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Via Email to foiaoig@hq.doe.gov and Online

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Subject: FOIA Request HQ-2024-01160-F

References:
1. Letter from Anthony Cruz to Phil Rutherford, "Freedom of Information Act Request No. HQ-2024-01160-F", March 26, 2024
2. Letter from Phil Rutherford to Anthony Cruz, "FOIA Request HQ-2024-01160-F", March 30, 2024
3. Letter from Anthony Cruz to Phil Rutherford, "Supplemental Response to HQ-2024-01160-F", May 31, 2024
4. Supplemental Response Documents, May 31, 2024

Dear Mr. Cruz,

Thank you for your continued assistance in the matter of FOIA HQ-2024-01160-F.

On March 26, 2024, you wrote a letter (Reference 1) regarding the status of FOIA Request HQ-2024-01160-F in which you provided evidence that one year previously, on March 16, 2023, OIG had requested a 30-day response from Mr. William White (Senior Advisor to EM, at one time, aka EM-1), to the original OIG complaint 23-0160-C. Your letter further stated that *"Document 4 is being referred to the Office of Environmental Management for a determination concerning its releasability."* Document 4 is Mr. William White's response to the original complaint 23-0160-C.

On March 30, 2024, I wrote you a response (Reference 2) requesting additional information.

On May 31, 2024, you provided a supplemental response to HQ-2024-01160-F (Reference 3 and Reference 4). The following addresses the specifics of your May 31, 2024, letter.

Comments on Letter from Anthony Cruz, May 31, 2024

Paragraph 4 deals with FOIA exemptions related to personal privacy. See section below titled "Comments on Personal Privacy Issues" for my response.

Paragraph 5 refers to Document 4 that was the response to complaint 23-0160-C, generated by EM, perhaps by Mr. William White or his staff. **Document 12** states that **Document 4** was transmitted to the OIG by Mr. Timothy Harms on 7/14/2023, four months after the original request on 3/16/2023. You repeat your claim from your March 26, 2024, letter that EM alone can decide whether it chooses to release **Document 4**. The same DOE office that was responsible for actions leading to the original allegations of complaint 23-0160-C can decide whether it wants to release its response to those allegations? This appears to be a blatant case of the fox guarding the chicken coop. The OIG is clearly not an independent investigator or decisionmaker in whistleblower cases such as this.

Further, the OIG is passing the buck back to Mr. Alexander Morris of the DOE FOIA Office to answer any questions related to the release status of **Document 4**. Mr. Alexander Morris responded to my original FOIA request HQ-2024-01160-F on February 9, 2024 and later on March 6, 2024, in which he attempted unsuccessfully to deny my requests for fee waiver and expedited processing. I replied to Mr. Morris on March 7, 2024. Subsequent emails and letters to FOIAOIG have included Mr. Morris on distribution as will this letter. Mr. Morris, as of March 26, 2024, has been silent on the status of **Document 4**.

Paragraph 6 states that **Document 4** has been redacted pursuant of FOIA exemptions 6 and 7(C).

Paragraph 8 defines CCC as the Complaint Coordination Committee. The specifics of FOIA HQ-2024-01160-F requests materials that would typically include minutes, PowerPoint presentations and documentation provided to this senior management CCC. That material would be more relevant than the non-informative minutia of the email exchanges in the Supplemental Response Documentation.

Paragraph 9 cites exemption five from 5 USC 522(b)(5) as a potential reason for refusal to release pertinent material in response a valid FIA request …

- *"inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency,* ***provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.****"*

Interestingly, this is the only location in the FOIA where *"deliberative process privilege"* is used and it is not defined in the FOIA. The bolded section was only added in the FOIA Improvement Act of 2016.

However Exemption 5 and the concept and use of *"deliberative process privilege"* in FOIA has been controversial for many decades. Several Department of Justice (DOJ) guides attempt to clarify Exemption 5 and determine when the claim of *"deliberative process privilege"* is a valid exemption, or not.

- FOIA Guide, 2004 Edition: Exemption 5
- FOIA 1979 Update: Policy Guidance: When to Assert the Deliberative Privilege Under FOIA Exemption Five

More recently, the California Appeals Court denied California's claim of deliberative process privilege, stating that *"In determining whether the deliberative process privilege applies, the key question is whether the disclosure of materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."* State of California vs Superior Court of Los Angeles County, April 5, 2024.

Your definition mirrors that concept …

- *"… the deliberative process privilege which protects recommendations, advice, and opinions that are part of the process by which agency decisions and policies are formulated."*

Note that your definition refers to *"recommendations, advice and opinions"*, that are all qualitative, subjective words. The complaint is based on well-reasoned facts and analysis, supported by DOE's own data and statements. In closing out the complaint with the recommendation that *"no further action is warranted"*, DOE OIG is obligated to support that conclusion with well-reasoned facts and analysis, backed up by data that disputes the allegations of the complaint. If DOE cannot do that then it should accept the complaint as valid and initiate whatever corrective actions it deems appropriate.

