

NUCLEAR REGULATORY COMMISSION

10 CFR Part 73

RIN: 3150-AH94

Relief from Fingerprinting and Criminal History Records Check
for Designated Categories of Individuals

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is issuing a new regulation to relieve certain categories of individuals who have been approved by the Commission for access to Safeguards Information (SGI) from the fingerprinting and criminal history records check requirements of section 149 of the Atomic Energy Act of 1954 (AEA), as amended.

EFFECTIVE DATE: [Insert date of publication in the Federal Register]

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I. Background

SGI is a form of sensitive, unclassified, security-related information that the Commission has the authority to designate and protect under section 147 of the AEA. Requirements governing access to and handling of SGI are presented in NRC regulations in § 73.21 and various NRC orders,¹ and are similar in some ways to requirements for the protection of Classified National Security Information. Consistent with its mission to promote common defense and security, the Commission shares SGI with a variety of licensees, Federal, State, and local law enforcement officials, members of Congress, and other individuals who need to know SGI to perform job functions related to the protection of nuclear facilities and materials.

¹See, *In the Matter of All Licensees Authorized to Manufacture or Initially Transfer Items Containing Radioactive Material for Sale or Distribution and Possess Certain Radioactive Material of Concern and All Other Persons Who Obtain Safeguards Information Described Herein; Order Issued on November 25, 2003 Imposing Requirements for the Protection of Certain Safeguards Information (Effective Immediately)*, (January 23, 2004; 69 FR 3397). In this order and certain other common defense and security orders, the Commission has also used the term "SGI-M" to identify modified handling requirements for SGI related to materials licensees.

Recently, Congress enacted legislation that imposes new requirements governing access to SGI. In section 652 of the Energy Policy Act of 2005,² which amended AEA section 149, Congress required the Commission to ensure that “any individual” who is permitted access to SGI be fingerprinted and undergo a criminal history records check. Previously, AEA section 149 only required fingerprinting and criminal history records checks of individuals seeking access to SGI (as defined in § 73.2) from a power reactor licensee or license applicant.

Under AEA section 149, as amended, the Commission must require the fingerprinting and submission of fingerprints to the Attorney General for an identification and criminal history records check of any individual permitted access to SGI, unless the Commission, by rule, has relieved that individual from the fingerprinting, identification, and criminal history records check requirements. The Commission may relieve individuals from those requirements “if the Commission finds that such action is consistent with its obligations to promote the common defense and security and to protect the health and safety of the public.” Currently, the Commission has no rule that would relieve individuals who seek access to SGI from non-power reactor licensees or the Commission from the expanded fingerprinting and criminal history records check requirements.

Current regulations in §§ 73.21 and 73.57 relieve Governors or their designated representatives, certain members of Congress, certain representatives of the International Atomic Energy Agency (IAEA), and State and local law enforcement organizations from fingerprinting and criminal history records checks if those individuals seek access to SGI as defined in § 73.2. This final rule continues that relief and expands it so that individuals described in this final rule need not be fingerprinted or undergo a criminal history check before receiving access to SGI not currently subject to the requirements of 10 CFR Part 73 (i.e., SGI

²Pub. L. 109-58 (August 8, 2005).

that the Commission has designated and required to be protected by order).

II. Need for Rule

When the Energy Policy Act became law on August 8, 2005, the Commission had already published a proposed SGI rule that would change requirements governing access to and handling of SGI.³ The Commission planned to significantly revise (and subsequently republish) the proposed SGI rule to fully implement the fingerprinting, identification, and criminal history check requirements established by the Energy Policy Act, but the revision has taken longer than initially expected. The Commission still intends to publish a revised proposed SGI rule for public comment in the near future, but in the meantime, the Commission has an immediate and ongoing need to share SGI with certain international and domestic government representatives, and has decided to issue an immediately effective final rule of limited scope to relieve certain individuals from the fingerprinting and criminal history check requirements of AEA section 149.

