



December 12, 2014

Ms. Donna L. Sealing
FOIA/Privacy Act Officer
Office of Information Services
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

RE: Appeal From Initial Decision; FOIA/PA-2014-0488

Dear Ms. Sealing:

Friends of the Earth (FOE), Public Employees for Environmental Responsibility (PEER), San Luis Obispo Mothers for Peace (SLOMFP), and the Santa Lucia Chapter of the Sierra Club (hereafter the "Requesting Parties") hereby appeal the U.S. Nuclear Regulatory Commission's (NRC) November 14, 2014 response to FOE's Freedom of Information Act (FOIA) request submitted on September 18, 2014 and assigned reference number FOIA/PA-2014-0488 (see attachments C and A, respectively).

Requesting Parties' FOIA request sought records regarding communications within the NRC and between NRC and PG&E about the release of the NRC's Final Decision on Dr. Michael Peck's Dissenting Professional Opinion and PG&E's Diablo Canyon Seismic Safety Report on September 10, 2014. Specifically, we requested all records dated between and including June 1, 2014 to September 18, 2014 in NRC's possession, custody, or control that contain or reference communication within the NRC or between the NRC (including NRC Commissioners and NRC Staff) and representatives of Pacific Gas and Electric Company "PG&E," regarding the information³ that was made publicly available by the NRC and PG&E on September 10, 2014 about (1) the NRC's "Final Decision" on NRC former Diablo Canyon Power Plant senior resident inspector Dr. Michael Peck's dissenting professional opinion (DPO) and (2) the PG&E Central Coastal California Seismic Imaging Project Report ("CCCSIP Report"), on earthquake faults around the Diablo Canyon Nuclear Plant. Our request included but was not limited to records regarding:

- NRC Spokeswoman Lara Uselding
- NRC Executive Director of Operations Mark Satorius
- NRC Senior Public Affairs Officer of Region IV, Victor Dricks
- NRC Office of New Reactors Director, Glenn Tracy
- NRC Office of New Reactors Deputy Director, Gary Holahan
- NRC Office of Nuclear Reactor Regulation Deputy Director for Reactor Safety Programs, Jennifer Uhle

NRC acknowledged receipt of FOE's FOIA request ("request") in FOIA/PA-2014-00488 Acknowledgment Letter dated September 19, 2014 and REVISED: FOIA/PA-2014-00488 Acknowledgment Letter, dated September 19, 2014 (see attachment B). NRC's partial response ("response"), dated November 14, 2014 included 69 redactions in emails and attachments covering 105 total pages (see attachment C).

Requesting Parties hereby appeals the withholding of responsive material for the following reasons:

1. Reference is made to both a “Communications Strategy on State Report” and “State Report Messaging.docx”(see email from Brenner, Eliot, Sunday, August 24, 2014, Subject “FW: COMMUNICATIONS STRATEGY ON STATE REPORT” with Attachment: STATE REPORT MESSAGING.docx”) and appear to have been withheld on the basis of exemption (b)(5) but both the resultant NRC final “Communication Strategy” and “messaging memo” are not referenced or provided in the documents. As the final communications strategy and messaging document are no longer pre-decisional, they may not be withheld under Exemption 5;
2. The NRC communication plan and messaging document referenced above ”(see email from Brenner, Eliot, Sunday, August 24, 2014, Subject “FW: COMMUNICATIONS STRATEGY ON STATE REPORT” with Attachment: STATE REPORT MESSAGING.docx”) is not a policy decision and thus is outside of scope of Exemption 5;
3. NRC fails to address segregability;
4. NRC fails to abide by statutory time limits; and
5. NRC fails to provide adequate justification for withholding the material or a Vaughn index of the withheld records (or withheld portions).

Discussion

1. NRC final “Communication Strategy” and “messaging memo” are no longer pre-decisional and may not be withheld under Exemption 5.

FOIA places an affirmative duty on agencies to disclose “final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases.” 5 U.S.C. § 552(a)(2)(A). In *NLRB v. Sears, Roebuck & Co.*, the Supreme Court held that this provision trumps Exemption 5 because of the “clear congressional aversion to ‘secret [agency] law.’” 421 U.S. 132, 153-54 (1975) (internal citations omitted). Therefore, final opinions that also constitute intra-agency memoranda cannot be withheld under Exemption 5. *Id.* at 148. But see *Fed. Open Market Comm. v. Merrill*, 443 U.S. 340, 360 n.23 (1979) (stating final opinions that are attorney work-product can still be withheld under Exemption 5). Any written explanation of the decisionmaker’s reasoning accompanying the final opinion must be disclosed as well. *Bristol-Meyers Co. v. FTC*, 598 F.2d 18, 25 (D.C. Cir. 1978).

