



OFFICE OF THE
SECRETARY

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

December 11, 1981

MEMORANDUM FOR: Carol Ann Reed
Freedom of Information and Privacy Branch
Division of Rules and Records
FROM: *Natalie O. Brown*
Natalie O. Brown
Correspondence & Records Branch
SUBJECT: FOIA REQUEST FROM DEVINE & LOWENSTEIN ON ZIMMER

The Chairman's office has identified three documents that are subject to these requests and should be released:

September 4, 1981 memo fm Palladino to Dircks
October 2, 1981 memo fm Palladino to Cummings
November 16, 1981 memo fm Palladino to Dircks

Commissioner Bradford's office has identified the following documents, all of which should be withheld pursuant to Exemption 5:

October 29th draft letter to Udall with handwritten comments at the top.
October 30, 1981 memo to Chairman Palladino fm Comm. Bradford re Proposed Draft Letter to Cong. Udall Regarding Zimmer
October 21, 1981 memo to Comm. Bradford from Tom Gibbon re Udall Letter on Zimmer with handwritten comments
September 29, 1981 memo to Comm. Bradford from Tom Gibbon re OIA Report on Zimmer

I have attached the documents for release. This will complete SECY action on these requests.

Attachments:
As Stated

cc: Rick Parrish, OGC, w/attachments

8505290456 841227
PDR FOIA
BAUSER84-415 PDR



OFFICE OF THE
SECRETARY

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555
February 3, 1982

IN RESPONSE REFER
TO FOIA-81-488

Mr. Thomas Devine
Government Accountability Project
1901 Que Street, NW
Washington, DC 20009

Dear Mr. Devine:

This is in further response to your letter dated November 23, 1981, in which you requested, pursuant to the Freedom of Information Act (FOIA), copies of documents prepared in connection with the Office of Inspector and Auditor's report on IE's investigation of the Zimmer Nuclear Power Station.

On October 27 and 28, 1981, the Commission held closed meetings to discuss potential enforcement actions stemming from the Zimmer investigations. We have reviewed those transcripts under the Government in Sunshine Act (GISA) to determine whether they should be released in whole or in part at this time. The meetings were closed pursuant to exemptions (5), (7), and (10) of the Government in Sunshine Act, 5 U.S.C. 552b, and 10 CFR 9.104 of the Commission's regulations, since the discussion focused on the review of investigatory reports and the consideration of potential enforcement actions, including the imposition of civil penalties, all within the context of an ongoing agency adjudication. Commission deliberations of this nature are exempt from mandatory public disclosure in the interest of avoiding interference with current and future Licensing Board proceedings and of protecting the uninhibited exchange of ideas and opinions which relate to such proceedings. For these reasons, the Commission has determined that the public interest does not require release of these transcripts and that they should be withheld in their entirety pursuant to exemption (3) of the Freedom of Information Act and exemptions (5), (7), and (10) of the Government in the Sunshine Act.

Because the Commission itself addressed this portion of your request, an FOIA appeal would be redundant. Therefore, please consider this the final agency action. Pursuant to the FOIA, judicial review of this decision is available in a Federal District Court in the district in which your client resides, has his principal place of business, or in the District of Columbia.

Sincerely,

John C. Hoyle
John C. Hoyle
Acting Secretary of
the Commission

82-414-4424

1/24/82 JMF does not want to sign
the letter. Clean draft sent
to Rick for processing.

RE: 12-31-81 ltr

B-1 and B-2 are in 81-A-15

B-3 thru B-6 we do not have (Commission
did not provide to us)

December 31, 1981

Mr. Thomas Devine
Government Accountability Project
1901 Que Street, N.W.
Washington, DC 20009

IN RESPONSE REFER
TO FOIA-81-488

Dear Mr. Devine:

This is in partial response to your letter dated November 23, 1981, in which you requested, pursuant to the Freedom of Information Act, copies of documents prepared in connection with the Office of Inspector and Auditor's report on IE's investigation of the Zimmer Nuclear Power Station.

The sixteen documents listed on Appendix A to this letter are enclosed in their entirety.

Portions of document 1 of Appendix B contain the names of persons the release of which would constitute an unwarranted invasion of personal privacy and disclose the identities of confidential sources. These names are being withheld pursuant to exemption (7)(C) and (D) of the Freedom of Information Act (5 U.S.C. 552(b)(7)(C) and (D)) and 10 CFR 9.5(a)(7)(iii) and (iv) of the Commission's regulations. A portion of document 2 of Appendix B contains the name of a person the release of which would constitute an unwarranted invasion of personal privacy. This withholding is being made pursuant to exemption (7)(C) of the Freedom of Information Act (5 U.S.C. 552(b)(7)(C)) and 10 CFR 9.5(a)(7)(iii). The non-exempt portions of these documents are enclosed.

Documents 3 through 6 of Appendix B are communications between Commissioners and their staffs and constitute advice, opinions and recommendations. These documents contain no reasonably segregable factual material and are, therefore, being withheld in their entirety. Release of this information would tend to inhibit future communications between and among Commissioners and their staffs, communication which is essential to the deliberative process. This information is being withheld pursuant to exemption (5) of the Freedom of Information Act (5 U.S.C. 552(b)(5)) and 10 CFR 9.5(a)(5).

Pursuant to 10 CFR 9.9 and 9.15 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 the denial of documents 1 and 2 of Appendix B are the undersigned and Mr. Richard C. DeYoung, Director, Office of Inspection and Enforcement. The person responsible for the denial of documents 3 through 6 of Appendix B is Samuel J. Chilk, Secretary of the Commission.

82-0414-0016 → SPP

The denial by Mr. DeYoung and myself may be appealed to the Executive Director for Operations within 30 days from the receipt of this letter. 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 denials by Mr. Chilk may be appealed within 30 days to the Commission and should be addressed to the Secretary of the Commission.

Sincerely,

(Signed) J. M. Felton

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

Enclosures: As stated

DISTRIBUTION

DRR Rdg
DRR Subj
DJDonoghue
JMaynard
ECShomaker
JCCarr
CAReed
NOBrown
ASchnebelen
RParrish
WMullinix
PDR

Handwritten: 1d2 B

OFFICE	ADM: DRR	ADM: DRR	ADM: DRR	OELD	I&E	SECY	QGC
URNAME	CAReed/smf	JCCarr	JMFelton	ECShomaker	WMullinix	NOBrown	RParrish
	12/1/81	12/ /81	12/2/81	12/3/81	12/7/81	12/7/81	12/2/81

APPENDIX A

1. Memorandum to G. A. Phillip from V. Stello, Jr., dated 1/16/81 re: Merit System Protection Board - Charges by IPS
2. Memorandum to V. Stello, Jr., from J. G. Keppler dated 1/12/81 re: Zimmer - Government Accountability Project Request for Investigation by Merit Systems Protection Board Concerning NRC's Handling of Applegate Allegations.
3. Memorandum to V. Stello, Jr., from J. G. Keppler dated 3/17/81 re: Investigation of Applegate Allegations Related to Zimmer.
4. Handwritten notes by K. Ward dated 9/81
5. Memorandum to J. G. Keppler from J. E. Foster dated 9/21/81 re: Supplementary Comments on OIA Report
6. Memorandum to file from J. R. Sinclair dated 2/5/81 re: Investigations of IE Efforts Pertaining to Investigations of Alleged Construction Deficiencies at the Zimmer Nuclear Facility (Applegate)
7. Memorandum to J. G. Keppler from R. A. Fortuna dated 1/29/81 re: Confidentiality and Restriction of Information Forwarded by the Office of Inspector and Auditor
8. Memorandum to Chairman Ahearne from J. J. Cummings re: Thomas W. Applegate Allegations
9. Memorandum to W. J. Dircks from N. J. Palladino dated 9/4/81 re: OIA Report
10. Memorandum to J. J. Cummings from N. J. Palladino dated 10/2/81 re: OIA Report
11. Memorandum to W. J. Dircks from N. J. Palladino dated 11/16/81 re: OIA Report
12. Memorandum to Commission from J. J. Cummings dated 8/6/81 re: OIA Special Inquiry
13. Letter to A. M. Tracey from J. J. Cummings dated 8/17/81 re: OIA Report
14. Memorandum to V. J. Stello from J. J. Cummings dated 2/10/81 re: Transfer of Documentation Provided By Government Accountability Project (2/9/81)

APPENDIX A

15. Memorandum to J. G. Keppler from G. A. Phillip undated re:
Comments on OIA Report
16. Memorandum to J. G. Keppler from J. E. Foster dated 9/3/81 re:
OIA Report

APPENDIX B

1. Memorandum to files from G. A. Phillip dated 12/15/80 re: Zimmer Plant - Allegations.
2. OIA Report Chronology by Foster.
3. October 29th draft letter to Udall with handwritten comments from Commissioner Bradford's Office at the top.
4. October 30, 1981 memo to Chairman Palladino from Comm. Bradford re: Proposed Draft Letter to Cong. Udall Regarding Zimmer.
5. October 21, 1981 memo to Comm. Bradford from Tom Gibbon re: Udall Letter on Zimmer with handwritten comments.
6. September 29, 1981 memo to Comm. Bradford from Tom Gibbon re: OIA Report on Zimmer.



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

December 31, 1981

Mr. Thomas Devine
Government Accountability Project
1901 Que Street, N.W.
Washington, DC 20009

IN RESPONSE REFER
TO FOIA-81-488

Dear Mr. Devine:

This is in partial response to your letter dated November 23, 1981, in which you requested, pursuant to the Freedom of Information Act, copies of documents prepared in connection with the Office of Inspector and Auditor's report on IE's investigation of the Zimmer Nuclear Power Station.

The sixteen documents listed on Appendix A to this letter are enclosed in their entirety.

