MARK D. SULLIVAN
Levy, Coleman, Sullivan & Koeckeritz, LLP
1110 Maple Way, Second Floor
P.O. Box 7372
Jackson, Wyoming 83002
phone - (307) 733-7057
fax - (307) 733-7142
msullivan@jhattorneys.com

Attorneys for Plaintiffs
Keep Yellowstone Nuclear Free
Environmental Defense Institute
David McCoy

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

KEEP YELLOWSTONE NUCLEAR FREE, ENVIRONMENTAL DEFENSE INSTITUTE, and DAVID McCOY,	)	06 Civ. 205 (D)
Plaintiffs,	)	
- against -	)	
THE UNITED STATES DEPARTMENT OF ENERGY, SAMUEL W. BODMAN, SECRETARY, UNITED STATES DEPARTMENT OF ENERGY,	)	
Defendants.	)	

MEMORANDUM OF LAW IN OPPOSITON TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This is an action under the Freedom of Information Act ("FOIA") in which the plaintiffs seek disclosure of documents in the possession of the defendant Department of Energy ("DOE") that describe safety shortcomings and the consequences of an accident at the Advanced Test Reactor ("ATR"), a 40-year old nuclear test reactor located at the

Idaho National Laboratory ("INL"). The ATR is well beyond its design life expectancy and has suffered badly from many years of what the DOE itself describes as "budget austerity." With seismic vulnerabilities both known and unknown, aging and suspect safety systems, and no containment dome, the ATR poses a threat to the residents of southeastern Idaho and western Wyoming and two of the nation's most cherished national parks, Yellowstone National Park and Grand Teton National Park. An accident at the ATR could release lethal doses of radioactivity and require the evacuation of a wide area, including the cities of Pocatello, Idaho Falls and Rexburg.

Some of the problems at the ATR were highlighted by safety reviews performed by teams from the Department of Energy's Office of Independent Oversight and Performance Assurance ("OA") in 2003 and 2005, and an independent team of experts assembled by the DOE's Idaho Operations Office (the "Assessment Team") in 2004. The safety reviews prompted the DOE to embark on the Life Extension Program ("LEP"), a ten-year $200 million dollar initiative under which the DOE is investigating the safety basis of the facility, addressing a massive engineering work backlog, and determining necessary upgrades, among other things, all with the intention of extending the operation of the ATR for another 40 years.

The documents at issue in this proceeding fall into two categories. The first category includes the 2003 OA report, a 2004 report by the Assessment Team, and a memorandum summarizing the 2004 Assessment Team report (collectively, the "Independent Safety Assessment Documents"). The second category includes regulation-mandated safety basis documents (the "Safety Basis Documents"). The DOE has alleged that it may withhold the Independent Safety Assessment Documents under the

"deliberative process" interpretation of FOIA Exemption 5, asserting that their release would compromise frank and open policy discussion at the agency. The DOE has alleged that it may withhold the Safety Basis Documents under FOIA Exemptions 2 and 7(F), claiming that the documents, if released, would aid potential terrorists determined to attack the ATR.

The claimed exemptions do not permit the DOE to withhold the documents in question. First, when an agency has adopted the reasoning of an otherwise exempt predecisional and deliberative document in a final action, the "deliberative process" privilege of Exemption 5 is extinguished. Here, the DOE explicitly adopted the reasoning of the Independent Safety Assessment Documents in its LEP and consequently those documents must be disclosed. Second, the DOE's arguments with respect the Safety Basis Documents stretch FOIA Exemptions 2 and 7 beyond recognition. None of the documents in question relate to "internal personnel" matters, and none were "compiled for law enforcement purposes," as required by exemptions 2 and 7 respectively. Thus, the documents must be released.

Plaintiffs respectfully ask that the Court: (1) deny the defendant's motion for summary judgment; and (2) grant Plaintiffs' cross-motion for summary judgment with respect to the withheld documents and order their immediate release.

STATEMENT OF UNDISPUTED FACTS

Plaintiffs concur with the Statement of Undisputed Material Facts and Procedural Posture set forth in Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment (hereinafter "Defendants' Memorandum"), with the following exceptions and clarifications:

(1) Defendants' Memorandum states that "On October 20, 2005 EDI submitted a third FOIA request for many of the same items it previously requested." Defendants' Memorandum at 3. That FOIA request was submitted jointly by all three of the plaintiffs, the Environmental Defense Institute ("EDI"), David McCoy and Keep Yellowstone Nuclear Free ("KYNF"). See Defendants' Exhibit 7 at 1.

(2) Defendants' Memorandum states that: "In a supplemental appeal, EDI challenged IOO's decision to withhold predecisional, deliberative material from the Sellers Memorandum and the ATR Planning Assessment Team Report." See Defendants' Memorandum at 5. EDI was joined in that supplemental appeal by David McCoy and KYNF.

