LBP-06-25

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 10/31/06

Before Administrative Judges:
Michael C. Farrar, Chairman
E. Roy Hawkens
Nicholas G. Trikouros

SERVED 10/31/06

In the Matter of	Docket No. IA-05-052
DAVID GEISEN	ASLBP No. 06-845-01-EA
	October 31, 2006

MEMORANDUM AND ORDER
(Ruling on Motion to Compel Production)

This enforcement proceeding, brought against David Geisen, a former employee of the Davis-Besse Nuclear Power Station in northwestern Ohio, stems from events of several years ago involving a serious safety problem at that facility and the accuracy of information regarding that problem that the Licensee filed with this agency. After a detailed inquiry into those events, the NRC Staff's Office of Investigations (OI) compiled for the agency's internal use a report, dated August 22, 2003, about the Licensee's handling of the safety and informational aspects of the matter.

Over 28 months later, the NRC Staff issued an Enforcement Order against Mr. Geisen, charging him, in essence, with contributing to the filing of false reports with the NRC about the safety problem at Davis-Besse. Based on those charges, the immediately-effective Order debarred Mr. Geisen from any work in the regulated nuclear industry for five years, thus resulting in his removal from his then-current job at another nuclear power plant.

As did two other individuals charged contemporaneously, Mr. Geisen requested a hearing before this Board to contest the validity of the Enforcement Order. In the course of the ongoing discovery process that is leading up to an eventual hearing, the Staff made available to

him a redacted copy of the 2003 OI Report, in which it had blacked-out numerous passages on the theory that those redactions involved matters covered by either a "deliberative process" privilege or a "personal privacy" privilege and were thus protected from discovery. After discussions between the parties failed to resolve their dispute over the applicability of the asserted privileges, Mr. Geisen filed with us a motion to compel the Staff to produce the full, unredacted version of the 2003 OI Report.

The matter has been fully briefed, and we heard oral argument on September 6, 2006 (Tr. at 176-284). As agreed, on August 28 the Staff had provided this Board the unredacted version of the OI Report for in camera inspection prior to the argument. Being thus fully advised in the premises, and in light of the precise nature of the respective redacted passages, we: (1) uphold the Staff's claim with respect to the deliberative process privilege (the objectives of that privilege are served by the redactions and are not overcome by any overriding need of Mr. Geisen's for the redacted passages); but (2) reject it as to the personal privacy privilege (a protective order can fully preserve the modest privacy interests implicated, and thus Mr. Geisen's litigative interest in receiving the redacted passages carries the day).

Our reasons for taking this action are explained below. We start in Part I by providing factual information about the setting in which the issues arise. In Part II, we provide the legal background by addressing briefly the tension that generally exists between the open flow of information achieved through discovery and the restrictions on that flow imposed by privileges. Then, using broad, non-revealing terms, we describe in Part III the nature of the redactions that were made to the OI Report.

Against that background, we set out in Part IV the legal standards that govern the invocation of the specific privileges at issue here. In Part V, we balance the factors that determine whether the needs of the party seeking disclosure outweigh the privileges claimed by the party opposing disclosure. We state formally in Part VI the result thus reached.

I

THE SETTING

On August 3, 2001, the NRC issued Bulletin 2001-001, setting out the agency's approach to responding to the emerging problem of "Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles." The Bulletin required the licensee of each pressurized water reactor to submit information under oath about its reactor pressure vessel (RPV), including reactor head penetration nozzle leakage and cracking, and to shut down for a special reactor head inspection by year-end.[1]

In response to the Bulletin, employees of the licensee First Energy Nuclear Operating Company (FENOC) at the Davis-Besse Nuclear Power Station supplied certain information to the NRC and, on the basis thereof, requested a 3-month delay of the required inspection until the plant's planned February-March 2002 shutdown.[2] The NRC Staff consented to the delay.[3]

On approximately March 6, 2002, during the scheduled shutdown, FENOC's employees identified a large cavity in the Davis-Besse reactor vessel head, apparently caused by corrosive boric acid released through a crack in or near a control rod guide mechanism nozzle.[4] The corrosion had eaten through the entire 6.63-inch-thick low-alloy steel portion of the head,

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[1] See David Geisen; Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), 71 Fed. Reg. 2,571, 2,571-72 (Jan. 17. 2006) [hereinafter Geisen Enforcement Order].

[2] Id. at 2,572.

[3] Id.

[4] See Nuclear Regulatory Commission Office of Investigations, Report of Investigation Re: Davis-Besse Nuclear Power Plant at 29 (Aug. 22, 2003) [hereinafter OI Report]; Geisen Enforcement Order, 71 Fed. Reg. at 2,572.

leaving -- as the sole reactor cooling system pressure boundary -- certain material not intended to serve that purpose, i.e., the less-than 1/3-inch-thick stainless steel cladding.[5]

Over the next year and a half, the NRC conducted an extensive investigation as to the causes of the reactor head corrosion and the accuracy of the information the company had provided.[6] The OI report, comprising some 250 pages exclusive of exhibits, was issued on August 22, 2003.[7] Among its many conclusions was that FENOC personnel, including Mr. Geisen, had "deliberately provided inaccurate and incomplete information to the NRC in response to NRC Bulletin 2001-01." [8]

The NRC Staff took no action against Mr. Geisen until two and a half years later, in January of 2006, when it issued an order barring him (and two others) from engaging in NRC-licensed activities for five years.[9] That enforcement order, which was immediately effective, alleged that Mr. Geisen had knowingly made incomplete and inaccurate statements to the

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[5] Geisen Enforcement Order, 71 Fed. Reg. at 2,572.

[6] See OI Report at 29; see also the page of that Report cited in fn. 7, below.

[7] Id. at added unnumbered Nov. 3, 2003 transmittal page (Bates # 30237).

[8] Id. at 135.

[9] See Geisen Enforcement Order, 71 Fed. Reg. at 2,575. See also Steven Moffitt, Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), 71 Fed. Reg. 2,581 (Jan. 17, 2006); Dale Miller; Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), 71 Fed. Reg 2,579 (Jan. 17, 2006). The agency had pursued other individual FENOC employees and a $5.45 million civil fine against the company itself. See In the Matter of Andrew Siemaszko, Order Prohibiting Involvement in NRC-Licensed Activities, 70 Fed. Reg. 22,719 (May 2, 2005); Tom Henry, First Energy is Slapped with $5.45M Fine, Toledo Blade, Apr. 22, 2005; First Energy to Pay $5.45M fine, Toledo Blade, Sept. 15, 2005.

For its part, the Department of Justice (1) obtained $28 million in penalties, restitution, and community service projects from FENOC, as part of an agreement to defer criminal prosecution of the company (News Release, DOJ, "FirstEnergy Nuclear Operating Company to Pay $28 Million Relating to Operation of Davis-Besse Nuclear Power Station" (Jan. 20, 2006)) and (2) brought criminal charges against Mr. Geisen and other former FENOC employees. See Indictment, United States v. David Geisen, Rodney Cook, and Andrew Siemaszko, Case No. 3:06CR712 (N.D. Ohio Jan. 19, 2006).

agency regarding the extent of inspections FENOC was able to make of the vessel head,[10] the number of leaking RPV flanges,[11] and the corrosion of the RPV head due to boric acid.[12] The order further alleged that these statements were material to the agency's decision to allow Davis-Besse to continue operating for an additional three months without shutting down to inspect the head.[13]

Mr. Geisen filed an answer to the enforcement order in February of 2006, denying its primary allegations and requesting a hearing before a Licensing Board.[14] At the outset of the proceeding, on May 19, 2006, this Board rejected the government's request that Mr. Geisen's hearing be delayed pending the outcome of the similarly-based criminal charges (see fn. 9, above) filed against him by the Department of Justice. LBP-06-13, 63 NRC 523 (2006). The Board's decision that the case should move forward was affirmed by the Commission some two months later. CLI-06-19, 64 NRC ___ (July 26, 2006).

While the appeal to the Commission was pending, the discovery process began. Early on in that process, on June 5, 2006, the NRC Staff provided Mr. Geisen and his attorney with some 13,000 documents, including unredacted transcripts of all the interviews, and unredacted copies of all the other exhibits, referenced in the OI Report.[15] The Staff also provided Mr. Geisen with the OI Report itself, but a number of portions were redacted. The Staff asserted

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[10] Geisen Enforcement Order, 71 Fed. Reg. at 2,573.