DOE cannot cover-up the poor judgement of ETEC and North Wand, with a feeble argument that translates into *"we cannot tell the public how we make decisions otherwise we may look foolish."* To take that route, would actually confirm that DOE's decision-making and response to whistleblower complaints is problematic at best.

Paragraphs 10, 11 and 12 reiterate the personal privacy protection exemptions of paragraph 4. See Section below for response. In contrast to your assertions, exemptions (b)(6) and (b)(7)(C) deal with protection of personal lives and make no mention of protection of professional activities.

Paragraph 13 discusses three exclusion categories of law enforcement and national security records specified in 5 US 522(c) which do not apply here, unless DOE has reason to believe the allegations of the complaint may lead to criminal litigation and/or national security issues.

Comments on Personal Privacy Issues

Much of your communications of March 26, 2024, and May 31, 2024, have focused on, not the specifics of OIG Complaint 23-0160-C, but the contrived issue of personal privacy as articulated in 5 USC 552(b)(6) and 552(b)(7)(C) which exempts public disclosure of …

- *"personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"* 5 USC 552(b)(6)

- *"records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information … (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy"* 5 USC 552(b)(7)(C)

First, it is clear that 5 USC 552(b)(7)(C) is irrelevant, unless the DOE believes that OIG Complaint 23-0160-C could lead to criminal charges.

Second, personnel involved in the actions that led to the original complaint, those personnel investigating the original complaint, and those personnel responding to the FOIA request, are all federal employees, federal contractors and/or subject to federal regulations, and are acting on behalf of the federal government, in conducting their assigned duties. As such, their intra-agency communications cannot be considered private personal communications. They are not acting in a private, personal capacity, and are not entitled to the protection from *"invasion of their personal privacy"* since their personal privacy is not being invaded.

Third, none of the communications involve personnel, medical or similar information, typically referred to as PPI (private personal information) or PII (personally identifiable information). These would include social security numbers, passport numbers, driver's license numbers, financial account numbers, credit card numbers, personal phone numbers, personal addresses, personal email addresses, medical information under HIPPA, etc. Names, work email addresses and work phone numbers of federal agency employees, conducting unclassified public business are not generally considered PPI or PII. Especially since public agencies often and openly publish employee work phone numbers and email addresses in the public domain.

Fourth, signing and certifying of official documents in the private and public sphere is commonplace, as DOE well knows. Professional published papers, newspaper bylines, letters to the editor, regulated activities and studies, all need a name (and signature) and affiliation that is intended to certify that what is written is correct, to the best of the authors knowledge, and that the author is prepared to stand by what is written. The fact that DOE and/or its contractor North Wind chose to redact the name(s) of the person(s), certifying the 540/541 Low-Level Radioactive Waste Manifests is inappropriate, and suggests that DOE and/or North Wind already recognized that the manifests were problematic and erroneous and wished to protect

the originator. Certification names/signatures of regulatory/legal documents should never be redacted.

Fifth, the DOE went to extraordinary lengths in Supplemental Response **Documents 11 through 34** to redact, based on personal privacy, all names, emails and cell phone numbers of senders and recipients of numerous emails. Given that most of these communications were idle chit-chat and common courtesies e.g. *"hope you had a good weekend"* etc., one wonders what is being protected?

Sixth, and notwithstanding the redaction mania discussed above, several Supplemental Response Documents appear to have escaped the censor's pen. It is notable that Mr. Timothy Harms does not need the same personal privacy protection as the many others in email threads in which he appears.

In conclusion, I believe that redaction of names and email addresses of senders and recipients in your Supplemental Response Documents is silly but is not the real issue of the complaint and is therefore no big deal. I do believe, however, that the redaction of the name and affiliation of the certifying official on all the NRC Form 540//541 Low-Level Radioactive Waste Manifests may be illegal.

Comments on Supplemental Response Documents

Document 10 (and Document 25) are emails from the IGHOTLINE addressed to me on 2/16/2023 and 4/10/2023, but which I did not receive. I assume that one may have gone to my spam folder … but both? The email(s) asked a series of questions that I will answer below.

1. **Please acknowledge you have read the Office of Inspector General Hotline Section of the OIG website.**
   Yes, I have read https://www.energy.gov/ig/ig-hotline. I note that the anonymity and confidentiality sections apply to the complainant only, and not to other DOE personnel. See previous section.

2. **Do you consent to the disclosure of your identity outside the OIG on a need to know basis?**
   Yes, I consent.