Portions of document 1 of Appendix B contain the names of persons the release of which would constitute an unwarranted invasion of personal privacy and disclose the identities of confidential sources. These names are being withheld pursuant to exemption (7)(C) and (D) of the Freedom of Information Act (5 U.S.C. 552(b)(7)(C) and (D)) and 10 CFR 9.5(a)(7)(iii) and (iv) of the Commission's regulations. A portion of document 2 of Appendix B contains the name of a person the release of which would constitute an unwarranted invasion of personal privacy. This withholding is being made pursuant to exemption (7)(C) of the Freedom of Information Act (5 U.S.C. 552(b)(7)(C)) and 10 CFR 9.5(a)(7)(iii). The non-exempt portions of these documents are enclosed.

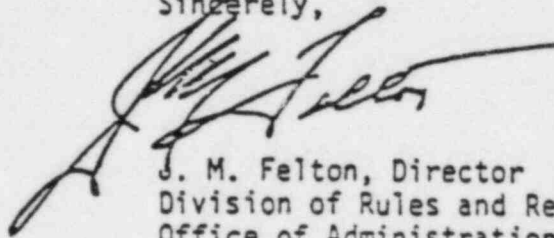
Documents 3 through 6 of Appendix B are communications between Commissioners and their staffs and constitute advice, opinions and recommendations. These documents contain no reasonably segregable factual material and are, therefore, being withheld in their entirety. Release of this information would tend to inhibit future communications between and among Commissioners and their staffs, communication which is essential to the deliberative process. This information is being withheld pursuant to exemption (5) of the Freedom of Information Act (5 U.S.C. 552(b)(5)) and 10 CFR 9.5(a)(5).

Pursuant to 10 CFR 9.9 and 9.15 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 the denial of documents 1 and 2 of Appendix B are the undersigned and Mr. Richard C. DeYoung, Director, Office of Inspection and Enforcement. The person responsible for the denial of documents 3 through 6 of Appendix B is Samuel J. Chilk, Secretary of the Commission.

5pp.
~~8207140016~~

The denial by Mr. DeYoung and myself may be appealed to the Executive Director for Operations within 30 days from the receipt of this letter. 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 denials by Mr. Chilk may be appealed within 30 days to the Commission and should be addressed to the Secretary of the Commission.

Sincerely,

A handwritten signature in dark ink, appearing to read "J. M. Felton", written over the typed name and title.

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

Enclosures: As stated

Wray W.
Rec
X2813

11/2/81

Wilde:

As we agreed, please do not allow copies of these two memos to be made unless the NRC decides to release them under FOIA. Under no circumstances should they be released unless all other NRC correspondence from other offices related to this matter is released with these memos.

J. F. Streeten

11/1/81

Letter - copied and placed in release

GOVERNMENT ACCOUNTABILITY PROJECT

Institute for Policy Studies

1901 Que Street, N.W., Washington, D.C. 20009

Wilton
DOCUMENTED
DATE:

(202) 234-9382

'82 FEB -2 P4:01

January 29, 1982

Mr. Samuel J. Chilk
Executive Secretary
Office of Admin.
Nuclear Regulatory Commission
Washington, D.C. 20555

APPEAL OF INITIAL FOIA DECISION

82-A-1C (81-488)

Rec'd 2-3-82

Dear Mr. Chilk:

This is an appeal pursuant to subsection (a)(6) of the Freedom of Information Act, as amended (5 U.S.C. 552). On November 23, 1981, on behalf of Mr. Thomas Applegate, we requested copies of all notes, memoranda, telephone logs, tapes, diaries and/or other records prepared by U.S. government employees in connection with an August 7, 1981 Nuclear Regulatory Commission ("NRC") Office of Inspector and Auditor ("OIA") report entitled "Special Inquiry re: Adequacy of IE Investigation 50-358/80-9 at the William H. Zimmer Nuclear Power Station." ("Zimmer OIA Report"), as well as the investigation the Zimmer OIA Report is based on. In addition, we asked for all earlier full or partial drafts and/or proposed supplements to the Zimmer OIA Report, as well as all records related to any deletions from its final version. (A copy is enclosed). In connection with a letter dated December 31, 1981 and postmarked January 4, 1982, Mr. J.M. Felton of your agency partially granted our request. (His response is enclosed).

Mr. Felton's letter failed to cite any exemptions for the effective denial of the bulk of our request, concerning informal records; earlier drafts and an explanation of any deletions. Instead, he simply ignored those portions of the request and failed to provide the documents without any explanation or citation. As a result, he violated the requirement of Vaughn v. Rosen (I), 484 F. 2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1977) to index and justify any records withheld. We are convinced that the final version of the OIA report was not the only draft, since press accounts quoted an "official close to the investigation" to the effect that "[t]he critical report 'was watered down.'" (The Cincinnati Enquirer, November 18, 1981, p.1).

There is little question that these records are available under the Act. In Arthur Anderson, Inc. v. IRS, 514 F. Supp. 1173 (D.D.C. 1981), the court held that numerous drafts of revenue rulings, as well as accompanying background information and notes were not exempt under exemption #5. The court reasoned that those materials were generated before the adoption of agency policy and they were not part of the deliberative give and take of the consultative process. This is clearly analogous to our case. The investigative records and drafts we are asking for are factual in nature and are not part of the deliberative process.

~~82-4210783~~ 3pp.

2/3...to OGC to Prepare Response for Signature of SECY...Date due: Mar 2

Cpys to: EDO, RF...82-81

Executive Secretary
Office of Admin.
Nuclear Regulatory Commission
Page 2

If there were any doubt, in Playboy Enterprises v. U.S. Dept. of Justice 516 F. Supp. 233 (D.D.C. 1981), the court held that an internal F.B.I. report concerning F.B.I. agents who infiltrated the Klu Klux Klan in the 1960's was not exempt, even though it was used by the Attorney General to form policy. The evaluative report was considered informational in nature and was not a part of the deliberative process. It only provided data to be evaluated by the Attorney General. The factual portions, including the first drafts, did not reveal the deliberative process of the Attorney General's office. Our case fits precisely into this category. What we are seeking concerns the entire factual record for the NRC investigation of Zimmer which Mr. Applegate challenged.

Mr. Felton has denied, under exemption #5, four documents identified as items 3-6 in Appendix B of his December 31, 1981 letter. Mr. Felton characterized the records as "communications between Commissioners and their staffs" that "constitute advice, opinions, and recommendations." Obviously his description was not all-inclusive, however. Mr. Felton continued, "These documents contain no reasonably segregable factual materials and are, therefore, being denied in their entirety." There was no explanation for Mr. Felton's assertion that the non-exempt portions of the records are inseparable from the rest.

The courts have required a restrictive interpretation of exemption #5. As the Supreme Court stated in E.P.A. v. Mink, 410 U.S. 73 (1973), "This exception (#5) to the general disclosure mandate of FOIA should be construed as narrowly as consistent with efficient government action." Further, the burden-of-proof is on the agency to justify the exemption. See e.g., Vaughn v. Rosen, 523 F. 2d 1144 (D.C. Cir. 1975)...Mr. Felton's asserted conclusion does not even attempt to satisfy this burden.

The default is not surprising, since the exemption is inapplicable. As the court held in Taxation v. IRS, 646 F. 2d 666, 677 (D.C. Cir. 1981), "Exemption #5 does not apply to agency actions which explain actions that an agency has already taken." See also Ryan v. Department of Justice, 617 F.2d 781 (D.C. Cir. 1980) and Brinton v. Department of State, 636 F. 2d. 600 (D.C. Cir. 1980). The Zimmer OIA report was an attempt to evaluate and explain a previous NRC investigation and enforcement action, as presented in Report No. 50-358/80-09. As a result, exemption #5 does not apply to Commission-staff communications concerning the report.

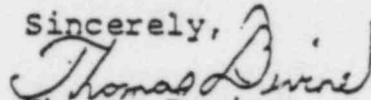
Even if the withheld records concerned deliberations about prospective agency policy, exemption #5 would not apply to facts, agency decisions, or existing agency policy, EPA v. Mink, 410 U.S. 73, 86 (1973). That information can only be denied if it is "inextricably intertwined" with exempt portions, Ryan v. Department of Justice, 617 F. 2d 781, 790-91 (D.C. Cir. 1980). Mr. Felton offered no analysis why exempt portions of the Commissioners' memoranda could not simply be whited-out. We are quite willing to appeal this denial to the courts for an in-camera review to determine segregability, Playboy v. U.S. Department of Justice, supra.

Executive Secretary
Office of Admin.
Nuclear Regulatory Commission
Page 3

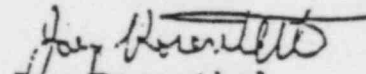
In conclusion, we are seriously concerned that the Commission may not have dealt in good faith with this FOIA request. Your response to this administrative appeal will determine whether we initiate a complaint under 5 U.S.C. Sec. 1206 (e)(1)(C) for an investigation of "arbitrary and capricious withholding of information", as well as possible disciplinary action.

As provided in the Act, we will expect to receive a reply to this administrative appeal letter within twenty working days.

Sincerely,



Thomas Devine
Associate Director



Jay Rosenthal
Staff Associate

November 23, 1981

Director
Office of Administration
Nuclear Regulatory Commission
Washington, D.C. 20555

To Whom it May Concern:

On behalf of our client, Mr. Thomas Applegate, and pursuant to both the Freedom of Information Act (5 U.S.C. §552) and the Privacy Act (5 U.S.C. §552a), we request copies of all notes, memoranda, telephone logs, tapes, diaries and/or other records prepared by U.S. government employees in connection with an August 7, 1981 Nuclear Regulatory Commission ("NRC") Office of Inspector and Auditor ("OIA") report entitled "Special Inquiry re: Adequacy of IE Investigation 50-358/80-9 at the William H. Zimmer Nuclear Power Station" ("Zimmer OIA Report"), as well as the investigation the Zimmer OIA Report is based upon. In particular, Mr. Applegate requests all earlier full or partial drafts and/or proposed supplements to the Zimmer OIA Report, as well as all records related to any deletions from its final version. If any material covered by this request has been destroyed and/or removed, please provide all surrounding documentation including but not limited to a description of the action(s) taken, relevant date(s), and justification for the action(s).

