

July 5, 2000

MEMORANDUM TO: Samuel J. Collins, Director, NRR
William F. Kane, Director, NMSS
R. William Borchardt, Director, OE
Guy P. Caputo, Director, OI
Karen D. Cyr, General Counsel
Hubert J. Miller, Regional Administrator, RI
Luis A. Reyes, Regional Administrator, RII
James E. Dyer, Regional Administrator, RIII
Ellis W. Merschoff, Regional Administrator, RIV

FROM: William D. Travers */RA/*
Executive Director for Operations

SUBJECT: ALLEGATION GUIDANCE MEMORANDUM 2000-01 -GUIDANCE ON
CORRESPONDENCE, RELEASING INFORMATION IN RESPONSE
TO FREEDOM OF INFORMATION ACT (FOIA) REQUESTS, AND
DEFINING DISCRIMINATION AND THE ELEMENTS OF A *PRIMA
FACIE* CASE OF DISCRIMINATION

The purpose of this Allegation Guidance Memorandum (AGM) is to provide additional guidance on correspondence with allegers and to clarify guidance on releasing and withholding information in response to requests under the FOIA. This AGM also provides definitions for discrimination and a *prima facie* case of discrimination, terms used in Management Directive 8.8, "Management of Allegations." Also included is an exhibit providing a standard response to allegations received via e-mail. The guidance is provided as an attachment to this memorandum.

Please implement this guidance within 30 days of the date of this memorandum.

Attachment: As stated

ALLEGATION GUIDANCE MEMORANDUM 2000-01

Status Letter Guidance

MD 8.8, Part I(E) "Periodic Status Letters to Allegers" requires that a periodic status letter be issued every 180 days to keep an allexer or confidential source informed of the status of their case. Occasionally, a status letter has been issued shortly before a closure letter has been issued. This has led to an allexer receiving two pieces of correspondence from the agency, with different messages, in a very short period of time. To remedy this situation, the following guidance is being provided.

The guidance in MD 8.8, Part I(E), found on pages 40-41, is revised to include a new sentence at the end of the first paragraph (1), so that the paragraph will now read as follows:

"The OAC, or other designated staff, should ensure that periodic status letters regarding the resolution of technical concerns, as appropriate, are provided to an allexer or confidential source. In instances of unusual delay in resolving the allegation, the OAC or other designated staff should advise an allexer or confidential source every 180 days or sooner of the status of his or her allegation so that he or she knows that the allegation is being pursued. For wrongdoing issues, the allexer should be informed that the review is ongoing. If a status letter is due and the OAC is confident the closure letter will be issued within two weeks of the due date for the status letter, it is not necessary to send the status letter."

Standard Language for E-mail Response to Allegers

Due to the fact that the agency is receiving allegations via e-mail, it has become necessary to provide a standard response to allexers who contact the agency in this manner to ensure that all allexers receive a consistent response. The exhibit section of MD 8.8 is revised to include a new Exhibit 7 (E-Mail Response) (attached).

A Correction to the Standard Acknowledgment Letter

In MD 8.8, Exhibit 4, "Acknowledgment Letter", on page 83, in the second paragraph referencing Enclosure 1, the last 5 words are changed from, "before we start our review" to "before we continue with our review."

Definition of Discrimination and *Prima Facie* Cases

MD 8.8 is revised to include the following definitions in the Glossary section on page 77 of the Handbook:

Discrimination. Occurs when a licensee, vendor, applicant for a license, a certificate holder, a contractor or a subcontractor of a licensee or certificate holder takes an adverse action, including a decision not to take a favorable action, against an employee for engaging in protected activities.

***Prima Facie* case of discrimination.** A situation in which circumstances as reported are such that at least a reasonable inference may be drawn that an employer took an adverse action against an employee for having engaged in protected activity. Such an inference may be drawn, for example, when the adverse action occurs in close proximity to the protected

activity. In such circumstances, further investigation and/or development of evidence will be needed in order to establish that discrimination actually did, indeed, occur.

Guidance on Handling Additional Concerns and Issuing Acknowledgment Letters

If an Office or Region receives additional concerns from the same alleged before an inspection is conducted, and the new concerns can be included in the planned inspection, the Office or Region should (not must) include the new concerns in the existing allegation. If new concerns are received that can not be accommodated in the planned inspection or if the concerns are received after the inspection has been conducted, a new allegation should be opened. However, if an Office or Region receives additional concerns, even if it is possible to include these new concerns in an existing allegation, it is required that receipt of the new concerns be acknowledged in a letter to the alleged. This action will ensure that the staff's understanding of the concerns is correct and that the alleged is aware the agency has received the new concerns.

