UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 8949

DOCKETED 12/08/04

SERVED 12/08/04

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward J. McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of	)	
	)	
RENE CHUN	)	Investigation 1-2003-037
	)	

CLI-04-34

MEMORANDUM AND ORDER

I. **Introduction**.

This matter is before the Commission on a Motion to Quash a subpoena issued by the NRC's Office of Investigations ("OI"). For the reasons stated below, we grant the Motion to Quash in part, subject to a condition expressed herein; we deny the Motion to Quash in part; and we set a new date for compliance with the subpoena.

II. **Factual Background**.

On July 8, 2004, OI served a subpoena on Mr. Rene Chun through his attorney. Mr. Chun is a free-lance writer who is the author of a magazine article published in 2003. The article discusses several issues relating to security at the Indian Point Nuclear Power Station, and contains several statements attributed to specific individuals, including a former Indian Point employee who had previously worked in the plant's security department. The NRC Staff has determined that at least one of the statements attributed to the former employee in the article contains "safeguards information" as defined in Section 147a of the Atomic Energy Act ("AEA") of 1954, as amended, 42 U.S.C. §2167. *See also* 10 C.F.R. §73.2. In other words, the

article contains at least one statement that gave the public detailed information about security at the Indian Point facility. However, that information should not be assumed to reflect the current security measures at that facility.

The NRC's regulations explicitly provide that only specified persons are authorized to receive safeguards information. 10 C.F.R. §73.21(c)(1). Disclosure of safeguards information to persons who are not authorized to receive it is a violation of the Commission's regulations. 10 C.F.R. §73.21(c)(2). In addition, Section 223 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2273, provides criminal penalties for a "willful" violation of the disclosure provisions of 10 C.F.R. §73.21. *See* 10 C.F.R. §73.81. *See also* AEA Section 147b, 42 U.S.C. §2273. Accordingly, OI initiated an investigation into whether the former employee committed a violation of Section 73.21 and, if there was a violation, whether that violation was willful. If the investigation concludes that the former employee did indeed violate the prohibition against the disclosure of safeguards information, the NRC could initiate an enforcement action against the former employee. In addition, if the NRC concludes that a "willful" violation occurred, the NRC could refer that matter to the Department of Justice (DOJ) for possible prosecution.

OI conducted a formal interview of the former employee, who stated that the article misquoted him and that he had not made some of the sensitive statements attributed to him in the article. But when OI informally interviewed Mr. Chun, he advised the OI investigator that (1) the former employee had indeed made the statements attributed to him in the article, and (2) because of similar accusations in the past, Mr. Chun always recorded his interviews and he had recordings to document the statements made in the article. The OI investigator then asked Mr. Chun for access to both the tapes and any notes taken by Mr. Chun of his interviews with the former employee. However, Mr. Chun refused to allow the investigator to have access to those materials and indicated that they were under the control of the magazine. But when OI raised

the issue with the magazine, a representative of the magazine advised OI that any request for the materials should be directed to Mr. Chun.

Obviously, there is a factual dispute as to what the former employee actually said to Mr. Chun. Therefore, the Office of Investigations issued a subpoena for Mr. Chun to testify about his conversations with the former employee. In addition, Mr. Chun's tapes and notes of his interview with the former employee would constitute the best evidence of what the former employee actually said. Accordingly, the subpoena required Mr. Chun to provide those materials to OI prior to his interview.

In response, Mr. Chun moved to quash the subpoena, arguing that (1) the subpoena violated the guidelines established by the Department of Justice for issuing a subpoena to a member of the media, and (2) enforcement of the subpoena would violate Mr. Chun's rights as a journalist under the First Amendment to the U.S. Constitution. The Motion also questions whether the NRC can issue a subpoena to a party that is not an NRC licensee. However, Mr. Chun's motion did not inform the NRC that he did not actually possess the materials. Subsequently, Mr. Chun's attorney orally advised the NRC that Mr. Chun had returned the tapes and notes to the magazine pursuant to his employment contract before he had received the subpoena. The magazine has now advised the NRC that it inadvertently discarded the tapes and notes relating to Mr. Chun's interviews.