Mr. Applegate requests that fees be waived, because "finding the information can be considered as primarily benefitting the general public." 5 U.S.C. § 552(a)(4)(A). The fee waiver should be granted for three reasons. First, he submits this request to further the goals of his December 10, 1980 whistleblowing disclosure to the Office of the Special Counsel of the Marit Systems Protection Board. The Special Counsel required an NRC investigation only after finding a reasonable belief that Mr. Applegate's disclosure evidenced illegality, mismanagement, gross waste and a substantial and specific danger to public health or safety. Unquestionably, the Special Counsel finding and the ensuing OIA Report — which fundamentally challenges the generic nature of NRC investigations — proves that Mr. Applegate's concerns serve "the public interest." He seeks these documents in order to monitor the adequacy of the NRC response.

Second, the findings of the Zimmer OIA Report totally ignored two vital issues in Mr. Applegate's whistleblowing disclosure —

- 1) the failure to adequately review his criminal allegations of widespread blackmarkets, smuggling, and theft; and
- 2) the failure to contact witnesses in April 1980 who would have exposed a series of issues six months before GAP raised them with the Commission and the Special Counsel.

8204140010 2pp

Director
Office of Administrative
Nuclear Regulatory Commission
November 23, 1981
Page Two

The Special Counsel had ordered the Commission to respond to both allegations. The documents Mr. Applegate requests may help to explain why the Commission chose to defy a legal requirement of the Civil Service Reform Act. We submit that it inherently serves the public interest to further understand the process that leads to government illegality.

Third, press accounts have contained charges that the report was "watered down." Although deleted portions would not represent the Commission's findings, it is in the public interest to fully air the facts and competing policies in the debate that produced this controversial document. The issue is of the utmost importance to the American people — the adequacy of NRC efforts to protect public health and safety.

For any documents or portions of documents that you deny due to a specific exemption, please provide an index itemizing and describing documents or portions of documents withheld. The index should provide a detailed justification of your grounds for claiming each exemption, explaining why each exemption is relevant to the document or portion withheld. This index is required under *Vaughn v. Rosen* (I), 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

We look forward to your response within ten working days.

Sincerely,

Thomas Devine
Associate Director



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

December 31, 1981

Mr. Thomas Devine
Government Accountability Project
1901 Que Street, N.W.
Washington, DC 20009

IN RESPONSE REFER
TO FOIA-81-488

Dear Mr. Devine:

This is in partial response to your letter dated November 23, 1981, in which you requested, pursuant to the Freedom of Information Act, copies of documents prepared in connection with the Office of Inspector and Auditor's report on IE's investigation of the Zimmer Nuclear Power Station.

The sixteen documents listed on Appendix A to this letter are enclosed in their entirety.

Portions of document 1 of Appendix B contain the names of persons the release of which would constitute an unwarranted invasion of personal privacy and disclose the identities of confidential sources. These names are being withheld pursuant to exemption (7)(C) and (D) of the Freedom of Information Act (5 U.S.C. 552(b)(7)(C) and (D)) and 10 CFR 9.5(a)(7)(iii) and (iv) of the Commission's regulations. A portion of document 2 of Appendix B contains the name of a person the release of which would constitute an unwarranted invasion of personal privacy. This withholding is being made pursuant to exemption (7)(C) of the Freedom of Information Act (5 U.S.C. 552(b)(7)(C)) and 10 CFR 9.5(a)(7)(iii). The non-exempt portions of these documents are enclosed.

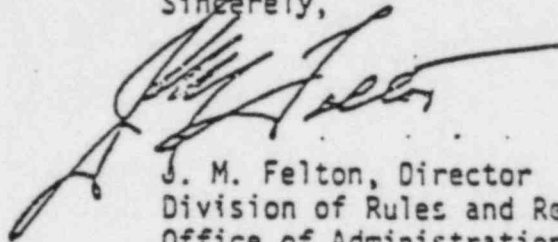
Documents 3 through 6 of Appendix B are communications between Commissioners and their staffs and constitute advice, opinions and recommendations. These documents contain no reasonably segregable factual material and are, therefore, being withheld in their entirety. Release of this information would tend to inhibit future communications between and among Commissioners and their staffs, communication which is essential to the deliberative process. This information is being withheld pursuant to exemption (5) of the Freedom of Information Act (5 U.S.C. 552(b)(5)) and 10 CFR 9.5(a)(5).

Pursuant to 10 CFR 9.9 and 9.15 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 the denial of documents 1 and 2 of Appendix B are the undersigned and Mr. Richard C. DeYoung, Director, Office of Inspection and Enforcement. The person responsible for the denial of documents 3 through 6 of Appendix B is Samuel J. Chilk, Secretary of the Commission.

8204140016 588

The denial by Mr. DeYoung and myself may be appealed to the Executive Director for Operations within 30 days from the receipt of this letter. 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 denials by Mr. Chilk may be appealed within 30 days to the Commission and should be addressed to the Secretary of the Commission.

Sincerely,



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

Enclosures: As stated

APPENDIX A

1. Memorandum to G. A. Phillip from V. Stello, Jr., dated 1/16/81 re: Merit System Protection Board - Charges by IPS
2. Memorandum to V. Stello, Jr., from J. G. Keppler dated 1/12/81 re: Zimmer - Government Accountability Project Request for Investigation by Merit Systems Protection Board Concerning NRC's Handling of Applegate Allegations.
3. Memorandum to V. Stello, Jr., from J. G. Keppler dated 3/17/81 re: Investigation of Applegate Allegations Related to Zimmer.
4. Handwritten notes by K. Ward dated 9/81
5. Memorandum to J. G. Keppler from J. E. Foster dated 9/21/81 re: Supplementary Comments on OIA Report
6. Memorandum to file from J. R. Sinclair dated 2/5/81 re: Investigations of IE Efforts Pertaining to Investigations of Alleged Construction Deficiencies at the Zimmer Nuclear Facility (Applegate)
7. Memorandum to J. G. Keppler from R. A. Fortuna dated 1/29/81 re: Confidentiality and Restriction of Information Forwarded by the Office of Inspector and Auditor
8. Memorandum to Chairman Ahearne from J. J. Cummings re: Thomas W. Applegate Allegations
9. Memorandum to W. J. Dircks from N. J. Palladino dated 9/4/81 re: OIA Report
10. Memorandum to J. J. Cummings from N. J. Palladino dated 10/2/81 re: OIA Report
11. Memorandum to W. J. Dircks from N. J. Palladino dated 11/16/81 re: OIA Report
12. Memorandum to Commission from J. J. Cummings dated 8/6/81 re: OIA Special Inquiry
13. Letter to A. M. Tracey from J. J. Cummings dated 8/17/81 re: OIA Report
14. Memorandum to V. J. Stello from J. J. Cummings dated 2/10/81 re: Transfer of Documentation Provided By Government Accountability Project (2/9/81)

APPENDIX A

15. Memorandum to J. G. Keppler from G. A. Phillip undated re:
Comments on OIA Report
16. Memorandum to J. G. Keppler from J. E. Foster dated 9/3/81 re:
OIA Report

APPENDIX B

1. Memorandum to files from G. A. Phillip dated 12/15/80 re: Zimmer Plant - Allegations.
2. OIA Report Chronology by Foster.
3. October 29th draft letter to Udall with handwritten comments from Commissioner Bradford's Office at the top.
4. October 30, 1981 memo to Chairman Palladino from Comm. Bradford re: Proposed Draft Letter to Cong. Udall Regarding Zimmer.
5. October 21, 1981 memo to Comm. Bradford from Tom Gibbon re: Udall Letter on Zimmer with handwritten comments.
6. September 29, 1981 memo to Comm. Bradford from Tom Gibbon re: OIA Report on Zimmer.



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

2014/

OFFICE OF THE
SECRETARY

March 22, 1982

Mr. Thomas Devine
Government Accountability Project
1901 Que Street, N.W.
Washington, D.C. 20009

IN RESPONSE REFER TO
FOIA-82-A-1C
(FOIA-81-488)

Dear Mr. Devine:

This is in response to your January 29, 1982 Freedom of Information Act (FOIA) appeal of the denial of access to four documents relating to the Commission's deliberations on the Office of Inspector and Auditor (OIA) Zimmer Report. The Commission has reviewed the initial determination to withhold these documents in their entirety and hereby affirms that decision.

The four documents identified in the Appendix to this letter were created as a part of the comprehensive Commission deliberations on the quality assurance/quality control problems at the William H. Zimmer Nuclear Power Station. The OIA Report was not prepared, as you imply, to defend or justify the Office of Inspection and Enforcement (I&E) investigation. Rather, it constitutes a vital element in the Commission deliberations alluded to above. The memoranda and comments described in the Appendix reflect the authors' advice, opinions and recommendations regarding the Commission resolution of the Zimmer matter. Withholding these documents is necessary to protect the uninhibited dialogue essential to the deliberative process. The draft letter (item No. 3) contains no factual information not also present in the letter dispatched to Congressman Udall, a copy of which you have been provided. The remaining documents contain no segregable factual portions. Accordingly, all of these documents are being withheld in their entirety pursuant to Exemption (5) of the FOIA, 5 U.S.C. 552(b)(5), and our regulations, 10 CFR 9.5(a)(5).

You also protest the "effective denial" of the bulk of your request, concerning informal records, drafts, and an explanation of any deletions. Our silence in this regard was intended to convey the message that no documents of this nature were retained in NRC files.

8244214785 3pp

This letter represents the final agency action on your FOIA appeal. Judicial review is available in a federal district court in the district in which you reside or have your principal place of business, or in the District of Columbia.