In addition, Plaintiffs add the following brief statement of additional undisputed facts. The ATR is in its 40th year of operation. It was designed in the 1950s, and began operation in 1967. The safety of the ATR has been investigated by the DOE's Office of Independent Assessment and Performance Assurance (the "OA") on several occasions since 2003. See Sullivan Declaration ¶¶ 2-3.

In response to these OA assessments, the DOE formulated and has embarked on the LEP. The LEP involves a suite of actions necessary to extend the life of the ATR for 40 years. The OA and Assessment Team reviews of 2003, 2004 and 2005 were explicitly cited as a reason for the LEP in the March 2006 and September 2006 LEP Plans. See Sullivan Declaration ¶ 4, Exhibits D & E.

ARGUMENT

POINT I

THE PURPOSE OF FOIA IS DISCLOSURE AND ITS EXEMPTIONS MUST BE CONSTRUED NARROWLY

The United States Supreme Court has repeatedly stressed that "the basic purpose of FOIA is to ensure an informed citizenry" which is "vital to the functioning of a democratic society…." John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989) citing NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). This basic purpose reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." Department of Air Force v. Rose, 425 U.S. 352, 360-361 (1976), quoting S. Rep No. 813, 89th Cong. 1st Sess., 3 (1965). FOIA is to be broadly construed in favor of disclosure, and its exemptions are to be narrowly construed. Audubon Society v. United States Forest Service, 104 F.3d 1201, 1203 (10th Cir. 1997). The agency resisting disclosure bears the burden of proving that the withheld documents fall under the narrow language of FOIA's enumerated exemptions. Id.; 5 U.S.C. § 552(a)(4)(B).

POINT II

THE DOE MUST RELEASE ALL REASONABLY SEGREGABLE NON-EXEMPT MATERIAL

FOIA requires the release of "any reasonably segregable portion of a record…after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). The DOE has not demonstrated that there is no reasonably segregable material within the withheld documents. On the contrary, the Declaration of Joel M. Trent dated January 8, 2007 submitted by the DOE in support of its motion for summary judgment

(the "Trent Declaration") suggests that the documents in question include segregable material that must be released even if the Court accepts the DOE's claimed exemptions.

As just one example, the Trent Declaration provides only a one-sentence description of a 72-page document, the "Update of ATR Break Spectrum and Direct Damage Loss of Coolant Accident ("LOCA") Frequency Analyses." The Trent Declaration summarily asserts that the document "identifies detailed information on reactor cooling pipes and locations." Trent Declaration ¶ 15(g). Even assuming that the piping information Mr. Trent describes is exempt, surely that document contains more than just reactor cooling pipes and locations. What about the "Loss of Coolant Accident Frequency Analyses" for which the document is named?

FOIA explicitly provides for *in camera* review of withheld documents when necessary to assist a court in determining the applicability of the FOIA exemptions. 5 U.S.C. § 552(a)(4)(B). FOIA states "the court…may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions…." Id. The decision whether or not to conduct in camera review is within the broad discretion of the trial court. See Horowitz v. Peace Corps, 428 F.3d 271, 282 (D.C. Cir. 2005).

For the reasons set forth below, the Court should reject the DOE's sweeping interpretations of exemptions 2, 5 and 7, and direct the release in full of the documents in question. However, even if the Court accepts the DOE's strained interpretations of the FOIA exemptions, Plaintiffs ask the Court to perform an *in camera* review of the documents in question and order the release of reasonably segregable non-exempt material.

POINT III

EXEMPTION 5 DOES NOT PERMIT DOE TO WITHHOLD THE INDEPENDENT SAFETY ASSESSMENT DOCUMENTS

The DOE asserts that it may lawfully withhold portions of the three Independent Safety Assessment Documents pursuant to an interpretation of FOIA Exemption 5 sometimes referred to as the "deliberative process privilege" exemption. 5 U.S.C. § 552(b)(5). The Independent Safety Assessment Documents are: (1) the Causal Analysis Report, Essential System Functionality dated December 17, 2003 (the "Causal Analysis Report"); (2) the Advanced Test Reactor Planning Assessment Team Report dated February 13, 2004 (the "Assessment Team Report"); and (3) a memorandum from INL Manager Elizabeth Sellers to William D. Magwood IV, Director of the DOE's Office of Nuclear Energy, Science and Technology dated March 19, 2004 (the "Sellers Memorandum"), which summarizes the Planning Assessment Team Report.[1] The redacted copies of these documents that were provided to the Plaintiffs are attached to the Declaration of Mark D. Sullivan dated February 5, 2007 (the "Sullivan Declaration"), as exhibits A, B and C.

