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JAY E. SILBERG, P.C.

August 16, 1985

APPEAL OF INITIAL FOIA DECISION

85-A-33C (85-493)

Rec'd 8-20-85

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Appeal of an Initial FOIA Decision
FOIA-85-493

Dear Sir:

By letter dated August 2, 1985, the Director, Division of Rules and Records, Office of Administration, responded to my request, pursuant to the Freedom of Information Act, for copies of SECY-85-80, SECY-85-208, and transcripts of any Commission meetings at which these two SECY papers were discussed. The Director's response to the request for SECY-85-80 was a reference to a previous FOIA request, FOIA-85-460. In FOIA-85-460, the Director stated that portions of SECY-85-80 were exempt from disclosure under Exemption 5 because they contained "the predecisional analyses, opinions, and recommendations of the Office of Investigations (OI) for the Commissioners' consideration on the adoption of proposed investigative policies".

This appeal is from that portion of the August 2, 1985 response which, by reference, determined that a portion of SECY-85-80 was exempt from disclosure. The basis for the appeal is as set forth below.

Based upon Commission statements to Congress, it appears that some or all of the withheld portions of SECY-85-80 have been expressly adopted as final Commission policy. Judicial precedent therefore calls for disclosure of these materials notwithstanding Exemption 5. By letter dated July 17, 1985, Acting Chairman Roberts transmitted to the Chairman of the Subcommittee on Energy Conservation and Power of the House Energy and Commerce Committee the NRC's answers to a series of questions propounded by the

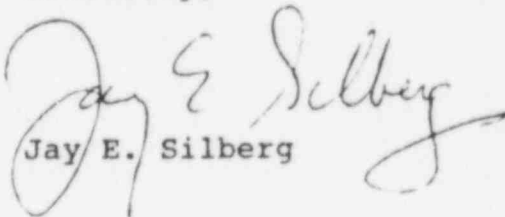
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Secretary of the Commission
August 16, 1985
Page 2

Chairman of the Subcommittee with respect to the June 9, 1985 loss of feedwater incident at Davis-Besse. The NRC's answer to Question 19 stated that "the Commission approved on May 21, 1985 the following policy applicable to investigations involving potential wrongdoing by the Commission's Office of Investigations." It is our understanding that SECY-85-80 was the document which set forth the policy approved by the Commission on May 21, 1985. The Supreme Court has held that "if an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5." N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 161 (1975). Since the Commission has now apparently expressly adopted as a final Commission policy the materials claimed to be exempt pursuant to Exemption 5, these materials have now lost their protection under Exemption 5 and should be released.

Please contact me if you have any questions with respect to this appeal.

Sincerely,


Jay E. Silberg



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

AUG 2 1985

Jay Silberg, Esquire
Shaw, Pittman, Potts & Trowbridge
1800 M Street, NW
Washington, DC 20036

IN RESPONSE REFER
TO FOIA-85-493

Dear Mr. Silberg:

This is in response to your letter dated July 10, 1985, in which you requested, pursuant to the Freedom of Information Act (FOIA), copies of 1) SECY-85-80, 2) SECY-85-208, and 3) transcripts of any Commission meetings at which these two SECY papers were discussed.

SECY-85-80 was addressed in a previous FOIA request, FOIA-85-460. Copies of this request and disclosed portions of SECY-85-80 are filed in the NRC Public Document Room (PDR) located at 1717 H Street, NW, Washington, DC 20555, under the name Hamblett.

SECY-85-208, identified on the enclosed appendix, is being withheld from disclosure. The document contains the predecisional advice, opinions and recommendation of the staff to the Commission on plans to improve the program for the investigation of significant operational events. Because the document reflects the predecisional process between the Commission and the staff, the document is exempt from mandatory disclosure pursuant to Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), and the Commission's regulations, 10 CFR 9.5(a)(5). Release of the document would tend to inhibit the open and frank exchange of ideas essential to the deliberative process. The document does not contain any reasonably segregable portions and is being withheld in its entirety.

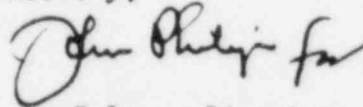
With regard to category 3 of your request, both SECY-85-80 and SECY-85-208 are "Notation Vote" papers and, therefore, were not discussed at a Commission meeting.

Pursuant to 10 CFR 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 person responsible for this denial is John C. Hoyle, Assistant Secretary of the Commission.

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This denial may be appealed to the Secretary of the Commission within 30 days from the receipt of this letter. Any such appeal must be in writing, addressed to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should clearly state on the envelope and in the letter that it is an "Appeal of an Initial FOIA Decision."

Sincerely,

A handwritten signature in dark ink, appearing to read "J. M. Felton", written in a cursive style.

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

Enclosure: As stated

Re: FOIA-85-493

APPENDIX

1. 06/10/85 SECY-85-208, "Incident Investigation Program." (8 pages)

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JAY E. SILBERG, P.C.

July 10, 1985

FREEDOM OF INFORMATION
ACT REQUEST

FOIA-85-793

rec'd 7/12/85

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

Re: Freedom of Information Act Request

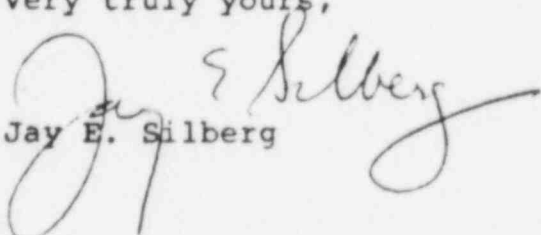
Dear Sir:

Pursuant to 10 C.F.R. §9.8, I hereby request a copy of the following documents:

1. SECY 85-80
2. SECY 85-208
3. Transcripts of any Nuclear Regulatory Commission meetings at which SECY 85-80 or SECY 85-208 were discussed

Please contact me if you have any questions with respect to this request.

Very truly yours,


Jay E. Silberg

JES:L

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