[11] Id. at 2,574.

[12] Id.

[13] Id. at 2,575.

[14] See [Geisen] Answer and Demand for an Expedited Hearing (Feb. 23, 2006).

[15] See NRC Staff's Answer to David Geisen's Motion to Compel (Aug. 21, 2006) at 1-2 [hereinafter NRC Staff Answer].

that doing so was necessary to protect the Staff's internal deliberative process and the personal privacy of Mr. Geisen's former co-workers.[16]

After corresponding with the NRC Staff regarding the redactions,[17] Mr. Geisen filed a motion to compel production of the unredacted OI Report, or alternatively for the Board to conduct an in camera inspection of the report.[18] Prior to oral argument, the parties agreed that we should have the complete report before us to aid our consideration of the matter.[19]

II

THE TENSION

For well over 60 years, it has been a cornerstone of modern American jurisprudence that civil trials "no longer need to be carried on in the dark." Hickman v. Taylor, 329 U.S. 495, 501 (1947). Instead, parties are entitled to obtain, through discovery and other pre-trial activities, "the fullest possible knowledge of the issues and facts before trial." Id. The basic philosophy underlying this requirement is that "prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person."[20] Using the same

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[16] Id. See also Geisen Motion to Compel (fn. 18, below) Exhibit 4, Letter from Richard A. Hibey, Counsel to David Geisen, to Sara Brock and Michael Spencer, Office of General Counsel, NRC (June 20, 2006).

[17] See, e.g., exhibits to Geisen Motion to Compel (fn. 18, below): Exhibit 6, Letter from Michael Spencer, Office of General Counsel, NRC to Richard A. Hibey, Counsel to David Geisen (July 12, 2006); and Exhibit 7, Letter from Richard A. Hibey, Counsel to David Geisen, to Michael Spencer, Office of General Counsel, NRC (July 19, 2006).

[18] See David Geisen's Motion to Compel the Production, or Alternatively the In Camera Inspection of, the Office of Investigation's Report Dated August 22, 2003 (Aug. 11, 2006) [hereinafter Geisen Motion to Compel]. The Staff filed a responsive brief on August 21 (see fn. 15, above), to which Mr. Geisen replied on August 28, thus setting the stage for the September 6 oral argument.

[19] See Licensing Board Order (Summarizing Conference Call, Setting Time of Oral Argument, Invoking In Camera Review, and Suggesting Discussions Among Counsel) at 2 (Aug. 25, 2006); NRC Staff Notice of Filing Under Seal (Aug. 28, 2006).

[20] See Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, Federal Practice and Procedure § 2001 (2d ed. 1994). See also Fed. R. Civ. P. 26(b)(1).

language as the Federal Rules of Civil Procedure, this agency's "Subpart G" regulations – which, per 10 C.F.R. § 2.310(b), govern this proceeding -- reflect a similar approach to the scope of discovery. See 10 C.F.R. § 2.705(b)(1).

There exists one large exception to this foundational principle -- matters that are protected by an applicable "privilege." From the outset, Rule 26 of the Federal Rules of Civil Procedure has specifically excluded privileged materials from the scope of discovery.[21] These privileges "are designed to protect weighty and legitimate competing interests." United States v. Nixon, 418 U.S. 683, 709 (1974).

In the course of applying these privileges, courts have been cognizant that protecting privileged material is in tension with the general principles of discovery. As the Supreme Court explained in United States v. Nixon, "these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." Id. at 710. A few years later, the Court again discussed this tension, writing that "evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances." Herbert v. Lando, 441 U.S. 153, 175 (1979).

Reflecting this approach, most privileges today -- including those protecting deliberative process[22] and privacy interests[23] -- are not absolute. Rather, they are "qualified" and,

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[21] Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party").

[22] See United States v. Nixon, 418 U.S. at 707-11; In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997).

[23] See Judicial Watch, Inc. v. FDA, 449 F.3d 141, 153 (D.C. Cir. 2006) ("the privacy interest at stake may vary depending on the context in which it is asserted"); Armstrong v. Executive Office of the President, 97 F.3d 575, 582 (D.C. Cir. 1996).

depending on the particular circumstances of the litigation, may be overcome if the interests on the other side are particularly weighty, or the privilege claim is particularly weak.[24]

Courts often engage in fact-specific balancing to determine the applicability, strength and persuasiveness of qualified privileges, examining the nature of the proceeding,[25] how broadly or narrowly the privilege is being asserted,[26] the need of the parties for the information,[27] and the issues being raised in the trial.[28] The greater the interest protected by the privilege, the more compelling the need and the other circumstances must be to overcome it.[29] In the following Parts of this opinion, we undertake this same type of analysis.

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[24] See United States v. Nixon, 418 U.S. at 709 (no absolute privilege for the President and other executive branch officials when information is needed for a criminal trial); Herbert, 441 U.S. at 175-77 (no absolute privilege for journalists); Federal Open Market Committee of Federal Reserve System v. Merrill, 443 U.S. 340, 362 (1979) (no absolute privilege for trade secrets or confidential information).

[25] See, e.g., Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 384 (2004) (upholding executive privilege and distinguishing Nixon because the proceeding was a civil case, not a criminal one).

[26] Privileges are looked upon more favorably when asserted narrowly and when specific information is given about what is being protected and why. See, e.g., Resolution Trust Corp. v. Diamond, 773 F.Supp. 597, 604 (S.D.N.Y. 1991); United States v. O'Neill, 619 F.2d 222, 227 (3d Cir. 1980); United States v. Nixon, 418 U.S. at 707.

[27] See, e.g., In re Motion to Unseal Electronic Surveillance, 965 F.2d 637, 642 (8th Cir. 1992) (“Much of the discovery done in civil suits implicates confidentiality and privacy interests, and courts are often asked to carefully balance these interests with the compelling need for discovery.”).

[28] See, e.g., In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (noting that "if the plaintiff's cause of action is directed at the government's intent . . . it makes no sense to permit the government to use the privilege as a shield"); North Pacifica, LLC v. City of Pacifica, 274 F. Supp. 2d 1118, 1124 (N.D.Cal. 2003) (the fact that the city government was accused of serious Constitutional violations made use of the deliberative process privilege inappropriate).

[29] See In re Sealed Case [1997], 121 F.3d at 737. For instance, a far greater showing of need is required to overcome the presidential communications privilege than must be shown to overcome the deliberative process privilege, because the interest in protecting presidential communications is stronger than the interest in protecting communications among executive branch subordinates. Id. at 755.

III

THE REDACTIONS

Our in camera review of the OI Report confirmed that, as the Staff had represented, the redactions made were readily traceable to one of the two general privileges the Staff had invoked, one involving deliberative process and the other personal privacy. A word about the general content of each of the two categories of redactions is appropriate at this juncture.

The OI portions redacted under the deliberative process rubric, which protects government decision-making, contain factual summaries, analyses, and evaluations. All are predecisional, having been written before any enforcement action was taken against Mr. Geisen and for the purpose of assisting in the decision whether to take such action.[30] Depending on how successive redactions are counted, the deliberative process redactions number close to twenty; some consist of just a paragraph but others cover a page or more. They typically come at the end of sections devoted to one of the several allegations into which the Staff divided the Licensee's overall response to the matter and contain the investigator's analysis and understanding of the incident relating to that allegation and a summary of related interviews.

The personal privacy redactions are premised on the law-enforcement-related notion that individuals who have been the focus of an investigation because of informal allegations should have their identity protected if those allegations are later shown to have been unsubstantiated.[31] Taking this "unsubstantiated allegations" approach, the Staff redacted, we estimate, approximately thirty pages of the two hundred and fifty page report. In total, then, the personal privacy redactions covered more material than did the deliberative process ones.

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[30] See NRC Staff's Answer at 8.

[31] See id. at 12. We note that the Staff also included within the "unsubstantiated" rubric those instances where allegations were substantiated but a decision was made not to bring charges. Geisen Motion to Compel, pp. 8, 19 and materials there cited; NRC Staff's Answer, fn. 9, p. 5. We address this definitional anomaly later herein (see fn. 121 and p. 33, below).

