

The National Security Archive

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Via facsimile

30 January 2003

FOIA/PA Officer
US Nuclear Regulatory Commission
Washington DC 20555-0001

RE: FOIA/PA Appeal
Case No. FOIA/PA 2002-0401

Dear Sir or Madame:

This letter constitutes an administrative appeal under the Freedom of Information Act, 5 U.S.C. Sec. 552, of the November 27, 2002 response of the Nuclear Regulatory Commission (NRC) to my FOIA request dated September 4, 2002. With that letter, NRC released 14 documents in full, but denied two documents in part and four in full on the basis of exemption (b)(5) of the FOIA.

For your reference, I have enclosed a copy of the NRC letter and a copy of my original request.

Preliminarily, let me commend NRC for proactively including a detailed listing describing the documents found responsive to this request. This effort, which many other agencies neglect to undertake, assists the requester's assessment as to whether issues are worth appealing. In that way, it enhances communication and trust between the agency and the public, and specifically, to the agency's benefit, prevents against a 'knee-jerk' response by an uninformed requester.

Nevertheless, with respect to the documents withheld on the basis of (b)(5), I ask that, at a minimum, you review these documents in the appeal process to release segregable, factual portions of documents found responsive to the request. Factual, post-decisional information, unless inextricably intertwined with other information, is not protected under the fifth exemption and must be released. See the Supreme Court's ruling in *EPA v. Mink*, 410 U.S. Further, the FOIA requires release of "any reasonably segregable portion of a record" "after deletion of the portions which are exempt". See 5 U.S.C. Sec.

552 (b). At a minimum, it seems certain that there is some releasable material contained in the four documents denied in their entirety.

Additionally, I would ask your reviewers to consider that the Ashcroft memorandum is by definition a policy directive and concluded and that NRC's implementing guidelines are likely also concluded and implemented. Correctly applied, exemption five protects deliberative material during the deliberative process. As the policy has been decided, there is likely no deliberative rationale remaining to properly withhold this material. Therefore, I seek the maximum disclosure of this information.

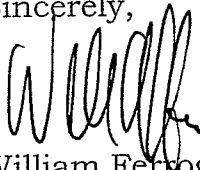
Attorney General Ashcroft's memorandum itself declares that the "Department of Justice and this Administration are committed to full compliance with the Freedom of Information Act". See <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>. Indeed, Attorney General Ashcroft's memorandum does not forbid disclosure of material that is deliberative or advisory in nature, but, as with other types of information, it advises agencies to "carefully consider" values and interests in determinations of disclosure.

Consequently, I ask that you reexamine the initial determination in light of the public interest in understanding the impact of Attorney General John Ashcroft's memorandum on FOIA, particularly at the NRC, which, due to its unique regulatory role, has developed disclosure policies and mechanisms important to public-government interaction.

I would also note that, in forwarding Attorney General Ashcroft's memorandum to departments and agencies, the Department of Justice's Office of Information and Privacy nevertheless advised "the presidential statement on the FOIA that was issued in 1993 remains in effect as well." See <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>. In that statement, President Clinton directed all executive branch departments and agencies to "renew their commitment to the Freedom of Information Act, to its underlying principles of government openness, and its sound administration." In particular, the President stressed that "(t)he existence of bureaucratic hurdles has no place in its implementation."

I look forward to receiving your decision on this appeal. If you have any questions, or believe that a discussion of this matter would be beneficial, please contact me directly at wferro@gwu.edu or (202) 994-7045.

Sincerely,

A handwritten signature in black ink, appearing to read 'William Ferroggiaro', written in a cursive style.