The "deliberative process privilege" component of Exemption 5 is intended to

[1] As if to downplay the significance of these documents, the DOE states that it withheld a "small amount" of material pursuant to this exemption. Defendants' Memorandum at 1. While the documents withheld under this exemption may not be voluminous, they contain a distillation of the critical observations and assessments of review teams convened to evaluate the ATR's safety, which assessments then were adopted in a 10-year, $200 million program intended to extend the life of the ATR, the so-called Life Extension Program. These documents, and the conclusions of the experts that compiled them, provide a concise summary of the safety concerns at the ATR, and would greatly assist members of the public in evaluating the prudence of extending its operation. They are, therefore, in Plaintiffs' view, the most important documents at issue in this proceeding.

protect the integrity of agency decision making processes from the chilling effect upon free and frank discussion that might occur if each opinion expressed within an agency can later be heard and questioned by the outside world. Environmental Protection Agency v. Mink, 410 U.S. 73, 87 (1973). An agency asserting an Exemption 5 privilege must demonstrate that the documents in question are both "predecisional" and "deliberative." Access Reports v. Dep't of Justice, 926 F.2d 1192 (D.C.Cir 1991). Exemption 5, as is the case for all FOIA exemptions, is to be narrowly construed. Washington Post Co. v. U.S. Dep't of the Air Force, 617 F. Supp 602, 604 (D.D.C. 1985).

Where an otherwise predecisional and deliberative document is expressly incorporated into a final agency action or decision, it loses its protected status under FOIA Exemption 5 and must be disclosed. National Labor Relations Board et al. v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C.Cir. 1980); Washington Post Co. v. U.S. Department of the Air Force, 617 F.Supp. 602 (D.D.C. 1985). The Supreme Court set forth this rule more than thirty years ago in N.L.R.B v. Sears, Roebuck & Co., holding as follows:

> Thus, we hold that, if an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5.

421 U.S. at 160. As the Court reasoned, where an agency adopts the recommendations of an otherwise predecisional document, the "chilling effect" of disclosure on agency decision making is no longer a concern. On the contrary, disclosure serves the public interest:

> The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, if adopted, will become

> public is slight. First, when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend. Second, the agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency.

421 U.S. at 160.

By the DOE's own admission in this litigation, all three of the Independent Safety Assessment Documents contributed to a final decision -- the DOE's decision to proceed with the LEP. The DOE's declarant, Joel Trent, states: "[t]he recommendations and opinions reflected in the OA reports were only part of the information used to determine a course of action for upgrading the ATR over the course of several years. This course of action was finalized into the ATR Life Extension Plan…." Trent Declaration ¶ 9. Indeed, the recommendations of the Independent Safety Assessment Documents were both "used to determine" the scope of the LEP, and were *expressly* incorporated into the DOE's decision to proceed with the LEP. The opening passage of the Executive Summary of the March, 2006 LEP Plan, refers to the Assessment Team Report, and states as follows:

> In February 2004, the manager of the U.S. Department of Energy Idaho Operations Office requested the assistance of an external team of subject matter experts to conduct an overall assessment of the viability and needs associated with the continued long-term operation of the Advanced Test Reactor (ATR). The team concluded that the current material condition of the ATR and the operations staff were sufficient to support safe near-term operations, but the viability of long-term operations was in doubt. In particular, the ATR Life Extension Program needed to develop and implement specific funded plans to characterize the planned missions; to ensure maintenance of those conditions required for safe operation; to develop and maintain a capable and qualified technical staff; to incorporate experience from the operation of other reactors; and to weigh potential improvements in safety design and management based on changing standards and experience.
>
> As a response to this need, the Idaho National Laboratory developed the ATR Life Extension Program. This plan identifies the proposed

> objectives, methodologies, and milestones needed to address the recommendations of the assessment team related to the long-term viability of the ATR. The approach has been, consistent with the February 2004 independent assessment, to (1) develop a comprehensive set of long-range planning tools, and (2) establish a process of evaluating issues and implementing appropriate corrective and preventive actions for those issues.

See Sullivan Declaration, Exhibit D, Executive Summary (emphasis added). The "February 2004 independent assessment" referred to above is summarized in the Assessment Team Report. The Sellers Memorandum in turn summarizes the Assessment Team Report.

In September 2006, the DOE updated the LEP Plan. The Executive Summary to that update also expressly incorporates the Assessment Team Report, as well as the third OA Document at issue in this proceeding, the OA's 2003 Causal Analysis Report. The September 2006 LEP Plan states as follows:

> Reviews of the ATR were performed in 2003 and 2005 by the DOE Office of Independent Oversight and Performance Assurance, in 2004 by the Department of Energy Idaho Operations Office (DOE-ID), and finally in 2006 by a special review team including members from the 2004 team.

