

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 12616

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

DOCKETED 11/29/06

SERVED 11/29/06

Michael C. Farrar, Chairman
E. Roy Hawkens
Nicholas G. Trikouros

In the Matter of
DAVID GEISEN

Docket No. IA-05-052
ASLBP No. 06-845-01-EA
November 29, 2006

ORDER
(Determining Disclosure Conditions)

In a recent decision (LBP-06-25), we addressed whether the NRC Staff was justified, during the discovery process, in claiming privilege for, and thus seeking to avoid disclosure of, certain portions of a report completed in 2003 by the Office of Investigations. One aspect of that decision granted Mr. Geisen's motion to compel production of those matters for which the Staff had asserted a law-enforcement-related "personal privacy" privilege. In issuing that ruling, we directed (slip op. at 34) that those portions of the Report "be released under an appropriate protective order to be prepared jointly by the parties and provided to the Board"

The parties were unable to reach total agreement on the terms of the protective order, and have put the disputed matters before us for resolution. Those matters involve assertions by Mr. Geisen¹ that (1) support staff within his counsel's law firm should not each be required to execute a standard-form Non-Disclosure Declaration before handling, for administrative purposes only, the privileged material covered by the protective order; and (2) such

¹ See David Geisen's Opposition to NRC Staff's Motion for Adoption of Proposed Protective Order; and Cross-Motion for Protective Order Proposed by David Geisen (Nov. 17, 2006) at 1 [Geisen Brief]; [Geisen] Proposed Order (Protective Order Governing Personal Privacy Materials) (November 15, 2006) at 3, 6.

Declarations, by whomever executed, should not have to be submitted to the NRC Staff, but rather should be served upon the Board alone. We find both assertions unavailing.

In reaching that conclusion, we recognize that many types of agency information may be more crucial to protect than the documentary material being released under protective order in this instance. See LBP-06-25, slip op. at 30-32. But the principles governing the handling of that more sensitive information are instructive as to what measures are needed, and should be followed, here. So that no information is compromised – either accidentally or intentionally – it is worthwhile to prescribe and to implement a formal system to impress upon all those handling the material the responsibilities incumbent upon them. This system involves the Board’s issuance of a formal protective order, the receiving parties’ subscription to a formal Declaration of Non-Disclosure, and the tracking of those declarations.

It might be possible, as Mr. Geisen’s counsel asserts, to leave to the receiving organization’s internal administrative controls the protection of the material vis-a-vis support staff within that organization.² But that is not the choice that commends itself routinely to the agency, or to us in this particular circumstance. Experience teaches that the danger of a damaging release -- whether inadvertent or deliberate – of information for which confidentiality is demanded is not limited to those at the highest echelons of an organization, but can arise at even the lowest.³

That being so, the system which the Staff embodied in its version of the proposed protective order -- whereby all organization employees who come in possession of the information, for whatever purpose, must sign a Non-Disclosure Declaration – is sensible.⁴ To

² See Geisen Brief at 3.

³ See, e.g., Chiarella v. United States, 445 U.S. 222, 224 (1980).

⁴ See [Staff] Proposed Order (Protective Order Governing Personal Privacy Materials) (November 15, 2006) at 6.

be sure, it requires that the organization's support staff who are handling the information only to perform "routine" administrative functions, such as copying or mailing, sign the declaration. Perhaps this limits the organization's flexibility, in terms of the number of people who can rapidly be assigned to the project. But Mr. Geisen's counsel concedes that, even if support staff were exempted from the filing requirement, any persons in his office ever assigned to the project would still have to be bound by – and therefore, we presume, would have to be instructed as to – the restrictions upon the use and disclosure of this information.⁵ That being so, the difference in internal administrative burden seems slight between one system and the other, and the Staff-proposed system has the benefit of precision and consistency in application. Accordingly, we adopt it.⁶

As to the manner in which the executed declarations should be filed, it has been customary that they be filed with the Staff, not the Board.⁷ It is, after all, the Staff's information which is being protected, and the Staff upon whom, in the first instance, the burden of tracking or enforcing the terms of the protective order and/or the declarations would fall. Accordingly, absent the bringing to our attention of special circumstances -- and none were mentioned here – we find compelling the Staff proposal that the declarations be filed with it.

Of course, if special circumstances were to arise in the future (as, for example, if counsel wished to share the protected information with an as-yet-unidentified expert advisor or

⁵ See Geisen Brief at 3.

⁶ Both parties have made collateral arguments as to whether the June 1, 2006 protective order governing proprietary materials required support staff to sign Non-Disclosure Declarations. See NRC Staff Motion for Adoption of a Protective Order (November 16, 2006) at 2 [Staff Brief]; Geisen Brief at 1-2, 2 n.2. Not having been asked to take any action on that matter, we consider it not to be before us, and thus decline to express any opinion as to the reach of the June 1 order. Moreover, the parties are fully capable of resolving among themselves any confusion that may exist on that score, and we trust that they will do so.

