

March 5, 1996

For: The Commissioners
 From: James M. Taylor /s/
 Executive Director for Operations
 Subject: COMMISSION POLICY STATEMENT ON PROTECTING THE IDENTITY OF ALLEGERS AND CONFIDENTIAL SOURCES

PURPOSE:

To obtain approval of a revision to the Commission's Policy Statement on Confidentiality.

BACKGROUND:

On November 21, 1995, the Commission issued a staff requirements memorandum requesting the staff to draft a new policy statement which discusses the NRC's protection of the identity of all individuals who bring safety concerns to it, in addition to information concerning confidentiality. Individuals who bring safety concerns to the NRC but are not granted confidentiality are hereafter referred to as allegers. Individuals granted confidentiality are referred to as confidential sources.

DISCUSSION:

The Commission's policy statement on confidentiality has not been updated since 1985. Since then, changes in the NRC's organizational structure and staff practice concerning confidentiality and protecting the identity of allegers and confidential sources have occurred that are not reflected in the existing policy statement.

The existing policy statement specifically discusses the role of the Office of Inspector and Auditor, which was abolished following creation of the Office of the Inspector General (OIG) in 1989. The OIG has established their own procedures on confidentiality, in accordance with the Inspector General Act of 1978.

The agency's practice concerning informing allegers of the availability of confidentiality and disclosing the identity of confidential sources has changed in the intervening period and now is inconsistent with the existing policy statement. This revision to the Commission's policy on confidentiality addresses these inconsistencies and includes a description of the basic identity protection provided for allegers.

With the update of the policy statement to reflect agency practice concerning confidentiality and the addition of the protection afforded all individuals who bring safety concerns to the NRC, the revised policy statement provides a comprehensive statement of the Commission's position on this subject. The Supplementary Information section of the attached Federal Register Notice provides a detailed description of and the rationale for the changes.

COORDINATION:

The Office of the General Counsel has no legal objection to the proposed recommendation.

The Office of the Inspector General has reviewed the revised policy statement and has no comments on the revised policy statement.

RECOMMENDATION:

The staff recommends the Commission adopt the revised policy statement.

James M. Taylor
 Executive Director for Operations

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ATTACHMENT: [Federal Register Notice](#)

ATTACHMENT

NUCLEAR REGULATORY COMMISSION**Statement of Policy on Protecting the Identity of Allegers and Confidential Sources**

AGENCY: Nuclear Regulatory Commission

ACTION: Policy Statement

SUMMARY: This revision is an update of the Commission's policy for protecting the identity of an individual who has been granted confidentiality. This revision reflects the changes in the organization of the NRC and the agency's practices concerning confidentiality, including informing individuals of the availability of confidentiality, circumstances under which confidentiality will be granted, and circumstances under which the identity of confidential sources will be revealed. The revision also describes the measures taken by the NRC to protect the identity of all individuals who bring safety concerns to the agency, regardless of whether the individual is granted confidentiality.

EFFECTIVE DATE: March XX, 1996

FOR FURTHER INFORMATION CONTACT:
 Edward T. Baker, Agency Allegation Advisor

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Introduction

On November 25, 1985, the Nuclear Regulatory Commission ("NRC" or "Commission") issued a Statement of Policy to provide a clear, agency-wide policy on the granting of confidentiality to persons who provide information to the NRC concerning licensee activities. (50 FR 48506) The Commission is revising the policy statement to reflect changes in the NRC organization and criteria for disclosing the identity of confidential sources and to describe the measures taken to protect the identity of any individual who brings safety concerns to the NRC and the circumstances under which the individual's identity may be disclosed. The Commission's inspection and investigatory programs rely in part on people voluntarily coming forward with information. Some individuals will come forward only if they are confident that their identities will be protected from public disclosure. Safeguarding the identities of these individuals is, therefore, a significant factor in ensuring the future voluntary flow of such information.

The Commission intends to make it clear that it will make all reasonable efforts to protect the identity of anyone who brings safety concerns to the NRC consistent with the NRC's responsibilities under the Atomic Energy Act of 1954, as amended, and other applicable statutes. This Policy Statement applies to all NRC offices except the Office of the Inspector General (OIG).