See Sullivan Declaration, Exhibit E. Again, after outlining the OA's 2003 and 2005 findings, the September, 2006 LEP Plan states "As a response to this need, the INL developed the ATR LEP. This plan identifies the objectives, methodologies, and milestones needed to address the recommendations of the assessment team related to the long-term viability of the ATR." See Sullivan Declaration, Exhibit E, Executive Summary.

In the March 2006 and September 2006 LEP Plans, the DOE expressly adopted the assessment teams' recommendations outlined in the Independent Safety Assessment

Documents. The LEP Plan is now underway.[2] Consequently, there is no longer any justification for withholding the Independent Safety Assessment Documents under Exemption 5. On the contrary, their disclosure would serve the public interest, since, presumably, they provide the supporting rationale for the LEP, a 10-year, $200 million federal initiative. The conclusions and reasoning of the Independent Safety Assessment Documents, now adopted by the DOE and incorporated into the LEP, are the conclusions of the DOE, and it is the DOE's obligation to defend its actions on the basis of that reasoning. N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. at 161. Therefore, summary judgment directing the DOE to disclose the Independent Safety Assessment Documents is warranted.

POINT IV

ALTHOUGH EMPOWERED TO DO SO, THE DOE HAS NOT CLASSIFIED THE SAFETY BASIS DOCUMENTS SOUGHT BY THE PLAINTIFFS

Classified information is protected from disclosure under FOIA Exemption 1, which states that FOIA's disclosure requirements do not apply to matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Executive Order 12958 grants agency heads the authority to classify certain categories of information, including "United States Government programs for safeguarding nuclear materials or facilities." See Executive Order 12958, section 1.5(f).

[2] The September 2006 LEP Plan states that the DOE "has embarked on a major project to extend the life of the ATR…." See Sullivan Declaration, Exhibit E at page ii (Executive Summary).

Here, although empowered to do so, the DOE has taken no steps to classify the Safety Basis Documents sought by the plaintiffs. Instead, DOE relies on strained readings of FOIA exemptions 2 and 7 as a basis withholding the Safety Basis Documents. As set forth below, the DOE's interpretation of FOIA Exemptions 2 and 7 represent an unsupportable attempt to broaden the reach of FOIA's exemptions and hide safety and accident information that the public has a right to know. The documents must be released.

POINT V

THE SAFETY BASIS DOCUMENTS ARE NOT PROTECTED FROM DISCLOSURE BY EXEMPTIONS 2 OR 7(F)

To justify withholding the Safety Basis Documents, the DOE asserts FOIA Exemptions 2 and 7(F), and claims that the release of these documents would encourage or enable an act of terrorism against the ATR. In making this argument, the DOE has stretched the language and meaning of these exemptions beyond recognition, and certainly far beyond the narrow construction that courts have repeatedly held all FOIA exemptions must be given. As set forth in detail below, DOE has not met its burden of demonstrating that FOIA's limited exemptions permit the DOE to withhold the Safety Basis Documents.

A. Plaintiffs Do Not Seek Any Security-Related Documents

Plaintiffs recognize the importance of protecting the ATR and all of the government's nuclear facilities from the threat of terrorist attack. For that reason, plaintiffs have not requested, and do not now seek, any security-related documents such as those described at length in the declaration of Joel Trent, a manager with the DOE Idaho Operations Office's Security and Emergency Management Division (the "Security

Division"). Plaintiffs have not sought documents relating to the Design Basis Threat, Radiological Sabotage Analyses or Vulnerability Assessments. Trent Declaration ¶ 13. Plaintiffs do not seek any information regarding "armed security protection officers, security detection and assessment systems, physical barriers, access controls, facility hardening" or "emergency planning zones." Trent Declaration ¶ 14. Plaintiffs seek no classified information, no information relating to the "protective force" at the ATR, and no information relating to the "strategy and tactics of hostage situations," "Force on Force Exercises" or "recovery of facilities that have been captured by adversaries," all of which are described at length by Mr. Trent. Trent Declaration ¶¶ 2, 4. None of this information, which could *perhaps* be protected from public disclosure under Exemption 7, is at issue in this proceeding and therefore Mr. Trent's lengthy discussion of these items is irrelevant, and provides no support for withholding the documents at issue here.

