May 12, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

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| In the Matter of | ) | |
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| U.S. DEPARTMENT OF ENERGY | ) | Docket No. PAPO-00 |
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| (High-Level Waste Repository: Pre-Application Matters) | ) | ASLBP No. 04-829-01-PAPO |
| | ) | |

# NRC STAFF RESPONSE TO ISSUES IDENTIFIED AT FIRST CASE MANAGEMENT CONFERENCE

## INTRODUCTION

The Nuclear Regulatory Commission staff ("Staff") hereby submits its response to issues identified at the first case management conference held on May 4, 2005. On May 11, 2005, the Pre-License Application Presiding Officer Board ("PAPO" or "Board") issued a Memorandum and Order (Scheduling Second Case Management Conference and Issues to be Briefed) ("May 11 Order") which clarified the timing, administrative requirements, and subject matters of issues to be briefed. The Staff was asked to provide (1) suggested changes to Appendix A, B, and C of the Board's April 19, 2005 Memorandum (Matters to be Addressed at the First Case Management Conference) ("April 19 Memorandum"); (2) a discussion addressing the issue of whether "confidential client discussions regarding legal advice" are covered by the attorney-client or attorney-work product privileges; (3) agreed or separate positions on the specific level within their organization of the senior official who is authorized to make the determination to assert the deliberative process privilege, and (4) a discussion addressing what privileges and special protections or procedures, if any, should cover employee concerns program files. May 11 Order, at 2 (unpublished). The Staff responds to each issue, in turn, below.

## DISCUSSION

### I. Comments and Suggestions Regarding Privilege Log Formats

Below, the Staff provides its comments and suggestions regarding the proposed privilege log formats for the attorney-client, the litigation work-product, and the deliberative process privilege attached as Appendix A, B, and C, respectively, to the April 19 Memorandum outlining matters to be addressed at the first case management conference. Question 3 of the April 19 Memorandum asked the parties to provide their views on whether the privilege log formats, as proposed in the appendices, were incorrect, under-inclusive, or over-inclusive. *See* April 19 Memorandum, at 2-3. Following discussion of the privilege log formats at the May 4, 2005 case management conference, the Board asked the parties to provide their comments and suggestions on the proposed privilege log formats in a brief, not to exceed ten pages in length. The Staff's views on the proposed privilege log formats for the attorney-client, the litigation work-product, and deliberative process privilege are discussed, in turn, below.

#### A. Attorney-Client Privilege

The Staff generally finds the proposed privilege log format for the attorney-client privilege to be acceptable with one clarification. Item 5 of the proposed privilege log format requires a party asserting a privilege claim to provide a "[s]tatement of facts supporting the assertion that the primary purpose for which the document was created and transmitted was either (a) providing legal advice, or (b) requesting legal advice." April 19 Memorandum, at Appendix A. The attorney-client privilege, however, is not limited to documents that were either transmitted from or received by an attorney. Instead, the privilege attaches to the confidential communication regarding legal advice.[1] *See e.g.*, *Long v. Anderson University*, 204 F.R.D. 129, 134 (S.D.Ind. 2001) (extending attorney-client privilege to email sent from university's director of human resources to dean of

[1] This issue is addressed in greater detail in the Section II, below.

students regarding a conversation with legal counsel and his legal advice); *see also*, *Weeks v. Samsung Heavy Indus. Co.*, 1996 WL 341537, *4 (N.D.Ill. 1996), *citing SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 514 (D. Conn. 1976), *appeal dismissed*, 534 F.2d 1031 (2nd Cir. 1976) ("A privileged communication does not lose its status as such when an executive relays legal advice to another who shares responsibility for the subject matter underlying the consultation."); *Santrade, Ltd. v. General Elec. Co.*, 150 F.R.D. 539, 545 (E.D.N.C.1993) (holding that a corporation does not waive its privilege when non-lawyer employees send or receive communications because corporate communications which are shared with those having need to know of the communications are confidential for purposes of the attorney-client privilege).

Thus, the privilege covers not only the initial "document" containing the legal advice (or request for legal advice), but also covers corollary documents which contain or discuss that legal advice so long as the document remains confidential. *See Federal Trade Commission v. GlaxoSmithKline*, 294 F.3d 141, 147-148 (D.C.Cir. 2002) ("The Company's burden is to show that it limited dissemination of the documents in keeping with their asserted confidentiality, not to justify each determination that a particular employee should have access to the information therein."). The confidentiality of a privileged document is assured by referencing item 7 of the attorney-client privilege log format. *See* April 19 Memorandum, at Appendix A. Accordingly, in the Staff's view, item 5 would be more accurate if it required a "[s]tatement of facts supporting the assertion that the document contains confidential communications, the primary purpose of which was either (a) providing legal advice, or (b) requesting legal advice."

