



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

JUL 2 1992

Mr. J. K. Houck, Editor
Atoms & Waste
310 Domer Street, #1
Takoma Park, MD 20912

IN RESPONSE REFER
TO FOIA-91-561

Dear Mr. Houck:

I am responding to your letter dated June 3, 1992 and to the May 5, 1992, letter from Ms. Jane M. Greenwalt, Department of Energy, Oak Ridge National Laboratory (DOE/ORNL). Both of these letters pertain to that portion of your Freedom of Information Act (FOIA) request for copies of the licensees' responses to the pretest questionnaire on the National Profile on Mixed Waste.

Enclosed are copies of an August 7, 1991, letter to the NRC licensees, et al., concerning the questionnaire; and a December 6, 1991, letter to DOE with attachments concerning the standard order for DOE work. It states on page 2 of the August 7, 1991, letter that--

Survey responses will be submitted to and retained by ORNL. Survey results will be provided to NRC and EPA, stripped of any facility identification.

It states on page 3 of the December 6, 1991, letter that--

Participants will be offered the greatest degree of confidentiality possible.... Unless a future development, involving the protection of the public health and safety and the environment, warrants the release of the names of the survey respondents, the performing organization [ORNL] will not provide NRC or EPA any information on the identity of any licensees contacted in relation to this project. Except as outlined above, data and results from the survey will only be provided to NRC, EPA or other groups or individuals, as approved in writing by the NMSS PM, in an aggregated format, stripped of any specific licensee identifiers.

The FOIA applies only to records maintained by agencies within the executive branch of the Federal Government. The Supreme Court has articulated a basic, two-part test for determining what constitutes an "agency record" under FOIA: "Agency records" are documents which must be (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA

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request. See Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989). Also, NRC regulations, 10 CFR 9.13, define agency record as

...a record in the possession and control of the NRC that is associated with Government business. Agency record does not include records such as--...(2) Records solely in the possession and control of NRC contractors;.... [emphasis added]

As indicated in the above letters, NRC did not intend to take possession of the licensees' responses, and as a matter of fact, does not possess the responses. The records you seek are solely in the possession of ORNL. Therefore, the licensees' responses do not constitute agency records in accordance with the definition in 10 CFR 9.13 and the FOIA does not apply to them.

If you have any questions, please telephone me at 301-492-7211.

Sincerely,



Donnie H. Grimsley, Director
Division of Freedom of Information
and Publications Services
Office of Administration

Enclosures:

- 1) 8/7/91 letter
- 2) 12/6/91 letter