III. **Possession of the Subpoenaed Materials**.

Mr. Chun now claims, through counsel, that he does not possess the subpoenaed materials, *i.e.*, the tapes and notes of his interviews with the former employee. Therefore, we will quash that portion of the subpoena that requires him to produce those materials if, within 14 days from the date of this Order, Mr. Chun files an affidavit with the Secretary of the Commission (1) stating that he returned the materials to the magazine pursuant to his

employment contract prior to the issuance of subpoena (including the date he returned the materials), (2) providing a copy of the employment contract (with personal information such as his salary, etc., redacted), and (3) releasing without reservation any claim of ownership in the materials (based on his creation of them) to the magazine.

We find it unfortunate that Mr. Chun's Motion to Quash did not inform the Commission that he did not have the tapes and notes. The legal process is not a game. The Commission expects more forthright pleadings from those who seek relief from the agency.

IV. **Analysis**.

Assuming *arguendo* that Mr. Chun does not now possess the tapes and notes relating to his conversations with the former employee, that does not end the matter. The subpoena still calls for Mr. Chun to appear and testify about his conversations with the former employee. Regardless of whether he possesses the tapes and notes, that portion of the subpoena still remains at issue. Accordingly, we now turn to the Motion to Quash.[1]

Before the Commission, Mr. Chun questions whether the NRC can issue a subpoena to a person who is not a licensee. He also claims that (1) OI issued the subpoena in violation of the DOJ's Guidelines, *see* 28 C.F.R. §50.10, and (2) enforcement of the subpoena would violate Mr. Chun's rights as a journalist under the First Amendment to the U.S. Constitution. We deal with each claim in turn below.

A. Statutory Authority.

Initially, Mr. Chun questions whether the NRC can issue a subpoena to a person who is not an NRC licensee. *See* Motion to Dismiss at 2, n.1. Section 161c of the Atomic Energy Act

---

[1]We understand that the arguments raised in the Motion to Quash apply equally to both Mr. Chun's testimony and to any tapes and notes in which he may have claimed an interest by virtue of having created them in the course of his work. Therefore, this Order will use the term "Mr. Chun's information" to refer to both information that he might provide in a formal interview as well as the tapes and notes of his conversations, if they were still in his possession.

of 1954, as amended, gives the NRC the authority to

> make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this Act, *or in the administration or enforcement of this Act, or any regulations or orders issued thereunder*. For such purposes the Commission is authorized to administer oaths and affirmations, and by subpoena to require *any person* to appear and testify or appear and produce documents, or both, at any designated place.

42 U.S.C. §2201(c) (emphasis added). Section 11s of the Act, 42 U.S.C. §2014(s), defines "person" to include "(1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution . . . and (2) any legal successor, representative, agent, or agency of the foregoing." Thus, it seems clear that the law allows the Commission to subpoena "persons" other than NRC licensees. Mr. Chun is an "individual," which would place him within the scope of the Commission's subpoena power.

Moreover, reviewing courts have consistently upheld the right of the NRC to issue subpoenas to persons who are not NRC licensees. *See*, *e.g.*, *United States v. Construction Products Research, Inc.*, 73 F.3d 464, 471 (2d Cir. 1996); *United States v. Comley*, 890 F.2d 539 (1st Cir. 1989); *United States v. Garde*, 673 F.Supp. 604 (D.D.C. 1987), *appeal dismissed as moot*, 848 F.2d 1307 (D.C. Cir. 1988); *United States v. McGovern*, 87 F.R.D. 582, 584, 590 (M.D. Pa. 1980).

Furthermore, the U.S. Court of Appeals for the Second Circuit has emphasized that an "NRC investigation is proper if it '*assist[s]* the [NRC] in exercising any authority provided in this chapter, ... or any regulations or orders issued thereunder.'" *Construction Products Research*, 73 F.3d at 471, *quoting* 42 U.S.C. §2201(c) (emphasis in the Court's opinion).[2] *See also United*

---

[2]Mr. Chun is a resident of New York and any enforcement of the subpoena would take place within the jurisdiction of the U.S. Court of Appeals for the Second Circuit. Thus, we have emphasized Second Circuit cases in this Order.