3. **Please define any acronyms you use. To ensure clarity please define the acronym LLRW.**
   Most all acronyms are defined during first use in the original complaint to DOE management. That complaint was incorporated as an online link in the OIG Complaint 23-0160-C.

LLRW is a standard acronym for low-level radioactive waste as a simple Google search would verify. See for example EPA's use of the acronym. Low-level radioactive waste is also defined in the Nuclear Waste Policy Act of 1982, Amended 2004.

4. **Why do you think there is an issue with disposing of non-radioactive demolition waste at the same facility as radioactive waste.**
   Waste comes in many forms. Household trash (yard clippings, recyclables, other trash), sewage, demolition debris, decommissioned materials, non-hazardous chemical waste, hazardous chemical waste, bio-waste, low-level radioactive waste (Class A, B or C), high-level radioactive waste, transuranic (TRU) waste, spent irradiated nuclear fuel. Each kind of waste has its own type of disposal facility and associated requirements, and it is inappropriate to dispose of waste in facilities not designed for that waste. One should not dispose of radioactive waste at a municipal landfill (for safety reasons) in the same way that one should not dispose of conventional building demolition debris or decommissioned materials at any kind of radioactive waste disposal facility. Radioactive waste facilities have limited capacities and filling them up with household trash or waste for which they were not designed would make no sense. Disposing of clean demolition debris and decommissioned material into radioactive waste facilities would not be required from a safety viewpoint and would be a reckless waste of taxpayer dollars.

5. **Why do you think shipping waste to a facility in Clive, Utah is not in compliance with the Consent Order amended in 2020 and California Executive Order D-62-02?**
   Shipping of clean building demolition debris and decommissioned material from ETEC does comply with the 2020 Amendment to Order on Consent signed by the California Department of Toxic Substances Control (DTSC) and DOE. Although DOE and DTSC have been criticized for signing the 2020 AOC, this criticism is not part of the complaints to DOE management or the DOE OIG.

   California Executive Order D-62-02 was signed following the veto of California Senate Bill 1970 (2002). SB-1970 had attempted to mandate that decommissioned material that had met all federal and state cleanup standards, and been released for unrestricted use, be nevertheless disposed of in an out-of-state licensed low-level radioactive waste (LLRW) disposal facility. California Governor Gray Davis vetoed this bill, stating that the bill re-defined radioactive waste, and would do little to significantly enhance protection of public health. As a compromise, Governor Davis signed D-62-02, prohibiting disposal of decommissioned material at municipal landfills (i.e. Class III or unclassified landfills) in California. Effectively, D-62-02 required that decommissioned material be disposed of to either Class I hazardous waste or Class II non-hazardous waste facilities in California. D-62-02 did not require disposal of decommissioned material out of the State of California.

Accordingly, the subject waste could and should be legally disposed of in non-LLRW disposal sites in the State of California.

The 2020 AOC effectively ignored Governor Davis' veto of Senate Bill 1970 (2002) and his Executive Order D-62-02. DTSC and DOE declared by a "gentlemen's agreement" to follow the dictates of Senate Bill 1970 for DOE waste generated at ETEC.

6. **Why is it an issue that containers with identical radionuclide activities have the same net waste weight on some manifests and different net waste weights on other manifests.**
   This is explained in detail in the original complaint. The vast majority of manifests use the same waste profile data with a fixed set of radionuclide concentrations. In order to calculate the container radionuclide activity one uses the equation …

   activity = concentration x net waste weight

   Since radionuclide concentration for the same waste profile is a fixed constant, it is a physical impossibility for multiple containers to have identical activities and different net waste weights.

   Multiple containers have been assigned identical net waste weight to the 7th significant place. This is a physical impossibility and suggests that only a small number of containers were actually weighed but the same net waste weights were inappropriately assigned to multiple different containers.

7. **When did the cleanup end?**
   Environmental remediation and building demolition is ongoing.

8. **When did you submit your FOIA request?**
   I submitted a FOIA request online for waste shipping records to NNSA on November 9, 2021. The request was transferred to EMCBC on November 15, 2021, and assigned a control number EMCBC-2022-00149-F.

9. **When did you report your concerns to the entities listed in your complaint? Has there been any updates on your complaints since then?**
   The concerns were first communicated to ETEC and DOE management and others via the January 10, 2023 letter. Subsequent communication is provided in the complaint timeline.

It is unfortunate that I did not receive either of these emails. Although some of the questions suggest that the OIG investigator was not familiar with the general subject of the complaint, it is the only, and I mean the only, communication from DOE that asks about the specific allegations of the complaint. Am I correct in assuming that this was the OIG investigator who no longer works for the OIG?