The individuals relieved from fingerprinting and criminal history checks under the final rule include Federal, State, and local officials involved in security planning and incident response, Agreement State employees who evaluate licensee compliance with security-related orders, and members of Congress who request SGI as part of their oversight function. Interrupting those individuals' access to SGI to perform fingerprinting and criminal history checks would harm vital inspection, oversight, planning, and enforcement functions, thereby impairing day-to-day implementation of the NRC's regulatory programs to the detriment of the common defense and security. It might also impair communications among the NRC, its licensees, and first responders in the event of an imminent security threat or other emergency. The final rule will permit the Commission to provide SGI without interruption to government

³See proposed rule, *Protection of Safeguards Information* (February 11, 2005; 70 FR 7196).

officials who need the information to be effective in their day-to-day efforts to ensure the continued security of nuclear facilities and materials. The final rule is also consistent with the Commission's obligations to promote the common defense and security and to protect the health and safety of the public.

The final rule will also permit the Commission to continue sharing SGI with its international partners. The information shared in these exchanges helps to maintain the security of nuclear facilities and materials domestically and abroad. Requiring fingerprinting and criminal history checks of foreign representatives who participate in these exchanges could strain the Commission's cooperative relationships with its international counterparts, and might delay needed exchanges of information to the detriment of current security initiatives both at home and abroad. The final rule will permit the Commission to avoid that result, and is consistent with the Commission's obligations to promote the common defense and security and to protect the health and safety of the public.

III. Analysis of Rule

The final rule provides relief from the fingerprinting and criminal history records check requirements set forth in AEA section 149 for the following individuals:

(1) An employee of the Commission or of the Executive Branch of the United States government who has undergone fingerprinting for a prior U.S. government criminal history check;

(2) A member of Congress;

(3) An employee of a member of Congress or Congressional committee who has undergone fingerprinting for a prior U.S. government criminal history check;

(4) The Governor of a State or his or her designated State employee representative;

(5) A representative of a foreign government organization that is involved in planning for,

or responding to, nuclear or radiological emergencies or security incidents who the Commission approves for access to SGI;

(6) Federal, State, or local law enforcement personnel;

(7) State Radiation Control Program Directors and State Homeland Security Advisors or their designated State employee representatives;

(8) Agreement State employees conducting security inspections on behalf of the NRC under an agreement executed under section 274.i. of the AEA; and

(9) Representatives of the International Atomic Energy Agency (IAEA) engaged in activities associated with the U.S./IAEA Safeguards Agreement who have been certified by the NRC.

The individuals described previously are considered trustworthy and reliable to receive SGI by virtue of their occupational status and have either already undergone a background or criminal history check as a condition of their employment, or are subject to direct oversight by government authorities in their day-to-day job functions. Under the final rule, if individuals in these categories need to know SGI to perform a job function, they may have access to SGI without being fingerprinted or undergoing a criminal history check.

Foreign representatives described in the final rule have been relieved from fingerprinting and criminal history checks because those checks would not likely yield any information probative of the representative's trustworthiness—domestic criminal databases typically would not have records on foreign representatives. In addition, requiring fingerprinting and criminal history checks of foreign government representatives could strain existing cooperative relationships with the Commission's foreign counterparts, thus undermining the Commission's international efforts to enhance nuclear security. Under the final rule, foreign representatives would only be granted access to SGI on a case-by-case basis with the approval of the

Commission.

The phrase “a representative of a foreign government organization” in the final rule includes more than employees of foreign governments. The phrase may encompass members of private industry, local first responders, vendors, law enforcement officials, or other individuals designated by a foreign government organization involved in nuclear emergency planning or incident response to serve as foreign government representatives before the NRC.

The categories of individuals relieved by the final rule from fingerprinting and criminal history checks are broader than those relieved by existing regulations in §§ 73.21 and 73.57 because the fingerprinting and criminal history records checks required by AEA section 149 now apply much more broadly. Prior to the Energy Policy Act amendments to AEA section 149, the Commission could provide SGI to its international and domestic government partners without first obtaining fingerprints and criminal history checks of those individuals, and without having to except them by rule. The fingerprinting and criminal history check requirements of AEA section 149 applied only when power reactor licensees provided SGI to an individual. To permit the Commission to continue its pre-Energy Policy Act practice of sharing SGI with international and domestic government representatives involved in nuclear security inspection, oversight, enforcement, planning, and emergency response, the final rule relieves individuals to whom the Commission has historically provided SGI from the expanded fingerprinting and criminal history records checks of AEA section 149, as amended. Accordingly, the list of individuals relieved from fingerprinting and criminal history check requirements has been lengthened.