We pause to note here, as we did at the oral argument (Tr. at 207), that it appears that some portion of the personal privacy redactions might have also come under the deliberative process umbrella. That is, portions of them appear to include an investigator's summary of an interview; it might conceivably have been claimed, had those at the requisite agency management level provided the proper review and documentation,[32] that such summaries, reflecting the investigator's judgment about which parts of the interview deserved mention and emphasis, were part of the deliberative process.[33] Be that as it may, the Staff did not initially claim that type of privilege for the summaries (nor did it attempt to invoke such a claim belatedly, after we raised the matter at argument), and -- in accord with settled principles -- any such privilege was thereby waived.[34] Accordingly, we analyze the summaries only in light of the personal privacy privilege that the Staff did claim.

In that regard, although the summaries constitute the bulk of the material redacted, the personal privacy privilege was also invoked to cover much smaller portions in which the name of the person who had been the subject of any unsubstantiated allegations is redacted from wrap-up sentences or paragraphs. Because those portions are essentially de minimis (both in volume and in significance) in the context of this proceeding, we do not analyze them separately; instead, we will let the Staff's withholding of them stand or fall along with our resolution of the larger "unsubstantiated allegation" personal privacy redactions to which they are logically connected.

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[32] See discussion at pp. 16-17, below.

[33] See Montrose Chemical Corp. of California v. Train, 491 F.2d 63, 70 (D.C. Cir. 1974).

[34] See Fed. R. Civ. P. 26(b)(5) (claims of privilege must be made expressly); Fed. R. Civ. P. 26(b)(5), comments, 1993 amendments (a party's failure to notify the other parties it is withholding materials under a certain privilege is viewed as a waiver). See also United States v. Anderson, 79 F.3d 1522, 1531 n.15 (9th Cir. 1996) (noting that it is a party's responsibility to assert the privilege and that the court will not raise the privilege itself).

IV

THE STANDARDS

In this Part, we set out the legal standards that define and limit the reach of the qualified privileges being invoked by the Staff here,[35] including the nature of the showing that must be made if those privileges are to be overcome and disclosure thus obtained. As we do in the next Part as well, we discuss each of the two privileges separately.

A. The Deliberative Process Privilege

As with any qualified privilege, determining whether "deliberative process" redactions in a government document, like the OI Report, may be withheld from the discovery process

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[35] Although we do not rely upon this shortcoming in reaching our decision, the manner by which the NRC Staff asserted both the deliberative process and the personal privacy privileges has raised concern. NRC regulations require that when materials are withheld from discovery, "sufficient information for assessing the claim of privilege or protected status of the documents" be provided to the requesting party. 10 C.F.R. § 2.336(b)(5). It is hard to imagine how a party could accurately assess the privileges asserted from the Staff's merely indicating that, "Unsubstantiated Allegations Withheld to Protect Personnel [sic] Privacy" and "agency's analysis withheld." Geisen Motion to Compel, Exhibit 3, Personal Privacy Log (June 5, 2006) and Exhibit 2, Deliberative Process Log (June 5, 2006). Similarly, which areas are redacted and for what reasons was not indicated. See id.

The Staff's argument (see NRC Staff Answer at 10, 11-12) that both logs had sufficient detail because Mr. Geisen was able to compile a table regarding the redactions is simply incorrect. That table was simply an index that lacked a log's descriptive information; that opposing counsel was able to prepare even that much, drawing on information from related cases (see Tr. at 196-97), does not excuse the party claiming a privilege from the obligations imposed on it (cf. Vaughn v. Rosen, 484 F.2d 820, 825-27 (D.C.Cir.1973), cert. denied, 415 U.S. 977 (1974) (expressing no doubt as to which entity should bear those burdens).

In that regard, another Licensing Board addressed similar inadequacies in the past, writing last year that "the fact that the Staff puts a document on a privilege log, and thus labels a document as deliberative is not sufficient to assess whether it is." Entergy Nuclear Vermont Yankee LLC (Vermont Yankee), LBP-05-33, 62 NRC 828, 852 (2005). See also Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution) ASLBP No. 04-829-01-PAPO (July 8, 2005) at Appendix C, D (specifying the many pieces of information required in the deliberative process and privacy privilege logs).

We remind the Staff, the party claiming privilege here, of the need to comply with § 2.336(b)(5) by presenting at the outset adequate privilege logs, including more detailed information regarding the location of and reason for any redactions. (See also the illuminating discussion, in an analogous context, in Vaughn v. Rosen, above, 484 F.2d at 827-28.) Failure to do so in the future might well lead to consideration of rejection of the claimed privilege. Cf., e.g., Louisiana Energy Services (National Enrichment Facility), CLI-04-35, 60 NRC 619, 621-23 (2004) (strictly applying other regulatory requirements regarding the content of party pleadings).

involves a two-step analysis. There must first be an inquiry into whether the redactions qualify for the privilege, so as to be exempt from public disclosure under the applicable provision of the NRC's Rules of Practice, 10 C.F.R. § 2.390 (which tracks the language of the Freedom of Information Act (FOIA)).[36] We conduct that analysis in this Section of Part IV.

If the redacted portions would be exempt from disclosure under FOIA to a member of the public, then the analysis turns to the three other factors found in 10 C.F.R. § 2.709(d) -- and the "overriding need" test (specific to the deliberative process privilege) reflected in Commission precedents -- to evaluate whether the documents should be released as discoverable despite the privilege.[37] We defer that analysis to Part V of this opinion.

The NRC Staff has argued that parts of the OI report are excluded from public disclosure under 10 C.F.R. § 2.390(a)(5), which exempts from public disclosure NRC "interagency or intra-agency memoranda or letters which would not be available by law to a party."[38] This exemption is identical to Exemption 5 in FOIA; it is meant to encompass the common-law discovery exemptions for attorney work product (not involved here) and government deliberative process.[39]

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[36] Both Licensing and Appeal Boards have noted this similarity and looked to FOIA cases and the balancing tests they employ for guidance on issues of public disclosure. See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station Unit 1), ALAB-773, 19 NRC 1333,1341 n.30 (1984); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), LBP-81-50, 14 NRC 888, 892 (1981).

[37] See 10 C.F.R. § 2.709(d); Georgia Power Co. (Vogtle Electric Generating Plant Units 1 and 2), CLI-94-5, 39 NRC 190, 198 (1994) (discussing the "overriding need" test with respect to deliberative process materials). See also 10 C.F.R. § 2.700 ("The provisions of this subpart apply to and supplement the provisions set forth in subpart C of this part with respect to enforcement proceedings initiated under subpart B of this part . . .").

[38] See NRC Staff Answer at 6.

[39] See Vogtle, CLI-94-5, 39 NRC at 197. See also 5 U.S.C. § 552(b)(5) (FOIA exceptions).

The general purpose of the deliberative process privilege is "to prevent injury to the quality of agency decisions" [40] and to do so by "ensur[ing] that the mental processes of decision-makers are not subject to public scrutiny." [41] In creating the FOIA exemptions, Congress acted on a belief that government decisions are better made when staff members are able to share ideas and opinions frankly, rather than operating "in a fishbowl." [42] The Supreme Court summarized the privilege's rationale in the following fashion:

> The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government.[43]

Rooted in common law, variations on the deliberative process privilege doctrine are thought to have been used in American courts since "the beginnings of our nation." [44] Federal courts "have long recognized the sanctity of the decision-making process, absent discernible likely gross abuse."[45] Similarly, all levels of adjudicators in this agency -- the Commission, the

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[40] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

[41] Montrose Chemical, fn. 33, above, 491 F.2d at 70.

[42] Hinckley v. United States, 140 F.3d 277, 285 (D.C. Cir. 1998). See also First Eastern Corp. v. Mainwaring, 21 F.3d 465, 468 (D.C. Cir. 1994).

[43] Department of Interior v. Klamath Water Users, 532 U.S. 1, 8-9 (2001).

[44] See In re Sealed Case [1997], 121 F.3d at 736.