States v. Oncology Services Corporation, 60 F.3d 1015, 1019 (3d Cir. 1995) (enforcing an NRC subpoena). Finally, as the Second Circuit also noted, "at the subpoena enforcement stage, courts need not determine whether the subpoenaed party is within the agency's jurisdiction or is covered by the statute it administers; rather, the coverage determination should wait until an enforcement proceeding is brought against the subpoenaed party." *Construction Products Research*, 73 F.3d at 470-71, *citing Endicott Johnson Corporation v. Perkins*, 317 U.S. 501, 509 (1943).

Here, Mr. Chun has information that would help determine whether the former employee violated the NRC's regulation prohibiting the disclosure of safeguards information. This regulation was issued under the authority of the Atomic Energy Act. The information sought by the subpoena would assist the NRC in determining whether the former employee violated an NRC regulation issued under the AEA. 42 U.S.C. §2201(c). *See*, *e.g.*, *Construction Products Research*, 73 F.3d at 471. Thus, this investigation is proper, and the Commission has the statutory authority to issue the subpoena to Mr. Chun as a part of the investigation.

B. Department of Justice Guidelines.

Mr. Chun's first substantive argument is that the subpoena violates the DOJ guidelines for issuing a subpoena to a member of the media.[3] Those guidelines require, *inter alia*, that (1) the agency strike a "proper balance" between the "public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement[,]" 28 C.F.R. §50.10(a); (2) all reasonable attempts should be made to obtain the information from alternative sources, 28 C.F.R. §50.10(b); (3) negotiations shall be pursued with the media, 28 C.F.R. §50.10(c); (4) the information sought should be "essential" to the case, whether it is criminal or

---

[3]The DOJ Guidelines are not binding on the NRC. However, they may provide some internal guidance to the DOJ in deciding whether to seek enforcement of the subpoena in Federal Court, should that eventually arise.

civil, 28 C.F.R. §50.10(f)(1)-(2); and (5) the information "should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information." 28 C.F.R. §50.10(f)(4). We believe that the subpoena satisfies these guidelines.

Initially, the DOJ guidelines do not vest any rights in Mr. Chun. By their own terms, the DOJ guidelines "are not intended to create or recognize any legally enforceable right in any person." 28 C.F.R. §50.10(n). *See In re Grand Jury Subpoena American Broadcasting Companies, Inc.*, 947 F.Supp. 1314, 1322 (E.D. Ark. 1996) (denying television network's request to quash grand jury subpoena on the basis that DOJ guidelines were not fulfilled because DOJ "regulations, by their own terms, confer no enforceable rights on the subpoenaed person.") (citations omitted). Thus, even if the subpoena does not satisfy the guidelines, that fact does not mean that a Federal Court would not enforce the subpoena.

Moreover, assuming *arguendo* that the guidelines do apply to this situation, it is clear that the subpoena fulfills the guidelines' requirements. First, taking the criteria in reverse order, the subpoena seeks information that is "limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information." 28 C.F.R. §50.10(f)(4). Thus, this case is not a matter where the NRC seeks the identity of a confidential source or information that is not in the public domain. Instead, the subpoena seeks to verify whether the former employee actually made the statements attributed to him in the article. The NRC needs to verify the accuracy of the attribution of the statements in the article before making a determination of whether there was a violation of the NRC's regulations and, if so, whether that violation was willful.

Second, the information is "essential" to the case. 28 C.F.R. §50.10(f)(2). If the employee made the statements attributed to him, he may have violated the applicable NRC

regulation. Furthermore, the information sought is not "peripheral, nonessential, or speculative." *Id*. Instead, the information sought goes directly to the heart of the matter: did the former employee make the statements attributed to him. Quite simply, the NRC needs Mr. Chun's information to determine the truth of the matter because there is a conflict between Mr. Chun and the former employee over what the former employee told Mr. Chun.[4] Third, the NRC has negotiated with Mr. Chun (through his counsel) and has concluded that further negotiations would be fruitless. 28 C.F.R. §50.10(c). Fourth, the NRC is not aware of any alternative source for the information sought here. 28 C.F.R. §50.10(b).

Finally, we find that this subpoena strikes the "proper balance" between the "public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." 28 C.F.R. §50.10(a). The NRC does not lightly issue subpoenas to members of the press. Here, the subpoena avoids probing into the general thesis of Mr. Chun's article and instead is narrowly focused on whether a specific individual (not Mr. Chun) made certain specific statements in order to determine whether those statements constitute a violation of NRC regulations and Federal law. As such, and in light of the national interest in enforcing laws designed to protect our nation from terrorist attack, we conclude that the subpoena satisfies the DOJ guidelines for subpoenas issued to the media.

