

Rec'd 2/15

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February 13, 1985

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

APPEAL OF INITIAL FOIA DECISION

85-A-4E (84-487)
Rec'd 2-13-85

Re: Appeal from FOIA Request 84-487.

Dear Mr. Dircks:

Pursuant to 10 C.F.R. §9.11, we hereby appeal that portion of the above-referenced Freedom of Information Act request which was denied. ~~6~~

In response to the initial FOIA request, certain materials were made available for review. A portion of the request, however, was denied on the basis of exemption 5 of the FOIA, 5 U.S.C. §552(b). A copy of my original request, together with your Commission's denial are enclosed herewith.

The initial request sought information concerning construction of the Comanche Peak Nuclear Power Plant and, in particular, information concerning Brown & Root, a Texas corporation involved in the construction of nuclear power plants, including the Comanche Peak installation.

In denying our access to the requested information, the Commission relies on subsection (b)(5) of the Freedom of Information Act (FOIA). That subsection, referred to as Exemption 5, provides that the FOIA does not apply to matters that are:

"inter-agency or intra-agency memorandum or letters which would not be available by law to a party other

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William J. Dircks
February 12, 1985
Page Two

than an agency in litigation with the agency."
5 U.S.C. §552(b)(5).

We believe that this exemption was incorrectly invoked as the basis for denying the release of the materials listed as Appendix B of the Commission's denial. Furthermore, use of the exemption was not explained or substantiated.

The Commission has not met its burden of specifying which material is exempt and which is not. Section 552(b) of Title 5 requires the Commission to provide "any reasonably segregable portion of a record ... after deletion of the portions which are exempt under this subsection." The segregability provision applies to documents that are withheld in reliance on Exemption 5. If any portions of the withheld documents contain non-exempt material, we are entitled to its release. We respectfully request that the withheld documents be reviewed and all segregable portions be promptly released. If your office decides to continue to withhold some or all of the material in the withheld documents, we respectfully request that you provide us with the justification for the denial of each segregable portion of the items being withheld. We would also request that you provide us with a more detailed description of the documents being withheld.

Alternatively, the Commission should exercise its discretion and release the materials listed as Appendix B to its notice of denial. Accordingly, we believe that even if the materials are exempt from disclosure by law, they should be released as a matter of agency discretion.

In consideration of the foregoing, we respectfully request that you reconsider the initial decision to withhold the above-referenced materials; exercise the Commission's discretionary authority, and make the withheld information available to us.

Respectfully submitted,

Harry Huge
Harry Huge

Enclosures

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JAMES F. NEAL
C. COVILL

[illegible]

TELESCOPIER
(202, 466-6422)

84-487

ROGOVIN, HUGE & LENZNER
A PROFESSIONAL CORPORATION

Joseph Felton
June 12, 1984
Page 2

Please call the undersigned as soon as the documents are available and please notify us if you anticipate that the expense of complying with this request exceeds \$200.00.

Thank you for your cooperation.

Sincerely,

ROGOVIN, HUGE & LENZNER

By: Harry Huge
Harry Huge

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

850110

Harry Ruge, Esquire
Baltimore, Maryland
Attorney at Law
1000 North Avenue
Baltimore, Maryland 21201

TO: FOIA-84-487

Dear Mr. Ruge:

This is in further response to your letter dated June 12, 1984, in which you request, pursuant to the Freedom of Information Act (FOIA), documents regarding Brown & Root, Inc.

The documents listed on the enclosed Appendix A are subject to your request. Some of the documents are already available in the NRC Public Document Room (PDR) located at 1717 L Street, NW, Washington, DC 20555, and may be accessed by referring to the PDR accession numbers identified at the documents. Copies of the remaining documents (numbers 1, 5, 7, and 8) will be placed in the PDR and will be filed in PDR folder FOIA-84-487 under your name.

