

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

**DOCKETED 01/25/05**

**SERVED 01/25/05**

Before Administrative Judges:

Thomas S. Moore, Chairman  
Alex S. Karlin  
Alan S. Rosenthal

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository:  
Pre-Application Matters)

Docket No. PAPO-00

ASLBP No. 04-829-01-PAPO  
NEV-01

January 24, 2005

FIRST CASE MANAGEMENT ORDER  
(Regarding Preparation of Privilege Logs)

The purpose of this order is to promote good management and efficiency in the resolution of documentary privilege disputes during the pre-license application phase of the expected application by the United States Department of Energy (DOE) for a license to construct a repository for high-level radioactive waste (HLW) at Yucca Mountain, Nevada. DOE, the NRC Staff, the State of Nevada (State), other potential parties, interested Indian Tribes, and interested units of local government (collectively Potential Participants) are directed to submit their responses to this order within the times specified below.

I. BACKGROUND

On August 31, 2004, this Board granted the motion of the State to strike DOE's certification regarding its production of documentary material on the grounds, inter alia, that the gaps in its document production, and the incompleteness of DOE's review of the documents for claims of privilege, showed that DOE had not made all documentary material available as

required by 10 C.F.R. § 2.1003(a). LBP-04-20, 60 NRC 300 (2004). In that decision, we noted that DOE had claimed approximately one million of its documents were entitled to some form of privilege and yet had not completed its privilege review for several hundred thousand of these documents. 60 NRC at 316, 318. Underscoring the magnitude of the issue, counsel for the State indicated that, given DOE's numerous claims of privilege, "we're going to be [before the Board] thousands of times asking for documents." 60 NRC at 328 n.47. Although our ruling of August 31, 2004 temporarily postponed such privilege disputes, once DOE's re-submits and re-certifies its documents, the controversies will begin anew.

Even assuming that DOE's pending document production is of the highest quality, it is now clear that thousands of documents in this proceeding (whether from DOE or other participants) will be subject to various claims of privilege and that hundreds, if not thousands, of these claims will be disputed. This threatens to delay the proceeding. But, as we noted in August, "a full and fair 6-month document discovery period, where all of DOE's documents are to be available to the potential parties and the public, is a necessary precondition to the development of well articulated contentions and to the Commission's ability to meet the statutory mandate to issue a final decision within three years." 60 NRC at 315. Mindful of the enormous task that looms before us, it is incumbent on this Board to develop procedures to manage and to resolve efficiently a very large number of privilege disputes.

## II. REGULATORY STRUCTURE

Development of an efficient plan for managing the privilege disputes in this proceeding first requires an understanding of the scope of the types of privilege claims that are available, and of the existing regulatory and technical structure.

### A. Scope of Available Privilege Claims

As we explained in our August decision, the regulations applicable to the Yucca Mountain proceeding, 10 C.F.R. Part 2, Subpart J, require that DOE and other Potential Participants make

“all documentary material” available. 10 C.F.R. § 2.1003(a)(1); see generally 60 NRC at 311. Documents must be produced electronically and will be placed on the NRC Licensing Support Network (LSN). The full text and an “electronic bibliographic header” (Header) is required for all documents except for documents “(i) for which a claim of privilege is asserted; (ii) which constitutes confidential financial or commercial information; or (iii) which constitute safeguards information,” where only a Header is required. 10 C.F.R. § 2.1003(a)(4)(i)-(iii) (collectively “privileges” or “privileged documents”).<sup>1</sup>

The scope of the privileges available under 10 C.F.R. § 2.1003(a)(4)(i) is addressed in 10 C.F.R. § 2.1006(a), that states:

[T]he traditional discovery privileges recognized in NRC adjudicatory proceedings and the exceptions from disclosure in § 2.390 may be asserted by potential parties, interested States, local governmental bodies, Federally-recognized Indian Tribes, and parties. In addition to Federal agencies, the deliberative process privilege may also be asserted by States, local governmental bodies and Federally-recognized Indian Tribes.

The regulation specifies that the Board may, in appropriate circumstances, deny claims of privilege, order the document produced, and/or require document production under an appropriate protective order.