The requirement to acknowledge new concerns in a letter to the alleged also applies in instances in which the staff identifies new concerns through the review of a transcript of an interview with the alleged. This letter should be sent to the alleged when a summary of the concerns is received from the technical staff following their review of the transcript.

Revision of MD 8.8 (A)(4)

MD 8.8 (A)(4) is being revised to correct an editorial error. Language in Part 1, Section (J)(5), found on page 54, was inadvertently placed there and is more appropriate to the discussion in Section (A)(4) on page 7. The relocated language will appear in Section (A)(4) as "bullet" (viii). Part 1 (A)(4) will now read as follows:

Disclosing an Alleged's Identity (4)

Inform an alleged of the limitations on the protection of his or her identity. Tell the alleged that his or her identity will not be disclosed outside NRC, except as follows: (a)

- The alleged has clearly indicated no objection to being identified. (i)
- Disclosure is necessary because of an overriding health or safety issue. (ii)
- Disclosure is necessary pursuant to an order of a court or NRC adjudicatory authority or to inform Congress or State or Federal agencies in furtherance of NRC responsibilities under law or public trust. (iii)
- Disclosure is necessary in furtherance of a wrongdoing investigation, including an investigation of a discrimination allegation. (iv)
- Disclosure is necessary to support a hearing on an enforcement matter. (v)
- The alleged has taken actions that are inconsistent with and override the purpose of protecting the alleged's identity. (vi)

- Disclosure is mandated by the Freedom of Information Act (FOIA) (see Section (J) of this part for FOIA requests). (vii)
- If it is necessary to release the identity of an alleged for any of the reasons outlined above, the staff will consult with the appropriate Regional Administrator or Office Director. An exception to this requirement is disclosures made by OI during the course of wrongdoing investigations, in which case the staff should make a reasonable effort to contact the alleged and explain the need for disclosure, if the need was not previously explained to the alleged. (viii)

Withholding Information from Public Disclosure

Part I, Section J, "Freedom of Information Act Requests," is replaced in its entirety by the text that follows.

Information that may identify an alleged or a confidential source shall not normally be released in response to FOIA requests. There are two exemptions under the FOIA that may justify withholding information that would identify an alleged or a confidential source (see 5 U.S.C. 552(b)(6) and (b)(7)(C) and (D) and 10 CFR 9.17(a)(6) and (7)(iv)). This is a case-by-case decision that has to be made by the OAC, the Director, OI (for OI confidential sources), the designated attorney in OGC, or other designated individuals. Information that may lead to "fingerprinting" an alleged also should normally be redacted when responding to a FOIA request. The type of information that may lead to an alleged being fingerprinted includes, but is not limited to, job titles, organizational names, work report numbers, licensee ECP file numbers, and a combination of dates, times, and equipment that could be combined by the requestor or another individual to identify an alleged. Redact these types of information to protect the identity of an alleged. If there is any question in this area, discuss it with the appropriate allegation or FOIA coordinator; review MD 3.1, "Freedom of Information Act"; or contact the Agency Allegation Advisor, Regional Counsel, designated OGC attorney, or the Freedom of Information Act/Privacy Act Section, Office of the Chief Information Officer. In any case where the NRC determines that it is necessary to release the identity of an alleged, the agency will make reasonable efforts to inform the alleged before the release.

Disclosures may be necessary to further the NRC mission or to address safety concerns; however, it is NRC policy to provide the maximum protection allowed by the FOIA to protect against the disclosure of the identity of alleged who have signed a "confidentiality agreement" and who thus have confidential-source status. FOIA Exemption 7(D) authorizes the protection of alleged and others who are defined as confidential sources. As such, the staff may withhold any information that has the potential for causing the identity of the confidential source to be revealed. This level of identity protection for confidential sources differs from that afforded to alleged who have not been given confidentiality. These non-confidential sources are protected under FOIA Exemptions 6 and 7(C) which protect from disclosure any information that could reasonably be expected to reveal their identity or constitute an unwarranted invasion of personal privacy.