[45] Montrose Chemical, 491 F.2d at 69. The primary exception to the privilege is waiver: if the agency has chosen "expressly to adopt or incorporate by reference [a] · · · memorandum previously covered by Exemption 5 in what would otherwise be a final opinion," that voluntary change of status would waive the exemption. See National Council of La Raza v. Department of Justice, 411 F.3d 350, 356-57 (2d Cir. 2005). It has not been argued that such circumstances apply here.

former Appeal Board, and the Licensing Board -- have consistently applied the deliberative process privilege.[46]

Precedents under both FOIA's Exemption 5 and the NRC's § 2.390(a)(5) require that a document be predecisional and deliberative to be categorized as deliberative process.[47] A document is predecisional when it was "prepared before the adoption of an agency policy and specifically prepared to assist the decisionmaker in arriving at his or her decision."[48] Materials "are deliberative if they reflect a consultative process." [49] Early in FOIA's existence, the Supreme Court gave a general definition to the exemption's scope:

> Exemption 5, properly construed, calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be.[50]

In this context, policy and lawmaking are not narrow terms; instead, depending on the circumstances, they can be viewed as including "most decisions of government agencies." [51]

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[46] See, e.g., Vogtle, CLI-94-5, 39 NRC at 197; Shoreham, ALAB-773, 19 NRC at 1341-42; Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96 (1981); Entergy Nuclear Vermont Yankee LLC (Vermont Yankee), LBP-05-33, 62 NRC 828, 839 (2005).

[47] See Renegotiation Bd. v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 186 (1975) (FOIA); Vogtle, CLI-94-5, 39 NRC at 197 (§ 2.390).

[48] Vogtle, CLI-94-5, 39 NRC at 197.

[49] Id. at 198. See also Vermont Yankee, LBP-05-33, 62 NRC at 843; Playboy Enterprises, Inc. v. Department of Justice, 677 F.2d 931, 937 (D.C. Cir. 1982) ("conclusions, recommendations, opinions, or advice" may properly be withheld).

[50] NLRB v. Sears, Roebuck & Co., 421 U.S. at 153 (internal citations omitted).

[51] Russell v. Department of the Air Force, 682 F.2d 1045, 1047 (D.C. Cir. 1982); see Hinckley, 140 F.3d at 281 n.1 (discussing Mr. Hinckley's misunderstanding that the deliberative process privilege applied only to policymaking). See also Shoreham, ALAB-773, 19 NRC at 1341 ("The privilege is not limited to policymaking, however. Rather, it may attach to 'the deliberative process that precedes most decisions of government agencies.' ") (internal footnote omitted).

Purely factual material is not generally protected by the deliberative process privilege,[52] but exceptions to this general rule exist.[53] For example, where the factual material "is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations," that material is protected by the privilege.[54]

Similarly, summaries of factual information may be protected in certain circumstances.[55] In Montrose Chemical (fn. 33, above), the D.C. Circuit held that summaries of a hearing record prepared for the EPA Administrator (to aid him in making a decision at the end of a lengthy adjudication on the continued registration of the pesticide DDT) were protected because "[t]o probe the summaries of record evidence would be the same as probing the decision-making process itself."[56] Other Courts of Appeals have likewise found summaries to be covered by the privilege when the disputed documents are "factual summaries that were written to assist the

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[52] See Environmental Protection Agency v. Mink, 410 U.S. 73, 91 (1973).

[53] See Mapother v. Department of Justice, 3 F.3d 1533, 1538 (D.C. Cir. 1993) ("[T]he fact/opinion test, while offering a quick, clear, and predictable rule of decision, is not infallible and must not be applied mechanically") (internal citation omitted).

[54] In re Sealed Case [1997], 121 F.3d at 737.

[55] See Montrose Chemical, 491 F.2d at 71 (applying the deliberative process privilege to summaries of factual materials); Russell, 682 F.2d at 1049 (applying the privilege to draft versions of certain Air Force histories); Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1569 (D.C.Cir.1987) (applying the privilege to draft versions of other Air Force histories). See also National Wildlife Federation v. U.S. Forest Service, 861 F.2d 1114, 1119 (9th Cir. 1988) ("[W]henever the unveiling of factual materials would be tantamount to the publication of the evaluation and analysis of the multitudinous facts conducted by the agency, the deliberative process privilege applies").

[56] 491 F.2d at 68.

making of a discretionary decision" [57] (but not when the summary was written only to inform or to prepare an official before a public appearance or briefing[58]).

In order to earn recognition, the deliberative process privilege must also be asserted in a particular way. That is, a qualified person, "such as the head of the department or division, having both expertise and an overview-type perspective concerning the balance between the agency's duty of disclosure versus its need to conduct frank internal debate," [59] must sign an affidavit asserting the privilege. Here, Guy Caputo, the Director of the NRC's Office of Investigations, provided Mr. Geisen with such an affidavit. [60] In the absence of any challenge as to whether his position was sufficiently above the fray, we find that Mr. Caputo possesses the requisite responsibility and oversight to claim the privilege on behalf of the Staff.

In analogous circumstances, such an affidavit must provide the basis for the withholding and "a specific statement of the harm that would result if the information sought to be withheld is disclosed to the public." [61] The Staff affidavit addresses this matter, but the statement of the alleged harm from disclosure lacks force in major respects: two of three dangers identified (the first and the last) seem patently non-applicable here, in that they involve a supposed threat that

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[57] Mapother, 3 F.3d at 1539.

[58] See Playboy Enterprises, 677 F.2d at 936 (distinguishing the protected summaries in Montrose Chemical from an unprotected document in which facts were summarized "only to inform the Attorney General of facts which he in turn would make available to members of Congress"). See also Mapother, 3 F.3d at 1539 (distinguishing between Montrose Chemical and Playboy Enterprises on the basis of the report's purpose for the agency official).

[59] Vermont Yankee, LBP-05-33, 62 NRC at 847. See also Marriott International Resorts v. United States, 437 F.3d 1302, 1306 (D.C. Cir. 2006) (allowing an agency head to delegate the authority to invoke the deliberate process privilege to an appropriate supervisor).

[60] See Geisen Motion to Compel Exhibit 6, Affidavit of Guy P. Caputo (Apr. 25, 2006), and NRC Staff Answer Attachment B, Affidavit of Guy P. Caputo (Aug. 17, 2006).

[61] 10 C.F.R. § 2.390(b)(1)(ii), applicable to those seeking protection for documents being submitted to the agency.

the Staff's preliminary views could be confused with the actual policy later adopted and could give rise to a suggestion that those preliminary views were the final agency action.

Although those arguments might have carried some weight while internal Staff deliberations were ongoing, the agency had already taken its final action in this matter[62] many months before the creation of the affidavits relied upon here. So any source of confusion about the preliminary views and their lack of official status had long since been eliminated.

More importantly, the notion that Licensing Board judges -- presumably more discerning than lay jury members -- would confuse the 2003 preliminary Report assessments with the 2006 ultimate Staff conclusions seems a product of attempting to force a general principle into a particular setting that it is obviously neither designed nor intended to fit.[63] We remind the Staff that the regulations require that a specific, not a generalized, statement of harm be provided to the party requesting discovery; we expect that all aspects of any such future statements will be applicable to the matter at hand.[64]

That leaves the third reason. Albeit conclusory in nature, it does serve as support for the claim of privilege here. Specifically, the Caputo affidavits assert that "forced disclosure of [the Staff's] internal discussion could serve to chill future deliberations and could interfere with its ability to engage in free exchange of opinions and analyses." [65] It is not disputed that the investigators' analyses in the OI Report were created as frank assessments of the situation to aid their superior's decision-making. As discussed above, this operational frankness is a needed aspect of government decision-making that can easily be chilled by public disclosure.[66]

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[62] See Enforcement Order, 71 Fed. Reg. at 2,571. Cf. Vogtle, fn.91 below.

[63] See Tr. at 223.

[64] See 10 C.F.R. § 2.390(b)(1)(ii); see also last paragraph of fn. 35 above.

[65] See affidavits cited in fn. 60, above.

[66] See Klamath Water Users, 532 U.S. at 8-9; and discussion at p.13, above.

B. The Personal Privacy Privilege

As was done with the privilege at issue in the previous Section, the privacy privilege must first be analyzed under the NRC regulatory exemption and the comparable FOIA exemption. This we do now, including consideration of whether, and if so to what extent, privacy interests might be preserved by use of a protective order narrowly circumscribing release of any privileged information. As before, we defer our "balancing" analysis to Part V of this opinion, where we consider the other three factors reflected in 10 C.F.R. § 2.709(d) (see pp. 30-32, below).