⁷ See Staff Brief at 2 (citing protective orders in the Louisiana Energy Services, Inc., Miller, and Moffitt proceedings).

potential witness), application could be made to file that individual's declaration with the Board only, until such time as the identity of the advisor or witness would have to be otherwise made known to the other litigant(s). In this fashion, counsel's developing trial strategy would not have to be disclosed prematurely. Again, no such argument has been made here.

Accordingly, the Board APPROVES the form of protective order proposed by the Staff (see filing of November 15, 2006), along with the accompanying form Non-Disclosure Declaration, which is (1) to be executed by all who come in possession of the privileged information and (2) to be served upon the NRC Staff. For ease of reference, we append a copy of the Protective Order, signed by the Board's Chairman on this date, to this Order.

It is so ORDERED.

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
November 29, 2006

Copies of this Order were sent this date by e-mail transmission to counsel for the parties.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

Michael C. Farrar, Chairman
E. Roy Hawkens
Nicholas G. Trikouros

In the Matter of
DAVID GEISEN

Docket No. IA-05-052
ASLBP No. 06-845-01-EA
November 29, 2006

PROTECTIVE ORDER
(Governing Personal Privacy Materials)

THIS MATTER came before the Atomic Safety and Licensing Board ("Board") for purposes of entering a Protective Order to govern the dissemination to and use by counsel for Mr. David Geisen ("Geisen") of certain materials designated by the Staff of the Nuclear Regulatory Commission (Staff) as personal privacy materials in this proceeding:

WHEREAS, the Board issued a Memorandum and Order dated October 31, 2006, in which the Board granted, in part, Mr. Geisen's Motion to Compel production of an unredacted version of the August 22, 2003 Office of Investigations Report ("August 2003 OI Report") and ordered the Staff to produce and disclose to Mr. Geisen, subject to a protective order to be presented by the parties, those portions of the August 2003 OI Report that the Staff had redacted on the ground of personal privacy privilege; and

WHEREAS, the Staff and Mr. Geisen discussed the terms of a protective order governing the use and dissemination of the documents and materials designated by the Staff as personal privacy materials in this proceeding, and the Board by Order of this date has resolved the matters remaining in dispute between them, and on that basis has adopted the terms of the order proposed by the Staff, which terms are set forth herein, it is now therefore

ORDERED, as follows:

1. This Protective Order shall govern the use of all Personal Privacy Materials produced by the Staff. Notwithstanding any order to terminate this proceeding, this Protective Order shall remain in effect until specifically modified by the Board or the U.S. Nuclear Regulatory Commission ("Commission").

2. Definitions for purposes of this Protective Order:

a. The term "party" shall mean Mr. Geisen, his counsel, and other individuals assisting Mr. Geisen in the challenge to the NRC enforcement order applicable to Mr. Geisen. With the exception of any specific obligations imposed on the Staff below (see, e.g., paragraph 3), the terms of this Protective Order do not apply to NRC employees, contractors, or consultants. Disclosure of personal privacy material by the Staff, including staff counsel, is governed by 10 C.F.R. §§ 2.390, 2.709, 9.17, 9.25.

b. The term "materials" means any audio tape or video tape recording or written matter of any kind, whether produced, reproduced, or stored on paper, cards, tapes, ribbons, disks, belts, charts, film, computer files, computer disks or diskettes, computer storage devices, or any other medium, and includes without limitation, documents, books, reports, transcripts, studies, statements, speeches, notebooks, calendars, working papers, manuals, memoranda, notes, instructions, directions, records, correspondence, diaries, diagrams, drawings, lists, telephone logs, minutes, and photographs, and also includes, without limitation, originals, copies (with or without notes or changes thereon), and drafts.

c. The term "Personal Privacy Materials" means and includes:

- i. materials designated by the Staff as Personal Privacy Materials;
- ii. any information contained in or obtained from such designated Personal Privacy Materials;
- iii. any other materials that are made subject to this Protective Order by the Board, by the Commission, by any court or any other body having appropriate authority, or by agreement of the parties;

- iv. notes of Personal Privacy Materials;
- v. copies of Personal Privacy Materials.

d. The term "Notes of Personal Privacy Materials" means memoranda, handwritten notes, or any other form of information (including electronic form) that copies or discloses Personal Privacy Materials described in paragraph 2(c) above. Notes of Personal Privacy Materials are subject to the same restrictions provided in this Protective Order for Personal Privacy Materials except as specifically provided in this Protective Order.