Sincerely,

A handwritten signature in dark ink, appearing to read "Samuel J. Chilk", written over the typed name.

Samuel J. Chilk
Secretary of the Commission

Enclosure:

Appendix - List of Documents Withheld

APPENDIX

1. October 29th draft letter to Congressman Udall with handwritten comments from Commissioner Bradford's office at the top. 2 pages.
2. October 30, 1981 memo to Chairman Palladino from Commissioner Bradford re: Proposed Draft Letter to Congressman Udall regarding Zimmer. 1 page.
3. October 21, 1981 memo to Commissioner Bradford from Legal Assistant Thomas R. Gibbon re: Udall letter on Zimmer, with handwritten comments. 1 page.
4. September 29, 1981 memo to Commissioner Bradford from Thomas R. Gibbon re: Public Release of OIA Report on Zimmer. 2 pages.



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

ACTION - RES/NMSS/ADM
Cys: Dircks
Cornell
Rehm
Bozik
Taboada
Nulsen
DeYoung
Denton
GCunningham
✓ Felton
Philips
Besaw
Woolley

March 23, 1982

MEMORANDUM FOR: William J. Dircks, Executive Director for Operations
Leonard Bickwit, Jr., General Counsel
Carlton C. Kammerer, Director, Congressional Affairs
Joseph J. Fouchard, Director, Public Affairs

FROM: Samuel J. Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION SESSION 82-9, 10:00 A.M.,
THURSDAY, MARCH 18, 1982, COMMISSIONERS' CONFERENCE ROOM,
D.C. OFFICE (OPEN TO PUBLIC ATTENDANCE)

I. SECY-81-707 - Dr. George V. Taplin's Petition (PRM-35-1) Regarding
10 CFR Part 35, "Human Uses of Byproduct Material"

The Commission, by a vote of 3-2¹ (Chairman Palladino, Commissioners Ahearne and Roberts approving; Commissioners Gilinsky and Bradford disapproving), approved a notice of proposed rulemaking which grants in part a petition for rulemaking by Dr. Taplin for an exception from certain regulatory requirements for use of radioactive drugs.

The Commission requested that:

1. the notice of proposed rulemaking (Enclosure 6 of the subject paper) be modified as in the 2/24/82 NRR memorandum and be published in the Federal Register; (RES) (SECY Suspense: 4/12/82)
2. appropriate Congressional committees be notified; (OCA/RES) (SECY Suspense: 4/12/82)
3. a public announcement be issued; and (OPA/RES) (SECY Suspense: 4/12/82)
4. the Federal Register notice be distributed to affected medical licensees and to other interested persons. (RES) (SECY Suspense: 4/26/82)

ADP
II. SECY-82-74 - Proposed Rulemaking, "Codes and Standards," 10 CFR 50.55a

The Commission, by a vote of 5-0², approved a notice of proposed rulemaking to modify the Codes and Standards rule (10 CFR 50.55a) by referencing ASME codes regarding construction of certain safety system components and by removing obsolete provisions no longer applicable.

For all footnotes, see last page.

8204020085

In connection with his approval on this paper, Commissioner Roberts noted that a misstatement of fact appears on page 7, first full sentence of Enclosure 1 to the subject paper, and requested the EDO to explain how this number was derived. (RES) (SECY Suspense: 3/29/82) *Yours to Roberts 3/24/82 Action complete*

The Commission requested:

1. the notice of proposed rulemaking (Enclosure 1 of the subject paper) be modified:
 - a. as indicated in the correction notice dated March 8, 1982;
 - b. by inserting the language in Attachment 1; and
 - c. by correcting the statement on page 7 referenced above and revising the Regulatory Flexibility Statement if required;
2. the notice of proposed rulemaking be published in the Federal Register; (RES) (SECY Suspense: 4/12/82)
3. the EDO publish the amendments in final form; if no significant adverse comments or questions have been received on the notice of proposed rulemaking and no substantial changes in text are indicated; (RES) (SECY Suspense: 7/12/82)
4. the appropriate Congressional committees be notified; (OCA/RES) (SECY Suspense: 4/12/82)
5. the FRN be distributed to power reactor licensees/permit holders, applicants for a construction permit for a power reactor, public interest groups, and nuclear steam system suppliers; and (ADM/RES) (SECY Suspense: 4/26/82)
6. the Chief Counsel for Advocacy of the Small Business Administration be informed that the Commission has certified that this final rule will not have a significant economic impact upon a substantial number of small entities as required by the Regulatory Flexibility Act (5 U.S.C. 605(b)). (RES) (SECY Suspense: 4/12/82)

ADM

III. SECY-82-82: Devine FOIA Appeal (82-A-1C): Regarding OIA Zimmer Report

The Commission, by a vote of 4-0³ (Commissioner Bradford not participating), denied an appeal by Thomas Devine of the Government Accountability Project for access to four documents relating to the Commission's deliberations on the Office of Inspector and Auditor's Zimmer report.

The Commission requested that the Secretary dispatch a letter (Attachment 4 to the subject paper) to Mr. Devine informing him of the denial. (Subsequently, the Secretary signed the letter.)

IV. SECY-81-625. - Final Rule on Intransit Physical Protection of Special Nuclear Material of Moderate Strategic Significance (10 CFR Part 73)

The Commission, by a vote of 4-0³ (Commissioner Bradford not participating), approved in final form amendments to 10 CFR Part 73 providing for improved early detection of theft of special nuclear material of moderate strategic significance while in transit.

The Commission requested that:

1. the amendments be modified as in the March 8, 1982 OPE memorandum and be published in the Federal Register;
(NMSS) (SECY Suspense: 4/30/82)
2. Regulatory Guide 5.59 be amended as necessary in accordance with the changes in the regulation;
(NMSS/RES) (SECY Suspense: 8/31/82)
3. the appropriate Congressional committees be notified;
(OCA/NMSS) (SECY Suspense: 4/30/82)
4. the final rule be distributed directly to affected licensees; and
(ADM/TIDC) (SECY Suspense: 5/14/82)
5. the Chief Counsel for Advocacy of the Small Business Administration be informed that the Commission has certified that this final rule will not have a significant economic impact upon a substantial number of small entities as required by the Regulatory Flexibility Act (5 U.S.C. 605(b)). (~~NMSS~~) (SECY Suspense: 4/30/82)

ADM

Attachment:
Modifications to
SECY-82-74

cc: Chairman Palladino
Commissioner Gilinsky
Commissioner Bradford
Commissioner Ahearne
Commissioner Roberts
Commission Staff Offices
ACRS
ASLBP
ASLAP
PDR (Advance)
DCS-016 Phillips

¹Section 201 of the Energy Reorganization Act, 42 U.S.C. §5841, provides that action of the Commission shall be determined by a "majority vote of the members present." Commissioners Gilinsky and Bradford were not present when this item was affirmed, but had previously indicated that they would disapprove. Had Commissioners Gilinsky and Bradford been present, they would have affirmed their prior votes. Accordingly, the formal vote of the Commission was 3-0 in favor of the decision.

²Section 201 of the Energy Reorganization Act, 42 U.S.C. §5841, provides that action of the Commission shall be determined by a "majority vote of the members present." Commissioners Gilinsky and Bradford were not present when this item was affirmed, but had previously indicated that they would approve. Had Commissioners Gilinsky and Bradford been present, they would have affirmed their prior votes. Accordingly, the formal vote of the Commission was 3-0 in favor of the decision.

³Section 201 of the Energy Reorganization Act, 42 U.S.C. §5841, provides that action of the Commission shall be determined by a "majority vote of the members present." Commissioner Gilinsky was not present when this item was affirmed, but had previously indicated that he would approve. Had Commissioner Gilinsky been present, he would have affirmed his prior vote. Accordingly, the formal vote of the Commission was 3-0 in favor of the decision.

MODIFICATIONS TO SECY-82-74

1. Add this paragraph after the last full paragraph on page 3 of Enclosure 1:

Presently, other parts of the ASME Nuclear Code (Section III), not incorporated by reference in §50.55a cover metal containments, component supports, core support structures and concrete vessels. It is the intent of the Commission to incorporate by reference all parts of the ASME Nuclear Code after appropriate evaluations and as adequate experience with use of each part of the code, confirm their acceptability.

2. Add this sentence after the first sentence of the first full paragraph on page 4 of Enclosure 1:

These paragraphs are included only to define the boundaries of Class 2 and Class 3 systems and do not necessarily relate to rules for assuring operability or inservice testing of components.

Mary Jan ———

The attached Divine He
is for your disposal.

Tell Carol Ann that it was
affirmed at the Affirmation
Session on Thursday, March 18.

The vote was 4-0 --
(Brody did not vote)

Titel

2/5/62

I spoke to Dineen to clarify
what was being appealed.

He stated only total dementia (etc)
were appealed not the other
two documents (etc). B.H. stated

that "equally if not more" they
were appealing these actions of
the original request that were
not addressed. I told Pick
about this.

Car

GOVERNMENT ACCOUNTABILITY PROJECT

Institute for Policy Studies

1901 Que Street, N.W., Washington, D.C. 20009

Fulton

EX-100

(202) 234-9381

82 FEB -2 P4:01

January 29, 1982

Mr. Samuel J. Chilk
Executive Secretary
Office of Admin.
Nuclear Regulatory Commission
Washington, D.C. 20555

APPEAL OF INITIAL FOIA DECIS

82-A-1C (81-488)

Rec'd 2-3-82

Dear Mr. Chilk:

This is an appeal pursuant to subsection (a)(6) of the Freedom of Information Act, as amended (5 U.S.C. 552). On November 23, 1981, on behalf of Mr. Thomas Applegate, we requested copies of all notes, memoranda, telephone logs, tapes, diaries and/or other records prepared by U.S. government employees in connection with an August 7, 1981 Nuclear Regulatory Commission ("NRC") Office of Inspector and Auditor ("OIA") report entitled "Special Inquiry re: Adequacy of IE Investigation 50-358/80-9 at the William H. Zimmer Nuclear Power Station." ("Zimmer OIA Report"), as well as the investigation the Zimmer OIA Report is based on. In addition, we asked for all earlier full or partial drafts and/or proposed supplements to the Zimmer OIA Report, as well as all records related to any deletions from its final version. (A copy is enclosed). In connection with a letter dated December 31, 1981 and postmarked January 4, 1982, Mr. J.M. Felton of your agency partially granted our request. (His response is enclosed).