Background

The Commission's policy statement on confidentiality has not been revised since 1985. Since then, changes in the NRC's organizational structure and agency practice concerning confidentiality and protecting the identity of allegers and confidential sources have occurred that are not reflected in the existing policy statement. Additionally, the review team for reassessing the NRC program for protecting allegers recommended in NUREG-1499, "Reassessment of the NRC's Program for Protecting Allegers Against Retaliation," that the policy statement be revised.

The existing policy statement specifically discusses the role of the Office of Inspector and Auditor, which was abolished following creation of the OIG in 1989. The OIG has established its own procedures on confidentiality, in accordance with the Inspector General Act of 1978.

Summary of Changes to Policy Statement

The agency's practice concerning protecting the identity of allegers, informing them of the availability of confidentiality, and disclosing the identity of confidential sources has changed in the intervening period. In order to reflect those changes and the staff's experience in dealing with confidentiality, the existing policy statement is being revised in the following respects:

(1) On March 22, 1995, the Commission approved the concept of disclosing the identity of a confidential source based on the existence of an overriding safety concern. The existing policy statement does not speak to disclosure in this circumstance.

(2) The existing policy statement restricts NRC employees from initiating a discussion of confidentiality except in the following circumstances:

- (a) It is apparent that an individual is not providing information because of fear that his/her identity may be disclosed, or
- (b) It is apparent from the surrounding circumstances that the individual wishes his/her identity to remain confidential.

On August 22, 1994, after notifying the Commission, the Office of the Executive Director for Operations (EDO) issued guidance to the staff that an allexer who has not requested to be a confidential source be clearly informed that he or she is not considered a confidential source. If the allegation is received during a phone call, the staff is required to tell the allexer of this position during the initial call. This position is also stated in the letter sent to an allexer acknowledging receipt of the allegation and documenting the staff's understanding of the allexer's concerns. The staff has adopted this position to avoid misperceptions by allegers as to whether they are considered confidential sources.

(3) The existing policy statement does not specifically address the problem of investigating discrimination when confidentiality has been granted to the individual who alleges that he or she was the victim of discrimination⁽¹⁾. In practice, individuals who allege that they are victims of discrimination and who request confidentiality are informed of the difficulty of performing an investigation of this type of concern without revealing the name of the subject of the discrimination. These individuals are told the NRC will not normally investigate the discrimination aspects of their allegation if confidentiality is granted.

(4) In addition, a change to the disclosure criteria allows the Office of Investigations (OI) to disclose the identity of a confidential source, on a need-to-know basis, to either the Department of Justice (DOJ) or to another law enforcement agency. Such disclosure would occur without seeking prior Commission approval or notifying the confidential source. Under the existing policy statement, the NRC is required to contact the confidential source before releasing his/her identity. If the confidential source agrees to the release, the EDO or the Director, OI is authorized to release the identity. If the confidential source objects to the release or cannot be reached, the agency may not release the identity without specific Commission approval.

It is common practice in the law enforcement community for investigative agencies and prosecutors' offices to share the identity of confidential sources if there is a legitimate need-to-know. Traditionally, in the interest of preserving the integrity of any ongoing investigation or prosecution, the sources are not informed that their identities have been shared. Additionally, DOJ and other law enforcement agencies appreciate the sensitivity with which they need to treat the identity of confidential sources. The ability to share the identity of confidential sources in this manner will enhance the sense of partnership in pursuing wrongdoing investigations.

(5) A provision has been added to allow the authorized NRC official who granted the confidentiality to withdraw it without further approval, provided the confidential source has made such a request in writing and the NRC official has confirmed that the requesting individual is the same person that was granted confidentiality.

In addition to these changes to the Commission's policy on confidentiality, this revision describes the basic protection afforded individuals who bring safety concerns to the NRC but have not been formally granted confidentiality, that is, *allegers*.

The primary differences between the protection afforded confidential sources and *allegers* are:

- An office director or regional administrator may approve the disclosure of the identity of an *allegor*, while the approval of the Commission, the EDO, or the Director of the Office of Investigations (OI) is necessary, depending on the circumstances, for disclosure of the identity of a confidential source;
- There is a formal, signed agreement between a confidential source and the NRC that sets forth the protection afforded and the circumstances in which a confidential source's identity may be revealed; and
- OI may disclose the identity of an *allegor* outside the agency during the pursuit of a wrongdoing investigation at their discretion without the knowledge or consent of the *allegor*. For confidential sources, the only time that OI may only disclose the identity, without the confidential source's knowledge or consent, is to DOJ or another law enforcement agency.