Furthermore, now knowing somewhat more about the contents of the withheld or redacted documents by virtue of the Trent Declaration, the Plaintiffs recognize that: (1) some of the reactor details contained in the Safety Basis Documents are sensitive; and (2) those same reactor details would likely not help members of the public understand the safety shortcomings of the ATR, the consequences of an accident, or the prudence of spending $200 million to extend the life of the facility, which are the matters of significant public concern to which this suit, and Plaintiffs' efforts, are primarily addressed. Therefore, without conceding that the exemptions claimed by the DOE permit withholding, in an effort to simplify this Court's review and sharpen the issues in this proceeding, plaintiffs now wish to further confine their demand to those portions of the Safety Basis Documents that, according to the DOE's own descriptions, set forth the

likelihood and consequences of accidents at the reactor, such as operator errors, equipment failures, or seismic events.[3] The Plaintiffs do not demand those portions of the withheld documents that primarily contain building drawings, cross-sections, equipment locations, construction details, or reactor operational instructions.[4]

Therefore, the Safety Basis Documents plaintiffs now ask this Court to order the DOE to release are the following:

(1) Chapter 15 of the current Upgraded Final Safety Analysis Report. The Trent Declaration describes this Chapter as follows: "This chapter (withheld in entirety) contains accident analysis of the ATR and describes mitigative actions and engineering safety features. This chapter includes EDF-4334, EDF-5488, and EDF-5614, which are addenda to the SAR and developed to resolve unreviewed safety questions. These EDFs contain additional safety analysis to resolve issues not previously considered and provide details of safety systems." Trent Declaration ¶ 15(a).

(2) Chapter 15 of the 1998 Upgraded Final Safety Analysis Report. The Trent Declaration describes this chapter as follows: "The redacted pages (1-375, withheld in its entirety) contain detailed analyses of the potential accidents at the ATR, including initiating events, progression sequences, and consequences, as well as the associated mitigating actions." Trent Declaration ¶ 15(d).

(3) HAD-3 Emergency Management Hazards Assessment Document. The Trent Declaration describes this document as follows: "Numerous accident scenarios along with their respective dose consequences that would allow an adversary to identify and exploit the worst case scenarios. The scenario details include which emergency systems would be necessary to mitigate a given accident and the barriers in place. Also details the protective actions recommended for the various scenarios, which would allow an adversary

[3] The documents that the Plaintiffs no longer seek are: (1) AD-116 Combination Fire Hazard Analysis and Fire Safety Assessment ATR Building TRA-670; (2) Sections 3 & 4 of TSR 186, Technical Safety Requirements for the ATR; and (3) Figures 1 and 2 from EDF-6020 Engineering Assessment of ATR Heat Exchanger and PCS Support Anomalies.

[4] It should be noted that, contrary to the claims made in the Trent Declaration, which asserts that "The information in the SAR that was withheld is unique and not available to the public" (Trent Declaration ¶ 30), there is a good deal of this type of purportedly sensitive material already available to the public, as the most basic web search reveals. Sullivan Declaration ¶¶ 8-10.

to impede or disrupt these actions and result in greater casualties or damage." Trent Declaration ¶ 15(f).

(4) Engineering Design File 4394 Update of ATR Break Spectrum and Direct Damage Los of Coolant Accident ("LOCA") Frequency Analyses. The Trent Declaration describes this document as follows: "Identifies detailed information on reactor cooling pipes and locations. This information could be used by an adversary to cause a LOCA, and also provides information that would help in prioritizing the pipes that, if damaged, would resulting the largest release. Trent Declaration ¶ 15(g).

(together, the "Accident Scenario Documents"). For the reasons set forth below, the DOE has failed to meet its burden of proving that the Accident Scenario Documents may be withheld under either exemption 2 or 7.

B. The DOE Has Failed to Demonstrate that the Accident Scenario Documents Were Compiled For Law Enforcement Purposes and Therefore Exemption 7(F) Does Not Apply

The primary justification offered by the DOE for withholding the Accident Scenario Documents (and all of the Safety Basis Documents) is FOIA exemption 7(F). Exemption 7(F) permits agencies to withhold "records or information compiled for law enforcement purposes" where such documents "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). As a threshold matter, an agency asserting Exemption 7(F) must first demonstrate that the records in dispute were "compiled for law enforcement purposes." Pratt v. F.B.I., 673 F.2d 408 (D.C. Cir 1982).[5] The DOE cannot meet this threshold requirement.

[5] In its memorandum of law, the DOE opens its discussion of this pivotal language by asserting that in 1986 Congress amended FOIA to broaden the reach of exemption 7, changing "investigatory records" to "records or information." Defendants' Memorandum at 13. However, as the Circuit Court for the District of Columbia stressed shortly after the passage of the 1986 amendments, "Congress' recent action amending Exemption 7 in no measure qualifies the authority of *Pratt*. As the history of the 1986 legislation makes clear, Congress did nothing with respect to the threshold showing of law-enforcement purpose that *Pratt* elaborates." Cythia King v. D.O.J., 830 F.2d 210, 230 (D.C. Cir.