Mr. Felton's letter failed to cite any exemptions for the effective denial of the bulk of our request, concerning informal records; earlier drafts and an explanation of any deletions. Instead, he simply ignored those portions of the request and failed to provide the documents without any explanation or citation. As a result, he violated the requirement of Vaughn v. Rosen (I), 484 F. 2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1977) to index and justify any records withheld. We are convinced that the final version of the OIA report was not the only draft, since press accounts quoted an "official close to the investigation" to the effect that "[t]he critical report 'was watered down.'" (The Cincinnati Enquirer, November 18, 1981, p.1).

There is little question that these records are available under the Act. In Arthur Anderson, Inc. v. IRS, 514 F. Supp. 1173 (D.D.C. 1981), the court held that numerous drafts of revenue rulings, as well as accompanying background information and notes were not exempt under exemption #5. The court reasoned that those materials were generated before the adoption of agency policy and they were not part of the deliberative give and take of the consultative process. This is clearly analogous to our case. The investigative records and drafts we are asking for are factual in nature and are not part of the deliberative process.

~~82-4421-783~~ *3pp.*

2/3...to OGC to Prepare Response for Signature of SECY...Date due: Mar 2

Cpys to: EDO, RF...82-81

If there were any doubt, in Playboy Enterprises v. U.S. Dept. of Justice 516 F. Supp. 233 (D.D.C. 1981), the court held that an internal F.B.I. report concerning F.B.I. agents who infiltrated the Klu Klux Klan in the 1960's was not exempt, even though it was used by the Attorney General to form policy. The evaluative report was considered information in nature and was not a part of the deliberative process. It only provided data to be evaluated by the Attorney General. The factual portions, including the first drafts, did not reveal the deliberative process of the Attorney General's office. Our case fits precisely into this category. What we are seeking concerns the entire factual record for the NRC investigation of Zimmer which Mr. Applegate challenged

Mr. Felton has denied, under exemption #5, four documents identified as items 3-6 in Appendix B of his December 31, 1981 letter. Mr. Felton characterized the records as "communications between Commissioners and their staffs" that "constitute advice, opinions, and recommendations." Obviously his description was not all-inclusive, however. Mr. Felton continued, "These documents contain no reasonably segregable factual materials and are, therefore, being denied in their entirety." There was no explanation for Mr. Felton's assertion that the non-exempt portions of the records are inseparable from the rest.

The courts have required a restrictive interpretation of exemption #5. As the Supreme Court stated in E.P.A. v. Mink, 410 U.S. 73 (1973), "This exception (#5) to the general disclosure mandate of FOIA should be construed as narrowly as consistent with efficient government action." Further, the burden-of-proof is on the agency to justify the exemption. See e.g., Vaughn v. Rosen, 523 F. 2d 1144 (D.C. Cir. 1975). Mr. Felton's asserted conclusion does not even attempt to satisfy this burden.

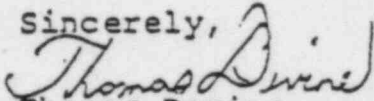
The default is not surprising, since the exemption is inapplicable. As the court held in Taxation v. IRS, 646 F. 2d 666, 677 (D.C. Cir. 1981) "Exemption #5 does not apply to agency actions which explain actions that an agency has already taken." See also Ryan v. Department of Justice, 617 F.2d 781 (D.C. Cir. 1980) and Brinton v. Department of State, 636 F. 2d 600 (D.C. Cir. 1980). The Zimmer OIA report was an attempt to evaluate and explain a previous NRC investigation and enforcement action, as presented in Report No. 50-358/80-09. As a result, exemption #5 does not apply to Commission-staff communications concerning the report.

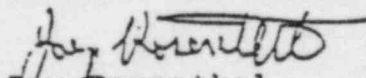
Even if the withheld records concerned deliberations about prospective agency policy, exemption #5 would not apply to facts, agency decisions, or existing agency policy, EPA v. Mink, 410 U.S. 73, 86 (1973). That information can only be denied if it is "inextricably intertwined" with exempt portions, Ryan v. Department of Justice, 617 F. 2d 781, 790-91 (D.C. Cir. 1980). Mr. Felton offered no analysis why exempt portions of the Commissioners' memoranda could not simply be whited-out. We are quite willing to appeal this denial to the courts for an in-camera review to determine segregability, Playboy v. U.S. Department of Justice, supra.

Executive Secretary
Office of Admin.
Nuclear Regulatory Commission
Page 3

In conclusion, we are seriously concerned that the Commission may not have dealt in good faith with this FOIA request. Your response to this administrative appeal will determine whether we initiate a complaint under 5 U.S.C. Sec. 1206 (e)(1)(C) for an investigation of "arbitrary and capricious withholding of information", as well as possible disciplinary action.

As provided in the Act, we will expect to receive a reply to this administrative appeal letter within twenty working days.

Sincerely,

Thomas Devine
Associate Director


Jay Rosenthal
Staff Associate

November 23, 1981

Director
Office of Administration
Nuclear Regulatory Commission
Washington, D.C. 20555

To Whom it May Concern:

On behalf of our client, Mr. Thomas Applegate, and pursuant to both the Freedom of Information Act (5 U.S.C. §552) and the Privacy Act (5 U.S.C. §552a), we request copies of all notes, memoranda, telephone logs, tapes, diaries and/or other records prepared by U.S. government employees in connection with an August 7, 1981 Nuclear Regulatory Commission ("NRC") Office of Inspector and Auditor ("OIA") report entitled "Special Inquiry re: Adequacy of IE Investigation 50-358/80-9 at the William H. Zimmer Nuclear Power Station" ("Zimmer OIA Report"), as well as the investigation the Zimmer OIA Report is based upon. In particular, Mr. Applegate requests all earlier full or partial drafts and/or proposed supplements to the Zimmer OIA Report, as well as all records related to any deletions from its final version. If any material covered by this request has been destroyed and/or removed, please provide all surrounding documentation including but not limited to a description of the action(s) taken, relevant date(s), and justification for the action(s).

Mr. Applegate requests that fees be waived, because "finding the information can be considered as primarily benefitting the general public." 5 U.S.C. § 552(a)(4)(A). The fee waiver should be granted for three reasons. First, he submits this request to further the goals of his December 10, 1980 whistleblowing disclosure to the Office of the Special Counsel of the Merit Systems Protection Board. The Special Counsel required an NRC investigation only after finding a reasonable belief that Mr. Applegate's disclosure evidenced illegality, mismanagement, gross waste and a substantial and specific danger to public health or safety. Unquestionably, the Special Counsel finding and the ensuing OIA Report — which fundamentally challenges the generic nature of NRC investigations — proves that Mr. Applegate's concerns serve "the public interest." He seeks these documents in order to monitor the adequacy of the NRC response.

Second, the findings of the Zimmer OIA Report totally ignored two vital issues in Mr. Applegate's whistleblowing disclosure —

- 1) the failure to adequately review his criminal allegations of widespread blackmarkets, smuggling, and theft; and
- 2) the failure to contact witnesses in April 1980 who would have exposed a series of issues six months before GAP raised them with the Commission and the Special Counsel.

8204140010 288

Office of Administration
Nuclear Regulatory Commission
November 23, 1981
Page Two

The Special Counsel had ordered the Commission to respond to both allegations. The documents Mr. Applegate requests may help to explain why the Commission chose to defy a legal requirement of the Civil Service Reform Act. We submit that it inherently serves the public interest to further understand the process that leads to government illegality.

Third, press accounts have contained charges that the report was "watered down." Although deleted portions would not represent the Commission's findings, it is in the public interest to fully air the facts and competing policies in the debate that produced this controversial document. The issue is of the utmost importance to the American people — the adequacy of NRC efforts to protect public health and safety.

For any documents or portions of documents that you deny due to a specific exemption, please provide an index itemizing and describing documents or portions of documents withheld. The index should provide a detailed justification of your grounds for claiming each exemption, explaining why each exemption is relevant to the document or portion withheld. This index is required under *Vaughn v. Rosen* (I), 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

We look forward to your response within ten working days.

Sincerely,

Thomas Devine
Associate Director



NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

December 31, 1981

Mr. Thomas Devine
Government Accountability Project
1901 Que Street, N.W.
Washington, DC 20009

IN RESPONSE REFER
TO FOIA-81-488

Dear Mr. Devine:

This is in partial response to your letter dated November 23, 1981, in which you requested, pursuant to the Freedom of Information Act, copies of documents prepared in connection with the Office of Inspector and Auditor's report on IE's investigation of the Zimmer Nuclear Power Station.

The sixteen documents listed on Appendix A to this letter are enclosed in their entirety.

Portions of document 1 of Appendix B contain the names of persons the release of which would constitute an unwarranted invasion of personal privacy and disclose the identities of confidential sources. These names are being withheld pursuant to exemption (7)(C) and (D) of the Freedom of Information Act (5 U.S.C. 552(b)(7)(C) and (D)) and 10 CFR 9.5(a)(7)(iii) and (iv) of the Commission's regulations. A portion of document 2 of Appendix B contains the name of a person the release of which would constitute an unwarranted invasion of personal privacy. This withholding is being made pursuant to exemption (7)(C) of the Freedom of Information Act (5 U.S.C. 552(b)(7)(C)) and 10 CFR 9.5(a)(7)(iii). The non-exempt portions of these documents are enclosed.