e. The term "Non-Disclosure Declaration" shall mean the Declaration, as attached to this Protective Order, by which any person who has been granted access to Personal Privacy Materials shall certify his or her understanding that such access to Personal Privacy Materials is provided pursuant to the terms and restrictions of this Protective Order, and that such person has read the Protective Order and agrees to be bound by it. All Non-Disclosure Declarations shall be served on counsel for the Staff, as provided on the official service list for this proceeding.

f. The term "Reviewing Individuals" shall mean a person who has signed a Non-Disclosure Declaration and who is:

- i. Mr. Geisen;
- ii. counsel for Mr. Geisen;
- iii. any person assisting Mr. Geisen or counsel for Mr. Geisen in the challenge of the NRC enforcement order applicable to Mr. Geisen, including paralegal staff and any consulting or testifying expert witnesses;
- iv. a person designated as a reviewing representative by order of the Board or the Commission;
- v. a court reporter engaged for the purpose of depositions or record proceedings; and

vi. any person who provides testimony at any deposition or hearing in this proceeding, but only to the extent that such person shall be permitted to review Personal Privacy Materials during the course of such testimony and such person has signed a Non-Disclosure Declaration prior to being shown any Personal Privacy Materials or such person is an NRC employee, contractor, or consultant, and therefore disclosure to that individual is governed by 10 C.F.R. §§ 2.390,2.709,9.17 and 9.15.

3. In the event that the Staff knows or has reason to believe that any previously designated Personal Privacy Materials have been intentionally disclosed publicly such that the materials no longer qualify for protection under any applicable personal privacy privilege, the Staff shall promptly notify Mr. Geisen and shall withdraw the designation of such Personal Privacy Materials, after which such Personal Privacy Materials (including any related Notes of Personal Privacy Materials) shall no longer be subject to this Protective Order.

4. The Staff shall produce Personal Privacy Materials separately from other information and shall clearly mark each page of Personal Privacy Materials and place in separate envelopes.

5. Personal Privacy Material shall remain available to Mr. Geisen, his counsel and Reviewing Individuals until the later of (a) the date that an order terminating this proceeding is no longer subject to any appeal or judicial review, or (b) the date that any other Commission proceeding related to the Personal Privacy Material is concluded and no longer subject to any appeal or judicial review. Mr. Geisen, his counsel, and Reviewing Individuals shall, within thirty (30) days of the later date described above, return the Personal Privacy Materials to the Staff, or shall destroy the Personal Privacy Materials, except that counsel for Mr. Geisen shall be entitled to retain copies of filings, official transcripts, exhibits, pleadings, memoranda, notes and any documents filed in this proceeding that contain personal privacy material, including Notes of Personal Privacy Materials, so long as counsel for Mr. Geisen continues to maintain them in

accordance with paragraph F below. Within such time period, Mr. Geisen, his counsel, and Reviewing Individuals shall submit to the Staff an affidavit stating that, to the best of their knowledge, all Personal Privacy Materials and all Notes of Personal Privacy Materials in their individual custody have been returned or destroyed or will be maintained in accordance with paragraph 6 below. To the extent Personal Privacy Materials are not returned or destroyed, they shall remain subject to this Protective Order.

6. Mr. Geisen, his counsel, and Reviewing Individuals shall maintain all Personal Privacy Materials in their custody in a secure place. Access to those materials shall be limited to Reviewing Individuals.

7. Personal Privacy Materials shall be treated as confidential in accordance with the Declaration executed pursuant to paragraph 9 below. Except as otherwise ordered by the Board, Personal Privacy Materials shall not be used except as necessary for the conduct of this proceeding, nor shall they be disclosed in any manner to any person except a Reviewing Individual. Reviewing Individuals may make copies of Personal Privacy Materials, but such copies become Personal Privacy Materials. Reviewing Individuals may make notes of Personal Privacy Materials, which shall be treated as Notes of Personal Privacy Materials if they disclose the contents of Personal Privacy Materials.

8. If Mr. Geisen or his counsel wish to designate as a Reviewing Individual a person not described in paragraph 2(c) above, they shall seek the agreement of the Staff. If an agreement is reached, that person shall be a Reviewing Individual pursuant to paragraph 2(c) above. If no agreement is reached, the dispute shall be submitted to the Board for resolution.

9. A Reviewing Individual shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Personal Privacy Materials pursuant to this Protective Order unless that Reviewing Individual has first executed a Non-Disclosure

Declaration. A copy of each executed Non-Disclosure Declaration shall be provided to the Staff prior to disclosure of any personal privacy material to that Reviewing Individual.

10. Attorneys qualified as Reviewing Individuals are responsible for ensuring that persons under their supervision or control comply with this Protective Order.