This agency's regulatory scheme for balancing privacy interests (arising in a law enforcement context) against the need for party discovery combines elements of both FOIA and the Federal Rules of Civil Procedure. Privacy interests are defined using FOIA's language[67] but their weight is tempered by the capability in the discovery process of making limited disclosure to a litigant under a protective order, as contrasted with making the FOIA-required unconditional release to a member of the public.[68] The privacy interest, if any, that would remain threatened after surrounding it with a protective order must then be weighed against the other party's need for disclosure (similar to what is done under the Federal Rules of Civil Procedure), rather than have the broadscale, unprotected privacy interest measured against the consequences of FOIA's command of unfettered public disclosure.

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[67] Compare 5 U.S.C. § 552(b)(7)(C) with 10 C.F.R. § 2.390(a)(7)(iii).

[68] See 10 C.F.R. § 2.705(c) (authorizing protective orders). Federal courts have described the relationship between FOIA and discovery requests as such:

> The FOIA acts as a "floor" when discovery of government documents is sought in the course of civil litigation. Though information available under the FOIA is likely to be available through discovery, information unavailable under the FOIA is not necessarily unavailable through discovery.

Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1344 (D.C. Cir. 1984).

Against the foregoing general background, we turn to the NRC regulations, which exempt from public disclosure information compiled for law enforcement purposes that "[c]ould reasonably be expected to constitute an unwarranted invasion of personal privacy" and thus parallels FOIA's law enforcement privilege.[69] When determining whether documents should be withheld on the basis of this exemption, federal courts have looked to balance "the private interest involved (namely, the individual's right of privacy) against the public interest." [70]

To make this balancing determination under FOIA, federal courts have first examined the strength of the privacy interest, which will vary according to context.[71] For example, the United States Court of Appeals for the District of Columbia Circuit uses a ten-point test for evaluating the law enforcement privilege under FOIA.[72] These points include an assessment of how disclosure will thwart governmental processes "by discouraging citizens from giving the

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[69] See fn. 67, above.

[70] Judicial Watch, Inc. v. FDA, 449 F.3d at 153 (internal citations omitted). In FOIA cases, the public interest is to open agency action to public scrutiny. Id. The NRC Staff incorrectly claims that the disclosures Mr. Geisen seeks have no public interest implications associated with them. See NRC Staff Answer at 13. In the first place, this being a highly-regulated industry with enormous public safety responsibilities lodged in both the private and public sectors, there is a strong public interest in the proper resolution of all aspects of what occurred at Davis-Besse. See also our related analysis in LBP-06-13, 63 NRC at 555, fn. 113, concerning the public interest in the fair resolution of matters the government puts before judicial tribunals. And Mr. Geisen has a property interest in his employment-related license sufficient to invoke the procedural protections of the Due Process Clause, the vindication of which certainly invokes a public interest. See Barry v. Barchi, 443 U.S. 55, 64 (1979) (a horse trainer's license is property and its suspension must include due process protections). See also Bell v. Burson, 402 U.S. 535, 539 (1971) (driver's licenses cannot be taken away without due process protections).

[71] See Judicial Watch, Inc. v. FDA, 449 F.3d at 153 ("the privacy interest at stake may vary depending on the context in which it is asserted"). See also Armstrong, 97 F.3d at 582; Lame v. U.S. Dept. of Justice, 654 F.2d 917, 923 (3d Cir. 1981).

[72] See In re Sealed Case, 856 F.2d 268, 272 (D.C. Cir. 1988). See also Tuite v. Henry, 98 F.3d 1411, 1417-1418 (D.C. Cir. 1996) (applying the 10-point test). This test has also been used by a number of district courts. See, e.g., Anderson v. Marion County Sheriff's Dept., 220 F.R.D. 555, 563-64 (S.D.Ind. 2004); Mueller v. Walker, 124 F.R.D. 654, 656-67 (D.Or.1989); Spell v. McDaniel, 591 F.Supp. 1090, 1116 (E.D.N.C. 1984), aff'd in part and vacated and remanded in part, both on unrelated grounds, 824 F.2d 1380 (4th Cir. 1987).

government information" and chilling governmental self-evaluation;[73] the impact upon the individuals identified; the kind of information sought; whether the law enforcement investigation has been completed; whether the person seeking the discovery is a defendant or suspect in a criminal proceeding; whether the information is available from other sources; and the importance of the information.[74] Such a multifaceted analysis recognizes the extraordinary variability possible in the strength of a privacy interest and the degree to which it should be protected,[75] and warrants close analysis of the specific circumstances behind a privilege claim.

Intrinsic to such analyses of the FOIA exceptions is an assessment of harm based on public disclosure;[76] Subsection 2.390(a)(7)(iii) of our regulations is also premised on such a public release of information.[77] Assuming such public disclosure, the redacted material in the OI Report might, depending on a FOIA court's assessments of the D.C. Circuit's 10-point test or a similar test, meet these exemption standards. On this score, federal courts have indeed found that third parties who were not charged have a legitimate privacy right not to be identified in law enforcement documents that are disclosed to the public.[78]

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[73] In re Sealed Case [1988], 856 F.2d at 272.

[74] Id.

[75] The Staff argues that the amended language of the exemption means it "does not need concrete or specific evidence that release of unsubstantiated allegations would constitute an unreasonable invasion of personal privacy." NRC Staff Answer at 11, n.18. The Staff does not cite any case law for what seems -- in light of the D.C. Circuit's practice of specifically assessing the harm to an individual when considering the 7(C) law enforcement exemption (see In re Sealed Case [1988], 856 F.2d at 272) -- to be an overly broad interpretation. Although an initial position of protecting privacy may be founded on mere theoretical constructs, an effective counter to a fact-based challenge would seem to depend upon "concrete or specific" analysis.

[76] See In re Sealed Case [1988], 856 F.2d at 272; 5 U.S.C. § 552(b)(FOIA exemptions).

[77] That regulation specifies the documents that are exempt from public inspection.

[78] See SafeCard Services, Inc. v. SEC, 926 F.2d 1197, 1205 (D.C.Cir. 1991) (with regard to names and addresses, "Exemption 7(C) affords broad privacy rights to suspects, witnesses, and investigators").

Without such public disclosure, the strength of the privacy interest diminishes because the "actual harm" in releasing the information can be virtually eliminated.[79] For instance, in Whalen v. Roe, the Supreme Court found that a New York program tracking sensitive information about patients' drug prescriptions did not violate the patients' right of privacy because there would be no public disclosure of the information outside of the State government.[80] Similarly, the Third Circuit mandated that a company turn over the personal health information of its employees to a government agency, despite the strong privacy interests involved, because the agency had provided "sufficiently adequate assurance of non-disclosure," including security measures.[81] In neither case was there perceived to remain -- after creation of the protective measures -- any real danger of public disclosure, so the contemplated selective disclosure did not implicate a strong privacy interest.

Using parallel reasoning, federal courts resolving discovery disputes generally find that a court-imposed protective order limiting the use of privileged materials to the trial provides sufficient protection against public disclosure.[82] In making discovery determinations, the court weighs the need "to protect a party or person from annoyance, embarrassment, oppression, or

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[79] See Doe v. Southeastern Pennsylvania Transp. Authority, 72 F.3d 1133, 1141 (3d Cir. 1995) (the "potential harm must be measured within the context of the disclosure that actually occurred"). See also United States v. Westinghouse Electric Corp., 638 F.2d 570, 579 (3d Cir.1980) ("we must consider whether there are effective provisions for security of the information against subsequent unauthorized disclosure").

[80] See Whalen v. Roe, 429 U.S. 589, 600-01 (1977). The Court also noted that "the remote possibility that judicial supervision of the evidentiary use of particular items of stored information will provide inadequate protection," was not adequate to find a privacy interest had been violated. Id. at 601.

[81] Westinghouse Electric Corp., 638 F.2d at 580.