Documents 3 through 6 of Appendix B are communications between Commissioners and their staffs and constitute advice, opinions and recommendations. These documents contain no reasonably segregable factual material and are, therefore, being withheld in their entirety. Release of this information would tend to inhibit future communications between and among Commissioners and their staffs, communication which is essential to the deliberative process. This information is being withheld pursuant to exemption (5) of the Freedom of Information Act (5 U.S.C. 552(b)(5)) and 10 CFR 9.5(a)(5).

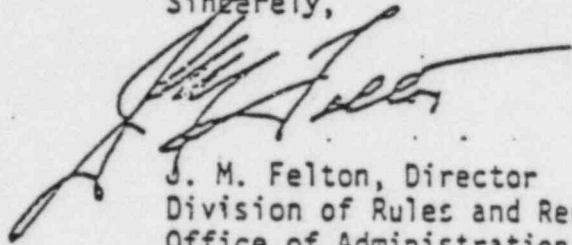
Pursuant to 10 CFR 9.9 and 9.15 of the Commission's regulations, it has been determined that the information withheld is exempt from production or disclosure, and that its production or disclosure is contrary to the public interest. The persons responsible for the denial of documents 1 and 2 of Appendix B are the undersigned and Mr. Richard C. DeYoung, Director, Office of Inspection and Enforcement. The person responsible for the denial of documents 3 through 6 of Appendix B is Samuel J. Chilk, Secretary of the Commission.

8247140016

SPP

The denial by Mr. DeYoung and myself may be appealed to the Executive Director for Operations within 30 days from the receipt of this letter. 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 denials by Mr. Chilk may be appealed within 30 days to the Commission and should be addressed to the Secretary of the Commission.

Sincerely,

A handwritten signature in dark ink, appearing to read "J. M. Felton", is written over the typed name and title.

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

Enclosures: As stated

APPENDIX A

1. Memorandum to G. A. Phillip from V. Stello, Jr., dated 1/16/81 re: Merit System Protection Board - Charges by IPS
2. Memorandum to V. Stello, Jr., from J. G. Keppler dated 1/12/81 re: Zimmer - Government Accountability Project Request for Investigation by Merit Systems Protection Board Concerning NRC's Handling of Applegate Allegations.
3. Memorandum to V. Stello, Jr., from J. G. Keppler dated 3/17/81 re: Investigation of Applegate Allegations Related to Zimmer.
4. Handwritten notes by K. Ward dated 9/81
5. Memorandum to J. G. Keppler from J. E. Foster dated 9/21/81 re: Supplementary Comments on OIA Report
6. Memorandum to file from J. R. Sinclair dated 2/5/81 re: Investigations of IE Efforts Pertaining to Investigations of Alleged Construction Deficiencies at the Zimmer Nuclear Facility (Applegate)
7. Memorandum to J. G. Keppler from R. A. Fortuna dated 1/29/81 re: Confidentiality and Restriction of Information Forwarded by the Office of Inspector and Auditor
8. Memorandum to Chairman Ahearne from J. J. Cummings re: Thomas W. Applegate Allegations
9. Memorandum to W. J. Dircks from N. J. Palladino dated 9/4/81 re: OIA Report
10. Memorandum to J. J. Cummings from N. J. Palladino dated 10/2/81 re: OIA Report
11. Memorandum to W. J. Dircks from N. J. Palladino dated 11/16/81 re: OIA Report
12. Memorandum to Commission from J. J. Cummings dated 8/6/81 re: OIA Special Inquiry
13. Letter to A. M. Tracey from J. J. Cummings dated 8/17/81 re: OIA Report
14. Memorandum to V. J. Stello from J. J. Cummings dated 2/10/81 re: Transfer of Documentation Provided By Government Accountability Project (2/9/81)

APPENDIX A

15. Memorandum to J. G. Keppler from G. A. Phillip undated re:
Comments on OIA Report
16. Memorandum to J. G. Keppler from J. E. Foster dated 9/3/81 re:
OIA Report

APPENDIX B

1. Memorandum to files from G. A. Phillip dated 12/15/80 re: Zimmer Plant - Allegations.
2. OIA Report Chronology by Foster.
3. October 29th draft letter to Udall with handwritten comments from Commissioner Bradford's Office at the top.
4. October 30, 1981 memo to Chairman Palladino from Comm. Bradford re: Proposed Draft Letter to Cong. Udall Regarding Zimmer.
5. October 21, 1981 memo to Comm. Bradford from Tom Gibbon re: Udall Letter on Zimmer with handwritten comments.
6. September 29, 1981 memo to Comm. Bradford from Tom Gibbon re: OIA Report on Zimmer.

SUBJECT Review of class on CIA Report
Reliability of IIS report at Review Point

FOIA NO. 81-488

DUE DATE 12/17/81

EXT. DUE DATE 12/11

CONTACTS

<u>Date</u>	<u>Name</u>	
12/8	P. Smith	Sat. 12/8/81 - P. Smith - 50-358/81-13 - no report.
12/17	P. Smith	P. Smith called - nothing other than what has - copy of letter to Callahan by Phillips. 1. Kopp to Stiller 3/17/81 - 2. " Stiller to Phillips - 1/16/81 ✓ 3. Phillips to P. Smith - 12/15/80 4. Kopp to Stiller - 1/12/81
12/10	Dorinda Smith	29704 - answer by J. Foster.
12/14	J. Kopp	Talked to Kopp in this P. Smith was not willing to report from information report.
3/18/82	J. Foster	Send copy of letter to T. Devine to Jim Foster.

FOIA CONTACT P. Smith

COMPLETED 12/11/81

TIME _____

REPRODUCTION _____

WJH

November 23, 1981

Director
Office of Administration
Nuclear Regulatory Commission
Washington, D.C. 20555

FREEDOM OF INFORMATION
ACT REQUEST

FOIA-81-488

Rec'd 11-30-81

To Whom it May Concern:

*No
Report released
under FOIA*

On behalf of our client, Mr. Thomas Applegate, and pursuant to both the Freedom of Information Act (5 U.S.C. §552) and the Privacy Act (5 U.S.C. §552a), we request copies of all notes, memoranda, telephone logs, tapes, diaries and/or other records prepared by U.S. government employees in connection with an August 7, 1981 Nuclear Regulatory Commission ("NRC") Office of Inspector and Auditor ("OIA") report entitled "Special Inquiry re: Adequacy of EE Investigation 50-358/80-9 at the William H. Zimmer Nuclear Power Station" ("Zimmer OIA Report"), as well as the investigation the Zimmer OIA Report is based upon. In particular, Mr. Applegate requests all earlier full or partial drafts and/or proposed supplements to the Zimmer OIA Report, as well as all records related to any deletions from its final version. If any material covered by this request has been destroyed and/or removed, please provide all surrounding documentation including but not limited to a description of the action(s) taken, relevant date(s), and justification for the action(s).

Mr. Applegate requests that fees be waived, because "finding the information can be considered as primarily benefitting the general public." 5 U.S.C. § 552(a)(4)(A). The fee waiver should be granted for three reasons. First, he submits this request to further the goals of his December 10, 1980 whistleblowing disclosure to the Office of the Special Counsel of the Merit Systems Protection Board. The Special Counsel required an NRC investigation only after finding a reasonable belief that Mr. Applegate's disclosure evidenced illegality, mismanagement, gross waste and a substantial and specific danger to public health or safety. Unquestionably, the Special Counsel finding and the ensuing OIA Report — which fundamentally challenges the generic nature of NRC investigations — proves that Mr. Applegate's concerns serve "the public interest." He seeks these documents in order to monitor the adequacy of the NRC response.

Second, the findings of the Zimmer OIA Report totally ignored two vital issues in Mr. Applegate's whistleblowing disclosure —

- 1) the failure to adequately review his criminal allegations of widespread blackmarkets, smuggling, and theft; and
- 2) the failure to contact witnesses in April 1980 who would have exposed a series of issues six months before GNP raised them with the Commission and the Special Counsel.

8244144444

200

JOIA August 81-488

DATE: 2/12/81

ORIGINATOR: Smith, Paul

TRANSMITTED

TIME: 320

OPERATOR: SW

Handwritten note:
J. C. Smith
JOIA 81-488

Trans dtd 12/15/80

P.A. Phillips to R. III. Teller Thru C. C. Rowland

12/8/81
JFM.

Attention: Pearl Smith, RUI
From: Wanda M. Smith, IE
49-24441

This relates to documents other than
those already released. Would appreciate
a call tomorrow if you have documents
and how many (approx).

Thanks,

12/9
Called W. M. to
opt no "new" deOIA
documents re 9/3+
opt since memo's
4/8 for killing: Foster.
missions draft. 20+ to
id held: 4 it for not
shown" to
anyone.

Wanda M. Smith kept by
Sent 1. Chronology
Foster
2. Notes for F.W. and ~9/81
3. memo ~9/21/81 Foster's
Kipper.
pts 12/11/81
orig 12/15/80
w fold
12/17/81

March 1, 1982



SECY-82-82

POLICY ISSUE (Affirmation)

For: The Commissioners

From: Leonard Bickwit, Jr.
General Counsel

Subject: DEVINE FOIA APPEAL (82-A-1C) REGARDING
OIA ZIMMER REPORT

Discussion: Thomas Devine, of the Government Accountability Project (GAP) and on behalf of Thomas Applegate, has appealed the initial response to his Freedom of Information Act (FOIA) request for records relating to the OIA Zimmer Report. Mr. Devine's appeal focuses on four documents which originated in Commission Bradford's office and were withheld pursuant to Exemption (5) of the FOIA, and on the failure to either identify or explain the absence of draft versions of the OIA report.