C. Mr. Chun's First Amendment Privilege.

Mr. Chun also asserts that the subpoena violates his First Amendment rights under the "reporter's privilege," which he claims is guaranteed under *Branzburg v. Hayes*, 408 U.S. 665 (1972). Motion to Quash at 6-9. However, the Motion to Quash concedes that any privilege afforded to Mr. Chun is a "qualified" privilege that can be overcome by a showing of need and

---

[4]While Mr. Chun is the "target" of the subpoena, he is not the target of the investigation.

unavailability from other sources. Motion to Quash at 7-8.[5] The Second Circuit has adopted this approach. *See generally Gonzales v. NBC*, 194 F.3d 29, 32-36 (2d Cir. 1999) (citations omitted). But, as the Second Circuit also noted in *Gonzales*, "where the protection of confidential sources is not involved, the nature of the press interest protected by the privilege is narrower." 194 F.3d at 35-36 (citation omitted). The *Gonzales* Court asserted:

> We believe that when protection of confidentiality is not at stake, the privilege should be more easily overcome. Accordingly, we now hold that, while nonconfidential press materials are protected by a qualified privilege, the showing needed to overcome the privilege is less demanding than the showing required where confidential materials are sought. Where a civil litigant seeks nonconfidential materials from a nonparty press entity, the litigant is entitled to the requested discovery notwithstanding a valid assertion of the journalists' privilege if he can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources.

194 F.3d at 36 (footnote omitted). *See also McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) ("When the information in the reporter's possession does not come from a confidential source, it is difficult to see what possible bearing the First Amendment could have on the question of compelled disclosure.").

In this case, we have concluded that the information subject to the subpoena is not "confidential." First, Mr. Chun did not make any specific claim of confidentiality in his Motion to Quash. Second, this is not a case where the reporter's source is "confidential;" instead, the

---

[5]Although we need not reach this issue here, new doubts have been raised as to whether this "qualified" privilege actually exists. The majority opinion in *Branzburg* explicitly rejected that claim within the context of a Grand Jury subpoena by a 5-4 vote. *See* 408 U.S. at 689-91. The conditional or qualified privilege claimed here was adopted by only three members of the Supreme Court in the *Branzberg* dissent. *See* 408 U.S. at 743. As the U.S. Court of Appeals for the Sixth Circuit points out in *In re Grand Jury Proceedings: Storer Communications v. Giovan*, 810 F.2d 580, 585 (6th Cir. 1987), most courts that have adopted the "qualified" privilege point to Justice Powell's concurring opinion as the basis for adopting that approach. However, the *Storer Communications* decision raises serious doubts about the correctness of such an analysis, correctly noting that Justice Powell also signed the majority opinion. *Id*.

article specifically quotes the former employee by name. Third, Mr. Chun has placed this information in the public domain by publication in the article. So this is not a case in which the reporter is maintaining in confidence the details about plant security that he has learned. Fourth, the NRC is not looking for information about any other people who may have been interviewed by Mr. Chun in preparation for the article; instead, the NRC is looking to confirm that the statements attributed to the former employee in the article are indeed exactly what he told Mr. Chun. Thus, Mr. Chun's information is not "confidential."

Mr. Chun cites *United States v. Burke*, 700 F.2d 70 (2d Cir.), *cert*. *denied*, 464 U.S. 816 (1983), for the proposition that the subpoena should be quashed. But that case is not applicable here. In *Burke*, the Second Circuit affirmed a decision by the trial judge to quash a defendant's subpoena for a reporter's notes and tapes about conversations with a prosecution witness. The Second Circuit held that the information sought was for impeachment purposes only and was merely cumulative, not "highly material and relevant." 700 F.2d at 77-78. Moreover, the Court held that the defendant had failed to demonstrate that the materials were not available from another source. 700 F.2d at 77, n.8. Here, the material sought is both "highly material and relevant" and unavailable from other sources.