[82] See, e.g., Truswal Systems Corp. v. Hydro-Air Engineering, Inc., 813 F.2d 1207, 1211 (Fed. Cir. 1987) (rejecting a motion to quash, filed on the grounds that disclosure would violate the confidentiality of business data, because a protective order preserving confidentiality was in place).

undue burden or expense" [83] against litigants' need for materials. With confidential protection orders in place, weighing the privacy invasion from public disclosure against a party's need for the materials is no longer appropriate, instead becoming "a red herring," according to the Fourth Circuit in the Lowcountry Red Cross case. [84] There, the court dismissed concerns about the harm to privacy from using in court the names of blood donors with AIDS -- an illness evoking intense privacy concerns -- because a strict protection order was in place:

> The possibility of public disclosure is even more remote in the case before us. The implicated donor's identity, already known to the Red Cross, would be revealed to only the court and to the lawyer appointed by the court. The revelation to the court, moreover, is to be made directly to the judge by the Red Cross, to be hand delivered in an envelope marked "Personal and Confidential." All answers are to be maintained in a sealed envelope marked "Confidential," and the answers provided by the donor must have the signature redacted prior to filing. We cannot conceive of a better system to maintain the confidentiality of the donor's identity. The potential for disclosure does not rise to the level of a violation of the privacy rights of the donor. (emphasis added).

Thus, with an appropriate protective order in place, parties in federal court must carry a heavy burden to show they are still entitled to a privacy-based withholding of otherwise-discoverable documents, because there is an assumption that disclosure only to the other parties will only minimally, if at all, harm that interest.[85]

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[83] Fed. R. Civ. P. 26(c); 10 C.F.R. § 2.705(c).

[84] Watson v. Lowcountry Red Cross, 974 F.2d 482, 487-88 (4th Cir. 1992).

[85] See, e.g., Smith v. Goord, 222 F.R.D. 238, 239 (N.D.N.Y. 2004) ("[D]efendants have failed to carry their burden of demonstrating grounds for withholding the requested documents . . . and . . . the concerns associated with disclosure of those documents can be addressed adequately through the entry of an appropriate protective order"). See also Rodriguez v. City of Fresno, No. 1:05CV1017, 2006 WL 1530251 at 1 (E.D.Cal. May 30, 2006) (because a protective order limiting the disclosure of documents is already in place, the court will not withhold the documents from the other party).

This agency's adjudicatory bodies have taken a similar approach.[86] A series of decisions in 1983 involved an organization called GAP that sought to quash subpoenas of several of its members on a number of grounds, including protecting the privacy of several anonymous whistleblowers.[87] The Licensing Board rejected the motions in part because the Board had, simultaneously with the issuance of the subpoenas, issued a strict protective order that limited the release of the information only to the parties, and only for use in that case.[88] In affirming the Licensing Board's denial of the motions to quash, the Appeal Board discussed the process by which the privacy privilege is evaluated when a protective order exists: "[t]he Board also concluded that the protective order it was imposing would eliminate the harm GAP perceived to its interest. It then weighed this factor against the others and -- quite reasonably, in our view -- denied the motion to quash." [89]

If an appropriate protective order were issued in the present case, the potential harm to privacy (of the subjects of the "unsubstantiated allegations" [see fns. 31, above, and 121, below]) that could occur with disclosure to the parties becomes, as in the Whalen, Lowcountry

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[86] Licensing Boards have found very few reasons for continuing to withhold documents or quash subpoenas once an applicable protective order has been issued or requested. One is that the information request is simply not material. See GPU Nuclear, Inc. Jersey Central Power and Light and American Energy Corporation, LLC (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 211 (2000). Another reason is that the protective order may be breached. Consumers Power Company (Midland Plant, Units 1 and 2), LBP-83-53, 18 NRC 282, 287-88 (1983). As in the judicial precedents cited, however, Boards will normally assume that protective orders will not be breached; to counter that assumption, the withholding party must show evidence of the likelihood of a breach. Id. at 288.

[87] See the series of decisions in Consumers Power Company (Midland Plant, Units 1 and 2): LBP-83-53, 18 NRC 282 (1983); LBP-83-64, 18 NRC 766 (1983); and ALAB-764, 19 NRC 633 (1984).

[88] See Midland, LBP-83-64, 18 NRC at 769; Midland, ALAB-764, 19 NRC at 643.

[89] Midland, ALAB-764, 19 NRC at 641 (internal citations omitted).

Red Cross, and GAP cases, extremely small. It is that diminished harm that must be weighed against Mr. Geisen's interest in the material and the general liberality of discovery procedures.[90]

V

THE BALANCE

In this Part, we apply the general standards just set forth to the particular matters before us. In doing so, we will balance the weight of each privilege, and what that privilege protects, against Mr. Geisen's interest in the materials and their necessity to the proceeding.

A. Deliberative Process

Upon examination, as we have done in camera, it is readily apparent that we must honor the Staff's request that the deliberative process redactions of the OI Report remain withheld.[91] As explained below, the redacted portions meet the deliberative process criteria, and any slight need for them does not outweigh the agency's considerable interest in their protection.

The redactions are, as required for deliberative process materials, both predecisional and deliberative.[92] In reaching this conclusion, we have been mindful that, while opinion-containing analyses and conclusions are uniformly considered deliberative,[93] purely factual

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[90] See, e.g., In re Motion to Unseal Electronic Surveillance, 965 F.2d at 641 ("Much of the discovery done in civil suits implicates confidentiality and privacy interests, and courts are often asked to carefully balance these interests with the compelling need for discovery . . . Thus the rules of discovery allow intrusions into the private affairs of parties to litigation as well as third parties").

[91] We note that in what appears to be the only other occasion in which a Licensing Board considered the withholding of an OI Report for deliberative process reasons, it was planned that the entire report would be released after the Commission made its final decision. See Vogtle, CLI-94-5, 39 NRC at 200. This was, however, by choice of the Staff, not by any compulsion of law or of the Licensing Board. Id. We trust that whatever factors motivated the release of the report in Vogtle were carefully considered (even if ultimately rejected) by the Staff in the present case.

[92] See discussion at p. 14, above.

[93] See, e.g., Playboy Enterprises, Inc., 677 F.2d at 935.

materials are generally unprotected.[94] But here the exceptions to this general rule apply.[95] When, as here, the redacted factual material is so intertwined that deliberations will be revealed from its disclosure, the material is deliberative.[96]

This conclusion is buttressed by the purpose of these summaries: the investigator wrote them not for the purpose of preparing a public statement, like the unprotected documents in Playboy Enterprises,[97] but to aid his superiors in making a decision regarding Mr. Geisen's employment in the nuclear industry. Put succinctly, the "Agent's Analysis" and other summary materials in the report were "assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action," [98] like the summaries found to be deliberative in both Mapother and Montrose Chemical.[99] Here, of course, that discretionary action was the decision to issue the enforcement order.

Once a document has been found to meet this standard definition of deliberative process and thus to be exempt from public disclosure under 10 C.F.R. § 2.390, the strength of the interest protected by the privilege is balanced against the litigant's need for the material. This balancing is guided by 10 C.F.R. § 2.709(d), which specifies the factors to be used in determining whether materials should be withheld in discovery,[100] and the Commission's

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[94] See Mink, 410 U.S. at 91.

[95] See discussion at p. 15, above.

[96] See In re Sealed Case [1997], 121 F.3d at 737.

[97] See 677 F. 2d at 935.

[98] Mapother, 3 F.3d at 1539.

[99] See id.; and Montrose Chemical Corp., 491 F.2d at 68.

[100] See Three Mile Island, LBP-81-50, 14 NRC at 892 (describing as a balancing test the 4-part test now contained in § 2.709(d)).

standard that, once material has been determined to be deliberative process, "the litigant must demonstrate an overriding need for the material."[101] Section 2.709(d) provides a general scheme, applicable to all privileged material, mandating that, once material is considered exempt from public disclosure, consideration be given to that material's relevancy to the decision,[102] its availability by other means,[103] and its relative necessity to the party.[104] Federal courts also use a balancing test and similarly consider "the relevance of the evidence, the availability of other evidence, the seriousness of the litigation, the role of the government, and the possibility of future timidity by government employees."[105]

In undertaking that balancing, courts have recognized that deliberative process protects several strong interests, including an agency's interest in preserving the integrity of its

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[101] Vogtle, CLI-94-5, 39 NRC at 198. See also Shoreham, ALAB-773, 19 NRC at 1341. The Seventh Circuit has used a similar standard. See Farley, 11 F.3d at 1389 ("Since the documents at issue are within the scope of the deliberative process privilege, the government could only be required to produce them if [the defendant] made a showing that his need for the documents outweighed the government's interest in not disclosing them").