The documents which originated in Commissioner Bradford's office were addressed in a recent FOIA appeal and the decision to withhold was affirmed (See Lowenstein Appeal, SECY-81-703). We see no reason to alter that decision in the present case. Each of the documents was withheld in its entirety pursuant to Exemption 5. The memoranda and comments listed in the Appendix to the proposed response reflect the author's advice, opinions, and

CONTACT: Richard Parrish, OGC
x43224

8401250164 24pp.

recommendations regarding the Commission resolution of various aspects of the Zimmer matter. Withholding these documents is necessary to protect the uninhibited dialogue essential to the deliberative process. Any factual material contained in these records is already on the public record and need not be segregated and released here.

Mr. Devine also appeals the "effective denial of the bulk of [his] request, concerning informal records, earlier drafts and an explanation of any deletions [from the final OIA report]." Consistent with OIA practice, draft versions of the report were not retained in their files. They were disposed of prior to the receipt of any FOIA request, a practice which in no way contravenes our statutory obligations. Therefore, all reasonably identifiable material relating to Mr. Devine's request was identified and addressed in NRC's initial response. The FOIA imposes no legal obligation to justify the absence of draft reports or to create documents explaining agency action in this regard. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161-162, 44 L.Ed.2d 29 (1975).

Finally, Mr. Devine argues that the OIA report and related materials represented a Commission attempt to evaluate and explain previous NRC action and are therefore not withholdable under Exemption (5). If the premise of this statement were true, it would be a valid comment because a distinct deliberative process must be identifiable to support this basis for exemption. However, we believe the OIA report was prepared not to justify or explain completed I&E action, but to investigate its sufficiency. The OIA report and related documents contributed to Commission deliberations on the adequacy of the I&E

investigation and therefore fall within the protection of Exemption (5).

Recommendation:

Authorize the Secretary to sign and dispatch the attached letter denying the appeal.

Leonard Bickwit, Jr.,
General Counsel

Attachments:

1. FOIA request dtd November 23, 1981
2. NRC response dtd December 31, 1981
3. FOIA appeal dtd January 29, 1982
4. Draft response to appeal

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Monday, March 15, 1982.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT March 8, 1982, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an open meeting during the week of March 15, 1982. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

DISTRIBUTION

Commissioners
Commission Staff Offices
Secretariat

GOVERNMENT ACCOUNTABILITY PROJECT

Institute for Policy Studies

1901 Que Street, N.W., Washington, D.C. 20009

(202) 234-938

November 23, 1981

Director
Office of Administration
Nuclear Regulatory Commission
Washington, D.C. 20555

To Whom it May Concern:

On behalf of our client, Mr. Thomas Applegate, and pursuant to both the Freedom of Information Act (5 U.S.C. §552) and the Privacy Act (5 U.S.C. §552a), we request copies of all notes, memoranda, telephone logs, tapes, diaries and/or other records prepared by U.S. government employees in connection with an August 7, 1981 Nuclear Regulatory Commission ("NRC") Office of Inspector and Auditor ("OIA") report entitled "Special Inquiry re: Adequacy of IE Investigation 50-358/8Q-9 at the William H. Zimmer Nuclear Power Station" ("Zimmer OIA Report"), as well as the investigation the Zimmer OIA Report is based upon. In particular, Mr. Applegate requests all earlier full or partial drafts and/or proposed supplements to the Zimmer OIA Report, as well as all records related to any deletions from its final version. If any material covered by this request has been destroyed and/or removed, please provide all surrounding documentation including but not limited to a description of the action(s) taken, relevant date(s), and justification for the action(s).

Mr. Applegate requests that fees be waived, because "finding the information can be considered as primarily benefitting the general public." 5 U.S.C. § 552(a)(4)(A). The fee waiver should be granted for three reasons. First, he submits this request to further the goals of his December 10, 1980 whistleblowing disclosure to the Office of the Special Counsel of the Merit Systems Protection Board. The Special Counsel required an NRC investigation only after finding a reasonable belief that Mr. Applegate's disclosure evidenced illegality, mismanagement, gross waste and a substantial and specific danger to public health or safety. Unquestionably, the Special Counsel finding and the ensuing OIA Report — which fundamentally challenges the generic nature of NRC investigations — proves that Mr. Applegate's concerns serve "the public interest." He seeks these documents in order to monitor the adequacy of the NRC response.

Second, the findings of the Zimmer OIA Report totally ignored two vital issues in Mr. Applegate's whistleblowing disclosure --

- 1) the failure to adequately review his criminal allegations of widespread blackmarkets, smuggling, and theft; and
- 2) the failure to contact witnesses in April 1980 who would have exposed a series of issues six months before GAO raised them with the Commission and the Special Counsel.

Director
Office of Administration
Nuclear Regulatory Commission
November 23, 1981
Page Two

The Special Counsel had ordered the Commission to respond to both allegations. The documents Mr. Applegate requests may help to explain why the Commission chose to defy a legal requirement of the Civil Service Reform Act. We submit that it inherently serves the public interest to further understand the process that leads to government illegality.

Third, press accounts have contained charges that the report was "watered down." Although deleted portions would not represent the Commission's findings, it is in the public interest to fully air the facts and competing policies in the debate that produced this controversial document. The issue is of the utmost importance to the American people — the adequacy of NRC efforts to protect public health and safety.

For any documents or portions of documents that you deny due to a specific exemption, please provide an index itemizing and describing documents or portions of documents withheld. The index should provide a detailed justification of your grounds for claiming each exemption, explaining why each exemption is relevant to the document or portion withheld. This index is required under *Vaughn v. Rosen* (I), 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

We look forward to your response within ten working days.

Sincerely,

Thomas Devine
Associate Director



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

December 31, 1981

Mr. Thomas Devine
Government Accountability Project
1901 Que Street, N.W.
Washington, DC 20009

IN RESPONSE REFER
TO FOIA-81-488

Dear Mr. Devine:

This is in partial response to your letter dated November 23, 1981, in which you requested, pursuant to the Freedom of Information Act, copies of documents prepared in connection with the Office of Inspector and Auditor's report on IE's investigation of the Zimmer Nuclear Power Station.

The sixteen documents listed on Appendix A to this letter are enclosed in their entirety.

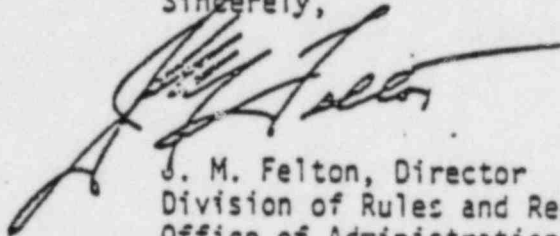
Portions of document 1 of Appendix B contain the names of persons the release of which would constitute an unwarranted invasion of personal privacy and disclose the identities of confidential sources. These names are being withheld pursuant to exemption (7)(C) and (D) of the Freedom of Information Act (5 U.S.C. 552(b)(7)(C) and (D)) and 10 CFR 9.5(a)(7)(iii) and (iv) of the Commission's regulations. A portion of document 2 of Appendix B contains the name of a person the release of which would constitute an unwarranted invasion of personal privacy. This withholding is being made pursuant to exemption (7)(C) of the Freedom of Information Act (5 U.S.C. 552(b)(7)(C)) and 10 CFR 9.5(a)(7)(iii). The non-exempt portions of these documents are enclosed.

Documents 3 through 6 of Appendix B are communications between Commissioners and their staffs and constitute advice, opinions and recommendations. These documents contain no reasonably segregable factual material and are, therefore, being withheld in their entirety. Release of this information would tend to inhibit future communications between and among Commissioners and their staffs, communication which is essential to the deliberative process. This information is being withheld pursuant to exemption (5) of the Freedom of Information Act (5 U.S.C. 552(b)(5)) and 10 CFR 9.5(a)(5).

Pursuant to 10 CFR 9.9 and 9.15 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 the denial of documents 1 and 2 of Appendix B are the undersigned and Mr. Richard C. DeYoung, Director, Office of Inspection and Enforcement. The person responsible for the denial of documents 3 through 6 of Appendix B is Samuel J. Chilk, Secretary of the Commission.

The denial by Mr. DeYoung and myself may be appealed to the Executive Director for Operations within 30 days from the receipt of this letter. 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 denials by Mr. Chilk may be appealed within 30 days to the Commission and should be addressed to the Secretary of the Commission.

Sincerely,

A handwritten signature in dark ink, appearing to read "J. M. Felton", is written over the typed name and title.

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

Enclosures: As stated

APPENDIX A

1. Memorandum to G. A. Phillip from V. Stello, Jr., dated 1/16/81 re: Merit System Protection Board - Charges by IPS
2. Memorandum to V. Stello, Jr., from J. G. Keppler dated 1/12/81 re: Zimmer - Government Accountability Project Request for Investigation by Merit Systems Protection Board Concerning NRC's Handling of Applegate Allegations.
3. Memorandum to V. Stello, Jr., from J. G. Keppler dated 3/17/81 re: Investigation of Applegate Allegations Related to Zimmer.
4. Handwritten notes by K. Ward dated 9/81
5. Memorandum to J. G. Keppler from J. E. Foster dated 9/21/81 re: Supplementary Comments on OIA Report
6. Memorandum to file from J. R. Sinclair dated 2/5/81 re: Investigations of IE Efforts Pertaining to Investigations of Alleged Construction Deficiencies at the Zimmer Nuclear Facility (Applegate)
7. Memorandum to J. G. Keppler from R. A. Fortuna dated 1/29/81 re: Confidentiality and Restriction of Information Forwarded by the Office of Inspector and Auditor
8. Memorandum to Chairman Ahearne from J. J. Cummings re: Thomas W. Applegate Allegations
9. Memorandum to W. J. Dircks from N. J. Palladino dated 9/4/81 re: OIA Report
10. Memorandum to J. J. Cummings from N. J. Palladino dated 10/2/81 re: OIA Report
11. Memorandum to W. J. Dircks from N. J. Palladino dated 11/16/81 re: OIA Report
12. Memorandum to Commission from J. J. Cummings dated 8/6/81 re: OIA Special Inquiry
13. Letter to A. M. Tracey from J. J. Cummings dated 8/17/81 re: OIA Report
14. Memorandum to V. J. Stello from J. J. Cummings dated 2/10/81 re: Transfer of Documentation Provided By Government Accountability Project (2/9/81)

APPENDIX A

15. Memorandum to J. G. Keppler from G. A. Phillip undated re:
Comments on OIA Report
16. Memorandum to J. G. Keppler from J. E. Foster dated 9/3/81 re:
OIA Report

APPENDIX B

1. Memorandum to files from G. A. Phillip dated 12/15/80 re: Zimmer Plant - Allegations.
2. OIA Report Chronology by Foster.
3. October 29th draft letter to Udall with handwritten comments from Commissioner Bradford's Office at the top.
4. October 30, 1981 memo to Chairman Palladino from Comm. Bradford re: Proposed Draft Letter to Cong. Udall Regarding Zimmer.
5. October 21, 1981 memo to Comm. Bradford from Tom Gibbon re: Udall Letter on Zimmer with handwritten comments.
6. September 29, 1981 memo to Comm. Bradford from Tom Gibbon re: OIA Report on Zimmer.