William Ferroggiaro
Director, Freedom of Information Project

Enclosures

NRC FORM 464 Part I
(3-1998)

U.S. NUCLEAR REGULATORY COMMISSION

FOIA/PA 2002-0401

RESPONSE NUMBER

1



RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) / PRIVACY ACT (PA) REQUEST

RESPONSE TYPE FINAL PARTIAL

REQUESTER

William Ferroggiaro

DATE

NOV 27 2002

PART I. -- INFORMATION RELEASED (See checked boxes)

RECEIVED DEC 02 2002

- No additional agency records subject to the request have been located.
- Requested records are available through another public distribution program. See Comments section.
- APPENDICES **A** Agency records subject to the request that are identified in the listed appendices are already available for public inspection and copying at the NRC Public Document Room.
- APPENDICES **B** Agency records subject to the request that are identified in the listed appendices are being made available for public inspection and copying at the NRC Public Document Room.
- Enclosed is information on how you may obtain access to and the charges for copying records located at the NRC Public Document Room, 2120 L Street, NW, Washington, DC.
- APPENDICES **A,B,C** Agency records subject to the request are enclosed.
- Records subject to the request that contain information originated by or of interest to another Federal agency have been referred to that agency (see comments section) for a disclosure determination and direct response to you.
- We are continuing to process your request.
- This completes NRC's action on your request.

PART I.A -- FEES

- Fees
- AMOUNT * You will be billed by NRC for the amount listed. None. Minimum fee threshold not met.
- \$ You will receive a refund for the amount listed. Fees waived.

* See comments for details

PART I.B -- INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE

- No agency records subject to the request have been located.
- Certain information in the requested records is being withheld from disclosure pursuant to the exemptions described in and for the reasons stated in Part II.
- This determination may be appealed within 30 days by writing to the FOIA/PA Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Clearly state on the envelope and in the letter that it is a "FOIA/PA Appeal."

PART I.C COMMENTS (Use attached Comments continuation page if required)

SIGNATURE - FREEDOM OF INFORMATION ACT AND PRIVACY ACT OFFICER

Carol Ann Reed

**RESPONSE TO FREEDOM OF INFORMATION
ACT (FOIA) / PRIVACY ACT (PA) REQUEST**

FOIA/PA 2002-0401

NOV 27 2002

PART II.A -- APPLICABLE EXEMPTIONS

APPENDICES
C & D

Records subject to the request that are described in the enclosed Appendices are being withheld in their entirety or in part under the Exemption No.(s) of the PA and/or the FOIA as indicated below (5 U.S.C. 552a and/or 5 U.S.C. 552(b)).

- Exemption 1: The withheld information is properly classified pursuant to Executive Order 12958.
- Exemption 2: The withheld information relates solely to the internal personnel rules and procedures of NRC.
- Exemption 3: The withheld information is specifically exempted from public disclosure by statute indicated.
 - Sections 141-145 of the Atomic Energy Act, which prohibits the disclosure of Restricted Data or Formerly Restricted Data (42 U.S.C. 2161-2165).
 - Section 147 of the Atomic Energy Act, which prohibits the disclosure of Unclassified Safeguards Information (42 U.S.C. 2167).
 - 41 U.S.C., Section 253(b), subsection (m)(1), prohibits the disclosure of contractor proposals in the possession and control of an executive agency to any person under section 552 of Title 5, U.S.C. (the FOIA), except when incorporated into the contract between the agency and the submitter of the proposal.
- Exemption 4: The withheld information is a trade secret or commercial or financial information that is being withheld for the reason(s) indicated.
 - The information is considered to be confidential business (proprietary) information.
 - The information is considered to be proprietary because it concerns a licensee's or applicant's physical protection or material control and accounting program for special nuclear material pursuant to 10 CFR 2.790(d)(1).
 - The information was submitted by a foreign source and received in confidence pursuant to 10 CFR 2.790(d)(2).
- Exemption 5: The withheld information consists of interagency or intraagency records that are not available through discovery during litigation. Applicable privileges:
 - Deliberative process: Disclosure of predecisional information would tend to inhibit the open and frank exchange of ideas essential to the deliberative process. Where records are withheld in their entirety, the facts are inextricably intertwined with the predecisional information. There also are no reasonably segregable factual portions because the release of the facts would permit an indirect inquiry into the predecisional process of the agency.
 - Attorney work-product privilege. (Documents prepared by an attorney in contemplation of litigation)
 - Attorney-client privilege. (Confidential communications between an attorney and his/her client)
- Exemption 6: The withheld information is exempted from public disclosure because its disclosure would result in a clearly unwarranted invasion of personal privacy.
- Exemption 7: The withheld information consists of records compiled for law enforcement purposes and is being withheld for the reason(s) indicated.
 - (A) Disclosure could reasonably be expected to interfere with an enforcement proceeding (e.g., it would reveal the scope, direction, and focus of enforcement efforts, and thus could possibly allow recipients to take action to shield potential wrongdoing or a violation of NRC requirements from investigators).
 - (C) Disclosure would constitute an unwarranted invasion of personal privacy.
 - (D) The information consists of names of individuals and other information the disclosure of which could reasonably be expected to reveal identities of confidential sources.
 - (E) Disclosure would reveal techniques and procedures for law enforcement investigations or prosecutions, or guidelines that could reasonably be expected to risk circumvention of the law.
 - (F) Disclosure could reasonably be expected to endanger the life or physical safety of an individual.
- OTHER (Specify)