B. Litigation Work Product Privilege

The Staff believes that the privilege log format for the litigation work product privilege is over-inclusive. Item 6 of the proposed privilege log format for litigation work product documents requires a statement of "[w]hether the document contains opinion work product (i.e., counsel's mental impressions, opinions, conclusions, or legal theories), fact work product (i.e., facts obtained

by counsel or at the request of counsel), or both." April 19 Memorandum, at Appendix B. This requirement goes beyond what is required to assert the privilege and is, therefore, unnecessary. There is no distinction between factual work product and opinion work product.[2] *Martin v. Office of the Special Counsel, Merit Systems Protection Board*, 819 F.2d 1181, 1187 (D.C.Cir. 1987) ("The work-product privilege simply does not distinguish between factual and deliberative material."). Accordingly, there is no 'automatic' duty to segregate factual work product from deliberative work product when claiming a privilege. Instead, the factual material in a work-product document is only available upon a showing of substantial need and undue hardship. *See e.g.*, 10 C.F.R. § 2.705(b)(3). Since the instances in which a requesting party will be able to successfully demonstrate substantial need and undue hardship are likely to be few, there is no reason to create an additional burden on the party withholding a document on work-product grounds. Therefore, in the Staff's view, item 6 of Appendix B is not necessary to assert the privilege and should be removed from the privilege log format.

C. Deliberative Process Privilege

The Staff believes that the privilege log format for the deliberative process privilege is over-inclusive. Item 10 of the proposed privilege log format for deliberative process documents requires a statement of "[t]he degree of confidentiality with which the document was treated at the time of its creation and transmission and subsequently." April 19 Memorandum, at Appendix C. This element goes beyond what is necessary to assert the privilege. The deliberative process privilege can only be waived through "official disclosure." *See e.g.*, *Dipace v. Goord*, 218 F.R.D. 399, 407 (S.D.N.Y. 2003) (finding no waiver of deliberative process privilege unless disclosure was authorized by the governmental agency and voluntary). Certainly, the government

[2] Unlike the litigation work product privilege, the deliberative process privilege does distinguish between factual and deliberative information. *See Mervin v. F.T.C.*, 591 F.2d 821, 827 (D.C.Cir. 1978) (comparing reasoning for treating the factual/deliberative distinction for the deliberative process privilege different than for the litigation work product privilege).

is responsible for demonstrating the applicability of the privilege, but a party who asserts that material is publicly available carries the burden of production on that issue. *Davis v. U.S. Department of Justice*, 968 F.2d 1276, 1279 (D.C.Cir.1992). This is so because the task of proving the negative—that information has not been revealed—might require the government to undertake an exhaustive, potentially limitless search. *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 342 (D.C.Cir.1989). Item 10, as proposed, improperly relieves the requesting party of the burden of demonstrating official disclosure and creates a new burden of confidentiality for the party asserting the privilege. Therefore, in the Staff's view, item 10 of Appendix C is not necessary to assert the deliberative process privilege and should be removed.

II. Confidential Client Discussions Regarding Legal Advice are Protected by the Privilege

Pursuant to the Pre-License Application Presiding Officer Board Order of May 11, 2005, the parties were required to brief their answer to whether "'confidential client discussions regarding legal advice' are covered by the attorney-client or litigation work product privileges." The NRC Staff response is set forth below.

The Commission has stated that *Upjohn v. United States* provides the federal common law standard for the attorney-client privilege. *See Georgia Power Co.*(Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181,187 (1995) (citing *Upjohn v. United States*, 449 U.S. 383 (1981)). While *Upjohn* did not directly address the confidentiality of client discussions, the Court's emphasis in that case on effectuating the flow of fact-finding interactions and legal advice in an organizational setting, strongly suggests these communications are protected under the attorney-client privilege. This can be seen from the Court's view that attorneys needed unimpaired access, as only guaranteed by the attorney-client privilege, to all levels of employees because mid and lower level workers could "embroil the corporation in serious legal difficulties...and would have the relevant information needed by corporate counsel if he is adequately to advise the client with

respect to such actual or potential difficulties." *Upjohn*, 449 U.S. at 391. Likewise, the Court found that transmittal of an attorney's advice should be similarly privileged because "the attorney's advice will also frequently be more significant to noncontrol group members...who will put into effect the corporation's policy." *Id*. at 392. The absence of such protections, the Court reasoned, "makes it difficult for corporate attorneys to formulate sound advice...[and] also threatens to limit the valuable efforts of corporate counsel to ensure their clients compliance with the law." *Id.* The Court's foregoing imperatives for an attorney to have unhindered access to facts, and clients to advice, which as *Upjohn* states, can only be gained through confidentiality, leads to the inescapable conclusion that client to client discussions, which serve the same interests articulated by the Court, are equally protected.

