



OFFICE OF THE
SECRETARY

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

QM-016

March 4, 1986

Mr. Steven Aftergood
Committee to Bridge the Gap
1637 Butler Avenue #203
Los Angeles, CA 90025

SUBJECT: FOIA Appeal-A-86-2 (FOIA-85-577)

Dear Mr. Aftergood:

This responds to your letter of January 9, 1986 appealing the NRC's denial of the two documents in its letter to you of December 13, 1985. The Commission has decided to affirm its action on the initial request for the reasons stated below. Accordingly, your appeal is denied.

The two documents you requested are exempt from release pursuant to 5 U.S.C. § 552(b)(5). Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Thus, any document which is privileged in the discovery context is also exempt from disclosure under the Freedom of Information Act (FOIA) Exemption 5. The Supreme Court in Weber Aircraft v. United States, 104 S. Ct. 1488 (1984), held that FOIA Exemption 5, exempts documents normally privileged in the civil discovery context, regardless of whether the claimed privilege is one that was explicitly mentioned in the legislative history of Exemption 5. 104 S. Ct. at 1492-93. The basis for denying your initial request was that the requested documents came within the critical self-evaluative privilege.

In Washington Post Co. v. HHS, 603 F. Supp. 235 (D.D.C. 1985), the Court held that the confidential report privilege "is based on the governmental interest in protecting the flow of information concerning the subject of the report in question." 603 F. Supp. at 238. The self-evaluative privilege (also known as the self-critical analysis privilege) has been described as "avoid[ing] discouraging an organization from undertaking a critical self-evaluation of its practices and procedures when there are strong policy reasons for ensuring that such an evaluation takes place." In re Application of the New York Times Co., Civil No. 8-85, slip op. at 3 (S.D.N.Y. Oct. 9, 1984). See generally Note, The Privilege of Self-Critical Analysis, 96 Harv. L. Rev. 1083 (1983).

The privilege is generally acknowledged, see, e.g., FTC v. TRW, Inc., 628 F.2d 207, 210 (D.C. Cir. 1980), to have been formulated fifteen years ago in the case of Bredice v. Doctor's Hospital, 50 F.R.D. 249 (D.D.C. 1970), aff'd mem., 479 F.2d 920 (D.C. Cir. 1973). In denying the requested discovery, the court held that the internal reports at issue were entitled to a qualified privilege. 50 F.R.D. at 251. The

principles enunciated in Bredice were thereafter considered and applied by both federal and state courts in a variety of factual situations. See, e.g., Keyes v. Lenoir Rhyne College, 552 F.2d 579, 581 (4th Cir. 1977) (discovery denied of confidential faculty evaluation records); Gillman v. United States, 53 F.R.D. 316, 318 (S.D.N.Y. 1971) (company's affirmative action plan held not discoverable as its release would "discourage frank self-criticism and evaluation"); Oviatt v. Archbishop Bergan Mercy Hospital, 191 Neb. 224, 227; 214 N.W. 2d 490, 492 (1974) (proceedings and records of medical staff committee held privileged).

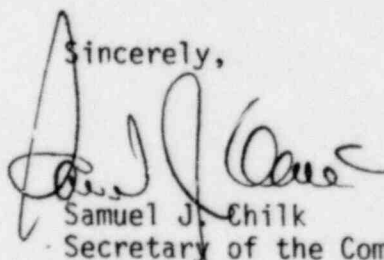
In sum, I find in the above-cited cases ample authority to bring the documents which are the subject of your request within the self-evaluative privilege. Thus, they are exempt from disclosure under Exemption 5 of the Freedom of Information Act.

In your appeal letter you noted that one of the documents you requested had been provided to the Senate Committee on Environment and Public Works. Providing documents to a Congressional committee for its official use is not a public disclosure of exempt documents and does not constitute a waiver of any FOIA exemptions applicable to those documents. See Aspin v. Department of Defense, 491 F.2d 24, 26 (D.C. Cir. 1973).

You also noted that other OIA reports have been previously released. The FOIA exemptions are discretionary, not mandatory and the Commission may release such reports when it finds it to be in the public interest to do so. Chrysler v. Brown, 441 U.S. 281 (1979).

This letter represents the final agency action on your FOIA appeal of the initial decision in FOIA-85-577. Judicial review of the decision is available in a federal district court in which you reside, or in the District of Columbia.

Sincerely,



Samuel J. Chilk
Secretary of the Commission

APPENDIX

RECORDS SUBJECT TO FOIA-85-577 WITHHELD IN THEIR ENTIRETY

1. 04/83 "Report to the Commission - Review of NRC's Reactor Safeguards Program," Office of Inspector and Auditor (128 pages).
2. 06/25/84 Memorandum for Chairman Palladino, Commissioner Gilinsky, Commissioner Roberts, Commissioner Asselstine, and Commissioner Bernthal from George H. Messenger, Acting Director, Office of Inspector and Auditor, entitled "Follow-up on Actions Taken on OIA's Report Entitled 'Review of NRC's Reactor Safeguards Program'" (5 pages).

COMMITTEE TO BRIDGE THE GAP

1637 BUTLER AVENUE #203
LOS ANGELES, CALIFORNIA 90025
(213) 478-0829

August 13, 1985

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

**FREEDOM OF INFORMATION
ACT REQUEST**

FOIA-85-577
Rec'd 8-16-85

Dear Sir:

This is a request under the Freedom of Information Act,
as amended.

I would like to obtain a copy of the following reports
prepared by the NRC's Office of Inspector and Auditor:

"Review of NRC's Reactor Safeguards Program"

and

"Follow-up on OIA Report 'Review of NRC's Reactor Safeguards
Program'"

The Committee to Bridge the Gap is a non-profit public
interest organization conducting ongoing research into safeguards
and security at NRC-licensed facilities. On numerous occasions
we have testified before the Commission and the ACRS on safeguards
issues. The results of our work are made available without charge
to all interested parties. We therefore request a waiver on
production costs.

If our public interest fee waiver request is denied, in whole
or in part, please indicate the basis for the denial, and how it
may be appealed.

Thank you.

Sincerely,

Steven Aftergood
Steven Aftergood
Executive Director

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

DEC 18 1985

Mr. Steven Aftergood
Committee to Bridge the GAP
1637 Butler Avenue #203
Los Angeles, CA 90025

IN RESPONSE REFER
TO FOIA-85-577

Dear Mr. Aftergood:

This is in response to your letter dated August 13, 1985, in which you requested, pursuant to the Freedom of Information Act (FOIA), copies of two reports prepared by the NRC's Office of Inspector and Auditor dealing with the NRC's reactor safeguards program.

The two documents identified on the enclosed Appendix are being withheld from disclosure pursuant to Exemption 5 of the FOIA (5 U.S.C. 552(b)(5)) and 10 CFR 9.5(5) of the Commission's regulations because these documents are critical, self-evaluative reports prepared by the Office of Inspector and Auditor on the NRC's reactor safeguards program. There are no reasonably segregable portions because release of the facts would permit an indirect inquiry into the predecisional process of the agency.

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 denial of the two reports identified on the Appendix is Mr. John C. Hoyle, Assistant Secretary of the Commission.

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 from an Initial FOIA Decision."

Sincerely,

Donnie H. Grimsley
Donnie H. Grimsley, Director
Division of Rules and Records
Office of Administration

Enclosure: As stated

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