The *Gonzales* case, cited above, supports the NRC's position. That case involved a civil rights lawsuit in Louisiana in which persons alleged that a Deputy Sheriff was stopping Hispanic individuals without cause. Shortly thereafter, NBC aired a segment in its "Dateline" television series that involved the same Deputy Sheriff, and that included video of the Deputy stopping the NBC reporter. Both parties issued subpoenas to NBC seeking the unedited tapes (or "outtakes") that were shot by the film crew, and for depositions of the NBC personnel involved. 194 F.3d at 30-31. The District Court ordered NBC to provide the outtakes to the parties and NBC appealed. 194 F.3d at 31-32.

The Second Circuit affirmed, stating:

> The outtakes are clearly relevant to a significant issue in the case. The District Court reasonably found they may assist the trier of fact in assessing whether [the Deputy] had probable cause to stop the NBC vehicle and might help determine whether he engaged in a pattern or practice of stopping vehicles without probable cause, as the Plaintiffs allege. We are also persuaded that the outtakes contain information that is not reasonably obtainable from other available sources, because they can provide unimpeachably objective evidence of [the Deputy's] conduct."

194 F.3d at 36 (citation omitted).

Likewise, in this case, Mr. Chun's information about any conversations with the former employee can help the NRC in determining whether the former employee made the statements attributed to him. Thus, the information subject to this subpoena is clearly "of likely relevance to a significant issue in the case," *i.e.*, did the former employee violate the NRC's regulation prohibiting the unauthorized disclosure of safeguards information when he provided information to Mr. Chun for his article? Moreover, this information is "not reasonably obtainable from other available sources" because there are no other sources for this material or its equivalent. Accordingly, we conclude that, in the circumstances of this case, the NRC Staff has overcome the "qualified privilege" accorded to Mr. Chun. Therefore, we deny the Motion to Quash insofar as it applies to Mr. Chun's testimony about any conversations with the former employee.[6]

V. **Conclusion**.

Based upon the foregoing analysis, we conclude that OI has proper authority to issue the subpoena to Mr. Chun; that the subpoena meets the Department of Justice Guidelines; and that the NRC's need for the information and lack of alternative source for the information

---

[6]Obviously, if the NRC Staff concludes that the former employee made the statements attributed to him in the article, and then either initiates an enforcement proceeding on its own or refers the matter to the DOJ for possible criminal prosecution, the former employee may very well subpoena Mr. Chun in an effort to vindicate himself. Mr. Chun appears to concede that a reviewing court might very well enforce such a subpoena. Motion to Quash at 9, *citing United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993).

overcomes Mr. Chun's qualified privilege as a journalist. Therefore, we deny the Motion to Quash with regard to Mr. Chun's testimony about his conversations with the former employee. We enforce the subpoena, as modified, and set a new return date for compliance with the subpoena of January 13, 2005, at 10:00 a.m. local time, at the NRC's Region I Office, or at any other reasonable time, date, and location mutually agreeable to Mr. Chun and OI.

However, as we noted above, Mr. Chun claims that he returned the tapes and notes of his conversations with the former plant employee to the magazine under his employment contract and before he was issued the subpoena under review in this case. Accordingly, as detailed above, we will grant the Motion to Quash with regard to that portion of the subpoena that calls for the production of the tapes and notes, subject to the condition specified, *i.e.*, that Mr. Chun files an affidavit within 14 days of the date of this Order (1) stating that he returned the materials to the magazine pursuant to his employment contract prior to the issuance of subpoena (including the date he returned the materials), (2) providing a copy of the employment contract (with personal information such as his salary, etc., redacted), and (3) releasing without reservation any claim of ownership or creative rights in the materials themselves to the magazine.

Should Mr. Chun not file such an Affidavit within the prescribed time, the Motion to Quash is denied in its entirety.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 8th day of December, 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
RENE CHUN	)	Investigation 1-2003-037
	)	
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-04-34) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution with copies by electronic mail as indicated.

Trip Rothschild, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: tbr@nrc.gov

David C. Vladeck, Esq.
Georgetown University Law Center
Institute for Public Representation
600 New Jersey Avenue, Suite 312
Washington, DC 20001-2075
E-mail: vladeckd@law.georgetown.edu

Guy P. Caputo, Director
Office of Investigations
Mail Stop - O-3 F1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: gpc@nrc.gov

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of December 2004