This conclusion is directly supported by subsequent case law. In *Santrade v. General Electric*, the court concluded, "A document need not be authored or addressed to an attorney in order to be properly withheld on attorney-client privilege grounds. First, in instances where the client is a corporation, documents subject to the privilege may be transmitted between non-attorneys to relay information requested by attorneys." *Santrade, Ltd. v. General Electric*, 150 F.R.D. 539, 545 (E.D. N.C. 1993). Also instructive is *Evans v. Atwood*, a case involving agency officials, who while working together, shared information which one of them may have passed to an attorney. *Evans v. Atwood*, 177 F.R.D. 1, 6 (D. D.C. 1997). The court found that "circulating truly confidential information among concerned officials does not defeat the [attorney-client] privilege since all the recipients shared the attorney client privilege with each other" and that it was "hard to understand why their sharing of that information with each other constitutes a waiver of the privilege they have to communicate...[it] to an agency lawyer." *Id*.; *See Commodity Futures Trading Comm'n, v. Wientraub*, 471 U.S. 343, 348-49 (1985) (concluding that a waiver of the corporate attorney-client privilege "rests with the corporation's management and is normally exercised by its directors"). Finally, when a client employee interviews other workers on behalf of

counsel, those discussions have been found to be privileged as well. *See Carter v. Cornell Univ*., 173 F.R.D. 92 (S.D. N.Y. 1997), *aff'd*, 159 F.3d 1345 (2nd Cir. 1998).

Aside from fact-finding, the case law is also supportive of the confidentiality of client discussions regarding the dispensation of legal advice. In *Long v. Anderson Univ.*, the court concluded "[a] privileged communication does not lose its status as such when an executive relays legal advice to another who shares responsibility for the subject matter underlying the consultation." *Long v. Anderson Univ.*, 204 F.R.D. 129, 134 (D.S.D. Ind. 2001) (quoting *Weeks v. Samsung*, 1996 WL 341537, at *4 (N.D. Ill. June 20,1996)); *See McCook Metals v. Alcoa*, 192 F.R.D. 242, 254 (N.D. Ill. 2000); *Shriver v. Baskin-Robbins*, 145 F.R.112, 114 (D. Colo. 1992). Such a client to client relay of advice, as one court separately found in a like context, "was merely making advice available to another party of this inanimate [corporate] entity." *See In re: Grant Jury 90-1*, 758 F.Supp. 1411, 1413 (D. Colo. 1991). In sum, as the court in *Johnson v. Sea-Land Serv.* noted, "[t]he attorney-client privilege affords confidentiality to communications among clients, their attorneys, and the agents of both, for the purpose of seeking and rendering an opinion on law or legal services." *Johnson v. Sea-Land Serv.*, 2001 WL 897185, at *2 (S.D. N.Y. Aug. 9, 2001).

Importantly, case law provides standards for protecting client discussions regarding legal advice as well. The first standard, is that the primary purpose or content of the communication must focus on fact-finding, or requests for, or dispensations of, legal advice. *See Andritz Sprout-Bauer, Inc. v. Beazer East,* 174 F.R.D. 609, 633 (D.M.D. Pa. 1997); *Georgia Power Co.*, *supra*, 42 NRC at 187. Second, communications of a routine nature are not privileged merely because an attorney is "copied in" on the communication. *See F.C. Cycles Intl. v. Fila Sport*, 184 F.R.D. 64, 71 (D. Md. 1998). A third standard is a need to know under which, "The communications retain their privileged status *if* the information is relayed from a non-lawyer employee or officer to other employees or officers of the corporation on a *need to know* basis" (Id. emphasis added) or to "employees that were 'authorized to speak or act' for the company."

*Federal Trade Comm'n. v. GlaxoSmithKline*, 294 F.3d 141,147 (D.C. Cir. 2002). And fourth, while documents can be shared client to client with those "needed to provide input to the legal department and/or receive the legal advice and strategies formulated by counsel," those transactions must be treated as being confidential in nature. *Id.*; *See Upjohn*, 449 U.S. at 394-95.

For the reasons set forth above, the attorney-client privilege applies to client to client discussions which meet the above standards.