[102] In our discovery process, materials cannot generally be withheld as irrelevant if the request "appears reasonably calculated to lead to the discovery of admissible evidence." 10 C.F.R. § 2.705(b)(1). The NRC Staff claims, however, that this rule does not apply to discovery against the Staff because that process is governed by § 2.709, not by the NRC's general discovery rules. See NRC Staff Answer at 13, n.20. But § 2.709 deals with special procedural norms for discovery against the Staff; there is no reason to believe, as to substantive content, that its repeated use of the "relevance" concept was not intended to embrace the universal understanding of that concept (quoted in line 2, above) that shapes the scope and definition of discoverable evidence in both the federal courts and our adjudications. See Fed. R. Civ. P. 26(b)(1); 10 C.F.R. § 2.705(b). See also Seattle Times Co. v. Rhinehart, 467 U.S. 20, 29 (1984); Degen v. United States, 517 U.S. 820, 825-26 (1996).

[103] See Three Mile Island, LBP-81-50, 14 NRC at 892 (explaining that the "obtainable from another source" language was designed to provide for materials available through the Licensee).

[104] See 10 C.F.R. § 2.709(d).

[105] In re Sealed Case [1997], 121 F.3d at 737-38.

consultative functions and the public's interest in good government.[106] Certainly, these interests are compromised and government processes chilled when the documents are released to the public; more to the point, even where the audience is smaller, the chilling effect can be just as great despite limiting the release to only those involved in particular litigation.[107]

These protected interests are so strong that courts are generally unwilling to compel discovery of deliberative materials, even when an individual's due process rights are plainly at stake,[108] unless there is a particular and compelling reason for the privilege to be suspended, like government corruption.[109] The Commission and the former Appeal Board have similarly recognized the strength of the interest protected by deliberative process and have rarely, and only in exceptional circumstances, allowed deliberative materials to be seen by parties.[110]

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[106] See, e.g. NLRB v. Sears, Roebuck & Co., 421 U.S. at 151; A. Michael's Piano, Inc. v. Federal Trade Commission, 18 F.3d 138, 147 (2d Cir. 1994).

[107] See In re Sealed Case [1997], 121 F.3d at 736. A general understanding that even limited disclosure in a courtroom would harm the frankness of debate explains the lack of precedent for allowing deliberative process documents to be released under a protective order, or for even considering such a measure. See, e.g., Hinckley, 140 F.3d at 277; Farley, 11 F.3d at 1389-90; Black v. Sheraton Corp. of America, 564 F.2d 531, 547 (D.C. Cir. 1977).

[108] See, e.g. Farley, 11 F.3d at 1389-90 (refusing access to deliberative process documents to a defendant facing a $910,000 civil penalty); United States v. Fernandez, 231 F.3d 1240, 1248 (9th Cir. 2000) (refusing access to deliberative process documents to a criminal defendant).

[109] See Hinckley, 140 F.3d at 285 ("[W]here there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied").

[110] See In Virginia Electric and Power Company, (North Anna Power Station Units 1 and 2), CLI 74-17, 7 AEC 313, 315 (1974) (making public certain information regarding a possible geological fault at the North Anna site when it was not discovered until after the plants' construction permits were issued and allegations, sufficient to warrant an investigation, were made that the licensee had intentionally withheld information concerning the fault).

At the same time, courts evaluate the strength of the particular interest protected by the deliberative process privilege, not a generalized agency interest in confidentiality.[111] The NRC Staff must show with specificity that the agency has a strong interest in protecting these materials.[112] Here, by providing the documents for in camera inspection and by asserting the agency's interest in preserving its investigators' ability to summarize candidly and to evaluate freely various situations for their supervisors, the Staff has demonstrated the strength of this particular interest in the circumstances the parties have put before us.[113]

Applying either the NRC's "overriding need" test or one of the discovery balancing tests,[114] the interest protected by the deliberative process privilege is stronger than Mr. Geisen's need for the material. The redacted portions are generally very brief and for the most part are explicitly limited to terse conclusions about the information revealed in the interviews already made available. Thus, absent a showing by Mr. Geisen as to why he needs such evaluations and summaries, they would seem to offer him very little help in assembling his case. That he does not agree with the agency's final enforcement decision is not sufficient to show need.[115]

On the other side, there is in enforcement cases a clear, strong interest in preserving the confidentiality of investigators' analyses and thought processes. Even making allowance for the difficulties of showing need for a document that he has not seen, there is no doubt that Mr.

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[111] See United States v. O'Neill, 619 F.2d 222, 227 (1980); Resolution Trust Corp, 773 F.Supp. at 604; Pacific Gas & Elec. Co. v. United States, 70 Fed. Cl. 128, 141 (2006). See also United States v. Nixon, 418 U.S. at 706, 711 (addressing the need for specifics in regard to the invocation of executive privilege).

[112] See Resolution Trust Corp. v. Diamond, 773 F.Supp. at 604.

[113] See NRC Staff Answer at 8.

[114] See 10 C.F.R. § 2.709(d); In re Sealed Case [1997], 121 F.3d at 737-38.

[115] See Hinckley, 140 F.3d at 286.

Geisen's arguments have not met the high bar required for discovery of materials protected by the deliberative process privilege in either federal court or NRC adjudications.[116]

B. Personal Privacy.

As indicated above (pp. 25-26), NRC regulations prescribe consideration of four factors in determining the treatment, for discovery purposes, of privileged materials, thereby creating a balancing test whereby the harm to the privacy interest is weighed against the three other factors.[117] In this regard, we conclude that the redacted OI Report portions would be exempt from disclosure under 10 C.F.R. § 2.390(a)(7)(iii) because, if publicly disclosed, the materials could reasonably be expected to present -- if only to a modest degree (see pp. 30-32, below) -- an unwarranted invasion of personal privacy.[118]

The actual harm done by disclosure -- either publicly or under protective order – is then weighed against the material's relevancy, the material's availability from other sources, and the necessity of the material to Mr. Geisen and this proceeding.[119] These factors, particularly Mr. Geisen's need for the material, must only be stronger than this individualized privacy invasion in these particular circumstances.[120] Our decision is thus based upon (1) the relative contextual strength (or lack thereof) of this particular privacy privilege; (2) the existence of alternative means to protect the privacy interests at stake here; and (3) the weight of the stated factors.

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[116] See Vogtle, CLI-94-5, 39 NRC at 198; Hinckley, 140 F.3d at 286.

[117] See 10 C.F.R. § 2.709(d). Again, the four factors are the relevancy of the document, whether the document is exempt from disclosure under 10 C.F.R. § 2.390, whether the document is necessary to a proper decision, and whether the document or information is reasonably obtainable from another source. Id.

[118] See discussion at p. 20, above.

[119] See 10 C.F.R. § 2.709(d).

[120] See fn. 100, above.

1. *Strength of the Privilege*. The basis of the "personal privacy" privilege being asserted by the Staff here involves, generally, an individual's interest in not having it made known that the individual had been the subject of "unsubstantiated allegations" of criminal or other nefarious conduct. It is easy to perceive why such an interest should be protected. Law enforcement authorities receive many complaints from many sources about possible unlawful activity. Some complaints prove meritorious, but for a variety of reasons other complaints turn out to be not well-founded. For instance, the complainant may be mistaken about what was seen; the complainant may not be truthful, but rather may be motivated by ill-will or revenge; or the activity under scrutiny, while appearing suspect, may have a legitimate explanation.

Given all the different circumstances that can thus lead to an individual being an innocent victim of "unsubstantiated allegations," it is not surprising that the law would recognize a personal privacy interest not to have such allegations publicly disseminated after they have been shown to be insubstantial.[121] Although cleared of any misdeeds, the individual might well have an interest in not having neighbors, relatives, colleagues, or other types of constituents wondering why the individual was once suspected of the misdeeds.

That understanding is a sensible one, and clearly can have great force in some circumstances. But it lacks strength as applied to the unique facts before us.