The expanded relief is not limited to cases where the Commission is providing access to SGI. A licensee or other person with lawful access to SGI may share that information with an individual described in the final rule without first performing fingerprinting and a criminal history

check of that individual, provided that individual needs to know the information.

Finally, the final rule also includes an expanded definition of “Safeguards Information” applicable only to new § 73.59 that would be coextensive in scope with AEA section 147. The expanded definition is necessary to make clear that the exceptions from fingerprinting and criminal history checks contained in the new § 73.59 apply regardless of whether the SGI being sought relates to source, byproduct, or special nuclear material. Without the expanded definition, the exceptions would only apply in cases where an individual seeks access to “Safeguards Information” as defined in existing § 73.2, which is limited to information related to (1) security measures for the physical protection of special nuclear material, or (2) security measures for the physical protection and location of certain plant equipment vital to the safety of production and utilization facilities. The Commission intends the relief from the fingerprinting and criminal history check requirements embodied in the final rule to apply regardless whether the SGI being sought relates to source, byproduct, or special nuclear material, and regardless of who is providing access to the SGI at issue.

IV. Basis for Immediate Effectiveness and Dispensing with Notice and Comment

Generally, the Commission issues final rules using the public notice and comment procedures set forth in the Administrative Procedure Act (APA). Under 5 USC 553, the Commission may dispense with those procedures where it finds for “good cause” that public procedures are “impracticable, unnecessary, or contrary to the public interest.” In this case, the Commission finds that notice-and-comment procedures are not required because the usual public rulemaking procedures are impracticable.

As set forth in Section II, the Commission has an immediate and ongoing need to share SGI with Federal, State, and local law enforcement officials, members of Congress, Governors

and their designees, representatives of foreign government organizations, and certain other individuals described in the final rule to ensure that a range of inspection, enforcement, planning, oversight, and response functions related to the security of nuclear materials continues uninterrupted. The Commission has three options to meet this need: (1) Refrain from sharing SGI with individuals described in the rule until they undergo fingerprinting and a criminal history records check; (2) Refrain from sharing SGI with individuals described in the rule until the Commission completes notice-and-comment rulemaking to provide exceptions; or (3) Relieve individuals who require SGI to perform day-to-day inspection, enforcement, planning, oversight, and response functions from fingerprinting and criminal history records check requirements by rule.

The first option is impracticable because it would seriously inhibit sharing of SGI until fingerprinting and criminal history records checks could be completed, thus frustrating the ability of individuals described in the final rule to perform vital day-to-day nuclear security functions. The second option is impracticable because the Commission would have to continue to withhold access to SGI during the notice and comment period, which would have the same detrimental effects on security as would the first option. The only way to ensure the flow of SGI continues to foreign and domestic government personnel who have a need to know while complying with the requirements of AEA section 149, is to issue a final rule relieving those individuals from fingerprinting and criminal history records check requirements without following notice and comment procedures. Therefore, under 5 USC 553, good cause exists to dispense with those procedures.

As mentioned previously, the Commission still plans to revise and publish for comment its proposed SGI rule. At that time, the public will be able to comment on whether any additional categories of individuals should be relieved from the fingerprinting and criminal

history records check requirements of AEA section 149.

Finally, this rule is immediately effective upon publication in accordance with 5 USC 553(d)(1), because it is a substantive rule which grants an exemption or relieves a restriction. Specifically, the rule relieves certain individuals from the fingerprinting and criminal history records check requirements of AEA section 149.

V. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113, requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless using such a standard is inconsistent with applicable law or is otherwise impractical. In this final rule, the NRC is granting relief from criminal history checks, including fingerprinting, for access to Safeguards Information by persons in certain occupational categories. This action does not involve the establishment of a standard that contains generally applicable requirements.