III. Designation of Senior Agency Official for Making Deliberative Process Determination

Following discussion of the privilege log formats at the May 4, 2005 case management conference, the PAPO Board asked the parties to identify the senior official who will be responsible for making a determination that a document is "predecisional" or "deliberative" and is therefore protected by the deliberative process privilege. The Staff hereby identifies the senior officials who will make the deliberative determination.

The traditional discovery privileges recognized in NRC adjudicatory proceedings and the exceptions from disclosure in 10 C.F.R. § 2.390 may be asserted by parties, potential parties, interested States, local governmental bodies, and Federally-recognized Indian Tribes. 10 C.F.R. § 2.1006(a). One such privilege, 10 C.F.R. § 2.390(a)(5), protects "inter-agency or intra-agency memorandums or letters which would not be available by law to parties other than an agency in litigation with the agency." *See also*, Exemption 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5) (same); 10 C.F.R. 9.17(a)(5). This exemption encompasses any number of traditional discovery privileges including attorney-client, attorney work product, and deliberative process privileges. *See e.g.*, *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1184-1185 (D.C.Cir. 1987).

As part of the PAPO's efforts to craft a case management order, the parties were asked to provide certain, specific information regarding the "deliberative process" privilege. This privilege

encourages open, frank discussions on matters of policy between subordinates and superiors, protects against premature disclosure of proposed policies before they are finally adopted, and protects against public confusion that might result from premature disclosure. *See e.g.*, *Jordan v. U.S. Dept. of Justice*, 591 F.2d 753,772-773 (D.C.Cir. 1978) (en banc). To ensure that each claim of deliberative process privilege has received the personal attention of the official whose department's operations may be affected by a decision to make documents public, the Board requested that the parties designate or identify a person or position who will make that determination. While the appropriate level of seniority necessary to assert the privilege varies by jurisdiction, the majority of courts recognize the authority of the head of an agency to delegate the authority to invoke the deliberative process privilege for documents within a subordinate official's purview. *See e.g.*, *Landry v. F.D.I.C.*, 204 F.3d 1125, 1135 (D.C.Cir. 2000); *Kerr v. U.S. Dist. Ct. For N.D. Cal.*, 511 F.2d 192, 198 (9th Cir. 1975); *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 882-83 (5th Cir. 1981); *Yankee Atomic Elec. Co. v. U.S.*, 54 Fed.Cl. 306, 310-311 (Fed.Cl. 2002).[3]

After consideration of the authority granted to responsible officials within the agency and their role in the decisionmaking process, the NRC Staff has identified two positions on its organizational chart, both within the Division of High Level Waste Repository Safety ("HLWRS") in the Office of Nuclear Material Safety and Safeguards, who will have the responsibility for personally reviewing each assertion of a privilege for predecisional or deliberative process reasons: (1) Deputy Director, Licensing and Inspection Directorate, and (2) Deputy Director, Technical

[3] At one end of the spectrum, a court has adopted the view that the privilege need not be asserted by the head of an agency or even a senior official, but may be "raised by individuals with specific and detailed knowledge of the documents in which the privilege is asserted," *U. S. Dept. of Energy v. Brett*, 659 F.2d 154, 155 (Temp.Em.Ct.App. 1981), but, at the other end, the Third Circuit required that the deliberative process privilege be invoked by the head of the agency after personal consideration. *See United States v. O'Neill*, 619 F.2d 222, 225 (3rd Cir. 1980).

Review Directorate.[4] Both Deputy Directors are close enough to the day-to-day activities of the Staff to have personal, specific, and detailed knowledge of the documents in their purview for which the deliberative process privilege is asserted. Within the agency's formal lines of authority, these positions exercise significant oversight of decisions made by subordinates within sections of HLWRS. The Deputy Directors are also senior agency officials who exercise sufficient authority to ensure that the deliberative process privilege is invoked in a deliberate, considered, and reasonably specific manner. Consequently, their involvement will insure that the requisite knowledge of agency policy and practices are applied consistently to documents withheld under the privilege and that application of the privilege conforms to the purposes of the protection.

## IV. NRC Position Regarding Withholding of DOE Employee Concerns Files

### A. Introduction

In a "Memorandum (Matters to be Addressed at First Management Conference)," dated April 19, 2005 (unpublished), at 3-4, the Pre-License Application Presiding Officer (PAPO) Board posed, among other things, questions concerning what privilege covers employee concerns program files and what information is essential to establish a *prima facie* case of the validity of the claim raised. During the case management conference held on May 4, 2005, the PAPO Board asked for submissions addressing employee concerns program files issues. Tr. 280. By Memorandum and Order (Scheduling Second Management Conference and Issue to be Briefed), dated May 11, 2005 (unpublished), at 2, the Board further asked what "special protections or procedures, if any, should cover employee concerns program files."