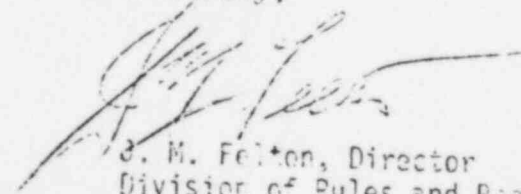
The documents listed on enclosed Appendix B contain comments, advice, opinions, and recommendations of the staff during a deliberative process and are being withheld from public disclosure pursuant to Exemption 5 of the FOIA (5 U.S.C. 552 (b)(5)) and 10 CFR 9.8(a)(5) of the Commission's regulations. Disclosure of the information would inhibit candid and frank communications in future deliberations and would not be in the public interest. Segregable factual information has already been placed in the public domain.

Pursuant to 10 CFR 9.9 of the Commission's regulations, it has been determined that the information withheld is exempt from production or disclosure and that its production or disclosure is contrary to the public interest. The persons responsible for this denial are the undersigned and Mr. Richard C. DeYoung, Director, Office of Inspection and Enforcement.

This denial may be appealed to the NRC within 30 days from the receipt of this letter. As provided in 10 CFR 9.11, any such appeal must be in writing, addressed to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should clearly state on the envelope and in the letter that it is an "Appeal from an Initial FOIA Decision."

The NRC has not completed its review of the remaining documents subject to your request. We will respond as soon as that review is completed.

Sincerely,



J. M. Felton, Director
Division of Rules and Records
Office of Administration

Enclosures: As stated

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APPENDIX A

1. 1/23/84 Licensee's Answer Protesting Civil Penalty. (12 pages)
2. 5/18/84 Transmittal letter from Richard L. Bangart, RIV, to Texas Utilities Electric Co. (2 pages) (PDR: 8405290176/ADOCK/50-445-A); w/attachment:
Allegations Concerning Comanche Peak Protective Coatings (12 pages) (PDR: 8405290176/ADOCK/50-445-A)
3. 5/23/84 Transmittal letter from Richard L. Bangart to Texas Utilities Electric Co. (2 pages) (PDR: 8405300331/ADOCK/50-445-Q) (refers to next item)
4. 4/25/84 Letter from John Taylor, BNL, to Eric Johnson, RIV, (1 page) (PDR: 8405300335/ADOCK/50-445-Q) w/attachment:
USNRC IE Region IV Interim Report on Protective Coatings, Prepared by Brookhaven National Laboratory (9 pages) (PDR: 8405300337/ADOCK/50-445-Q)
5. 5/31/84 Letter from J. B. George, TUGCo, to Richard L. Bangart (1 page)
6. 6/12/84 Letter from J. B. George to Richard L. Bangart (1 page) (PDR: 8412110298/ADOCK/50-445-A)
7. 7/16/84 Letter from J. T. Merritt, TUGCo, to Richard L. Bangart w/attached responses (18 pages)
8. 7/20/84 Letter from L. F. Fikar, TUGCo, to Richard L. Bangart w/attachment, responses to findings of BNL report (47 pages)
9. 8/7/84 Memorandum from Darrell G. Eisenhut, NRR, to P. Block, W. Jordan, and K. McCollom (2 pages) Board Notification - Allegations Concerning The Protective Coatings at Comanche Peak (Board Notification No. 84-136) (PDR: 840160313/ADOCK/50-445-Q)
10. 6/22/84 Letter from L. F. Fikar to Richard L. Bangart, Comanche Peak Protective Coating Allegations (320 pages) (PDR: 8408220412/ADOCK/50-445-Q)
11. 6/13/84 Letter from John H. Taylor, BNL, to Richard L. Bangart, w/attachment, Draft report, USNRC, IE Region IV Status Report on Protective Coating Allegations Prepared by Brookhaven National Laboratory (61 pages) (PDR: 8408220415/ADOCK/50-445-Q)

APPENDIX B

1. 02/01/84 Draft Note from J. Axelrad to Subject: MEETING WITH COMANCHE PEAK. (2 pages)
2. 02/01/84 Draft Note from R. Rosano to J. Axelrad Subject: ATCHISON/COMANCHE PEAK CASE. (1 page)