Exemption 7(F) can be applied to documents generated by both traditional law-enforcement agencies such as the Federal Bureau of Investigation, and agencies with mixed law enforcement and administrative functions, such as the DOE. However, where a mixed-function agency asserts Exemption 7(F), the Courts have applied an "exacting standard" and carefully scrutinized the purportedly exempt documents to determine whether or not they were "compiled for law enforcement purposes." See e.g., Tax Analysts v. I.R.S., 294 F.3d 71, 77 (D.C.Cir. 2002); Pratt v. Webster, 673 F.2d at 418 (mixed-function agencies' claims regarding "law enforcement purposes" must be scrutinized with skepticism). The DOE admits that it is a mixed-function agency. See Defendants' Memorandum of Law at 13. Its claims are therefore subject to this exacting standard and must be scrutinized with skepticism.

In considering the applicability of Exemption 7(F), the critical question turns on "how and under what circumstances the files were compiled…." Rural Housing Alliance v. United States Department of Agriculture, 498 F.2d 73, 80 (D.C.Cir. 1973) citing Weisberg v. U.S. Dep't of Justice, 489 F.2d 1195 (D.C.Cir 1973). In performing this investigation, it is the trial court's duty to "examine the total record to determine 'whether the files sought…relate to anything that can fairly be characterized as an enforcement proceeding." Rural Housing, 498 F.2d at 80 citing Aspin v. Dep't of Defense, 491 F.2d 24 (D.C.Cir 1973).

In Rural Housing, the Circuit Court for the District of Columbia, which handles the majority of FOIA cases, established a now "generally accepted" rule that distinguishes between records generated during routine administrative functions, which

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1987).

must be disclosed, and records compiled as part of an inquiry into specific suspected violations of law, which may be withheld. Rural Housing, 498 F.2d at 81; see also Gould Inc. v. G.S.A., 688 F.Supp 689 (D.D.C. 1988) (stating that the Rural Housing rule is "generally accepted"; multiple citations omitted); Sakamoto v. E.P.A., 443 F.Supp. 2d 1182 (D.N.D.Calif. 2006). Therefore, routine internal audits compiled to determine whether an agency's operations comport with a statute or regulation are not "compiled for law enforcement purposes." Church of Scientology v. Army, 611 F.2d 738, 748 (9th Cir. 1979); Rural Housing, 498 F.2d at 81.

The Accident Scenario Documents are audits of the safety of the ATR that are compiled and maintained by the DOE's contractor, Batelle Energy Alliance ("BEA"), in order to meet the requirements of DOE regulations found at 10 C.F.R. Part 830 ("Part 830") governing DOE-owned and contractor-operated nuclear facilities. Part 830 requires that the contractor "must establish and maintain the safety basis for the facility" and "prepare a documented safety analysis for the facility." 10 C.F.R 830.202(a) and (b)(4). The Accident Scenario Documents are part of the documented safety analysis of the ATR – an audit that BAE must "establish and maintain" to demonstrate the safety of the ATR; they were not, and are not, "compiled for law enforcement purposes."

The DOE states that the requirements of Part 830 "are subject to enforcement by all appropriate means, including the imposition of civil and criminal penalties." Defendants' Memorandum of Law at 16 citing 10 C.F.R. § 830.5. That is both true, and irrelevant. That fact alone has no bearing on whether the documents in question were or are "compiled for law enforcement purposes." The Defendants have not asserted that BEA was or is being investigated or failing to comply with Part 830, nor, more to the

point, have they asserted that the Accident Scenario Documents were compiled as part of any such law enforcement proceeding or investigation. The fact that BEA *could* be subjected to either civil or criminal law enforcement proceedings for failure to maintain an adequate safety basis, does not mean that Accident Scenario Documents were "compiled for law enforcement purposes."

In its memorandum of law, the DOE cites several cases for the proposition that the Court must examine how the documents are currently compiled, rather than the purpose for which they were originally compiled. DOE Memorandum at 14. However, the DOE makes this argument without factual support suggesting that the Safety Basis Documents are today, or were at any time, "compiled" for law enforcement purposes. The Safety Basis Documents were originally compiled, and are today maintained as part of the documented safety analysis required by Part 830.

Mr. Trent states that the Safety Basis Documents "are used internally by DOE Security to perform Radiological Sabotage Analysis and any necessary vulnerability assessments." Trent Declaration ¶ 9. Such Radiological Sabotage Analyses and vulnerability assessments, which are not sought by the plaintiffs, are plainly "compiled" for law enforcement purposes; the Safety Basis Documents are not. It is irrelevant that copies of the Safety Basis Documents are provided to DOE Security (as well as state and local officials) and used for their planning purposes. Indeed, it is virtually certain that almost every document prepared by the DOE and its contractor for the purposes of evaluating the ATR's safety is utilized in some fashion by the DOE Security in performing its emergency planning functions. However, the mere fact that DOE Security has reviewed the documents and considered the scenarios they outline in their emergency

planning does not transmute the documents into documents "compiled for law enforcement purposes." If it did, FOIA Exemption 7(F) would gain an extraordinarily broad sweep that would swallow up the disclosure objective of FOIA.