In cases where the NRC has disclosed the name of an alleged to the licensee in furtherance of an investigation or because of an overriding safety issue, the NRC will continue to withhold the alleged's name from release pursuant to a FOIA request, unless the alleged's name is already widely associated publicly with the allegation. Some ways in which an alleged's name can be widely associated publicly with the allegation include the alleged notifying the media, holding a press conference about the subject, or identifying himself or herself as the alleged at a public meeting. The purpose of this approach is to protect the alleged from public scrutiny, criticism, or ridicule that might arise if the alleged's identity were revealed.

During review of an allegation, all documentation may be exempt from release under FOIA, in accordance with FOIA Exemption 7(A) and 10 CFR 9.17(a)(7), when release of information could reasonably be expected to interfere with law enforcement proceedings. However, a FOIA request received while a case is open will "freeze" those documents in the file (they cannot be destroyed) because they have been captured under a FOIA request. When the case is closed, allegation documentation may be subject to release under FOIA, with appropriate precautions to protect the identity of the alleged and/or confidential source and to avoid the release of privacy information, safeguards information, or proprietary information. In the absence of a FOIA request, management may freely review case files and, when an allegation is closed, retain only those documents necessary to account for official action.

When an alleged files a FOIA request seeking the documents from files on closed allegations he or she submitted, much of the alleged's case file is releasable to him or her, unless the documents would affect the personal privacy of another individual, the documents were covered by attorney/client privilege, the document contains predecisional information or the release of a particular document met the harm criteria in that it would harm the NRC's investigation of the allegation. If a FOIA request captures an open allegation file, the contents of the open file may be withheld in whole or in part under Exemption 7(A) or 7(C), unless the alleged is the requestor. When an alleged files a FOIA request seeking the documents from his or her own open allegation file, the entire file may be withheld if disclosure would interfere with an ongoing investigation or proceeding. However, anytime Exemption 7(A) is asserted, each record or category of records must be considered for disclosure on a case-by-case basis. When the alleged is the FOIA requester, normally his or her own statements and/or documents provided to NRC cannot be withheld unless release could interfere with the investigation or proceeding. If the alleged provides documents that were not his or hers, such as documents taken from the licensee, those may be more reasonable to withhold than his or her own documents. If a personal representative of an alleged submits a request under FOIA, a written authorization is needed from the alleged.

When a licensee files a FOIA request seeking documents from a closed file involving an allegation of discrimination filed against that licensee, much of the alleged's case file, including the name of the alleged, is releasable because the identify of the alleged has been previously disclosed, unless (1) the documents would affect the personal privacy of another individual, (2) the documents are covered by attorney client privilege, (3) the documents are predecisional, or (4) the release of a particular document meets the harm criteria in that it would harm the NRC's investigation of the allegation or the subsequent enforcement proceeding.

The licensee will receive any documents they submitted to the agency and any NRC staff evaluations of the technical aspects of the allegation that were the basis for the alleged's claim of protected activity. When a licensee files a FOIA request seeking documents from an

open allegation file, the entire file may be withheld if disclosure would interfere with an ongoing investigation or enforcement proceeding. However, each record or category of records must be considered for disclosure on a case-by-case basis to determine whether Exemption 7(A) applies.

When a FOIA request is filed by a third party, the agency will not release the name of the alleged unless the alleged's name has already been widely associated publicly with the allegation by actions taken by the alleged, such as notifying the media, holding a press conference about the subject, or identifying himself or herself as the alleged at a public meeting.

The third party will receive redacted versions of the documents protecting the name of the alleged and any other information that might allow the requestor to identify the alleged. The staff will also redact information concerning other persons mentioned who have privacy concerns. The third party will receive licensee and agency technical evaluations and the OI synopsis. When a third party files a FOIA request seeking documents from an open allegation file, the entire file may be withheld if disclosure would interfere with an ongoing investigation or proceeding. However, each record or category of records must be considered for disclosure on a case-by-case basis to determine whether Exemption 7(A) applies.

EXHIBIT 7

E-MAIL RESPONSE

In situations where an allegation is received via e-mail, and the e-mail does not include a postal address, the following language should be used as standard language in the e-mail response:

"The NRC is in receipt of your e-mail dated _____. We are conducting follow-up activities to review your concerns. If you would like the NRC to provide you the results of our review, please contact (the appropriate OAC) at 1-800-xxx-xxxx. If you prefer a response via e-mail, we also request that you confirm that desire by contacting us by telephone. Please be advised that we cannot protect the information during transmission on the Internet and there is the possibility that someone could read our response while it is in transmission. If you do not confirm your desire to communicate via the Internet by contacting us by telephone, we will not transmit any additional information via the Internet."

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