



Nuclear Information and Resource Service

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November 5, 1984

Samuel J. Chilk, Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

James A. Fitzgerald
Assistant General Counsel
Office of the General Counsel
Nuclear Regulatory Commission
Washington, D.C. 20555

John E. Zerbe, Director
Office of Policy Evaluation
Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Appeal from an Initial FOIA Decision
FOIA 84-795

Dear Sirs:

This letter is an appeal of the partial denial of a request made by the Nuclear Information and Resource Service (NIRS) pursuant to the Freedom of Information Act, 5 U.S.C. 552(a)(6), and NRC regulations at 10 CFR 9.11. The hand-delivered request, dated October 9, 1984, asked for:

1. All transcripts of closed Commission meetings held during June, July, and August of 1984 concerning the complicating effects of earthquakes on emergency preparedness at the Diablo Canyon plant;

2. SECY-84-70;

3. SECY-84-291; and

4. Copies of all drafts of the Commission's final order CLI-84-12, and closely related documents.

That request was partially denied, granted and not responded to on October 26, 1984 by Mr. J. M. Felton. This letter appeals the denial of the following documents:

1. SECY-84-70, February 10, 1984 and four attachments;

2. SECY-84-291, July 18, 1984 and two attachments; and

APPEAL OF INITIAL FOIA DECISION

84-A-78C(84-795)

Rec'd 11-8-84

11/8....To OGC to Prepare Response for Signature of
SECY....Date due: Nov 21...Cpys to: RF, EDO...84-1065

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3. August 3, 1984 Memorandum to the Commissioners from M. Malsch, OGC and one attachment.

This letter also serves notice of appeal for the failure to respond to the request for transcripts of the Commission's meetings as identified above.

In denying the documents, Mr. Felton's letter relied on the exemption for intra-agency memoranda. 5 U.S.C. 552(b)(5). However, given the lack of information in Mr. Felton's denial, it is impossible for NIRS to determine whether the documents withheld fall within that exemption. While the letter states that the denied documents contain "pre-decisional advice, opinions, and recommendations" they are not described with the requisite specificity. Thus, it is impossible to determine whether the exemption was properly applied. As a requestor obviously does not have the ability to review denied documents to allow it to argue that the denial was improper, the D.C. Circuit has squarely held that the burden is "specifically plac[ed] on the Government" to establish that the withheld material is exempt from the requirement of disclosure. Moreover, it held that this burden cannot be met by "sweeping and conclusive citation of an exemption".

Thus, we require that when an agency seeks to withhold information it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply. Mead Data Central, Inc. v. U.S. Department of the Air Force, 566 F.2d 242, 251 (D.C. cir. 1977).

Mr. Felton's letter contains none of the information required by the court in Mead Data. The denied documents listed above are identified only by date, author, recipient, and title. No "detailed justification" is included despite the fact that Section b(5) of the Act does not provide a blanket exemption for all pre-decisional agency memoranda. The exemption does not apply, for example, to statements of law or policy; statements of final agency action; or statements by agency superiors to subordinates explaining the reasons for decisions. Taxation With Representation v. IRS, 646 F.2d 666, 676-21 (D.C. Cir. 1981). It does not apply to instructions to staff that affect a member of the public; an agency's "working" or "secret" law; or positions on issues taken by the agency formally or informally, even if at the time of preparation it was pre-decisional. See e.g. Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 866; Federal Open Market Commission v. Merrill, 443 U.S. at 360 n.23; and NLRB v. Sears, Roebuck & Co., 421 U.S. at 151-53.

The citation of Exemption 5 is, in essence, "executive" privilege, which protects advice, recommendations, and opinions which are part of the deliberative, consultative, decision-making process of government. See NLRB v. Sears, Roebuck & Co., 421 U.S. at 151-53. In Sears, the Court held that memoranda that explained the general counsel's decision not to file complaints are final administrative decisions that must be disclosed, because Exemption 5 does not apply to final opinions or dispositions. According to the D.C. Circuit, "as a general principle * * * action taken by a responsible decision-maker in an agency's decision-making process which has the practical effect of disposing of a matter before the agency is 'final' for purposes of the FOIA." Bristol-Myers v. FTC, 598 F.2d at 25. Without, of course, having seen the documents which have been denied, it can be assumed that they constitute the agency's decision to dispose of the issue of the complicating effect of earthquakes on emergency planning at the Diablo Canyon nuclear plant.

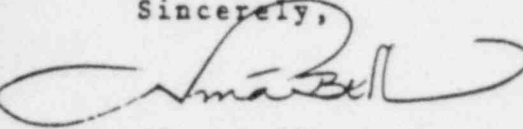
If it is predecisional at the time of preparation but is "adopted formally or informally as the agency position on an issue or is used by the agency in dealing with the public," it ceases to be exempt. Coastal States Gas Corporation v. Department of Energy, 617 F.2d at 866. The Supreme Court recognized a distinction between pre-decisional documents, which are exempted, and post-decisional documents which are not exempted. The Court noted that it would be reluctant to consider "statements of policy and interpretations which have been adopted by the agency" and "instructions to staff that affect a member of the public" to be exempt under Exemption 5. Sears, supra at 151-153. This is consistent with numerous court interpretations that the FOIA's Exemption 5 does not exist to protect an agency's "secret law." The public has a right to know, under the FOIA, how the agency interprets the laws as they are written, in particular emergency planning at Diablo Canyon.

The Felton letter does not identify the specific portions of the documents that allegedly are covered by the exemption. Non-exempt materials must be segregated from exempt materials and disclosed "unless they are inextricably intertwined with exempt portions." Mead Data, supra, at 260. Where an agency decides not to segregate non-exempt material, it must provide a detailed justification of that decision. Id. at 261. Mr. Felton's letter provides no information as to why exemption b(5) applies to any one of the entire documents, or why non-exempt portions were not disclosed.

NIRS urges that you review the withheld documents and decide to disclose them. If you do not, the NRC must provide a detailed justification for the denial of each document or the portions of each document being withheld. I look forward to your response within the twenty working days allowed by law.

In addition I would note that the Commission has not yet fully responded to my request. No specific additional period of time has been stated within which a complete response will be provided, as required by NRC regulations 10 CFR 9.9(c) & (d) and 9.13. I urge the Commission to reach a timely decision in this matter taking into consideration the importance of the issues contained within the requested documents.

Sincerely,



Nina Bell
Assistant Director

cc: File