The case law illustrates that a privacy interest does not exist as a generalized theory but instead will depend on such specific factors as the impact of the information's disclosure upon

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[121] See SafeCard Services, Inc., 926 F.2d at 1205. The court's discussion recognizes that mere witnesses may also be entitled to privacy protections, but the Staff did not here assert the need for any such witness protection, and thus we have no question before us as to its legitimacy or applicability.

We have already observed (fn. 31, above) that what the Staff groups together as "unsubstantiated allegations" also includes allegations that were substantiated, but where the ultimate Staff decision was not to bring charges. In light of our overall disposition of the privacy issue, we need not decide here whether individuals in that category would have a greater or a lesser right than the others with whom the Staff grouped them.

particular individuals.[122] Here, based on the circumstances of this case and our in camera review of the disputed portions, that impact is at most relatively slight. As all will recall, the Davis-Besse situation at the root of this proceeding was an open and notorious one, the subject not only of government investigations but of intense reporting by the news media. The licensee's settlements with the NRC and with the Department of Justice were highly publicized (see fn. 9, above). In other words, the overall allegations involved were highly visible, well-known in the professional and community circles in which plant employees operated -- all not surprising for those who work in a highly-regulated industry.

In the eyes of the public, then, an indication that a particular employee in this fact-specific case was not found by either agency to bear civil or criminal responsibility would be more likely to provide vindication than, as in the situation described above (pp. 30-31), to arouse suspicion. Whatever the degree to which one subscribes to this "vindication" view, it appears clear to us that the notorious nature of the Davis-Besse problems and investigations distinguishes the "personal privacy" privilege being asserted from the usual situation, where the allegation is not made, and the investigation is not performed, under public scrutiny.

In this regard, it is not a confidential matter that each of the employees whose privacy rights are now being advocated was interviewed in connection with the investigation, for the transcripts of each of those interviews were included as exhibits to the redacted OI Report, already made available by the Staff as part of its discovery obligations (Staff Brief at 2) and not covered by any protective order (Tr. at 219). It is only an investigator's summary of those interviews that is being withheld.[123] In other words, the public has constructive knowledge that

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[122] See In re Sealed Case [1988], 856 F.2d at 272. See also Tuite v. Henry, 98 F.3d 1411, 1417 (D.C. Cir. 1996).

[123] Again (see p. 10, above), we observe that no "deliberative process" privilege was asserted as to those summaries.

each of the employees interviewed had a sufficient employment relationship to the root problem to warrant being interviewed.[124] In all these circumstances, it seems that the right of personal privacy being asserted is weak compared to the privacy rights that might cry out for protection in other "unsubstantiated allegation" circumstances.

2. *Protective Order*. That being so, it would seem the rights the Staff wishes to protect here would be amply preserved by invoking the simple expedient of a protective order -- as has been done for other types of privileged materials at an earlier stage[125] -- that limits the disclosures to those involved in this litigation and thus having a need to know. Such an order would largely diminish, if not entirely eliminate, the potential harm from the disclosure.

3. *Need for, and Other Availability of, the Information*. Because, as mentioned above, what is at stake here are agents' summaries of interviews, the full transcript of which has already been released, the need for the material is likely considerably less than it would be if the transcripts themselves were being withheld and were sought after.[126] At the same time, we have also seen that the nature of the privilege being asserted begins as a relatively weak one and ends up -- by virtue of the use of a standard protective order regularly employed in analogous circumstances -- as being fully vindicated in any event.

In this circumstance, where the privilege and the need may be equally weak, but the privilege can be protected by other means, we return to where we started (see Part II, above) --

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[124] See, e.g., John Funk and John Mangels, Probe Looks for Davis-Besse Misdeeds, Cleveland Plain Dealer, Aug. 30, 2002, at 1C.

[125] See Licensing Board Order (Protective Order Governing Disclosure of Proprietary Materials) (June 1, 2006). See also [Dale L. Miller] Order (Governing Personal Privacy Materials) (June 28, 2006).

[126] Mr. Geisen argued that one reason he needs these materials is to prepare to cross-examine the investigators should they be called to testify in the upcoming trial. See Geisen Reply Brief at 2; Tr. at 185. This argument no longer carries any force, for the NRC staff has represented that it does not intend to call the report's investigators to testify (except for exhibit identification and transcript introduction purposes). See Tr. at 215, 227-28.

in litigation's search for truth, full and open discovery is the norm, and privileges that stand in the way of truth are disfavored. Relevancy, not need, becomes the determinative standard.[127]

On that score, the Staff conceded very recently, in a companion case, the important role that discovery in litigation before a Licensing Board played in enabling it to determine that the truth was different from what it had originally believed.[128] Here, the Staff had the benefit of both a lengthy investigation and a lengthy deliberation, and we believe it important to provide Mr. Geisen every permissible countering opportunity to obtain discoverable information: he knows the underlying facts far better than we do, and he is in position to see, in what the Staff thought were unsubstantiated allegations (or substantiated allegations it chose not to pursue (see fns. 31 and 121, above)), connections and clarifications whose significance could well escape the notice of most but could well point him to productive inquiries about others' roles.

To be sure, the Staff correctly notes that only Mr. Geisen's guilt, not that of his former colleagues, is in issue before us. But more knowledge and perspective about others' roles might help him put his actions in a transactional context that would lessen or eliminate his responsibility for any mis-steps.[129] Perhaps the benefit to him from these forced disclosures will not prove great -- but on the other hand, with the benefit of a protective order, any possible invasion of the interviewees' privacy rights will be vanishingly small.[130]

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[127] See 10 C.F.R. § 2.705(b)(1). See also Fed. R. Civ. P. 26(b)(1).

[128] See Licensing Board Order (Approving Proposed Settlement and Dismissing Proceeding [In the Matter of Dale L. Miller]) at 5 (September 29, 2006) ("in light of new information developed during the discovery process . . . the NRC Staff acknowledges that it no longer has a concern about the reliability and trustworthiness of Mr. Miller and believes that the health and safety of the public will be adequately protected if Mr. Miller is allowed to resume involvement in licensed activities"). Compare Dale Miller; Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), 71 Fed. Reg 2579 (Jan. 17, 2006).

[129] Several of the sections redacted for privacy reasons mention Mr. Geisen by name. See OI Report.

[130] Notably, the precedents recognize that protective orders can be fully effective to preserve privacy interests, even those of a far greater caliber than are asserted here. See, e.g., Lowcountry Red Cross, 974 F.2d at 487-88.

VI

THE RESULT

Accordingly, the Motion to Compel Production is GRANTED as to the personal privacy redactions, which are to be released under an appropriate protective order to be prepared jointly by the parties and provided to the Board by November 10, and DENIED as to the deliberative process redactions, which may continue to be withheld.

It is so ORDERED.[131]

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

/RA/

E. Roy Hawkens
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 31, 2006

Copies of this Order were sent this date by e-mail transmission to counsel for the parties in this proceeding. Because of the Order's possible relationship to a companion enforcement proceeding, a copy is also being sent to counsel therein.

[131] We note that, owing to the pendency of the criminal charges against him, Mr. Geisen recently invoked here his Fifth Amendment privilege against self-incrimination in declining to respond to various written discovery requests the Staff had served upon him. See, e.g., his Oct. 3 "Objections and Answers to NRC Staff's First Set of Interrogatories." In unsuccessfully seeking a stay of this proceeding at an earlier stage, the government had warned that Mr. Geisen might do exactly that, thus taking advantage of his discovery rights here to obtain information useful not only before us but in the criminal proceeding, while using his aforementioned privilege to deny discovery to the Staff. In denying the government's stay, we acknowledged that possibility but downplayed its significance. See LBP-06-13, 63 NRC at 553-54, particularly fn. 109. For similar reasons, Mr. Geisen's recent invocation here of his constitutional privilege gives us no cause to deny him the discovery sought by the instant motion to compel. Whether or not other procedural consequences might flow from that action is another matter, not presented now.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
DAVID GEISEN	)	Docket No. IA-05-052
	)	
	)	
(Enforcement Action)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LBP ORDER (RULING ON MOTION TO COMPEL PRODUCTION) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by R. L. Giitter]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 31st day of October 2006