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[4] The State of Nevada objects to the Staff's designation of a position within the agency's organizational structure in lieu of the particular, named, individual in that position. However, requiring named NRC personnel to make the deliberative determination is inconsistent with the Commission's treatment of NRC Staff. *See e.g.*, 10 C.F.R. § 2.709(a)(1) ("The attendance and testimony of ... named NRC personnel at a hearing or on deposition may not be required by the presiding officer, by subpoena or otherwise."). Instead, the function runs with the position, not a specific individual. The Department of Energy did not object to the Staff's designation.

For the reasons stated below, the Staff submits that while it lacks sufficient information to determine whether there is any privilege or exemption that would protect employee concerns files as a class of documents, it is apparent that certain information in employee concern files may be withheld from disclosure (*e.g.*, to protect privacy of DOE and contractor employees, the identity of confidential informants and confidential information), provided DOE can make the requisite showing to support the claim asserted under 10 C.F.R. §§ 2.1003(4) or 2.1006[5] on a document-by-document basis. To the extent that disclosure of information in employee concerns files could have a chilling effect on the willingness of DOE employees to raise safety concerns outside of their line management, disclosure could impair DOE's ability to identify and address safety issues in a timely fashion and would be contrary to Commission policy favoring a safety-conscious work environment at NRC-regulated entities.

B. Arguments Raised by DOE and Nevada

At the case management conference, the Department of Energy (DOE) argued the broad proposition that it would not be appropriate to permit the release of all employee concerns program files (approximately 5,000 documents) since the information had been provided to DOE with the expectation that confidentiality would be preserved. *See* Tr. 105, 112. DOE argued that while it was willing to release information in the files pursuant to a protective order, a requestor should have to show a need for the information or inability to obtain the information elsewhere given the potential harmful effect on DOE's employee concerns program. *E.g.,* Tr. 106, 107, 109-10, 111. DOE further asserted that redaction of privacy information alone may not be sufficient to protect the identity of individual employees and thus could deter future participation in the DOE employee concerns program. *See* Tr. 104-05, 107-08, 109, 121-22, 125-26. DOE noted that the Board

[5] Under the Commission's regulations, traditional discovery privileges are recognized in NRC adjudicatory proceedings and the exceptions from disclosure in 10 C.F.R. § 2.390 may be asserted by, among others, parties, potential parties, and interested States. *See* 10 C.F.R. § 2.1006(a).

should strike a balance between the need for discovery and protection of confidentiality which is important in maintaining a safety conscious work environment, *see* Tr. 115, and cited 10 C.F.R. § 2.1018(c)(1), which permits the issuance of any order that justice requires to protect a party, potential party, interested governmental participant, or other person, from annoyance, embarrassment, oppression, or undue burden, based on a showing of good cause, Tr. 120.

The State of Nevada (NEV) argued that the materials have been released under the Freedom of Information Act, after redactions to protect privacy, and that no threshold showing is required. *See* Tr. 117-18, 119. NEV also noted that the DOE Employee Concerns Program Guide indicates that confidential employee concerns may be subject to disclosure under the Privacy Act or the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and that confidentiality may not be granted to employees that, by nature of their position, are required to provide such information. *See* Tr. 128.

C. Commission Policy Emphasizes Maintaining a Safety-Conscious Work Environment

Before addressing the Board's questions, it is helpful to recount relevant NRC policy. While the Staff recognizes that DOE is not yet a license applicant or licensee, the Nuclear Regulatory Commission expects that "licensees and other employers subject to NRC authority will establish and maintain safety-conscious work environments in which employees feel free to raise safety concerns both to their management and the NRC without fear of retaliation." "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation: Policy Statement," 61 Fed. Reg. 24,336, 24,337 (May 14, 1996). The policy statement applies to all NRC licensees and their contractors and the term "licensee" as used in the Commission's policy statement includes licensees and applicants for licenses as well as holders of certificates of compliance. *See* 61 Fed. Reg. 24,337 n.2. The Commission has emphasized that a safety-conscious work environment "is critical to a licensee's ability to safely carry out licensed

activities." *Id.* [6]

Notably, employee concerns programs that provide ways to raise concerns outside of the normal management structure can improve the quality of the work environment. Licensees are expected to establish environments where employees "are encouraged to raise concerns and where such concerns are promptly reviewed, given the proper priority based on their potential safety significance, and appropriately resolved with timely feedback to employees." 61 Fed. Reg. 24,338. The Commission encourages licensees to have a dual focus on (1) achieving and maintaining an environment where employees are free to raise concerns directly to their supervisors and to licensee management, and (2) ensuring that alternate means of raising and addressing concerns are accessible, credible, and effective. *Id.*

Among the factors that may affect the success of alternate programs for addressing employee concerns are how accessible the program is to employees, provisions to protect the identity of employees including the ability to allow for reporting of issues with anonymity, demonstrated management support, and employee perceptions about the program. *Id*. at 24,338.