For the purposes of FOIA, an opinion is “final” when the “responsible decisionmaker in an agency’s decision-making process... has the practical effect of disposing of a matter before the agency.” *Id.* Here, the withheld Communication Strategy” and “messaging memo” are final decisions under FOIA, 5 U.S.C. § 552(a)(2)(A), thus negating any possible “deliberative” character. Even if a document is “predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.” *Coastal States*, 617 F.2d at 866. See also *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-2, 161 (1975); *American Soc. of Pension Actuaries v. IRS*, 746 F. Supp. 188, 192 (D.D.C. 1990) (ordering disclosure on the basis that the IRS’s budget assumptions and calculations were “relied upon by the government” in making its final estimate for the President’s budget).

They were distributed for execution by NRC spokespeople without further alteration and are subject to disclosure.

2. NRC communication plan is not a policy decision and thus is outside of scope of Exemption 5.

To invoke the deliberative process exemption, an agency must establish what deliberative process is involved and the role played by the documents at issue in the course of that process. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980). The documents must “make[] recommendations or express[] opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). The agency must demonstrate specific harm to the decision-making process. *Mead Data Central v. Dep't of Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977).

Here, the NRC identifies no legal or policy matter bearing on a Communications Strategy, nor does it explain what decision-making process the document was part of, or how its disclosure could harm the agency decision-making process.

We would contend that official “spin” is not a policy matter covered by Exemption 5.

3. NRC fails to address segregability.

FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt.” 5 U.S.C. § 552(b) (sentence immediately following exemptions). “The segregability requirement applies to all . . . documents and all” FOIA Exemptions. *Judicial Watch, Inc. V. DOJ*, 432 F.3d 366, 371 (D.C. Cir. 2005). When responding to FOIA requests, agencies are to determine and explain to the requester whether “any intelligible portion of the contested” redactions can be “segregated for release.” *Mays v. DEA*, 234 F.3d 1324, 1328 (D.C. Cir. 2000).

Agencies are required to address segregability “with reasonable specificity” and cannot make assumptions as to the value of withheld information to the requester, no matter how seemingly insignificant the redacted portions may be in the eyes of the agency. *Stolt-Nielsen Transp. Group Ltd. V. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008). Furthermore, an agency cannot rely on conclusory assertions to satisfy the segregability requirement. The agency must demonstrate that all reasonably segregable, nonexempt information is properly disclosed. *United Am. Fin., Inc. v. Potter*, 531 F. Supp. 2d 29, 41 (D.D.C. 2008).

In this instance, NRC withholds pages of responsive documents. See attachment C : pages 19 – 23, pages 31 -34, pages 46 – 48, pages 55 – 56, and pages 59 – 60. These withholdings are not accompanied with any explanation or discussion of segregability. Instead, the responsive records appear to contain arbitrarily deleted swaths of information.

4. NRC fails to meet its statutory time limit.

NRC’s response indicates that the agency is “continuing to process your request.” For those remaining documents, NRC fails to meet the twenty-business day response time that FOIA imposes on agencies. FOIA states that agencies “shall make records promptly available” upon request. 5 U.S.C. § 552(a)(3)(A). Under FOIA’s administrative appeal provision, a requester may administratively appeal an agency’s adverse determination (including agency’s failure to address requested records). 5 U.S.C. § 552(a)(2). FOE appeals NRC’s constructive denial of these records.

5. NRC fails to inform the requester of the reason(s) for denial, justify its withholding, and provide itemized descriptions or a Vaughn index of the withheld records.

As a fundamental matter, NRC withholds many pages of records without providing any context, explanation or description of the withheld information. NRC has simply failed to meet its heavy burden to justify redacting the information. A decision to deny a request must inform the requester of the reasons for denial. See 5 U.S.C. § 552(a)(6)(A)(i) (requiring agencies to “immediately notify the [requester] of such determination and the reasons therefor”). NRC’s response is a boilerplate form that merely quotes the statutory language. Parroting the statutory language is not a justifiable “reason” for withholding records as it does not demonstrate how the records are properly exempt under FOIA.

Conclusion

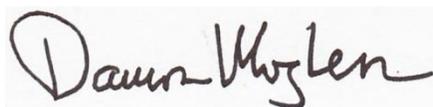
In his January 21, 2009 memo, President Barack Obama declared the following policy for the Executive Branch:

“The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve... All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.”

NRC’s claim that the records Requesting Parties requests are exempt from full disclosure falls short of meeting the requirements for any FOIA exemption, including 5 U.S.C. § 552 (b)(5). Consequently, Requesting Parties maintain that NRC fails to adequately or properly respond to its FOIA request and is in violation of the Freedom of Information Act for wrongfully withholding properly requested records.

Thank you for the consideration of this appeal.

Sincerely,

A handwritten signature in black ink that reads "Damon Moglen". The signature is written in a cursive, flowing style.

Damon Moglen
Senior Strategic Advisor, Climate and Energy Program
Friends of the Earth
1100 15th St NW
Washington, DC 20005
(202) 222-0708
dmoglen@foe.org

Enclosed Attachments:

- A. Requesting Parties’ original FOIA
- B. NRC’s Acknowledgement Letter
- C. NRC’s Response/production of documents of November 14, 2014