Document 11 is an email in which Mr. Timothy Harms requested an extension of the deadline of OIG's request to Mr. William White, Senior Advisor to Environmental Management (EM), for a response to the complaint 23-0160-C. It is not obvious what is the connection between EM and Resource Management. The deadline was extended from 4/17/2023 to 5/17/2023. Mr. Harms is Senior Advisor, Office of Resource Management, and is identified in several of the provided documents. He does not appear to warrant or need personal privacy protection.

Document 15 refers to an additional request for an extension from 5/17/2023 to 6/17/2023.

Document 14 refers to an additional request for an extension from 6/17/2023 to 7/17/2023.

Document 12 is an email thread on 7/14/2023 in which Timothy Harms sends the William White (EM) response to the complaint to OIG. Note that the attachment is not provided among the Supplemental Response Documents. It is now almost one year since Document 4 was provided to OIG and it has still not been provided to me. Why? Jennifer Bacon of FOIAOIG in her June 4, 2024 email, believed that Document 4, EM's response to complaint 23-0160-C, should have already been sent to me. But I guess EM management has misled OIG as well as myself. EM has not provided Document 4 as of the date of this letter.

Documents 18, 19, 20 & 21 are all labeled "Law Enforcement Sensitive" and originate from a non-DOE address, doeoig-cmts@mycmts.com. It is strange that DOE takes so much effort to redact DOE employee identities as part of this FOIA investigation but has no problem communicating with a private, non-DOE email address? Does the labeling imply that DOE believes complaint 23-0160-C is law enforcement sensitive? CMTS is a third-party software for "Case Management & Tracking System." **Document 18** gives the date of 8/3/2023 for "Complaint Closed Final."

Document 27 is an email with the subject line, "23-0160-C Deconfliction." Some lines in the body of the text were redacted with exemption (b)(5). This is the only example that I could locate where exemption (b)(5) has been used. See prior comments on the questionable ethics on the use of exemption (b)(5). OIG complaint 23-0147-C apparently has similar issues to 23-0160-C. I am not aware of the existence or content of complaint 23-0147-C, but my curiosity is piqued. Deconfliction is defined as the avoidance of friendly fire on the battlefield. Does the use of the word refer to my one-time responsibilities for decommissioning at ETEC?

Document 31 recommends closure, but provides no backup, no basis for closure or dispute of the allegations. One email in the thread forwards EM's response for review before a pre-CCC meeting. Obviously this and likely other Documents had associated attachments of material of interest to the complainant, however none are provided. Reference is made to "packets", presumably PowerPoint summaries together with background supporting documentation of OIG's and/or EM's investigation. None of these materials are provided. The email exchanges are totally devoid of any meaningful content in terms of response to the complaint's allegations.

Document 34 is the email referring complaint 23-0160-C to Timothy Harms for EM's response.

With the exception of the prior referenced **Documents 10 and 25** and copies of my emails to DOE (**Documents 5, 6, 7, 8, 9, 33**), none of the remaining emails between DOE personnel directly addressed, agreed with, or disputed, the specific allegations of the complaint to DOE management, the OIG complaint 23-0160-C or the requests of FOIA HQ-2024-01160-F.

The majority of emails discuss how many emails each recipient has on their plate, and an exchange of pleasantries … "I'm on leave next week", "Hope you enjoyed your vacation". "It's finally Friday!", "Hope you enjoyed the weekend."

Conclusions

Mr. Cruz, neither your March 26, 2024, nor your May 31, 2024, letters have even attempted to address the specific allegations of complaint 23-0160-C or the specific requests of FOIA HQ-2024-01160-F.

It appears that the 17-month effort to get answers from DOE regarding complaint 23-0160-C is still awaiting action by Mr. William White. Mr. White has been on distribution for all of my communication with DOE since the original complaint to DOE management on January 10, 2023, and the latter complaint to OIG on February 10, 2023. I realize that, after 17 months, it is questionable whether anything meaningful will come from Mr. White.

Thank you for the information on the appeal process. I will await the result of OIG's request to EM-1 to release Document 4, before submitting an appeal.

Thank you also for the information on judicial review by the US District Court. The total lack of any evidence from OIG and EM-1 rebutting the specific allegations of the complaint would not be viewed favorably in any court of law.

You refer to Mr. Alexander Morris, the DOE FOIA Public Laison to answer questions related to this complaint, the FOIA request and release of Document 4. Mr. Morris has been the addressee and/or on distribution for my communications since the date of the FOIA request on February 8, 2024. I will contact him shortly.

I am including Ms. Candice Robertson on distribution in anticipation of her taking over the reins of EM from Mr. William White and inheriting this issue. Hopefully she can assist.

A complete timeline of complaint 23-0160-C may be found at … https://philrutherford.com/ssfl.html#wastefoia.

Sincerely,

Phil Rutherford
President: Phil Rutherford *Consulting*

cc

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