While discussion of facts concerning the DOE's employee concerns program files are uniquely within the purview of DOE, the Staff notes that the "[DOE] Employee Concerns Program Guide," DOE G 442.1-1, dated February 1, 1999, indicates that although employees may submit confidential or anonymous concerns, identifying information such as an employee's name, mailing address, phone number, organization, and position with DOE or a DOE contractor may be contained in the files. *See id.* at Section 5.2. Confidentiality is not protected if honoring that

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[6] Counsel for DOE was not totally correct in stating that 10 C.F.R. § 63.9, "Employee Protection," requires DOE to maintain a safety conscious work environment and that an employee concerns program is integral to meeting that requirement. *See* Tr. 194 (Faglioni). While the Staff does not dispute the importance of concerns program, the cited regulation prohibits discrimination against employees who engage in protected activities." Commission policy encourages licensees to establish alternate programs for identifying and resolving concerns, but does not require such programs. 61 Fed. Reg. 24,338.

request would endanger the health and safety of workers and the public and may depend on whether, for example, information provided is part of litigation or subject to release under statute. *See id.* at Sections 7, 13. The DOE Guide also indicates that, generally, the identity of an employee would be revealed during investigation of a concern on a need-to-know basis only. *See* Section 7.[7]

Pursuant to 10 C.F.R. § 2.1003, and subject to certain exclusions in § 2.1005, DOE is required to make certain documentary material[8] available before submitting its license application. An electronic bibliographic header is appropriate for documentary material withheld based on claims of privilege or which constitutes confidential financial or commercial information or safeguards information. *See* 10 C.F.R. § 2.1003. To the extent that information in employee

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[7] In accordance with Commission Policy, the identity of allegers and confidential sources who bring safety concerns to the NRC is generally protected regardless of whether confidentiality has been granted. "Protecting the Identity of Allegers and Confidential Sources; Policy Statement," 61 Fed. Reg. 25,924 (May 23, 1996). For example, the identity of a confidential source may be disclosed based on the need to protect the public because of an "overriding safety issue identified based on the alleger's concern," a hearing on an enforcement action, or a court or NRC adjudicatory board order. *Id.* at 25,926. Release of the identity of a confidential source may be provided when requested by a Federal agency (other than the Department of Justice) or a State agency if the agency demonstrates that it requires the identity in furtherance of its statutory responsibilities, the agency agrees similarly to protect the source's identity and if the source does not object. 49 Fed. Reg. 25,927. The NRC Office of Investigations may reveal the identity of a confidential source to DOJ or other law enforcement agency without notifying the individual or consulting the Commission. *Id.*

Under the "Statement of Policy on Investigations, Inspections, and Adjudicatory Proceedings," 49 Fed. Reg. 36,032, 36,033 (September 12, 1984), any licensing board decision that orders disclosure of a confidential source must be certified for Commission review. The statement also recognizes that disclosure of information to parties under protective order could breach promises of confidentiality or allow the subject of an investigation to prematurely acquire information about an investigation. *Id*.

[8] Documentary material is (1) any information upon which a party, potential party, or interested governmental participant intends to rely upon and/or cite in support of its position in the proceeding on a license application; (2) any information that is known to and in the possession of, or developed by the party that is relevant to, but does not support its position, and (3) all reports and studies, prepared by or on behalf of the potential party, including all related "circulated drafts," relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69, regardless of whether they will be relied upon and/or cited by a party. 10 C.F.R. § 2.1001.

concern files constitutes documentary material that must be made available prior to submission of an license application,[9] the relevant inquiry is what protection, if any, should be afforded that information.

