

**POGO**  
Project On Government Oversight

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OFFICE OF SECRETARY  
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Rulemaking and Adjudications Staff  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

RE: RIN 3150-AH57 – Proposed Rule for “Protection of Safeguards Information”

To whom it may concern:

This comment is in response to the Nuclear Regulatory Commission’s (NRC’s) Proposed Rule for “Protection of Safeguards Information” that was published in 70 Federal Register 7196 (February 11, 2005). The Project On Government Oversight (POGO), which has investigated safety and security issues at nuclear power plants since the mid-1990’s, opposes the proposed rule’s expansion of controls for unclassified “Safeguards Information” (SGI).

Specifically, POGO concludes that the proposed rule is overreaching in scope and expanding the cloak of secrecy over the NRC and its licensees and applicants. The rules also inhibit the public’s right to know how the federal government operates in the areas of byproduct material, source materials, nuclear power plants, and geologic repositories (including Yucca Mountain, Nevada) among others to “protect” SGI. All those categories are new SGI designated sections. Such a sweeping policy poses a significant threat to our nation’s security as well as to the rights of American citizens.

William Leonard, Director of Information Security Oversight Office in the National Archives and Records Administration (the agency that governs classified information), stated at a recent congressional hearing: “In certain circumstances, even with respect to national security information, classification can run counter to our national interest.” Secrecy conveniently conceals safety failings from journalists, concerned citizens, and nonprofit watchdogs who play a vital role in holding government accountable and making public policy stronger. Without sunshine and public debate, our homeland security vulnerabilities are festering behind closed doors. The end result is a more – not less – vulnerable nation.

The statutory definition of “safeguards information” is “information which specifically identifies a licensee’s or applicant’s detailed” plans for “the physical protection of special nuclear material,” “the physical protection of source material or byproduct material,” or “the physical

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protection of and the location of certain plant equipment vital to the safety of production or utilization facilities." 42 U.S.C. § 2167(a); *see also* 10 C.F.R. § 73.2. In other words, information that "might compromise the security of nuclear facilities." NRC Regulatory Issue Summary 2003-08, *Protection of Safeguards Information from Unauthorized Disclosure*, April 30, 2003, at p. 1. The NRC claims that the release of SGI "could result in harm to the public health and safety and the Nation's common defense and security, as well as damage to the Nation's critical infrastructure, including nuclear power plants and other facilities licensed and regulated by the NRC." *Id.*

Access to SGI is on a "need-to-know" basis. 10 C.F.R. § 73.21(c); *see also* 10 C.F.R. § 73.2 (defining "need to know"). Based on that standard, in essence, NRC's message is nothing more than "err on the side of caution – NRC licensees and applicant must protect all information." That message, however, is too broad and overreaching, preventing genuine internal and external debate that may improve nuclear safety.

POGO is also troubled by the criminal and civil penalties that may result from release or unauthorized disclosure of SGI. Undoubtedly, those penalties will have an internal and external chilling effect that may impact the exchange of information resulting in a reduced level of safety. Is it important to note that any willful attempts to hide non-protected information do not result in similar penalties.

POGO has experienced the SGI issue first-hand after a "request" by the NRC that POGO cease the public dissemination of a September 11, 2003 letter to Chairman Diaz raising questions about the adequacy of the NRC's testing of defenses against sabotage in place at Indian Point. POGO requested that the NRC identify the SGI to ensure that we were not being unfairly silenced. The NRC took the position, however, that it had no obligation to identify the passages in the letter that it claimed were sensitive and threatened POGO with civil and criminal sanctions if it continued making public the Diaz letter or any of the sensitive material it allegedly contained. So long as the NRC refused to identify what portions of the letter were objectionable, it presented POGO with a Hobson's choice – remain silent or risk criminal prosecution. POGO believed that the agency took that position to stifle legitimate criticism of the agency.

Believing that the NRC's position was unreasonable and untenable as a matter of law, POGO retained counsel and threatened legal action against the NRC for stifling POGO's speech. Ultimately, the agency made concessions, agreeing to identify the portions of the Diaz letter that the NRC considered SGI. POGO appreciated the agency's willingness to engage in a discussion on this issue and believe that our discussions were helpful to all concerned – the NRC protected alleged SGI and POGO was able to resume its criticism of security at Indian Point while avoiding inadvertent disclosures. It must be stated that some of the information that was designated as SGI did not need to be withheld from the public and it was not until senior NRC officials were involved that the agency backed away from some of its SGI claims.

The NRC's rule would "protect" additional types of security information held by an expanded group of licenses as SGI. POGO believes the use of any unclassified designation, including SGI, to "protect" information is an abuse of power, unless it is created with the intent that all information is public and that any exemptions to the public release of information, should be the exceptions rather than the rule. Furthermore, the NRC must have a genuine system for designating

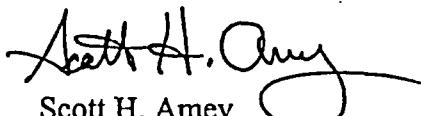
officials who may withhold SGI, provide oversight of that system, and allow for administrative agency appeals of any denial of SGI. The current law (42 U.S.C. § 2167(c)) permits judicial review pursuant to the Freedom of Information Act (FOIA at 5 U.S.C. § 552(a)(4)(B)), however, litigation is inappropriate for initial appeals. Unlike FOIA, the current statutes, regulations, and proposed rule do not permit someone holding SGI “to appeal to the head of the agency any adverse determination.” 5 U.S.C. § 552 (a)(6)(A)(i)).

Additionally, the NRC must not forget that the designation of SGI does not permit it to withhold all information. Even with classified national security or FOIA’able information, courts have repeatedly compelled agencies to carefully review withheld documents and release non-classified, segregable information. *See, e.g., Donovan v. FBI*, 806 F.2d 55, 60 (2d Cir. 1986).

Those rights and duties have been the cornerstone of FOIA and, to a limited extent, the government’s process for classifying information. Creating a system without such rights, duties, and obligations would abuse the open government principals on which this country was founded – an open government that is for the people. In comparison, the NRC’s rules on SGI makes the government’s classification system and FOIA look like tremendous open government vehicles, which is far from their reality.

POGO recognizes the need for secrecy of certain government activities and information. In fact, shortly after 9/11, POGO contacted the Department of Energy suggesting that it remove detailed maps of nuclear weapons facilities (including the locations of fence lines, guard posts, and “hidden vaults” for special nuclear materials) from its web site that we viewed as a roadmap for terrorists. The NRC, however, is making a leap in the wrong direction – a leap that could harm homeland security by silencing those who are trying to improve nuclear security for all Americans. The NRC’s proposed rule could create, at the least, an environment fostering waste and fraud, and at worst, possibly endanger American lives. POGO urges the NRC to reconsider the proposed rule’s expansion of SGI to ensure that it balances the government’s need to legitimately protect some government information against the public’s right to know.

Sincerely,



Scott H. Amey  
General Counsel