PART II.B -- DENYING OFFICIALS

Pursuant to 10 CFR 9.25(g), 9.25(h), and/or 9.65(b) of the U.S. Nuclear Regulatory Commission 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 the denial are those officials identified below as denying officials and the FOIA/PA Officer for any denials that may be appealed to the Executive Director for Operations (EDO).

DENYING OFFICIAL	TITLE/OFFICE	RECORDS DENIED	APPELLATE OFFICIAL		
			EDO	SECY	IG
Joseph Gray	Associate General Counsel for Licensing and Regulations	C/1		XX	
Lawrence Chandler	Associate General Counsel for Hearings, Enforcement and Administration	D/1, D/2 and D/4		XX	
Stuart Reiter	Chief Information Officer	C/2 and D/3	XX		

Appeal must be made in writing within 30 days of receipt of this response. Appeals should be mailed to the FOIA/Privacy Act Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, for action by the appropriate appellate official(s). You should clearly state on the envelope and letter that it is a "FOIA/PA Appeal."

**APPENDIX A
RECORDS ALREADY AVAILABLE IN THE PDR**

<u>NO.</u>	<u>DATE</u>	<u>ACCESSION NUMBER</u>	<u>DESCRIPTION/(PAGE COUNT)</u>
1.	10/29/01	ML021120050	Memo from William Travers to the Commission, subject: Guidance to the Staff on Release of Information to the Public, with attached guidance. (9 pages)
2.	06/17/02	ML021630416	Memo from William Travers to Office Directors and Regional Administrators, subject: Withholding Sensitive Homeland Security Information, with attachments: a) 5/28/02 memo from Annette Vietti-Cook to W. Travers and K. Cyr, and b) 4/4/02 memo from W. Travers to the Commission . (9 pages)

**APPENDIX B
RECORDS BEING RELEASED IN ENTIRETY**

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)</u>
1.	Undated	Draft Announcement to all employees. (1page)
2.	Undated	Draft Announcement to go to all employees. (1 page)
3.	Undated	Draft Announcement to all employees. (1 page)
4.	Undated	Draft Announcement to all employees. (1 page)
5.	Undated	Draft NRC FOIA Process Changes. (1 page)
6.	10/18/02	E-mail from R. Doornbos to B. J. Holt regarding FOIA Policy Changes and Training Opportunities. (3 pages)
7.	11/7/01	E-mail from C. Reed to J. Pellet regarding FOIA AG Memo Followup. (1 page)
8.	12/03/01	E-mail Network Announcement. (1 page)
9.	12/04/01	E-mail from C. Reed to J. Pellet regarding FOIA Process Change. (1 page)
10.	12/19/01	Memo to All Agreement States - Program Information: NRC Guidance to Staff on Application of Attorney General Ashcroft FOIA Policy Memorandum. (2 pages)
11.	12/27/01	E-mail from C. Reed to various addressees, subject: Guidance. (1 page)
12.	01/31/02	Regional Procedure RP-0959R1 Freedom of Information Act Requests. (12 pages)