GOVERNMENT ACCOUNTABILITY PROJECT

Institute for Policy Studies

1901 Que Street, N.W., Washington, D.C. 20009

(202) 234-9381

72 17-2 0001

January 29, 1982

Mr. Samuel J. Chilk
Executive Secretary
Office of Admin.
Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mr. Chilk:

This is an appeal pursuant to subsection (a)(6) of the Freedom of Information Act, as amended (5 U.S.C. 552). On November 23, 1981, on behalf of Mr. Thomas Applegate, we requested copies of all notes, memoranda, telephone logs, tapes, diaries and/or other records prepared by U.S. government employees in connection with an August 7, 1981 Nuclear Regulatory Commission ("NRC") Office of Inspector and Auditor ("OIA") report entitled "Special Inquiry re: Adequacy of IE Investigation 50-358/80-9 at the William H. Zimmer Nuclear Power Station." ("Zimmer OIA Report"), as well as the investigation the Zimmer OIA Report is based on. In addition, we asked for all earlier full or partial drafts and/or proposed supplements to the Zimmer OIA Report, as well as all records related to any deletions from its final version. (A copy is enclosed). In connection with a letter dated December 31, 1981 and postmarked January 4, 1982, Mr. J.M. Felton of your agency partially granted our request. (His response is enclosed).

Mr. Felton's letter failed to cite any exemptions for the effective denial of the bulk of our request, concerning informal records; earlier drafts and an explanation of any deletions. Instead, he simply ignored those portions of the request and failed to provide the documents without any explanation or citation. As a result, he violated the requirement of Vaughn v. Rosen (I), 484 F. 2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1977) to index and justify any records withheld. We are convinced that the final version of the OIA report was not the only draft, since press accounts quoted an "official close to the investigation" to the effect that "[t]he critical report 'was watered down.'" (The Cincinnati Enquirer, November 18, 1981, p.1).

There is little question that these records are available under the Act. In Arthur Anderson, Inc. v. IRS, 514 F. Supp. 1173 (D.D.C. 1981), the court held that numerous drafts of revenue rulings, as well as accompanying background information and notes were not exempt under exemption #5. The court reasoned that those materials were generated before the adoption of agency policy and they were not part of the deliberative give and take of the consultative process. This is clearly analogous to our case. The investigative records and drafts we are asking for are factual in nature and are not part of the deliberative process.

300

Executive Secretary
Office of Admin.
Nuclear Regulatory Commission
Page 2

If there were any doubt, in Playboy Enterprises v. U.S. Dept. of Justice 516 F. Supp. 233 (D.D.C. 1981), the court held that an internal F.B.I. report concerning F.B.I. agents who infiltrated the Klu Klux Klan in the 1960's was not exempt, even though it was used by the Attorney General to form policy. The evaluative report was considered informative in nature and was not a part of the deliberative process. It only provided data to be evaluated by the Attorney General. The factual portions, including the first drafts, did not reveal the deliberative process of the Attorney General's office. Our case fits precisely into this category. What we are seeking concerns the entire factual record for the NRC investigation of Zimmer which Mr. Applegate challenges.

Mr. Felton has denied, under exemption #5, four documents identified as items 3-6 in Appendix B of his December 31, 1981 letter. Mr. Felton characterized the records as "communications between Commissioners and their staffs" that "constitute advice, opinions, and recommendations." Obviously his description was not all-inclusive, however. Mr. Felton continued, "These documents contain no reasonably segregable factual materials and are, therefore, being denied in their entirety." There was no explanation for Mr. Felton's assertion that the non-exempt portions of the records are inseparable from the rest.

The courts have required a restrictive interpretation of exemption #5. As the Supreme Court stated in E.P.A. v. Mink, 410 U.S. 73 (1973), "This exception (#5) to the general disclosure mandate of FOIA should be construed as narrowly as consistent with efficient government action. Further, the burden-of-proof is on the agency to justify the exemption. See e.g., Vaughn v. Rosen, 523 F. 2d 1144 (D.C. Cir. 1975). Mr. Felton asserted conclusion does not even attempt to satisfy this burden.

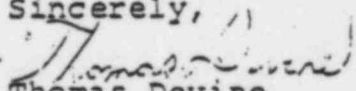
The default is not surprising, since the exemption is inapplicable. As the court held in Taxation v. IRS, 646 F. 2d 666, 677 (D.C. Cir. 1980): "Exemption #5 does not apply to agency actions which explain actions that an agency has already taken." See also Ryan v. Department of Justice, 617 F.2d 781 (D.C. Cir. 1980) and Brinton v. Department of State, 636 F. 2d. 600 (D.C. Cir. 1980). The Zimmer OIA report was an attempt to evaluate and explain a previous NRC investigation and enforcement action, as presented in Report No. 50-358/80-09. As a result, exemption #5 does not apply to Commission-staff communications concerning the report.

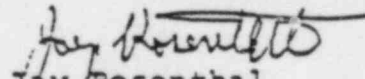
Even if the withheld records concerned deliberations about prospective agency policy, exemption #5 would not apply to facts, agency decisions, or existing agency policy, EPA v. Mink, 410 U.S. 73, 86 (1973). That information can only be denied if it is "inextricably intertwined" with exempt portions, Ryan v. Department of Justice, 617 F. 2d 781, 790-91 (D.C. Cir. 1980). Mr. Felton offered no analysis why exempt portions of the Commissioners' memoranda could not simply be whited-out. We are quite willing to appeal this denial to the courts for an in-camera review to determine segregability, Playboy v. U.S. Department of Justice supra.

Executive Secretary
Office of Admin.
Nuclear Regulatory Commission
Page 3

In conclusion, we are seriously concerned that the Commission may not have dealt in good faith with this FOIA request. Your response to this administrative appeal will determine whether we initiate a complaint under 5 U.S.C. Sec. 1206 (e)(1)(C) for an investigation of "arbitrary and capricious withholding of information", as well as possible disciplinary action.

As provided in the Act, we will expect to receive a reply to this administrative appeal letter within twenty working days.

Sincerely, 
Thomas Devine
Associate Director


Jay Rosenthal
Staff Associate

Mr. Thomas Devine
Government Accountability Project
1901 Que Street, N.W.
Washington, D.C. 20009

IN RESPONSE REFER TO
FOIA-82-A-1C
(FOIA-81-488)

Dear Mr. Devine:

This is in response to your January 29, 1982 Freedom of Information Act (FOIA) appeal of the denial of access to four documents relating to the Commission's deliberations on the Office of Inspector and Auditor (OIA) Zimmer Report. The Commission has reviewed the initial determination to withhold these documents in their entirety and hereby affirms that decision.

The four documents identified in the Appendix to this letter were created as a part of the comprehensive Commission deliberations on the quality assurance/quality control problems at the William H. Zimmer Nuclear Power Station. The OIA Report was not prepared, as you imply, to defend or justify the Office of Inspection and Enforcement (I&E) investigation. Rather, it constitutes a vital element in the Commission deliberations alluded to above. The memoranda and comments described in the Appendix reflect the authors' advice, opinions and recommendations regarding the Commission resolution of the Zimmer matter. Withholding these documents is necessary to protect the uninhibited dialogue essential to the deliberative process. The draft

letter (item No. 3) contains no factual information not also present in the letter dispatched to Congressman Udall, a copy of which you have been provided. The remaining documents contain no segregable factual portions. Accordingly, all of these documents are being withheld in their entirety pursuant to Exemption (5) of the FOIA, 5 U.S.C. 552(b)(5), and our regulations, 10 CFR 9.5(a)(5).

You also protest the "effective denial" of the bulk of your request, concerning informal records, drafts, and an explanation of any deletions. Our silence in this regard was intended to convey the message that no documents of this nature were retained in NRC files.

This letter represents the final agency action on your FOIA appeal. Judicial review is available in a federal district court in the district in which you reside or have your principal place of business, or in the District of Columbia.

Sincerely,

Samuel J. Chilk
Secretary of the Commission

Enclosure:
Appendix - List of Documents Withheld

APPENDIX

1. October 29th draft letter to Congressman Udall with handwritten comments from Commissioner Bradford's office at the top. 2 pages.
2. October 30, 1981 memo to Chairman Palladino from Commissioner Bradford re: Proposed Draft Letter to Congressman Udall regarding Zimmer. 1 page.
3. October 21, 1981 memo to Commissioner Bradford from Legal Assistant Thomas R. Gibbon re: Udall letter on Zimmer, with handwritten comments. 1 page.
4. September 29, 1981 memo to Commissioner Bradford from Thomas R. Gibbon re: Public Release of OIA Report on Zimmer. 2 pages.