



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

November 25, 2019

IN RESPONSE REFER TO:
NRC-2020-000026
NRC-2019-000363

Mr. Samuel Miranda
2212 Forest Glen Road
Silver Spring, MD 20910

Dear Mr. Miranda:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to your letter, dated October 25, 2019, in which you appealed the agency's September 20, 2019, response related to your July 18, 2019, Freedom of Information Act (FOIA) request, NRC-2019-000363. In responding to your request, the NRC redacted some of the information from the NRC internal staff memorandum you requested pursuant to the deliberative process privilege under exemption 5. You appealed the redactions, asserting that exemption 5 does not support withholding the information.

Acting on your appeal, I have reviewed the memorandum at issue and have determined that the redaction of portions of the memorandum under exemption 5 was appropriate for the reasons set forth below. Therefore, I have denied your appeal.

The most commonly invoked privilege incorporated within exemption 5 is the deliberative process privilege. The purpose of this privilege is to protect the agency decision-making process and to encourage open and frank discussion amongst employees while they are developing legal and policy decisions. As you noted in your appeal letter, for the deliberative process privilege to apply, several requirements must be met. I have determined, as discussed below, that these requirements have, in fact, been met.

First, the memorandum, which is co-signed by three branch chiefs, and addressed to their respective division directors in the Office of Nuclear Reactor Regulation (NRR), is an intra-agency record on its face, and I am not aware of any facts indicating the memorandum was shared with any external audience.

Second, the communication is predecisional. The memorandum sets forth NRR staff's preliminary views on the issues that they intend to develop for inclusion in a replacement for the withdrawn Regulatory Issue Summary (RIS) 2005-29. As of the date of the memorandum's issuance, and as is still the case today, this matter remains an ongoing one, as no replacement for the withdrawn RIS has yet been finalized and issued. Although the memorandum also contributed to the agency's decision to withdraw both the original RIS and a draft revision to the RIS, see Agencywide Documents Access and Management System (ADAMS) Accession No. ML19121A534 (memorandum from May 15, 2019); 84 Fed. Reg. 28,775 (June 20, 2019) (announcing the withdrawals), those withdrawal actions represent only an interim step in the

agency's process of reconsidering how to address the relevant policy matters, not a final agency decision on those matters. Instead, the agency is still in the process of developing statements of the relevant agency positions, which are expected to be included in a revision to the Standard Review Plan (NUREG-0800) that the agency currently plans to issue as a draft for public comment in 2020. Moreover, the redacted information specifically addresses the views of the memorandum's authors on what agency positions should be expressed in a replacement for the RIS. As such, the redacted information is predecisional.

Third, the redacted information is deliberative. The redacted information in the memorandum, as just noted, proposes positions for the agency to adopt, and it provides justifications for those recommendations, all for consideration by higher management within the agency. Thus, the information forms part of the agency's internal deliberations on what positions to take in a future agency product that would replace the RIS and the draft revision to the RIS.

Fourth, releasing the document without the redactions would foreseeably cause harm against which the deliberative process privilege is intended to protect. Specifically, the preliminary positions expressed in the redacted text may not ultimately align with the final positions expressed by the agency, thereby risking public confusion as to the nature of the NRC's positions on the matters addressed and also risking that agency staff will be deterred in the future from committing comparable recommendations to writing, which would complicate future internal agency deliberations.

Fifth, because no final agency decision on a replacement for the RIS has been made, the redacted content cannot be said to be identical to or expressly incorporated into that agency decision (which, again, would be the relevant final agency decision with respect to the redacted information).

Accordingly, I have concluded that the partial release of the memorandum, which was provided in response to your initial FOIA request, is appropriate.

This is the final agency decision. As set forth in the FOIA (5 U.S.C. 552(a)(4)(B)), you may seek judicial review of this decision in the district court of the United States in the district in which you reside or have your principal place of business. You may also seek judicial review in the district in which the agency's records are situated or in the District of Columbia.

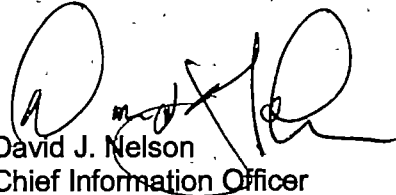
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Miranda, S.

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Sincerely,

A handwritten signature in black ink, appearing to read "David J. Nelson". The signature is stylized with large loops and a long horizontal stroke.

David J. Nelson
Chief Information Officer
Office of the Chief Information Officer