The DOE repeatedly cites Living Rivers, Inc. v. United States Bureau of Reclamation, 272 F.Supp.2d 1313 (D. Utah 2003), a case in which the Utah District Court upheld the Bureau of Reclamation's determination to withhold, pursuant to Exemption 7(F), "inundation maps" used for emergency planning in the event of a failure of the Glenn Canyon and Hoover Dams. First, Living Rivers is an aberrational decision by a Utah District Court not based on any Circuit Court precedent. It is not binding on this Court. Second, the Living Rivers holding represents a substantial broadening of the reach of Exemption 7(F). As such, it should not be followed by this Court because it is a stark departure from the well-established and fundamental precepts that FOIA favors disclosure and that FOIA exemptions are to be construed narrowly. Third, Rural Housing properly highlighted the distinction between records generated during routine administrative functions or auditing from records compiled as part of an inquiry into specific suspected -- or even potential -- violations of law. Only the latter category of documents is protected under Exemption 7(F). To follow Living Rivers and permit the DOE to withhold the Accident Scenario Documents under Exemption 7, would ignore this distinction. Finally, unlike the Safety Basis Documents, the inundation maps at issue in Living Rivers were not maintained as part of an ongoing regulatory obligation to demonstrate the safety of the dams in question. They were "compiled" for law enforcement purposes. Therefore, Living Rivers should not be followed by this Court.

The DOE also cites Los Angeles Times Communications, LLC v. Dep't of Army,

442 F.Supp.2d 880 (C.D. Cal 2006) and the unreported decision in U.S. News & World Report v. Dep't of Treasury, No. 84-2303, 1986 U.S. Dist. LEXIS 27634 (D.D.C. 1986), both of which permitted withholding security-related information under Exemption 7(F). Both cases are distinguishable.

The L.A. Times case involved a FOIA request for Army-generated "Security Incident Reports" or "SIRs" which had been compiled pursuant to a clear law-enforcement purpose. Drawing the same critical distinction that is at issue here, the L.A. Times Court stated as follows:

> The Court finds that Defendants have established that the ROC's purpose in compiling the SIRs and maintaining the SIRs database falls within a cognizable law enforcement mandate in Iraq: its tracking of insurgent attacks on and other unlawful activities against Coalition forces and PSC employees to improve intelligence information that will enhance security for reconstruction efforts. It is clear that the ROC's collection of SIRS and maintenance of the SIRs database is not akin to the type of 'internal audit' that would fall short of the standard for compilation for a law enforcement purpose.

L.A. Times, 442 F.Supp.2d at 898 (emphasis added). Here, in contrast, the Accident Scenario Documents were not compiled pursuant to a "cognizable law enforcement mandate." They are compiled and maintained as part of a regulation-mandated internal audit of engineering and seismic safety issues.

In U.S. News, the Court considered a request for documents compiled by the Secret Service, an agency that, unlike the DOE, is not a "mixed-function" agency, but one with a clear law enforcement mandate. The Secret Service therefore needed only to establish a "rational nexus" between the subject documents and a law enforcement purpose. U.S. News & World Report v. Dep't of the Treasury, 1986 U.S. Dist. LEXIS 27634 at 4 citing Pratt v. Webster, 673 F.2d 408, 420 and Church of Scientology v. Dep't

of Defense, 611 F.2d 738, 748 (9th Cir. 1979). The Court found that the Secret Service documents at issue in that case, records pertaining to the Secret Service's purchase of two armored limousines for the President, were related to vitally important law enforcement purposes and met that less burdensome test.

In contrast, the Accident Scenario Documents are compiled and maintained pursuant to the routine auditing requirements of the DOE, set forth in Part 830, which are intended to ensure that DOE-owned and contractor-operated facilities are safely operated. FOIA Exemption 7(F) does not permit the DOE to withhold them.

Finally, it cannot be said that the release of the Accident Scenario Documents "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552 (b)(7)(F). The documents pertain to the likelihood and consequences of accidents, not intentional acts by malevolents. As set forth above, with this memorandum of law, Plaintiffs have further limited their demand to the exclusion of several documents that appear, by their description in the Trent Declaration, to primarily contain sensitive reactor layout or operational details. The defendants have failed to show how the remaining Accident Scenario Documents could "reasonably be expected to endanger the life or physical safety of any individual."

C. The DOE Has Failed to Demonstrate that the Safety Basis Documents Relate to Internal Personnel Rules and Practices and Therefore Exemption 2 Does Not Apply.