The exemptions from disclosure specified in 10 C.F.R. § 2.390 are those specified in the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The regulation sets forth the general rule that NRC must make all records and documents available to the public, and the nine FOIA exemptions from disclosure. These nine exemptions include documents that (1) are properly classified; (2) relate solely to internal personnel rules and practices; (3) are specifically exempted from disclosure by a statute that leaves no discretion on the issue; (4) are trade secrets or privileged or confidential commercial or financial information; (5) are interagency or intra-agency

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<sup>1</sup> A Header only is also acceptable for a document that is not suitable for image or searchable full text. 10 C.F.R. § 2.1003(a)(3).

memoranda that would not be available by law to a party other than in litigation;<sup>2</sup> (6) personnel and medical files, etc.<sup>3</sup>

In sum, the Subpart J regulations establish numerous categories of privileged documents with respect to which the person producing them need only provide a “Header.” These categories include:

- (1) the traditional discovery privileges recognized in NRC proceedings (e.g., the attorney work product privilege and the attorney-client communication privilege);
- (2) confidential financial or commercial information;
- (3) safeguards information;
- (4) the deliberative process privilege information (for governmental entities); and
- (5) the nine FOIA exemptions of 10 C.F.R. § 2.390(a).

For each of these privileges, there are specific elements or requirements that must be met, and the elements vary substantially depending on the privilege. For example, a person claiming that a document is protected under the attorney-client communication privilege generally must establish that the document was (a) to or from an attorney acting in his or her capacity as an attorney; (b) written primarily for the purpose of seeking or providing legal advice; and (c) not shared or disseminated to persons outside of the attorney-client relationship. On the other hand, in order for a document to qualify under the deliberative process privilege the person claiming the privilege generally needs to show that it is pre-decisional, deliberative, and that an appropriately senior agency official personally reviewed and specifically identified the documents

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<sup>2</sup> This FOIA exclusion is related to, but not identical with, the deliberative process privilege.

<sup>3</sup> There is some obvious overlap between the three categories of documents excluded under 10 C.F.R. § 2.1003(a)(4)(i)-(iii) and the nine FOIA exclusions. For example, section 2.1003(a)(4)(i) excludes “confidential financial or commercial information,” whereas section 2.390(a)(4) (FOIA Exemption 4) excludes “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” These are not identical.

as meeting the requirements of the deliberative process privilege.<sup>4</sup> In order to determine whether a document properly qualifies for a specific privilege, the Board must be provided with the facts showing that the document satisfies all of the elements applicable to the privilege claimed.

B. Content of Electronic Bibliographic Headers

Turning to the prescribed content of the Headers, they do not appear to provide the parties or the Board with the information necessary to determine whether a given document satisfies the elements applicable to the privilege claimed for it. More fundamentally, the regulations do not require that the Header state that a withheld document is claimed to be privileged, much less the type of privilege claimed.<sup>5</sup> Similarly, there is no requirement that the person producing the document provide the essential information that would normally be required in a litigation privilege log, *i.e.*, the facts relating to the document that represent the elements of each privilege. “Bibliographic header” is defined as “the minimum series of descriptive fields that a potential party, interested governmental participant, or party must submit with a document or other material.” 10 C.F.R. § 2.1001. But no regulation lists or mandates this “minimum series of descriptive fields” or their contents.

The LSN Administrator and the LSN Advisory Review Panel, neither of which have authority to issue binding regulations, have attempted to fill this gap by issuing guidance. Guidance document “LSN Baseline Design Requirements” specifies a “Recommended Participant Bibliographic Header Field Structure,” that suggests that each Header include fields for items such as: addressee name, addressee organization, author name, author organization,

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<sup>4</sup> The descriptions of the elements of the attorney-client communication privilege and the deliberative process privilege are provided to illustrate their differences, and are not to be construed as this Board’s final interpretation of the elements of these privileges.

<sup>5</sup> A person may provide only a Header for a document that (a) is not technically suitable for electronic text display or (b) is claimed to be privileged. See 10 C.F.R. § 2.1003(a)(3) and (4). But the regulations and guidance do not require the person to state which of the two reasons justify his or her withholding of the document’s text.

comments, descriptors, document date, document type, and title.<sup>6</sup> The guidance describes the “comments” field basically as a catch-all field that can be used to explain (a) whether the document was claimed to be privileged and (b) if so, why.<sup>7</sup> The guidance document divides the suggested fields into three categories -- mandatory, required if available, and optional -- and the comments field is listed as “optional.”

Although the recommended Header fields help identify a document (name of author, date, subject), they do not provide the information necessary to assess whether a document qualifies for any given privilege. For example, although the recommended Header fields include the “addressee name” and the “author name,” they do not provide the information necessary to determine whether the document qualifies for the attorney-client communication privilege, i.e., (a) whether the addressee or author was an attorney, (b) whether the addressee and author had an attorney-client relationship, (c) whether the document was written for purposes of requesting or providing legal advice, and (d) whether the document was shared or disseminated to persons outside of the attorney-client relationship.<sup>8</sup> Alternatively, the Header fields provide no information about whether the document might qualify for the deliberative process privilege, such as was it pre-decisional and was it deliberative.

