

November 9, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
PA'INA HAWAII, LLC)	Docket No. 30-36974
)	
Material License Application)	ASLBP No. 06-843-01
)	

MODIFIED NRC STAFF MOTION FOR
PROTECTIVE ORDER GOVERNING DISCLOSURE OF INFORMATION

INTRODUCTION

On November 7, 2005, the NRC staff ("Staff") filed a Motion for a Protective Order Governing Disclosure of Information (Motion) and a draft Protective Order. It has since come to the attention of the Staff that the directions to the parties in the Protective Order may not be sufficiently specific to assure proper understanding of the actions necessary to protect Safeguards Information-Modified Handling (SGI-M).¹ As discussed below, the Staff requests that the Board modify the Staff's recommended protective order to include more guidance on the appropriate handling of protected information in this proceeding, particularly with regard to storage of and access to the information.²

¹ As explained in the Staff's original motion, some information in the application meets the definition of SGI-M information under the Irradiator Security Order Compensatory Measures ("Security Order"), rather than the definition of SGI information in 10 C.F.R. § 73.21. The Order outlines different and less stringent handling requirements than the handling requirements contained in § 73.21. Although the Staff's original motion inadvertently omitted the "-Modified Handling" designation, it is clear from reference to the Security Order that the information is SGI-M rather than SGI as defined by § 73.21

² Because the Staff views this as a clarification of the generic assignment of responsibility already in the draft Protective Order, and to avoid delay, the Staff has not further consulted with the other parties to the proceeding prior to filing this modified motion.

DISCUSSION

Although the Staff's prior motion references the Irradiator Security Order Compensatory Measures, specific requirements that logically apply by analogy to the information in this proceeding were not spelled out in detail. While the draft Protective Order set forth details on transmitting materials and, in paragraph 5 and footnote 7, generally indicated that counsel were responsible for determining measures necessary to protect such information, the Security Order provides the best indication of what the Commission has determined are the necessary measures for protecting this category of information.

The Security Order includes requirements for both access to SGI-M and storage of SGI-M. 69 Fed. Reg. 35458 (June 13, 2003).³ Access to SGI-M is "limited to those persons . . . considered to be trustworthy and reliable," and who have been subjected to background check requirements imposed by the order. *Id.* at 35458 and 35460. Details on the background check requirement are included in an attachment to the Security Order.⁴ The background check must consist of a criminal record check, verification of identity and employment eligibility and a verification of all employment or education references for a three year period.⁵ The Staff attaches a modified Protective Order clarifying the above requirements.

³ In addition to the transmission requirements outlined in the draft Protective Order, the following handling requirements must be met: (1) while the information is in use, it must be under the control of an authorized individual; and (2) while the information is not in use, it must be stored in a locked file cabinet. *Id.* at 35460-61.

⁴ The attachment containing the background check requirements is SGI-M, but all information in this motion is suitable for public release.

⁵ Completion of a background check complying with the Order will take a significant amount of time (several months, if not more). In order to avoid delay, the Staff would, in this particular case, accept a fingerprint check, which could be completed relatively quickly, in lieu of a background check to establish that the individuals to be granted access to the SGI-M are "trustworthy and reliable." In the case of either a background check or a fingerprint check, the individuals to be granted access to SGI-M would submit the appropriate information to the NRC's Office of Administration for processing. The individuals would be responsible for paying all fees associated with either course of action, therefore, it is worth noting that, in addition to being less time consuming, a fingerprint check is less costly than a background check.

CONCLUSION

Accordingly, the Staff respectfully requests that the Board issue a protective order in the modified form attached as soon as possible.

Respectfully submitted,

/RA/

Margaret J. Bupp
Counsel for NRC Staff

Dated at Rockville, Maryland
this 9th day of November, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
PA'INA HAWAII, LLC)	Docket No. 30-36974-ML
)	
Material License Application)	ASLBP No. 06-843-01
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "MODIFIED NRC STAFF MOTION FOR A PROTECTIVE ORDER GOVERNING DISCLOSURE OF INFORMATION" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 10th day of November, 2005.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Paul Abramson
Dr. Anthony J. Baratta

_____)	
In the Matter of)	
PA'INA HAWAII, LLC)	Docket No. 30-36974
Material License Application)	ASLBP No. 06-843-01
_____)	

MEMORANDUM AND ORDER
(Protective Order)

This Protective Order governs the disclosure and use of certain protected information¹ included in the application of Pa'ina Hawaii, LLC ("Pa'ina") for the possession and use of byproduct material to be used in a commercial irradiator at the Honolulu International Airport in Honolulu, Hawaii.

Specifically, counsel and consultants for Pa'ina and Concerned Citizens of Honolulu ("Concerned Citizens") shall be permitted access to protected information upon the following conditions:

¹ "Protected information" is defined as information identified by the Staff as Safeguards Information (SGI) and information protected by 10 C.F.R. § 2.390(d) on the following pages of the application: 28, 32, 33, 42, 44, 76, GI-204 page 4 of 5, GI-204 page 5 of 5, GI-205 page 4 of 4, GI-303 page 1 of 3, and GI-303 page 2 of 3. No other portions of the application are considered protected information or otherwise governed by the terms of this Protective Order.