**APPENDIX C
RECORDS BEING WITHHELD IN PART**

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)/EXEMPTIONS</u>
1.	10/17/01	E-mail from Catherine Holzle to various addressees, subject: New FOIA policy, (1 page), portions EX. 5 , with attached announcement from DOJ Office of Information Policy website: New Attorney General FOIA Memorandum Issued. (5 pages)
2.	03/05/02	E-mail from C. Reed to Nick Hilton, subject: FOIA Clarification. (1 page) EX. 5, Attorney-client privilege

**APPENDIX D
RECORDS BEING WITHHELD IN THEIR ENTIRETY**

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)/EXEMPTIONS</u>
1.	10/19/01	E-mail exchange between Donald Hassell to Paul Lohaus and Susan Frant, subject: Proposed Letter to States on FOIA. (5 pages) EX. 5
2.	11/29/01	E-mail from D. Hassell to Carol Ann Reed, subject: Network Announcement. (1 page) EX. 5
3.	02/28/02	E-mail from Carol Ann Reed to Mary Pat Siemien, subject: Use of Exemption 5. (1 page) EX. 5
4.	03/01/02	E-mail from Mary Pat Siemien to Carol Ann Reed, subject: Use of Exemption 5, responding to 2/28/02 e-mail above. EX. 5



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FAX COVER SHEET

Date: 9/4/02

To: Carol Ann Reed, FOIA/PA Officer

Organization: NRC

From: William Ferroggiaro

Number of pages (including cover sheet) 2

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Message:

New FOIA request (Archive no. 20020525NRC001)

The National Security Archive

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Via Facsimile

September 4, 2002

Carol Ann Reed
FOIA/PA Officer
Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Archive FOIA Request #20020525NRC001

Dear Ms. Reed:

Pursuant to the Freedom of Information Act (FOIA), I hereby request disclosure of the following documents for inspection and possible copying:

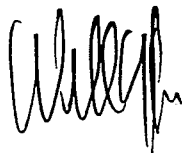
All records, including but not limited to guidance or directives, memoranda, training materials, or legal analyses, concerning the Nuclear Regulatory Commission's implementation of US Attorney General John Ashcroft's October 12, 2001 memorandum on the US Freedom of Information Act.

If you regard any of these documents as potentially exempt from the FOIA's disclosure requirements, I request that you nonetheless exercise your discretion to disclose them. As the FOIA requires, please release all reasonably segregable nonexempt portions of documents. To permit me to reach an intelligent and informed decision whether or not to file an administrative appeal of any denied material, please describe any withheld records (or portions thereof) and explain the basis for your exemption claims.

As you know, the National Security Archive qualifies for waiver of search and review fees as a representative of the news media. This request is made as part of a scholarly and news research project and not for commercial use. For details on the Archive's research and publication activities, please see our Web site at the address above. Please notify me before incurring photocopying costs over \$100.

To expedite the release of the requested documents, please disclose them on an interim basis as they become available to you, without waiting until all the documents have been processed. If you have any questions regarding the identity of the records, their location, the scope of the request or any other matters, please contact me directly at (202) 994-7045 or wferro@gwu.edu. I look forward to receiving your response within the twenty-day statutory time period.

Sincerely,



William Ferroggiaro
Director, Freedom of Information Project

 *** TX REPORT ***

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FAX COVER SHEET

Date: 30 January 2003

To: FOIA/PA Officer

Organization: US Nuclear Regulatory Commission

From: William Ferroggiaro

Number of pages (including cover sheet) 12

If there is a problem with this transmission, please call us at
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Message:

FOIA/PA Appeal
 Case No. FOIA/PA 2002-0401 (Archive's 20020525NRC001)