D. Potential Protection of Employee Concerns Files Information

The PAPO was delegated the authority by the Commission and, pursuant to 10 C.F.R. § 2.1010(e), possess all the general powers in 10 C.F.R. §§ 2.319 and 2.321(c) that the PAPO requires to carry out its responsibilities, solely for the purposes of ruling on disputes over electronic availability of documents, including disputes relating to claims of privilege. *U.S. Dept. of Energy* (High-Level Waste Repository), CLI-04-20, 60 NRC 15, 16 (2004). *See also* "Department of Energy; Establishment of Atomic Safety and Licensing Board, 69 Fed. Reg. 42210 (July 14, 2004) (delegation to PAPO Board). The PAPO Board possesses authority under §§ 2.1010(e) and 2.319 "to regulate the course of the proceedings and the conduct of the participants" and is expected to use this authority to ensure a fair and impartial process. *Id.* at 18. Given this broad authority over discovery and that 10 C.F.R. § 2.1018(a) and(b)(1) indicate that access to documentary material (including production of material identified by bibliographic headers) only begins during the pre-license application phase, the PAPO Board has the authority under 10 C.F.R. § 2.319, based on a showing of good cause, to issue any order that justice requires to protect parties and participants in the HLW proceeding from discovery that could cause "annoyance, embarrassment, oppression, or undue burden, delay or expense." *See* 10 C.F.R. § 2.1018(c). The range of options available

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[9] Inasmuch as the full scope of "reliance" materials may not become apparent until after proffered contentions are admitted by the Presiding Officer in the licensing proceeding, "an LSN participant would not be expected to identify specifically documents that fall within either Class 1 or Class 2 [reliance] documentary material in the prelicense application phase." 69 Fed. Reg. 32836, 32843 (June 14, 2004). The scope of reliance documentary material could change based on events subsequent to the initial DOE certification, including the admission of contentions. *See id.* Absent special circumstances, a dispute on a particular document in the reliance category "would be more appropriately raised before the Presiding Officer designated during the time following admission of contentions." 69 Fed. Reg. 32843-44.

include that discovery not be had, that certain matters not be inquired into, or that subject to the provisions of 10 C.F.R. § 2.390, "a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."

There appears to be a number of discovery privileges or FOIA exemptions (available to DOE via 10 C.F.R. §§ 2.1006 and 2.390) that could apply to employee concerns files, depending on the contents and nature of those files. For example, the files may contain information that relates solely to the internal personnel rules and practices of the agency. *See* 10 C.F.R. §§ 2.1006(a), 2.390(a)(2); 2.390(a)(2). 5 U.S.C. § 552(b)(2). Exemption 6, protects "personnel and medical files and similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 2.390(a)(6). The term "similar files" is viewed broadly in that protection of privacy information does not depend on the file label, but instead on whether there is information that applies to a particular individual. *U. S. Dept. of State v. Washington Post Co.*, 456 U.S. 595, 599-603 (1982). The public interest in disclosure must be weighed against the privacy interest in nondisclosure. *U. S. Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989).

If information in the files is commercial in nature, DOE may be able to rely on Exemption 4 by asserting its governmental interest in assuring the continued availability of such voluntarily submitted information and the possible reduction in the effectiveness of the agency's program that could result from its release. *See, e.g., Allnet v. Communications Servs. v. FCC*, 800 F. Supp. 984, 990 (D.D.C. 1992) (computer models); *Comstock Int'l. Inc. v. Exp.-Imp. Bank*, 464 F. Supp. 804, 808 (D.D.C. 1979) (loan applicant information). Exemption 4 could also protect DOE's governmental interest in the continued availability of the information since without assurance of confidentiality, persons may decline to cooperate, thus impairing the ability to make well-informed decisions. *See Critical Mass,* 975 F.2d at 878 citing *Nat'l Parks & Conservation Ass'n v. Morton*,

498 F.2d 765, 767 (D.C. Cir. 1974) (disclosure sought of audits and other financial information).[10]

Exemption 4 protects "trade secrets and commercial or financial information obtained from a person" and that is "privileged and confidential." *See* 5 U.S.C. § 552(b)(4); 10 C.F.R. § 2.390(a)(4). The exemption protects the government and the submitters of information by encouraging the voluntary submission of reliable information and provides protection from the competitive disadvantages that could result from disclosure. "Commercial and financial information" is not limited to records that reveal commercial operation, but also records in which the submitter has a commercial interest. *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing *Wash. Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982), and *Bd. of Trade v. Commodity Future Trading Comm'n*, 627 F.2d 392, 403 (D.C. Cir. 1980). Commercial information includes any information "pertaining to or dealing with commerce." *Am. Airlines, Inc. v. Nat'l Mediation Bd.,* 588 F.2d 863, 870 (2d Cir. 1978). Commercial information may also be possessed by a nonprofit entity. *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 880 (D.C. Cir. 1992) (*en banc*) (safety reports on plant operations submitted by nonprofit consortium of nuclear power plants are "commercial in nature").

