

November 29, 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
)	

NRC STAFF RESPONSE TO BOARD ORDER OF NOVEMBER 22, 2005

INTRODUCTION

On November 22, 2005, the Atomic Safety and Licensing Board ("Board") in the above-captioned proceeding ordered the NRC Staff ("Staff") to file a draft protective order incorporating the requirements for protection and handling of Safeguards Information-Modified Handling ("SGI-M")¹, and to further explain the Staff's acceptance of a fingerprint check to permit access to SGI-M in the present case. The Staff's explanation follows.

BACKGROUND

On November 9, 2005, the NRC Staff filed the "Modified NRC Staff Motion for Protective Order Governing Disclosure of Information" ("Modified Motion"), indicating that, in keeping with a Commission Order relevant to the type of facility involved in this proceeding², access to SGI-M should be limited to individuals considered to be trustworthy and reliable as the result of a background check. The Staff also indicated that, in this particular case, it would accept a

¹ The revised protective order is attached.

² In the Matter of All Panoramic and Underwater Irradiators Authorized to Possess Greater than 370 TerraBecquerels (10,000 Curies) of Byproduct Material in the Form of Sealed Sources; Order Imposing Compensatory Measures (Effective Immediately), 68 Fed. Reg. 35,458, 35,460 (June 13, 2003).

fingerprint check in lieu of a background check. Modified Motion at fn. 5. In its Order, the Board expressed a concern that the Staff, in accepting a fingerprint check in lieu of a background check, had made a decision to “trade security for a savings in time.” Order at 2.

DISCUSSION

Background checks serve a dual purpose. First, they are an element of establishing that an individual is trustworthy and reliable through investigation of their criminal history, credit report, and employment and education records. Checking this information provides a level of assurance that the individual seeking access to SGI-M has no information in his or her past that would call into question his or her trustworthiness and reliability and also confirms that the individual has been truthful in providing background information to the licensee, another indicia of trustworthiness and reliability. This information also serves the secondary purpose of verifying the identity of individuals seeking access to SGI-M, thereby reducing the risk that someone could gain access by means of subterfuge.

In the present circumstance, federal fingerprint checks, when combined with the proposed Protective Order and Non-Disclosure Agreement and the fact that the person requesting the information and the specific information requested are all a matter of public record, will provide comparable level of confidence in permitting access to SGI-M in this proceeding. A federal fingerprint check processed through the NRC will reveal the individual's criminal history within the United States.³ Lack of a criminal history indicates that an individual is likely to respect and follow all applicable laws and regulations, and also indicates that an individual is likely to comply with a court order, including any Protective Order issued by the Board in the current proceeding.

³ A federal fingerprint check, which encompasses several databases, provides information that establishes a level of confidence in an individual's background comparable to that provided by a background check conducted by a licensee.

At this point in the proceeding, counsel for the intervenors has requested access to SGI-M through publicly available motions. They will be granted access to information that they have a need to know, if at all, under a Protective Order, the terms of which will be made available to the public. Both the Staff and the Board will be aware of the precise information given to all parties in the instant proceeding, and, under the terms of the Protective Order, publicly filed documents accompanying each transfer of SGI-M will alert the public to the release of this information to a party.

In contrast to the current situation in which access to SGI-M will be controlled, as described in general terms above, licensees grant access to SGI-M to employees and contractors under regulations and orders issued by the NRC, but outside of the immediate control and knowledge of the Staff, and, therefore, the need for a background check in addition to fingerprinting is greater when licensees are responsible for controlling access to information. Such generic employee access is not on a per document basis, so, unlike the instant situation, there may be no record of the specific SGI-M documents reviewed by the employees. Under such circumstances, the background check provides an appropriate level of surety with regard to trustworthiness. On the other hand, the parties in the instant proceeding will be subject to federal fingerprint checks (if they choose that option) and will be operating voluntarily under the strictures of a Protective Order, the Staff and the Board. Therefore, the Staff has determined that federal fingerprint checks in concert with a Protective Order and Non-Disclosure Agreement provide a level of confidence in an individual's trustworthiness and reliability comparable to the level of confidence provided by background checks.