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<sup>6</sup> LSN Baseline Design Requirements (June 5, 2001), at 17, Table A, 22-23.

<sup>7</sup> The guidance document states that the “comments” field should include “any information not covered in other fields which the submitter or indexer believes would be of help to identify or retrieve the document, or to further explain any field entry for the document . . . This field may include summaries of documents that are privileged.” *Id.* at 17.

<sup>8</sup> Of course the Board, by inspecting the document, might glean some or all of this information. But this misses the point, which is that it is literally impossible for this Board to review individually 100,000 or a million documents to attempt to determine what privilege, if any, the document provider is claiming and whether the document meets the necessary elements.

In short, even if a person were inclined to follow the optional recommendations of the LSN Administrator's non-binding guidance, the information in the Header fields would be of little assistance in resolving privilege disputes.

### C. Privilege Logs

Privilege logs are the tool employed to manage and to resolve privilege claims. For example, Rule 26(b)(1) of the Federal Rules of Civil Procedure states that a party "may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party" and further provides:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Fed. R. Civ. Proc. 26(b)(5). The "privilege log" is the mechanism whereby a party claiming the privilege "describes the nature of the documents . . . in a manner that . . . will enable other parties to assess the applicability of the privilege or protection." The log is generally a chart, listing each document for which a privilege applies, and providing, in different columns or fields, the information necessary to assess whether the privilege legitimately applies.

The Commission's general rules of practice for adjudicatory proceedings support the use of privilege logs. The rules governing Subpart G proceedings are virtually identical to the above quoted provisions of Rule 26. See 10 C.F.R. § 2.705(b)(1) and (4). Even in Subpart L proceedings, where discovery is limited to certain mandatory disclosures, the rules require each party to provide a privilege log -- "a list of documents otherwise required to be disclosed for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents." 10 C.F.R. § 2.336(a)(3).

Although the regulations for the Yucca Mountain HLW proceeding do not incorporate 10 C.F.R. §§ 2.705 or 2.336 (see 10 C.F.R. § 2.1001), privilege logs remain an authorized and necessary tool under Subpart J. This Board, as the pre-license application presiding officer, is required and authorized to resolve privilege claims, see 10 C.F.R. §§ 2.1006(b) and 2.1010(b), and possesses all the general powers of a presiding officer, including the power to manage the process, rule on offers of proof, and avoid delay. See 10 C.F.R. §§ 2.1010(e) and 2.319.

Privilege logs will vary from case to case.<sup>9</sup> In many lawsuits, only a few dozen, or perhaps a hundred documents will be listed on a privilege log. In most cases, only two privileges are asserted -- the attorney-client communication privilege and the attorney work product privilege. In these typical cases the privilege logs will be short and relatively simple. In other cases, privilege logs are larger and more complicated. For example, in the tobacco claims litigation involving massive numbers of documents, the court issued a detailed case management plan and procedure for resolving discovery and privilege disputes.<sup>10</sup> Likewise, in FOIA cases, where there are nine FOIA exemptions, rather than the two traditional privileges, the logs may be more complicated because each type of FOIA exemption has its own sub-elements. See Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir. 1973). Certainly in any case involving a significant number of privileged documents, it is critical to establish at an early point the information that the

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<sup>9</sup> See Robert J. Nelson, The Importance of Privilege Logs, *The Practical Litigator*, 27, 29 (Mar 2000). See also Heavin v. Owens-Corning Fiberglass, No. 02-2572-KHV-DJW, 2004 U.S. Dist. LEXIS 2265 \*1, \*24 (D. Kan. Feb. 3, 2004) (describing what a privilege log should include "at a minimum"); Hill v. McHenry, No. 99-2026-CM, 2002 U.S. Dist. LEXIS 6637 \*1, \*8 (D. Kan. Apr. 10, 2002) (listing requirements of satisfactory privilege log).