Assuming, for the moment, that DOE can establish that information in its employee concerns program files is commercial, the test for evaluating confidential treatment of information depends in part on whether the information is provided to the government on a mandatory or voluntary basis. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 147-148, 151(D.C. Cir. 2001) (voluntarily submitted airbag performance information not customarily divulged to the public may be protected). Information submitted voluntarily is protected as confidential if the

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[10] The Court in *Nat'l Parks* did not address whether any other governmental interests such as compliance or program effectiveness might be protected. 498 F.2d at 770 n.17; *Critical Mass*, 975 F.2d 871, 879. In *9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 10 (1st Cir. 1983), the court indicated that the question is whether public disclosure will harm "an identifiable private or governmental interest which the Congress sought to protect" by enacting FOIA Exemption 4.

submitter does not customarily disclose the information to the public, *Critical Mass,* 975 F.2d at 879. The agency that seeks protection of the information has the burden of proving the provider's custom. *Id.* If DOE can establish that its files contain information that is commercial in nature and that is customarily kept privileged or confidential, employee concerns program files information can be withheld from disclosure.

It may also be that information in the files may be withheld under Exemption 7-- records or information compiled for law enforcement purposes -- if, for example, production of the information could interfere with enforcement proceedings, constitute an unwarranted invasion of personal privacy, disclose the identity of a confidential source, or disclose investigative techniques. 10 C.F.R. § 2.390(a)(7); 5 U.S.C. § 552(b)(7).

If DOE cannot successfully address these factors to support withholding of information in its files (or particular documents, in whole or in part), release of the information, redacted to protect personal privacy and other identifying information (including the specifics of an employee concern that would compromise any grant of confidentiality to the employee), would be appropriate.

Alternatively, the information could be released to participants in the proceeding under appropriate protective orders. As noted previously, such release could adversely affect DOE's ability to maintain a safety-conscious work environment by reducing employee willingness to raise safety concerns under a program that allows employees to raise safety concerns in confidence and without fear of reprisal or retaliation from management or co-workers. As a consequence, the ability of DOE to identify and correct conditions affecting safety could be impaired. Therefore, it would be prudent to establish a procedure under which, for example, the release of information that would reveal a confidential source is allowed under protective order only (1) when there is a showing of need for the information and (2) after the confidential source is contacted and agrees

to the release of the information to third parties other than law enforcement authorities.[11]

In short, depending upon the contents of the files, the extent of personal privacy (or identifying information in the concerns of a confidential submitter), and whether the information is encompassed by law enforcement activities, the showing necessary to support nondisclosure will vary.

E. Summary

For the reasons stated above, disclosure of certain information in DOE's employee concerns program files would be contrary to the Commission policy that encourages licensees to establish programs that enable employees to raise safety concerns in confidence and without fear of reprisal. Disclosure might also frustrate DOE's interest in having access to information important to the agency in assessing the effectiveness of its repository program. Employee concerns files information could be withheld from disclosure provided DOE makes the requisite showing under applicable privileges or exemptions recognized by 10 C.F.R. §§ 2.390 and 2.1006.

While the Staff lacks sufficient information to determine whether there is a privilege or exemption that protects employee concerns files from disclosure as a class, determinations regarding whether disclosure is appropriate could be done on a document-by-document basis with redactions of personal privacy or other protected information prior to production in discovery. Protective orders issued based on a showing of need and other procedures could be used to reduce adverse impacts on confidential sources and DOE's employee concerns program, as well as the related impairment of DOE's ability to address safety issues in a timely manner and maintain a safety conscious work environment.

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[11] This procedure would be similar to the treatment afforded under the Commission's policy for protecting the identity of allegers and confidential sources who bring safety concerns to the NRC. *See* 61 Fed. Reg. 25,924, 25,926-27.

CONCLUSION

For the foregoing reasons, the Staff requests that the PAPO revise the appendices as discussed above and recognize the attorney-client privilege for client to client discussions. The Staff further submits that the holders of the organizational positions identified above will be responsible for making any deliberative process or predecisional determination prior to invoking a privilege. Finally, there may be a number of privileges or exemptions that DOE could use to protect employee concerns files on a document-by-document basis and procedures that could reduce impacts on DOE's interests.

Respectfully submitted,

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Dated at Rockville, Maryland
this 12th day of May, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

| | | |
|---|---|---|
| In the Matter of | ) | Docket No. PAPO-00 |
| | ) | |
| U.S. DEPARTMENT OF ENERGY | ) | ASLBP No. 04-829-01-PAPO |
| | ) | |
| (High-Level Waste Repository: Pre-Application Matter) | ) | NRC-01 |
| | ) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO ISSUES IDENTIFIED AT FIRST CASE MANAGEMENT CONFERENCE" in the above captioned proceeding have been served on the following persons this 12th day of May, 2005, by electronic mail, and/or Electronic Information Exchange as denoted by an asterisk (*).

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