With the update of the policy statement to reflect agency practice concerning confidentiality and the addition of the protection afforded all individuals who bring safety concerns to the NRC, the following policy statement provides a comprehensive statement of the Commission's position on the subject.

POLICY STATEMENT

The Commission's investigative and inspection programs rely in part on individuals coming forward with information about safety concerns or perceived wrongdoing. Routine public release of the identities of those who come forward with such information could lead to reprisals against those individuals. Reprisals may involve not only physical harm to the individual, but may take other forms such as employment-related discrimination, including blacklisting, economic duress, or ostracism. Such actions obviously would deter others from coming forward with information and, accordingly, could jeopardize the effectiveness of the NRC's oversight activities.

Both Congress and the Commission have recognized this concern. Section 211 of the Energy Reorganization Act, 42 U.S.C. 5851, and the Commission's related employee protection regulations, are designed to protect those who assist the NRC in carrying out its safety responsibilities from discrimination by their employers. In addition, the Commission has developed procedures for protecting the identity of individuals who bring safety concerns to the NRC, hereafter referred to as *allegers*, and for protecting the identity of individuals who have been granted confidentiality, hereafter referred to as confidential sources.

Identity Protection For Allegers

In resolving *allegers'* concerns, the NRC intends to make all reasonable efforts not to disclose the identity of an *allegor* outside the agency. NRC staff who receive an allegation are required to forward all information to an NRC allegation coordinator. The allegation coordinator provides the identity of an *allegor* only to NRC staff who have a need to know an *allegor's* identity, e.g., an inspector or investigator assigned to interview an *allegor*. In addition, documents containing the identity of *allegers* are stored in locked cabinets with controlled access, and are not placed in the NRC's public document rooms.

However, the NRC may reveal the identity of an *allegor* outside the agency under the following circumstances:

- The *allegor* clearly states that he/she has no objection to being identified;
- The NRC determines that disclosure of the *allegor's* identity is necessary to protect the public because of an overriding safety issue identified based on the *allegor's* concerns;
- Disclosure of the *allegor's* identity is necessary to respond to a request from Congress or State or Federal agencies in the furtherance of NRC responsibilities under law or public trust;
- Disclosure is necessary pursuant to a court order or an NRC adjudicatory board subpoena;
- The *allegor* takes an action that is inconsistent with and overrides the purpose of protecting his or her identity;
- Disclosure is necessary to pursue a wrongdoing investigation; or
- Disclosure is necessary to support a hearing on an enforcement action.

In addition, if the NRC is investigating an allegation that the *allegor* was a victim of discrimination because he or she raised a safety concern, it would be extremely difficult to investigate such an allegation without naming the individual who was the subject of discrimination.

NRC Management Directive 8.8, "Management of Allegations", contains additional information concerning protecting the identity of *allegers* and the circumstances in which the identity may be disclosed.

Confidentiality

The protective measures and disclosure circumstances described above apply to all *allegers*. If the individual is granted confidentiality, as described below, the individual is considered a confidential source.

The Commission's regulations authorize withholding the identities of confidential sources from public release. 10 CFR 2.790

(a)(7). Further, Part 21 of the Commission's regulations provides that, "as authorized by law", the identity of individuals "not subject to the regulations in this part" who report certain nuclear safety-related problems "will be withheld from disclosure." 10 CFR 21.2(d). Additionally, under 10 CFR 19.16(a) if a worker requesting an inspection requests that his or her name not be included in the copy of the request given to the licensee, the name of the worker and the name of individuals referred to in the request will be withheld. The following discussion explains the Commission's general policy regarding confidentiality.

1. Circumstances Under Which Confidentiality May Be Granted

The Commission, while it recognizes the importance of confidentiality, does not believe that confidentiality should be granted to all individuals who provide information to the NRC or that it should be granted routinely, particularly in light of the protection afforded all alleged. Rather, the Commission believes that confidentiality should be granted only when necessary to acquire information related to the Commission's responsibilities, or when warranted by special circumstances. It should ordinarily not be granted, for instance, when the individual is willing to provide the information without being given confidentiality.