11. Any Reviewing Individual may disclose Personal Privacy Materials to any other Reviewing Individual as long as the disclosing Reviewing Individual and the receiving Reviewing Individual have both executed the Non-Disclosure Declaration. If any Reviewing Individual to whom the Personal Privacy Materials are disclosed ceases to be engaged in these proceedings or ceases to qualify as a Reviewing Individual, access to Personal Privacy Materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Declaration shall continue to be bound by the provisions of this Protective Order and the Non-Disclosure Declaration.

12. Nothing herein prevents any party of the Staff from seeking an amendment, modification or extension of this Protective Order. The Board shall resolve any disputes arising under or relating to this Protective Order. Prior to presenting any dispute under this Protective Order to the Board, counsel for the Staff and counsel for Mr. Geisen shall use their best efforts to resolve the dispute.

13. All copies of documents or pleadings reflecting Personal Privacy Materials that are filed in this proceeding, including hearing testimony, the portion of exhibits, the portion of transcripts, the portion of pleadings, and the portion of documents that refer to Personal Privacy Materials shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked "PERSONAL PRIVACY MATERIAL" and shall be served only on the Board, NRC's Office of the Secretary, and persons authorized to receive Personal Privacy Materials under this Protective Order. Nothing herein shall preclude or restrict Geisen or the Staff from

filing, by electronic mail or otherwise, redacted versions of such documents or pleadings that do not reflect or include Personal Privacy Materials, in which event the person making the filing shall be permitted to file the unredacted version containing Personal Privacy Materials on the following day nunc pro tunc. The Board shall subsequently establish, by order or otherwise, any specific procedures that will govern the disclosure or use of Personal Privacy Materials at the evidentiary hearing in this proceeding.

14. Nothing in this Protective Order shall be construed as or shall result in a waiver, limitation or restriction of any right (a) to challenge the designation of any documents or materials as Personal Privacy Materials or (b) to object to the admission or relevance of any Personal Privacy Materials on any legal grounds.

15. Nothing in this Protective Order shall preclude a request that the Board, the Commission, or any other body having proper authority, find that this Protective Order should not apply to any or all materials previously designated as Personal Privacy Materials pursuant to this Protective Order. The Board may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

16. The parties to this Protective Order may seek changes in this Protective Order as appropriate from the Board or the Commission.

17. Subject to the Staff's obligations described in paragraph 3 above, nothing in this Protective Order prevents a request for public disclosure of information designated as Personal Privacy Materials, in accordance with NRC procedures.

18. If the Board finds at any time in the course of this proceeding that all or part of the Personal Privacy Materials need not be protected, those materials shall, nevertheless, be subject to the protection afforded by this Protective Order for ten (10) days from the date of issuance of the Board's decision, and if there is an interlocutory appeal or request that the issue be certified to the Commission, for an additional ten (10) days. The right to seek additional

administrative or judicial remedies after the Board's decision respecting Personal Privacy Materials or Reviewing Individuals, or the Commission's denial of any appeal is not waived.

19. Nothing in this Protective Order shall be deemed to preclude a party from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this Protective Order.

20. The right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Personal Privacy Materials is not waived by this Protective Order.

21. Personal Privacy Materials or Notes of Personal Privacy Materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this proceeding. Any violation of this Protective Order and any Non-Disclosure Declaration executed hereunder shall constitute a violation of an order of the Commission. Any violation of this Protective Order may result in the imposition of sanctions as the Licensing Board or the Commission may deem appropriate.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/
Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 29, 2006

Attachment: Non-Disclosure Declaration

**ATTACHMENT TO
NOVEMBER 29, 2006 PROTECTIVE ORDER**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

Michael C. Farrar, Chairman
E. Roy Hawkens
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In the Matter of DAVID GEISEN

Docket No. IA-05-052

ASLBP No. 06-845-01-EA

NON-DISCLOSURE DECLARATION

Under penalty of perjury, I hereby certify my understanding that (1) access to personal privacy materials is provided to me pursuant to the terms and restrictions of the Atomic Safety and Licensing Board's November 29, 2006 Protective Order in this proceeding; (2) I have been given a copy of and have read the Protective Order; and (3) I agree to be bound by it.

I understand that the contents of the personal privacy materials, any notes or other memoranda, or any other form of information that copies or discloses personal privacy materials shall not be disclosed to anyone other than in accordance with that Protective Order.

I acknowledge that a violation of this Declaration or the Protective Order, which incorporates the terms of this Declaration, constitutes a violation of an order of the Nuclear Regulatory Commission and may result in the imposition of sanctions as the Licensing Board or the Commission may deem appropriate.

WHEREFORE, I do solemnly agree to protect such personal privacy information as may be disclosed to me in this NRC proceeding, in accordance with the terms of this Declaration.

Name (printed):

Representing:

Title:

Date:

