

Environmental Defense Institute
Troy, Idaho 83871-0220

February 12, 2009

Director, Office of Hearings and Appeals
U.S. Department of Energy
1000 Independence Av. SW
Washington, DC 20585

Sent via U.S. Certified Mail

**Re: Freedom of Information Appeal
concerning USDOE Idaho Operations Office Partial Response to Freedom of
Information Request from EDI & KYNF (FOIA-08-018) (Om-PA-08-058)**

Dear Director,

On behalf of the Environmental Defense Institute, Inc. (EDI) and Keep Yellowstone Nuclear Free, Inc. (KYNF) "Requestors" and pursuant to 10 C.F.R. ss 1004.8, I write to appeal the December 16, 2008 release decision of the Department of Energy Idaho Operations Office (DOE/ID) or (IOO) (received by me 12/30/08) which substantially redacted significant portions of documents sought by Requestors under the Freedom of Information Act (FOIA).

As set forth below, under no reading of FOIA, or relevant case law, do the FOIA exemptions cited by IOO cover the documents that IOO has redacted. I therefore ask that the Office of Hearings and Appeals direct IOO to immediately release the redacted documents in their entirety.

Requestors original FOIA filed 4/10/08 to DOE Idaho Operations Office (IOO) is below in Attachment A. This 4/10/08 FOIA was subsequently negotiated to accommodate a phased release as the documents are processed by IOO.

To date, IOO has sent three partial shipments responsive to Requestors FOIA;

- 1.) 7/15/08 (OM-08-021);
- 2.) 8/21/08 (OM-PA-08-036);
- 3.) 12/16/08 (FOIA-08-018) (OM-PA-08-058) received 12/30/08. See attached IOO cover letter.

Requestors Appeal; IOO's "exemption from disclosure" as applied in FOIA "Exemption 2", "Exemption 3" and "Exemption 6" as described in IOO 12/16/08 FOIA transmittal cover letter below in Attachment B.

Relief Requested; A complete copy of each of the following IOO redacted documents;

1. ATR Vessel Vent Valve Instillation, EG&G Facility Change Form, 1988; Reactor Vessel Vent System issued 6/22/93, Doc. No. 7.3.12.3.21; [Response to Request No. 9i]. *[This report is HEAVILY redacted with current DOE/ID “Ex. 2, 3” notations (FOIA Exemptions 2 and 3 hand written in blue ink at each redaction); Redactions include 31 individual paragraphs plus 13 whole pages];*

2. Recommendation for Upgrade of Radiation Monitoring at the Idaho National Laboratory Reactor Technology Complex, August 2007, ANN Inc., et al., Attached to Response to Request No. 9d. *[Only page 2-41 was attached, thus the rest of the report was redacted]*

3. Chapter 12, Radiological Protection Upgraded Final Safety Analysis Report for Advanced Test Reactor, SAR-153, 2/05/08, page 12-69, Rev. 09. Attached to “Response to Request No. 9d.” *[Only page 12-69 was attached, thus the rest was redacted]*

Previous Rulings; Office of Hearings and Appeals (OHA) rulings on EDI include; Case No. TFA-0128 and Case No. TFA-0177. OHA ruling on KYNF include: Case No. TFA-0156.

Relevant Authority; 10 CFR Section 1004.8 Appeal of initial denials.

(a) Appeal to Office of Hearings and Appeals. When the Authorizing Official has denied a request for records in whole or in part or has responded that there are no documents responsive to the request consistent with Section 1004.4(d), or when the Freedom of Information Officer has denied a request for waiver of fees consistent with Section 1004.9, the requester may, within 30 calendar days of its receipt, appeal the determination to the Office of Hearings and Appeals.

Purported Exemptions do not Apply;

As OHA is well aware, FOIA provides the public a right, enforceable in federal court to access government documents and information. FOIA is to be broadly construed in favor of disclosure, and its exceptions narrowly construed. Furthermore, the federal agency that is resisting disclosure bears the burden of proving that the withholding is authorized by the statute. *Audubon Society v. Unites Forest Service* 104 F.3d1201, 1202 (10th Cir. 1997). Here as set forth below, the DOE-ID has badly overreached, applying Exemptions 2, 3 and 6 in ways never intended by Congress and unsupported by case law.

Documents do Not Fall Within the Language of Exemption 2;

None of the documents withheld by DOE/ID under exemption 2 are exclusively “internal” nor will “their disclosure significantly risk installations and projects and safeguard nuclear materials and facilities.”

Disclosure of the information requested here will not risk circumvention of federal rules or statutes. DOE/ID’s claim that “Exemption 2’s anti-circumvention protections is applicable in this case because some of the requested documents identify vulnerabilities to sabotage events, system configurations/capabilities that may be exploited and internal procedures for operating the reactor that are inherently internal” has no basis in fact.

The “circumvention” exemption only protects documents such as agency law enforcement manuals and procedures from public disclosure so that individuals may not use them to circumvent the law or law enforcement measures.

Documents do Not Fall Within the Language of Exemption 3;

Requested documents do not relate to “special nuclear material.” DOE/ID is claiming that; “Exemption 3 has been invoked under the provisions of the Atomic Energy Act [42 USC ss 2162 (92000 & Supp. III 2003)], that prohibits the disclosure of restricted data to the public specifically related to special nuclear materials” is not supported in fact.

A broad categorical reference in a document to “reactor fuel” cannot be warped under “special nuclear materials” when it is used extensively in public documents such as Environmental Impact Statements.

Documents do Not Fall Within the Language of Exemption 6;

Requested documents do not relate to “privacy concerns.” DOE/ID is claiming that; “Exemption 6 has been used to address privacy concerns relating to potential invasions of privacy” is not supported in fact.

DOE/ID additionally states; “Those documents in which material is so inextricably intertwined as to make redaction impossible or reduce the document to worthlessness have also been withheld.” It is impossible to assess the veracity of this claim when DOE/ID refuses to specifically identify which documents have been completely withheld and under what grounds. Requestors therefore, ask OHA to independently review documents completely withheld and undisclosed by DOE/ID and issue a ruling on its legality.

Respectfully submitted,

Chuck Broschious, President of the Board
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cc: sent via email:

Mark Sullivan, Counsel for Keep Yellowstone Nuclear Free (KYNF)
Mary Woollen Mitchell, Executive Director KYNF

Attachment A:

Environmental Defense Institute and Keep Yellowstone Nuclear Free, April 10, 2008
Advanced Test Reactor FOIA Request.

Attachment B:

Department of Energy, Idaho Operations Office, Clayton Ogilivie, FOIA Officer,
12/16/08 cover letter and USPO date stamp