If it becomes apparent that an individual is not providing information because of a fear that his/her identity will be disclosed, an authorized NRC employee may suggest a grant of confidentiality. Similarly, an authorized NRC employee may suggest confidentiality in the absence of a request when it is apparent from the surrounding circumstances that the witness wishes his/her identity to remain confidential. This could be the case, for instance, if a witness sets up an interview in a secretive manner.

The Commission recognizes that some individuals who desire confidentiality may not request it because of an erroneous belief that the identities of everyone providing information to the NRC are kept in confidence, and some individuals may not provide information because they do not know that confidentiality is available. The Commission has, therefore, decided to adopt a policy which requires an individual desiring confidentiality explicitly to request it. In the initial contact with the NRC, the extent to which the NRC can protect an alleged's identity will be explained. If the individual does not request confidentiality, the individual will be informed that he or she is not considered a confidential source. If the individual asks about confidentiality, the differences between identity protection for alleged and confidential sources will be explained. If the individual then requests confidentiality, the staff will evaluate the request and inform the individual whether it was granted.

2. The Manner and Form in Which the Granting of Confidentiality Should Be Disseminated Within the NRC

The Commission has delegated authority to the EDO and the Director, OI to designate those persons within their organizations who will be authorized to grant confidentiality. Confidentiality will be granted only when an NRC employee authorized to grant confidentiality and the individual requesting confidentiality sign a standard NRC Confidentiality Agreement, unless it is impossible to sign the Agreement at the time the information is obtained. The Agreement will explain the conditions to which the NRC will adhere when it grants confidentiality, as set forth in this Policy Statement. In those circumstances where it is impossible to sign a Confidentiality Agreement at the time the information is obtained, e.g., where the information is obtained over the telephone, confidentiality may be given orally pending signing of the Confidentiality Agreement, which must be done within a reasonable time. If confidentiality is granted orally, this must be fully documented by the person granting it. If the Confidentiality Agreement is not signed within a reasonable time, the EDO or Director, OI, as appropriate, will determine whether the confidentiality should be continued.

Once confidentiality is granted, the individual's name should be divulged to NRC employees only on a need-to-know basis. Each NRC employee with access to a confidential source's identity should take all necessary steps to ensure that the identity is not further disseminated. The EDO and the Director, OI, are to ensure that consistent procedures are developed throughout the agency for implementing this requirement, which should prevent inadvertent disclosures.

3. Circumstances Under Which Identity of a Confidential Source Will Be Divulged

The Commission stresses the importance that it attaches to protecting the identity of a confidential source. There are, however, six circumstances under which the identity of a confidential source may be released outside the NRC by the Commission or by certain Commission staff officials as described below. The Commission emphasizes that in each of these cases it will attempt to limit disclosure to the minimum necessary, and that it expects such disclosure to occur only rarely.

(1) The first category involves disclosure to a licensee because of an overriding safety issue. There are conceivable circumstances in which public health and safety require the NRC to divulge the identity of a confidential source to allow a licensee to correct an immediate safety concern. If this situation occurs, which we expect to be infrequently, the NRC will try to limit the disclosure to the licensee's senior management.

In most circumstances, the agency will be able to give a licensee sufficient information to correct an immediate safety issue without divulging the name of a confidential source. However, the Commission believes individuals should be aware their identity could be divulged if this situation occurs.

(2) The second category involves disclosure pursuant to a court order. It is conceivable that a licensee or other entity could obtain a court order requiring the NRC to divulge the identity of a confidential source. If that happens, the NRC will seek to keep the disclosure limited, through protective orders or otherwise, to the minimum necessary.

(3) The third category of circumstances under which a confidential source's identity might be disclosed outside the NRC involves disclosure during an NRC adjudicatory proceeding. The Commission, in a separate Statement of Policy on Investigations, Inspections, and Adjudicatory Proceedings, has provided that any Licensing Board decision to order disclosure of the identity of a confidential source shall automatically be certified to the Commission for review. 49 Fed. Reg. 36032 (September 13, 1984). Therefore, the Commission is the only adjudicatory tribunal within the NRC with the actual authority to require that the identity of a confidential source be revealed. The Commission will look to current judicial standards in determining whether to disclose the identity of a confidential source.