With regard to the secondary purpose of background checks, that is, verifying the identity of individuals seeking access to SGI-M, the Staff has determined that the federal fingerprint checks, in combination with the public nature of the instant proceeding, will provide confidence that all parties have accurately identified themselves.

CONCLUSION

For the aforementioned reasons, the Staff has determined that federal fingerprint checks, in combination with a Protective Order and Non-Disclosure Agreement are sufficient to permit access to SGI-M in the instant proceeding.

Respectfully submitted,

/RA/

Margaret J. Bupp
Counsel for NRC Staff

Dated at Rockville, Maryland
this 29th 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 "NRC STAFF RESPONSE TO BOARD ORDER OF NOVEMBER 22, 2005" 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 29th day of November, 2005.

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Margaret J. Bupp
Counsel for NRC Staff

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 Material License Application)))))))	Docket No. 30-36974 ASLBP No. 06-843-01
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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 and have been subject to a fingerprint check conducted by the NRC³ 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-

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.

³ For the fingerprint check, individuals should fill out Standard Form 87, available from the U.S. Nuclear Regulatory Commission, Office of Administration, Security Processing Unit, Mail Stop T-6E46 11555 Rockville Pike, Rockville, MD 20852. The completed form, along with a \$27.00 processing fee in the form of a money order or check made out to the Nuclear Regulatory Commission, should be sent to the address above (Note: If a background check is conducted, the individual should fill out Standard Form 85P, available at http://www.opm.gov/forms/pdf_fill/SF86P.pdf, and return the form, with a \$345.75 processing fee in the form of a money order or a check made out to the Nuclear Regulatory Commission, to the address above).

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;
- b. Be served only on lead counsel⁴, 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 "Safeguards Information-Modified Handling." 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.

⁴ "Lead counsel" is defined as Fred Paul Benco for the applicant and David Henkin for the petitioners.

5. Counsel shall take all reasonable precautions necessary to assure that protected materials are not distributed to unauthorized persons. The parties granted access to SGI-M shall take the following steps in accordance with Attachment 3 to the Irradiator Protective Orders (68 Fed. Reg. 35458):

- a. When not under the possessor's direct control or the direct control of another individual authorized to have access thereto, all documents containing SGI-M must be stored in a locked file drawer or container. Keys and knowledge of lock combinations safeguarding SG-MI shall be limited to persons authorized access to the SGI-M stored within the locked file drawer or container.
- b. Any administrative support work performed at the request of a possessor of SGI or under their supervision in this proceeding, or further proceedings, must be performed by personnel who have executed a Non-Disclosure Agreement.
- c. Documents containing SGI-M may be reproduced to the minimum extent necessary consistent with need. Care should be taken when using newer digital copiers which scan and retain images of documents, to ensure that SGI-M is not retained in the memory of the copier.
- d. SGI-M shall not be discussed by telephone or communicated by email or facsimile transmission unless the SGI-M is transmitted through the use of an encryption system that the National Institute of Standards and Technology has validated as conforming either to Federal Information Processing Standard 140-1 or to Federal Information Processing Standard 140-2.
- e. If SGI-M is processed on or with automated data processing, computerized word processing equipment, or a personal or laptop computer, access to such equipment shall require the use of an entry code for access to stored SGI-M. If use of an entry code is not feasible, SGI-M may be processed on, but shall not be stored in, such equipment. If any SGI-M is backed-up or stored on a computer hard drive or other device, that drive or device shall be capable of being removed and shall be stored in the security storage container referred to in paragraph 3 of this Protective Order when not in use. Additionally, any such word processing equipment, data processing equipment, or computer that is used to process or store

SGI-M shall be operated as stand-alone or free-standing equipment, not connected to any other such equipment by means of a Local Area Network or Wide Area Network or other data-sharing system.

- f. Each document that has been determined to contain SGI-M shall be marked "Safeguards Information-Modified Handling" in a conspicuous manner on the top and bottom of the first page to indicate the presence of protected information. Additional pages should also be marked with the letters "SGI-M", denoting "Safeguards Information-Modified Handling", in a conspicuous manner on the top and bottom of the page.

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.⁵ 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

⁵ 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.

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 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