<sup>10</sup> United States v. Phillip Morris, Inc., Ninth Case Management Order, 99-CV-2496, 2001 U.S. Dist. LEXIS 12603 \*1 (D.D.C. Mar. 27, 2001).

privilege log must contain if there is to be any hope that the case is to proceed fairly and expeditiously.<sup>11</sup>

### III. ORDER

Based on the foregoing, the Board hereby orders DOE, the NRC Staff and the State, together with any other Potential Participants who may wish to respond, to meet, either telephonically or in person, within 20 days of the publication of this order in the Federal Register, for the purpose of developing and agreeing on (a) a joint proposed format for privilege logs and (b) associated procedures for resolving privilege disputes. The joint proposed format for the privilege logs shall cover all categories of privilege or protected status claims available under Subpart J and relevant to this proceeding. See II.A.(1)-(5) above. For each category of claimed privilege (e.g., attorney-client communication, deliberative, Privacy Act), the joint proposed format for that particular privilege log should specify and define the sub-elements of information that must be provided in order to enable other parties to assess the applicability of the privilege or protection without revealing the privileged or protected information itself.<sup>12</sup>

The jointly agreed procedures associated with privilege claims and disputes shall be based upon the regulatory requirements and procedures of Subpart J and provide any suggested

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<sup>11</sup> As one commentator has noted that “it is in the producing party’s interest to provide the absolute minimum amount of information about the document on the privilege log; downplay the potential importance of the document, disguise the weaknesses associated with the privilege or work product claim; and ultimately to delay producing or never produce the document.” Robert J. Nelson, The Importance of Privilege Logs, *The Practical Litigator*, 27, 29 (Mar 2000). To the contrary, it is in the public interest in this case, as well as the interest of sound judicial management, that the privilege logs contain all necessary information, so that privilege disputes can be minimized and promptly resolved.

<sup>12</sup> For example, DOE and its litigation support contractor, CACI Inc., are using computer software to screen documents for potential claims of privilege as well as teams of people reviewing and evaluating documents for privilege. See 60 NRC at 318. This software, and DOE’s instructions to these individuals, presumably identify the elements of each category of privilege that DOE is claiming. The NRC, which made its documents available on the LSN on September 30, 2004, presumably developed similar criteria and went through a similar process in evaluating which documents qualified for a privilege.

additional measures or procedures that will avoid, or expedite the resolution of, privilege disputes.<sup>13</sup> For example, the procedure may call for additional conferences between the parties, or for a mechanism for the redaction of small amounts of “privileged information” from an otherwise unprivileged document, in lieu of the blanket exclusion of a document. To the maximum extent possible, the privilege logs and procedures should encourage the prompt resolution of privilege disputes by the parties themselves. The proposed procedures should distinguish between those privileges that are absolute, and those that are qualified. The proposed procedures shall maximize the effective use of the LSN.

Not later than 40 days after the publication of this order in the Federal Register, DOE, the NRC Staff, and the State shall submit a jointly-agreed proposed case management order to the Board that establishes a proposed format for a privilege log and specifies privilege claim related procedures for this proceeding. They shall allow any other Potential Participant the opportunity to negotiate, to endorse and/or to join in the joint submission. In addition, such other Potential Participants may develop and submit their own joint or individual alternative proposed case management orders on the subject of privilege log formats and procedures.

If DOE, the NRC Staff, and the State are unable to agree upon a joint proposed case management order prescribing the format for a privilege log and associated procedures, then, 50 days after the publication of this order in the Federal Register, each of them, and any other Potential Participant shall submit separate proposed case management orders on this subject.

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<sup>13</sup> Appointment of a discovery master, authorized under 10 C.F.R. § 2.1018(g), merely pushes the discovery disputes to another level and, therefore, would not appear to be a panacea.

In such case, 65 days after publication of this order in the Federal Register, each person or entity filing a proposed case management order shall file a supplement identifying and explaining the material differences between its proposed order and the other proposed orders.

It is so ORDERED.

The Pre-license Application  
Presiding Officer Board

***/RA/***

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Thomas S. Moore, Chairman  
ADMINISTRATIVE JUDGE

***/RA/***

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Alan S. Rosenthal  
ADMINISTRATIVE JUDGE

***/RA/***

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Alex S. Karlin  
ADMINISTRATIVE JUDGE

Rockville, Maryland

January 25, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
)  
U.S. DEPARTMENT OF ENERGY ) Docket No. PAPO-00  
)  
)  
(High-Level Waste Repository: )  
Pre-Application Matters) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB FIRST CASE MANAGEMENT ORDER (REGARDING PREPARATION OF PRIVILEGE LOGS) have been served upon the following persons by electronic mail and/or Electronic Information Exchange as denoted by an asterisk (\*).

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[Original signed by Rebecca Giitter]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 25<sup>th</sup> day of January 2005