VI. Finding of No Significant Impact: Availability

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in Subpart A of 10 CFR part 51, that this rule is not a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required. As permitted by section 149.b. of the AEA, this rulemaking relieves individuals in certain occupational categories from the criminal history records check and fingerprinting requirements imposed by the Energy Policy Act of 2005 to facilitate the sharing of SGI among international and domestic government representatives and officials. The rule does not require any individuals to take action that would have an environmental impact. A copy of the environmental assessment supporting this finding is available at <http://www.nrc.gov/reading-rm/adams.html> ML061520342.

VII. Paperwork Reduction Act Statement

This final rule does not contain new or amended information collection requirements subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget, approval number 3150-002.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

VIII. Regulatory Analysis

A regulatory analysis has not been prepared for this regulation because it relieves restrictions and does not impose any regulatory burdens on licensees.

IX. Backfit Analysis

No backfit analysis is required because the final rule does not modify or add to systems, structures, components, or the design of a facility, or the design approval or manufacturing license for a facility, or the procedures or organization required to design, construct, or operate a facility. Therefore, the final rule does not impose a backfit as defined in 10 CFR 50.109(a)(1), 70.76(a)(1), 72.62(a)(1) and (2), or 76.76(a)(1).

X. Small Business Regulatory Enforcement Fairness Act

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

List of subjects in 10 CFR part 73

Criminal penalties, Export, Hazardous materials transportation, Import, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Security measures.

For the reasons set out in the preamble, and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; the Energy Policy Act of 2005, and 5 U.S.C. 552 and 553; the NRC is adopting the following amendments to 10 CFR part 73.

PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS

1. The authority citation for Part 73 is revised to read as follows:

AUTHORITY: Secs. 53, 161, 149, 68 Stat. 930, 948, as amended, sec. 147, 94 Stat. 780 (42 U.S.C. 2073, 2167, 2169, 2201); sec. 201, as amended, 204, 88 Stat. 1242, as amended, 1245, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 5841, 5844, 2297f); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

Section 73.1 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 73.37(f) also issued under sec. 301, Pub. L. 96-295, 94 Stat. 789 (42 U.S.C. 5841 note). Section 73.57 is issued under sec. 606, Pub. L. 99-399, 100 Stat. 876 (42 U.S.C. 2169).

2. A new section 73.59 is added to read as follows:

§ 73.59 Relief from fingerprinting and criminal history records check for designated categories of individuals.

(a) For purposes of this section, the phrase “Safeguards Information” means information not otherwise classified as National Security Information or Restricted Data, which specifically identifies a licensee’s or applicant’s detailed—

(1) Control and accounting procedures or security measures (including security plans, procedures, and equipment) for the physical protection of special nuclear material, by whomever possessed, whether in transit or at fixed sites, in quantities determined by the Commission to be significant to the public health and safety or the common defense and security;

(2) Security measures (including security plans, procedures, and equipment) for the physical protection of source material or byproduct material, by whomever possessed, whether in transit or at fixed sites, in quantities determined by the Commission to be significant to the public health and safety or the common defense and security;

(3) Security measures (including security plans, procedures, and equipment) for the physical protection of and the location of certain plant equipment vital to the safety of production or utilization facilities involving nuclear materials covered by paragraphs (a)(1) and (a)(2) of this section;

or

(4) Any other information within the scope of Section 147 of the Atomic Energy Act of 1954, as amended, the unauthorized disclosure of which, as determined by the Commission through order or regulation, could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of radiological sabotage or theft or diversion of source, byproduct, or special nuclear material.

(b) Notwithstanding any other provision of the Commission's regulations, fingerprinting and the identification and criminal history records checks required by section 149 of the Atomic Energy Act of 1954, as amended, are not required for the following individuals prior to granting access to Safeguards Information:

(1) An employee of the Commission or of the Executive Branch of the United States government who has undergone fingerprinting for a prior U.S. government criminal history check;

(2) A member of Congress;

(3) An employee of a member of Congress or Congressional committee who has undergone fingerprinting for a prior U.S. government criminal history check;

(4) The Governor of a State or his or her designated State employee representative;

(5) A representative of a foreign government organization that is involved in planning for, or responding to, nuclear or radiological emergencies or security incidents who the Commission approves for access to Safeguards Information;