(4) The fourth circumstance in which the identity of a confidential source might be released is in response to a request by Congress. Section 303 of the Atomic Energy Act requires the NRC to keep Congressional committees with jurisdiction over the NRC "fully and currently informed with respect to the activities... of the Commission." That section also requires "[a]ny Government agency [to] furnish any information requested by [Congressional] committees with appropriate jurisdiction..." The Commission accordingly may have to release the identity of a confidential source in response to a Congressional request. While any such request will be handled on an individual basis, the Commission will disclose the identity of a confidential source only if the request is in writing and it will make its best efforts to have any such disclosure limited to the extent possible.

(5) The fifth circumstance in which the identity of a confidential source may be revealed is in response to a request from a Federal or State agency. The Commission recognizes its responsibility to assist other agencies in their functions. However, the Commission also recognizes that providing the identities of confidential sources to other agencies could adversely affect the flow of information to the Commission. The Commission has decided to balance these two considerations as follows. If the requesting agency demonstrates that it requires the identity in furtherance of its statutory responsibilities and agrees to provide the same protection to the source's identity that the NRC promised when it granted confidentiality, the NRC will make a reasonable effort to contact the source to determine if he/she objects to the release. If the source can be reached and does not object, the EDO or his designee, or the Director, OI are authorized to provide that identity to the requesting agency.

If the source either objects to the release of his/her identity, or cannot be reached, the EDO or his designee, or the Director, OI, may not release the source's identity, except as noted in (6) below, but shall advise the requesting agency of the situation. The requesting agency may then ask the Commission itself to release the identity. While ordinarily the source's identity will not be provided to another agency over the source's objection or without contacting him/her, in extraordinary circumstances where furtherance of the public interest requires release, the Commission may release the identity of a confidential source to another agency despite the objections of that source or without being able to contact him/her. Even in those cases, however, the requesting agency must agree to provide the same protection to the source's identity that were promised by the NRC.

(6) As an exception to (5) above, when OI and DOJ are pursuing the same matter or when OI is working with another law enforcement agency, the EDO or the Director, OI may reveal the identity of a confidential source to DOJ or the other law enforcement agency, as needed, without notifying the individual or consulting with the Commission.

It is common practice in law enforcement and when conducting criminal prosecutions for agencies to share the names of confidential sources if there is a need to know. One of the primary reasons for such exchanges of sensitive information is the protection of the confidential source. It is essential that the parties investigating and prosecuting know the identity of a confidential source to physically protect the source during the course of investigative activities and to prevent compromising the source's identity through some inadvertent action by one of the outside investigators or prosecutors. Since it is inappropriate for a source to know the investigative or prosecutorial activities, strategies, or tactics, it is also inappropriate to notify the source that his or her identity is being shared.

4. Circumstances Under Which Confidentiality May Be Revoked

A decision to revoke a grant of confidentiality can only be made by (1) the Commission itself, (2) the EDO, or (3) the Director, OI. The Commission emphasizes, however, that a grant of confidentiality will be revoked only in the most extreme cases. As a general matter, confidentiality will be revoked only where a confidential source personally takes some action so inconsistent with the grant of confidentiality that the action overrides the purpose behind the confidentiality. This can happen, for instance, when the source discloses information in a public forum that reveals his or her status as a confidential source or when he/she has intentionally provided false information to the NRC. Before revoking confidentiality, the Commission will attempt to notify the confidential source of its intent and provide him/her an opportunity to explain why such action should not be taken.

5. Withdrawal of Confidentiality

The NRC official granting confidentiality may withdraw confidentiality without further approval, provided that the confidential source has made such a request in writing and the NRC official has confirmed that the requesting individual is the same person who was granted confidentiality.

Conclusion

In summary, the Commission views protecting the identity of alleged and confidential sources as an important adjunct to the Commission's investigative and inspection programs. The Commission therefore places great emphasis on protecting the identity of individuals who bring safety concerns to the NRC. However, the Commission recognizes that there are limited circumstances, as explained above, where the identity of an alleged or confidential source will be divulged outside the NRC. In those circumstances the Commission will attempt to limit disclosure to the extent possible.

(Dated at Rockville, MD, this ___th day of _____, 1996
For the Nuclear Regulatory Commission, John Hoyle, SECY)

1. In this policy statement, the term "discrimination" includes allegations of harassment and intimidation.