1. Designated representatives of Pa'ina and Concerned Citizens shall execute the attached Confidentiality and Non-Disclosure Agreement. After the Confidentiality and Non-Disclosure Agreements are executed, the originals shall be sent to the Office of the Secretary of the Commission and copies shall be sent to counsel for each party and to the Board.

2. Only individual counsel, consultants, and others representing a party² who have executed the attached Confidentiality and Non-Disclosure Agreement may have access to protected information. Access to SGI-M information shall be granted only after completion of a background check or fingerprint verification for each individual. Protected information shall not be used except as necessary for the conduct of this proceeding, nor shall it be disclosed in any manner to any person except to the counsel, consultants or other party representatives who are engaged in the conduct of this proceeding and who need to know the information in order to carry out their responsibilities in this proceeding. Individuals with access to protected information pursuant to this Order may make copies of and take notes on the protected information, but such copies and notes shall be subject to the same restrictions on disclosure and use as Protected Information. Such notes and copies will not be included in ADAMS.

3. Counsel, consultants, and others representing a party who receive any protected information shall maintain its confidentiality as required in the attached Confidentiality and Non-Disclosure Agreement, the terms of which are hereby incorporated in this Protective Order.

4. In addition to the requirements specified in the Confidentiality and Non-Disclosure Agreement appended to this Protective Order, all pleadings and correspondence in this proceeding (including testimony) that disclose any Protected Information shall:

- a. Be segregated;

² The term "party" shall mean Pa'ina Hawaii, LLC and Concerned Citizens of Honolulu. For the purposes of this protective order, the term "party" does not include the NRC staff. The provisions of this Protective Order, unless expressly stated, do not apply to NRC employees, contractors, or consultants.

b. Be served only on lead counsel³, the Assistant for Rulemakings and Adjudications in the Commission's Office of the Secretary, and the individual members of the Licensing Board;

c. Be served only by: (i) United States first class, registered, express, or certified mail, (ii) internal NRC mail, (iii) messenger-courier or overnight delivery service (e.g., Federal Express), or (iv) personal delivery by an individual who otherwise is authorized access pursuant to 10 C.F.R. § 73.21(c) or an order issued by the Board or the Commission in this proceeding; and

d. Be transmitted in two sealed envelopes or wrappers, including: (i) an outer mailing envelope, and (ii) a heavy, opaque inner envelope bearing the name and address of the addressee and the statement "PRIVATE. TO BE OPENED BY ADDRESSEE ONLY." Addressees shall take all necessary precautions to ensure that they alone will open envelopes so marked. The outer envelope or wrapper will contain the intended recipient's name and address, and will bear no marking or indication that the document within contains Protected Information; and

e. Include an attached cover letter or memorandum, which also shall be served separate from any Protected Information on the other participants to the proceeding, that briefly describes the contents of the pleading or correspondence without disclosing any Protected Information such that the cover letter or memorandum can be placed in the public docket of the proceeding.

5. Counsel shall take all reasonable precautions necessary to assure that protected materials are not distributed to unauthorized persons. When not in use, all SGI-M material shall be stored in a locked file cabinet. Counsel are responsible for ensuring that persons under their

³ "Lead counsel" is defined as Fred Paul Benco for the applicant and David Henkin for the petitioners.

supervision or control comply with this Protective Order.

6. The terms of this Protective Order apply to protected information notwithstanding any prior releases in which this information was treated as public. A public release of protected information before this Order became effective shall not serve as grounds for subsequent distribution of protected information to unauthorized persons.

7. Protected information shall remain available to all parties until the later of the date that an order terminating this proceeding is no longer subject to judicial review, or the date that any other Commission proceeding relating to the protected information is concluded and no longer subject to judicial review. The parties shall, within fifteen (15) days of the later date described above, return the protected information (excluding notes of protected information) to the party that produced them, or shall destroy the information, except that copies of filings, official transcripts and exhibits in this proceeding that contain protected information, and notes of protected information may be retained, if they are maintained in a secure place.⁴ Within such time period, each party shall also submit to the producing party an affidavit stating that, to the best of its knowledge, all protected information and all notes of protected information have been returned or have been destroyed or will be maintained in accordance with the above. To the extent protected information is not returned or destroyed, it shall remain subject to the provisions of this Protective Order.

8. Counsel, consultants or any other individual representing a party who has reason to suspect that protected information may have been lost or misplaced or that protected information has otherwise become available to unauthorized persons during the pendency of this proceeding shall notify this Licensing Board promptly of those suspicions and the reasons

⁴ Counsel are responsible for determining what measures are necessary to assure that protected information is kept in a secure place such that no distribution of protected information to unauthorized individuals will occur.

for them.

9. Any violation of the terms of this Protective Order or a Confidentiality and Non-Disclosure Agreement executed in furtherance of this Protective Order may result in the imposition of sanctions as the Presiding Officer or the Commission may deem appropriate, including but not limited to referral of the violation to appropriate bar associations and/or other disciplinary authorities.

10. The Licensing Board may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

It is so ORDERED.

For the Licensing Board

Dated at Rockville, Maryland
this ____ day of November, 2005