdable under the exemption of Section 552(b)(5). Naturally, Suffolk reserves the right to make substantive arguments for the disclosure of this material when Suffolk receives an index that permits Suffolk to evaluate the NRC's claims.

The NRC has Failed to Segregate and Disclose Factual Material

The D.C. Circuit has held that when an agency withholds a document on the basis that the document is pre-decisional and deliberative, the agency must demonstrate that it has segregated and released factual material, unless the factual and deliberative material is "inextricably intertwined". Mead Data Center, Inc. v. Department of Air Force, 566 F.2d 242, 260, 261 (D.C. Cir. 1977). Indeed, the FOIA as amended, expressly requires agencies to segregate non-exempt from exempt material and to release the former. 5 U.S.C Section 552(b).

Notwithstanding this requirement, the NRC in this case has done virtually nothing to demonstrate that it has released all reasonably segregable factual material. Rather, the NRC has withheld every page of 39 documents, some of which are 50 and 60 pages long, on the dubious theory that there is not one segregable factual portion of any of these 39 documents. The NRC's only argument for the withholding is its conclusory incantation that the documents reflect the NRC's pre-decisional, deliberative process. Accordingly, we request that the NRC review each of the 39 withheld documents and describe each portion of these documents and release all factually segregable portions.

The NRC has Waived any Privilege
Concerning Document No. 35 in Appendix K

The NRC has withheld Document 35 in Appendix K which its letter of May 23, 1984 concerning FOIA 84-250 describes as "contain[ing] Chairman Palladino's undated draft notes on meeting on licensing delays". According to the NRC, the release of these pre-decisional notes would tend to inhibit the open and frank exchange of ideas between agency officials which is essential to the deliberative process. However, in response to Suffolk's April 9, 1984 request (No. 84-267), the NRC has released notes taken by Judge Cotter, a participant in the same meeting, which describe the communications which took place at that meeting.

The courts have said that once an agency voluntarily reveals a privileged communication, the agency's privilege under 5 U.S.C. Section 552 (b)(5) to withhold other documents concerning that

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communication is waived. Peck v. United States, 514 F.2d 210, 212 (S.D. N.Y. 1981), State of North Dakota v. Andrus, 581 F.2d 177, 181 (8th Cir. 1978). In this case, the NRC has already voluntarily disclosed the communications at the March 16th meeting by releasing Judge Cotter's notes. Accordingly, the NRC must release all notes in its possession or control concerning the Shoreham issues discussed at the March 16, 1984 meeting, including Chairman Palladino's notes.

The NRC Must Take Responsibility for the
Production of Documents Originated by FEMA

The D.C. Circuit has recently warned agencies that they cannot delay the processing of an FOIA request by referring responsive documents in their possession or control to the agencies which originated the document. McGehee v. Central Intelligence Agency, 697 F.2d 1095, 1103-12 (D.C. Cir. 1983). McGhee involved a request by a free lance reporter to the CIA for information regarding the Jonestown mass suicides. The CIA attempted to duck responsibility for processing McGhee's request by referring documents to the State Department and the FBI. The Court criticized the CIA for adopting a referral system that delayed the government's compliance with the Freedom of Information Act.

We conclude, in other words, that a system adopted by an agency for dealing with documents of a particular kind constitutes "withholding" of those documents if its net effect is to significantly impair the requester's ability to obtain the records or significantly to increase the amount of time he must wait to obtain them. 697 F.2d at 1110.

In this case the NRC has taken almost two months to respond to Suffolk's FOIA requests and, just at the moment when the NRC was to process the requests, the NRC has exempted four responsive documents in the NRC's possession by referring those documents to FEMA (Appendix J to the NRC's letter of May 23, 1984). To date we have not heard from FEMA concerning these documents. Thus the effect of the NRC's referral has been to delay the processing of Suffolk's FOIA request. Under McGehee, the NRC must take responsibility for processing the documents identified in Appendix J.

Conclusion

As we noted in our earlier appeal, we will pay copying fees as set out in the NRC's regulations. 10 C.F.R Section 9.14.

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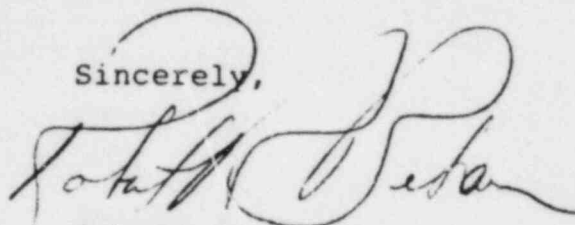
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We expect the NRC to respond to this appeal within 20 working days as required by the FOIA and by the NRC's regulations. 5 U.S.C Section 552(b), 10 C.F.R. Section 9.11(b). As we also noted in earlier correspondence, we request that the NRC make its response to this appeal as detailed as possible in order to better enable our client to determine the need for legal action.

Sincerely,

A handwritten signature in dark ink, appearing to read "Robert R. Belair", written in a cursive style.

Robert R. Belair

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Conclusion

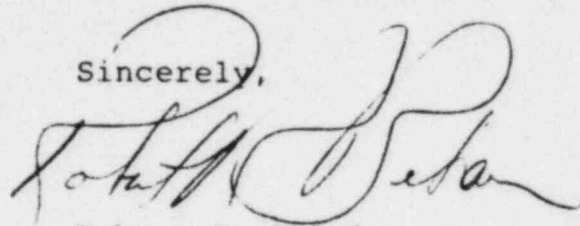
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Sincerely,

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Robert R. Belair