



RESTRICTED — Not to be released outside the General Accounting Office without the approval of the Director, General Accounting Office
 UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548

RESOURCES, COMMUNITY,
AND ECONOMIC DEVELOPMENT
DIVISION

B-217906

APRIL 24, 1985

The Honorable Glenn English
 Chairman, Subcommittee on Government
 Information, Justice, and Agriculture
 Committee on Government Operations
 House of Representatives

Dear Mr. Chairman:

Subject: Concerns Regarding the Nuclear Regulatory
 Commission's Implementation of the Freedom of
 Information Act (GAO/RCED-85-101)

In an October 3, 1984, letter, you requested that we review the Nuclear Regulatory Commission's (NRC) implementation of the Freedom of Information Act (FOIA) (5 U.S.C. 552) with respect to allegations made during testimony before your Subcommittee on June 20, 1984. A representative of the Nuclear Information and Resource Service (Information Service), a clearinghouse for information on nuclear power plants, charged that NRC frequently ignores and violates the FOIA by

- removing or destroying documents to avoid disclosure;
- abusing exemption 5 of the FOIA, which applies to pre-decisional documents;
- consistently failing to meet the time limits specified in the FOIA; and
- running its FOIA operations using unwritten and erratic rules.

On January 24, 1985, we provided a briefing to your office on the results of our survey work. At that time, we were told that you would not require any further work on this subject and we were asked to summarize the problems and concerns that were raised about NRC's FOIA operations. The following is a discussion of our survey results, including our objective, scope, and methodology, and background on the FOIA.

531879

(301686)

Objective, Scope, and Methodology

The objective of our survey was to determine the basis for the allegations made to the Subcommittee. Although we reviewed the four areas discussed in the request letter, we concentrated, as agreed, on the possible removal or destruction of records by NRC officials and NRC's use of exemption 5. We reviewed the FOIA requirements and NRC regulations, procedures, and operations to understand their implementation of the act. We interviewed the Information Service representative regarding the basis for her allegations and other groups that she referred to us as having similar problems with NRC's implementation of the FOIA. These groups, which have frequently requested information from NRC under the FOIA, include the Union of Concerned Scientists, the Palmetto Alliance, the Government Accountability Project, and three law firms, which represent these and other public interest groups. We also interviewed NRC's Director of Rules and Records and the FOIA Branch Chief, who are responsible for administering the FOIA program in NRC, and the attorney in NRC's Office of General Counsel who specializes in FOIA.

As agreed with your office, we limited our scope and methodology to identifying problems and concerns raised about NRC's FOIA operations. Except as noted above, our work was performed in accordance with generally accepted government auditing standards. As requested, we did not obtain agency comments on this report. We did, however, discuss the report's contents with NRC's FOIA officials and their comments are incorporated where appropriate.

Background

The FOIA requires that most federal agency records be made available to the public on request. The Act exempts from public disclosure certain records such as "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" (known as exemption 5). This exemption generally applies to documents that are part of an agency's decisionmaking process and is designed to protect the free and frank discussion of issues prior to a decision.

The FOIA requires agencies to respond to a request for information within 10 working days by at least notifying the requestor whether the agency intends to grant or deny the request. An extension of an additional 10 working days is allowable provided that the requestor is notified in writing in cases where the documents requested are (1) numerous, (2) located at field offices, or (3) of interest to another agency that needs to be consulted about the release of information. In either case, the agency is

required to promptly release documents to the requestor after the decision has been made to comply with the request. When an information request is denied, the requestor can appeal the decision to the agency head. Further, if the agency head denies the appeal, the requestor can sue in U.S. district court to have that decision overturned.

Concerns Raised About NRC's FOIA Operations

The concerns raised about NRC's FOIA operations by the individuals and groups we contacted were similar to those raised in the testimony before the Subcommittee. Although all seven of the parties we interviewed had problems obtaining certain documents, receiving a timely response, or had disagreed with the use of exemption 5, four of them said that NRC appears to be as or more responsive to their FOIA requests than other agencies or that, in one case, NRC's lateness was understandable because the request involved was a large scope request of a general nature.

Removal and Destruction of Documents

The main example cited of NRC trying to circumvent the FOIA by removing or destroying documents is the Zimmer case. The incident in this case is well-documented because it was the subject of an FOIA lawsuit (Applegate v. NRC) in the U.S. District Court for the District of Columbia. The documents in question related to a report by NRC's Office of Inspector and Auditor (OIA) on the adequacy of NRC's investigation of activities involving the construction of the Zimmer Nuclear Power Plant in Ohio. In Applegate v. NRC, the court found that NRC had claimed that many documents, which were requested by the plaintiff, Mr. Thomas Applegate, in 1981 relating to the OIA report were nonexistent. The court found that not until a congressional investigation of NRC recordkeeping procedures in 1982 and Mr. Applegate's subsequent initiation of the judicial process were these documents released by NRC. In a May 1983 opinion and order on the case, the court stated that

". . . evidence was uncovered in the record suggesting that despite the existence of carefully drafted official NRC FOIA policies and procedures, the personnel assigned to implement FOIA in OIA executed those rules in a manner designed to thwart the release of responsive materials. These procedures appeared to include the removal of documents from agency files, taking documents home, and the use of carefully worded oral inquiries designed to avoid identification of documents.

"The NRC assured the Court that it has taken and is taking affirmative steps to ensure effective and complete compliance with the requirements of FOIA. It is disturbing to this Court that unbeknownst to agency management, an office in the NRC was able to design a filing and oral search system which could frustrate the clear and express purposes of FOIA. The assertion of an exemption is one thing, avoidance borders on dishonesty. It is also disturbing that FOIA appears to have been implemented in an adversarial manner. A lawsuit ought not be required to ensure the adequacy of a search."

More recently, in a January 1985 opinion and order regarding the settlement for attorneys fees on the case, the court stated:

"It was obvious to the Court throughout this litigation that the defendant NRC was determined to avoid its obligations under FOIA. In fact, information presented in the course of this litigation suggests that some NRC employees went to considerable lengths to avoid release of relevant documents including removing from the office to their homes."

According to NRC's Director of Rules and Records, this problem has been corrected by the further clarification and restatements of agency FOIA policies and procedures to NRC staff.

Another example given was that an NRC investigator for region II (Atlanta, Georgia) had destroyed his handwritten notes of interviews with Duke Power employees regarding construction problems at the Catawba nuclear plant. NRC explained that the investigator had destroyed his notes after summarizing his findings in an August 1984 memorandum.

NRC's FOIA officials stated that they believe handwritten notes are generally not agency records, unless they are used by the agency or mingled with agency records, but are personal documents that can be disposed of at the individual's discretion.

Use of Exemption 5

Several of the parties we contacted disagreed with NRC's use of exemption 5 and provided examples of where they disagreed. For example, one party questioned NRC's withholding of a document prepared by the Institute of Nuclear Power Operations (a private organization) as part of a joint effort with NRC. This party contends that any documents prepared by the Institute are not covered under exemption 5 because the Institute's records are not

"intra-agency or inter-agency records." Further, the party questioned the withholding under exemption 5 of an NRC draft submitted to the Institute as part of this effort and maintained that the exemption should be waived once the document is released to any private party outside the agency.

The officials responsible for administering the FOIA program in NRC defended the withholding of these documents. They asserted that the documents in question are part of NRC's decisionmaking process and thus covered by exemption 5 in that they contain information on a joint effort in which NRC had a special need for the Institute's expertise. They added that a lawsuit to overturn the decision denying release of these documents is currently pending in U.S. district court.

Another example cited by two of the parties we contacted related to engineering analysis inputs to NRC Safety Evaluation Reports on nuclear power plants that have applied for operating licenses. These parties stated that the engineering inputs are not covered by exemption 5 because they represent an engineer's final report on technical evaluations, are factual, and are not part of the decisionmaking process.

NRC's FOIA officials stated that NRC can legally withhold these engineering analysis inputs to safety reports because they are subject to review and approval as part of the decision on power plant safety evaluations. However, according to these officials, the engineering analysis inputs may be released to the public after the safety evaluation report has been completed if approved by program officials responsible for safety evaluations.

Data supplied by NRC shows that in each of calendar years 1982 and 1983 approximately 7,000 documents were released under FOIA. In these same years, 323 and 266 documents, respectively, were wholly or partially withheld under exemption 5. For these same years, on the basis of our examination of NRC records, we identified 31 appeals to NRC of its use of exemption 5, which involved at least 106 documents. NRC's use of exemption 5 to withhold these documents was upheld by the agency on appeal for at least 73 of the 106 documents involved. The remaining documents were wholly or partially released as a result of the appeal. Similar statistics for calendar year 1984 were not available as of February 7, 1985.

Timing of Response

All of the parties we interviewed noted that NRC is not responding to FOIA requests in a timely manner. Generally, the examples cited involved cases where NRC had not formally responded to the FOIA request within the 10-day time limit specified by the Act. One party cited an FOIA request dated October 20, 1983, to which NRC had not formally responded as of January 1985.

NRC's FOIA officials agreed that they often do not meet the 10-day time limit for responding to FOIA requests. These officials attribute the timeliness problem to (1) an increasing number of FOIA requests (for example, from 630 in calendar year 1982 to 793 in 1983), (2) large and complex requests, which require them to identify and examine many individual documents to determine whether they will be released, and (3) the limited budget and staff to handle FOIA requests (about \$355,000 for personnel cost and 9 professional staff members in fiscal year 1983 and \$475,000 for personnel cost and 11 professional staff members in fiscal year 1984).

In respect to the FOIA request, which has been outstanding since October 1983, NRC's FOIA Branch Chief stated that it was due to the need for negotiations with the government of the United Kingdom. The documents requested were, in part, property of the United Kingdom and relate to their Sizewell-B nuclear power plant. As of February 27, 1985, NRC said it was preparing a formal response to the FOIA request.

Use of Unwritten and Erratic Rules

The contention that NRC FOIA operations are run using unwritten or erratic rules was made by all of the parties interviewed. However, the examples they cited deal more with the application of NRC's FOIA written rules, policies, and procedures rather than the absence of such guidance, and relate closely to examples used in the other areas. In fact, in Applegate v. NRC the District Court judge found that NRC had carefully drafted official FOIA policies and procedures.

The examples cited include NRC's inconsistent performance in meeting the 10-day time limit to respond to FOIA requests and in one instance, the release of a document to one requestor but not to another. According to NRC's Director of Rules and Records, NRC has a computerized system to track published agency documents and reports but cannot track all documents such as memorandums or draft materials on this system, and must rely on FOIA and program staff memories and manual checks of their files for requested documents. As such, he commented that it is not possible to ensure that all documents and requests are handled consistently.

Further, one party cited an NRC change to its policy on disclosing the meeting minutes of the Committee to Review Generic Requirements as an example of inconsistency. Formerly, these minutes were available in the public document room. NRC's Director of Rules and Records agreed that NRC had changed its policy on the release of Committee to Review Generic Requirements meeting minutes. However, he stated that the minutes should not have been released previously, since the committee provides advice

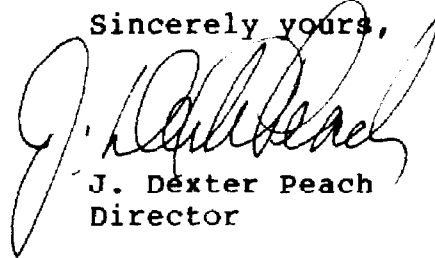
B-217906

on proposed rules and regulations that is covered by exemption 5 of the Act. As of May 1984, these minutes are not placed in the public document room until a final decision is made on the subject matter.

- - - -

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of the report. At that time, we will send copies of the report to the Director, Office of Management and Budget; the Nuclear Regulatory Commission; other interested parties; and make copies available to others upon request.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "J. Dexter Peach", is written over the typed name and title.

J. Dexter Peach
Director