The DOE also asserts that it may withhold the Accident Scenario Documents under FOIA Exemption 2, which exempts from disclosure documents "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Exemption 2 has been described as a "low-brow" measure intended to avoid wasteful

harassment of trivial agency operations." See James T. O'Reilly, *Federal Information Disclosure*, 555-56 (2000). It was intended "to relieve agencies of the burden of assembling and maintaining for public inspection matters in which the public could not reasonably be expected to have an interest." Dep't of the Air Force v. Rose, 425 U.S. 352 (1976). Over the years, however, several Circuit Courts (notably not the 10th Circuit), relying on somewhat contradictory legislative history of this particular FOIA exemption, have employed Exemption 2 more broadly, creating a so-called "high 2" exemption which permits an agency to withhold a document if: (1) the information falls within the language of the exemption, meaning that it relates to "internal personnel rules and practices" and is "predominantly internal"; and (2) its disclosure would risk circumvention of federal statutes or regulations. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir.1981).

The 10th Circuit Court of Appeals considered the "high 2" exemption, without adopting it, in Audubon Society v. U.S. Forest Service, 104 F.3d 1201 (10th Cir. 1997). Briefly reviewing the legislative history of Exemption 2, the Court emphasized that when it was enacted, Exemption 2 was intended to narrow the former "internal management" exemption by limiting it to "personnel" practices. Thus, the key question for the 10th Circuit was whether the documents related to such "personnel" practices. 104 F.3d at 1204. The Court found that Forest Service maps depicting owl nesting locations were not sufficiently related to "personnel practices" to qualify for exemption.

The same is true of the Accident Scenario Documents at issue here. For example, Chapter 15 of the 1998 UFSAR "contains detailed analyses of the potential accidents at the ATR, including initiating events, progression sequences, and consequences…" Trent

Declaration at 15(d). The HAD-3 Emergency Management Hazards Assessment Document contains "Numerous accident scenarios along with their respective dose consequences..." Trent Declaration at 15(f). This information does not in any way constitute "personnel practices" and cannot be withheld under Exemption 2.

Furthermore, to qualify for protection under Exemption 2, the DOE must also demonstrate that the Accident Scenario Documents are "predominantly internal." Citing Crooker, the DOE claims that the Accident Scenario Documents are "predominantly internal" because they do not purport to set standards to be followed by agency personnel in deciding whether to take actions affecting members of the public. Defendant's Memorandum of Law at 23. As the Court stated in Crooker, "the word 'internal' in Exemption 2 plainly limits the exemption to those rules and practices that affect the internal workings of the agency. 'Related solely to' limits the exemption to those matters that are truly internal, and not of legitimate public interest." Crooker, 670 F.2d at 1056 (emphasis added). Similarly, in Cox, the Court stressed that Exemption 2 "exhibits a congressional judgment that material lacking external impact is unlikely to engage legitimate public interest, the touchstone of the policies underlying the Freedom of Information Act." Cox, 601 F.2d at 5 (emphasis added).

It cannot be reasonably argued that the Accident Scenario Documents are "not of legitimate public interest" or that the documents are "lacking external impact." As the Trent Declaration makes clear, a severe accident at the ATR would have widespread consequences and lethal effects, and require the evacuation of a wide area including Pocatello, Idaho Falls, and Rexburg. Trent Declaration ¶¶ 23 - 24. The Accident Scenario Documents are not, therefore, "predominantly internal."

Finally, no court of which we are aware has upheld the use of Exemption 2 in the circumstances presented in this case – where the agency seeks to withhold documents due to purported terrorism concerns. The "high 2" interpretation has been used primarily to exempt from disclosure law enforcement manuals. See e.g., Cox v. United States Dep't of Justice, 601 F.2d 1 (D.C.Cir 1978); Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 544 (2d Cir. 1978). In such cases, the "circumvention" requirement is easily met, disclosure of such law enforcement manuals would clearly risk circumvention of law by giving potential lawbreakers insight into law enforcement techniques. Here, the DOE has made no showing that the Accident Scenario Documents would enable a malefactor to "circumvent" measures employed by DOE Security to protect the ATR from a terrorist attack. Indeed, the requested portions of the Accident Scenario Documents relate to accidents and their consequences, and would not enable a potential malefactor to defeat ATR Security.

* * * * *

CONCLUSION

For the reasons set forth above, plaintiffs respectfully ask the Court to deny defendants' motion for summary judgment, grant the plaintiffs' cross motion for summary judgment, and enter an order directing the DOE to immediately release the documents in question.

Respectfully Submitted,

LEVY, COLEMAN, SULLIVAN & KOECKERITZ, LLP

By: _____/s/_____

Mark D. Sullivan
1110 Maple Way
P.O. Box 7372
Jackson, WY 83002
(307) 733-7057

Attorneys for Plaintiffs
Keep Yellowstone Nuclear Free
Environmental Defense Institute
David McCoy