

May 16, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

In the Matter of	)	Docket No. PAPO-00
	)	
U.S. DEPARTMENT OF ENERGY	)	ASLBP No. 04-829-01-PAPO
	)	
(High Level Waste Repository:	)	
Pre-Application Matters)	)	

NRC STAFF ANSWERS TO APRIL 19, 2007 ORDER
REGARDING ACCESS TO SAFEGUARDS INFORMATION

INTRODUCTION

Pursuant to the Pre-License Application Presiding Officer (PAPO) Board's Order (Scheduling Case Management Conference) dated April 19, 2007¹, the NRC Staff (Staff) hereby submits its written answers to questions 1, 2, 3(c)(1-2), 4(a-c), and 5.

DISCUSSION

Question 1. Potential substantial delays associated with lack of deadlines for NRC actions.

Given the statutory and regulatory deadlines associated with the high level waste proceeding, time is of the essence during the pre-license application phase.

The PTCMO sets forth a process whereby (a) the originator of the requested SGI document has 20 business days to make an initial need to know determination; (b) the originator has another 40 business days (with the right of indefinite continuance) for the NRC, after receiving the necessary information from the requestor, to conduct a fingerprint criminal history background

¹ PAPO Board Order (Scheduling Case Management Conference) (April. 19, 2007), ADAMS Accession No. ML071090265.

check or an alternative background check. PTCMO at 16. Thereafter, the requestor who objects to a denial of access to the document cannot file a motion to compel until, inter alia, the originator submits a privilege log, for which there is no filing time deadline. Thus, actions required by the originator will likely consume approximately 90 days and, only at that point, can the Board's review of such motion under 10 C.F.R. § 2.1010(b) even begin. Thus, even if the requestor initiated the process for an SGI document on the same day that DOE certifies its LSN collection, the process set forth in the PTCMO would take over 50% of the likely 6 month pre-license application phase to resolve.

The time problem becomes even more acute if the dispute resolution process specified in the proposed 10 C.F.R. § 2.1010(b)(6)(i)(D) is used. The dispute resolution process described in that section of the proposed rule adds 40 days to the time-line after a final determination has been made by the NRC.

(DOE, NRC, and the State) Discuss how the process under both scenarios might be expedited and shortened.

NRC Staff Answer 1

As encouraged by the Board during the March 5, 2007, case management conference², access to safeguards information (SGI) could be accelerated by pre-screening³ interested individuals. In this context, pre-screening refers to the criminal history check (fingerprinting) and background determination⁴ resulting in a finding concerning trustworthiness and reliability, or a

² Tr. at 1029, Case Management Conference on High-Level Waste Repository Pre-Application Matters (March 5, 2007).

³ As noted by the Board (Tr. at 1029), the proposed rule change could impact the pre-screening process. See Protection of Safeguards Information, 71 Fed. Reg. 64004 (Proposed Oct. 31, 2006) (to be codified at 10 C.F.R. Parts 2, 30, 40, 50, 52, 60, 63, 70, 71, 72, 73, 76, and 150) ("Proposed Safeguards Rule").

⁴ The Proposed Safeguards Rule would cause 10 C.F.R. § 73.22(b) to require a criminal history and background check. Thus, as noted by the Staff during the March 5th conference, the PTCMO would have to be changed to require both a criminal history (fingerprints) and a background check. Tr. at 1022. Additionally, the Staff notes that the 40-day time frame quoted in the PTCMO will be insufficient to complete the criminal history and background check requirements.

determination that an individual is exempt. Although such pre-screening would not address the need-to-know⁵ determination, needed for access to SGI, it could still result in time-savings. The NRC Office of Administration may be able to pre-screen individuals before any potential party requests to access SGI.

In addition to pre-screening, the process under the proposed third case management order (PTCMO)⁶ could be shortened. A requestor may expedite the SGI access process by submitting the fingerprint and background check forms concurrently with the request for SGI. See PTCMO at 16 n.13. This results in a potential time-savings of 20 business days which had been provided for the need-to-know determination. However, processing these submissions concurrently risks unnecessary expenditure of the NRC's or the SGI originator's resources because a negative determination on the need-to-know would render the other checks unnecessary. The risk of potentially unnecessary costs would have to be balanced against the potential time-savings.

Also, the process can be shortened if challenges to the categorization of a document as SGI are entertained even if the challenger has separately applied for access to the SGI.

Regarding the times in proposed 10 C.F.R. § 2.1010(b)(6)(i)(D), presuming the final rule is consistent with the proposed, requests for access filed as soon as possible afford the greatest opportunity for time-savings. The NRC's 10-day time response period is triggered by the requestor's action.

⁵ Except as the Commission may otherwise authorize, no person may have access to Safeguards Information unless the person has an established "need to know" for the information. 10 C.F.R. § 73.21(c)(1).

⁶ Joint Proposed Third Case Management Order (Dec. 19, 2005), ADAMS Accession No. ML053540026.

Question 2. State Governor Representative Exemption from fingerprinting and background checks.

Prior to the promulgation of new 10 C.F.R. § 73.59(b)(4) (71 Fed. Reg. 33,989, 33,992 (June 13, 2006)), the “Governor of a State or his/her designated representative” were exempt from the fingerprinting and criminal background check requirements by 10 C.F.R. § 73.57(b)(2)(ii). The new section 73.59(b)(4) amended the pertinent exemption language so that it currently refers to the “Governor of a State or his or her designated State employee representative” (emphasis added). Although the plain language of new 10 C.F.R. § 73.59(b)(4) appears to narrow the category of individuals exempt from the fingerprint and background check requirements, the Commission’s Statement of Considerations accompanying the new rule states that the “[c]urrent regulations in §§ 73.21 and 73.57 relieve Governors or their designated representatives . . . from fingerprinting and criminal history records checks if those individuals seek access to SGI as defined in § 73.2. This final rule continues that relief” 71 Fed. Reg. at 33,989 (emphasis added).

Further, the Statement of Considerations states that “[t]he categories of individuals relieved by the final rule from fingerprinting and criminal history checks are broader than those relieved by existing regulations in §§ 73.21 and 73.57” 71 Fed. Reg. at 33,990 (emphasis added).

(a) (NRC) Does the NRC Staff interpret new 10 C.F.R. § 73.59(b)(4) (i.e., “his or her designated State employee representative”) as narrowing the category of exempt persons from the previous sections 73.21 and 73.57(b)(2)(ii) (i.e., “his/her designated representative”)?

(b) (NRC) To qualify for the exemption, does the NRC Staff interpret new section 73.59(b)(4) to require the designated representative of a Governor to be a state employee?

(c) (NRC) Does the NRC Staff interpret section 73.59(b)(4) to permit the Governor to delegate the designation authority to another State official? If not, what language in section 73.59, the regulatory history of the new rule, or other authority precludes a delegation by the Governor?

(d) (NRC) If the NRC interprets section 73.59(b)(4) to narrow the category of representatives of a State Governor exempt from the fingerprinting and background checks, was the intent, in whole or

in part, of the new section 73.59(b)(4) to require the private counsel representing the State of Nevada in the pre-license application proceeding to undergo fingerprinting and background checks before gaining access to SGI? If not, what was the intent underlying the addition of the language "State employee" in section 73.59(b)(4)?

NRC Staff Answer 2

(a) The Staff interprets the new 10 CFR § 73.59(b)(4) as limiting the category of exempt persons covered by this section of the regulations to those who are State employees. The previous sections 73.21 and 73.57(b)(2)(ii) did not appear, on their face, to limit the exemption to State employees. As the Board noted in its April 19, 2007, order, the Statement of Considerations accompanying the new section 73.59(b)(4) states that "[t]he categories of individuals relieved by the final rule from fingerprinting and criminal history checks are broader than those relieved by existing regulations in §§ 73.21 and 73.57." The Staff understands the new rule to broaden the categories of exempt persons by inserting additional categories of individuals, such as State Radiation Control Program Directors and State Homeland Security Advisors or their designated State employee representatives. However, the exemption contained in (b)(4) for a State Governor and his or her designated State employee representative was not broadened by the new rule.

(b) The Staff understands that to qualify for the exemption in (b)(4), the designated representative of a Governor must be a State employee.

(c) The language of section 73.59(b)(4) does not expressly allow for or prohibit a delegation of the Governor's designation authority. However, the Staff interprets section 73.59(b)(4) as precluding the Governor from delegating the designation authority to another State official. Because of the sensitivity of SGI, the Staff believes that only the Governor, who is the highest State official, should make determinations regarding who will be exempt from the fingerprinting and criminal history records check requirements; the rule should not be interpreted

to broaden the exemption for designated State representatives by allowing the Governor to delegate his designation authority.

(d) Section 73.59(b)(4) was not specifically directed towards private attorneys representing the states. However, the effect of section 73.59(b)(4) is to exclude private counsel from falling within the exemption. Section 73.59(b)(4) was intended to exempt individuals who are State employees because they “are considered trustworthy and reliable to receive SGI by virtue of their occupational status and have either already undergone a background or criminal history check as a condition of their employment, or are subject to direct oversight by government authorities in their day-to-day job functions.” 71 Fed. Reg. 33989, 33990. Private counsel representing the State of Nevada in the pre-license application proceeding will not qualify for the (b)(4) exemption because they are not considered to be State employees; nevertheless, they may qualify for the exemption in proposed section 73.59(k), which would exempt “[a]ny agent, contractor, or consultant of the [Governor] who has undergone equivalent criminal history and background checks to those required by [proposed] 10 CFR §§ 73.22(b) or 73.23(b).”

Question 3. PTCMO Definitions.

(c) The PTCMO defines originator as a “potential party that creates and asserts that a document qualifies” as exempt. PTCMO at 2 (emphasis added).

(1) (NRC) Under the definition of originator, is it the NRC's position that it is not the “creator” of SGI and, therefore, the NRC is not the originator of such information?

(2) (NRC) If not, explain when and how the NRC is the creator and originator of SGI.

NRC Staff Answer 3

“Originator” means a potential party that creates and asserts that a document qualifies, in whole or in part, as exempt from inclusion on the LSN in full text format because it contains sensitive unclassified information. PTCMO at 2.

(1) The NRC is the originator of SGI in some instances.

(2) For example, the NRC might originate SGI by writing safeguards inspection reports that contain details of an applicant's physical security system. 10 C.F.R. § 73.21(b)(3-4).

Question 4. Production of redacted documents by other federal agencies.

The PTCMO requires DOE, which definitionally includes the Naval Nuclear Propulsion Program, to produce redacted documents. PTCMO at 1, 9. It also requires “[a]ll other federal agencies originating sensitive unclassified information [SUI] subject to this [PTCMO]” to produce redacted versions of such documents. Id. at 9.

(a) (NRC, DOE and State) Under the PTCMO, is the NRC required to produce redacted versions of SGI documents?

(b) (NRC, DOE and State) What “other federal agencies” will be potential parties to the PAPO proceeding and “subject to” the PTCMO?

(c) (NRC, DOE and State) What entity, if any, produces the redacted version of a document on the LSN where the NRC possesses the document but the “other federal agenc[y],” which is the originator, is not “subject to” the PTCMO?

NRC Staff Answer 4

(a) Yes, when the NRC is the originator that withholds a document on the grounds that it includes SGI, the NRC shall make an electronic redacted version of the document available on the LSN, with an appropriate bibliographic header, to the extent the sensitive unclassified information can reasonably be segregated from the SGI. PTCMO at 8. The bibliographic header for the redacted document shall cross-reference the bibliographic header for the un-

redacted document. PTCMO at 8. The redacted version shall be a separate document on the LSN. PTCMO at 8.

(b) No other federal agencies are currently anticipated to be potential parties to the PAPO proceeding and subject to the PTCMO. However, during the application and review process, consultations with, or comments, from other federal agencies might produce SGI.

(c) If the NRC possesses the document, but the originator was another federal agency, and the NRC has concluded that the document is SGI, then the NRC will redact the document in consultation with the other federal agency.

Question 5. SUI Log

The PTCMO requires the originator of a document to produce a privilege log for certain contested SUI. PTCMO at 17. The proposed SUI log states, inter alia, that the originator should provide “[a] justification . . . that the information qualifies as [SUI].” PTCMO at App. F.

It appears that the proposed SUI privilege log in the PTCMO is fundamentally different from the privilege log formats contained in the July 8, 2005, Second Case Management Order. The privilege logs in our previous order are based upon the requirement in 10 C.F.R. § 2.336(b)(5) that logs contain “sufficient information for assessing the claim of privilege or protected status.” In turn, that regulatory requirement has its roots in Rule 26(b)(5) of the Federal Rules of Civil Procedure, requiring that a privilege log describe a withheld document in a manner that “will enable other parties to assess the applicability of the privilege or protection.”

(NRC, DOE and State) Explain why the proposed SUI privilege log should not have to present facts sufficient to establish a *prima facie* case that the document at issue is entitled to be withheld. Stated otherwise, should not the SUI privilege log require sufficient facts to establish each element of the particular protection claimed for the document?

NRC Staff Answer 5

The requirement to make a *prima facie* case in the SUI privilege log would reveal the underlying SGI. For example, an entry regarding an alarm problem, if listed with any detail, would reveal the weakness, contrary to 10 C.F.R. § 73.21(b)(3)(i) ("[Protected information includes] . . . evaluations, audits, or investigations that . . . disclose uncorrected defects, weaknesses, or vulnerabilities in the system."). As a consequence, it is more likely that a dispute regarding SGI would require *in camera* review of the disputed documents.

To answer the question fully, the elements for a *prima facie* case that a document is entitled to be withheld need to be reviewed. The NRC's rules on discovery have incorporated the exemptions from the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.* *Consumers Power Co.* (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 121 (1980). FOIA exemption 3 allows withholding matters exempted from disclosure by statute. 5 U.S.C. § 552(b)(3). SGI is exempt by Section 147 of the Atomic Energy Act of 1954, as amended, codified at 42 U.S.C. § 2167.

NRC FOIA case law provides the following guidance regarding when a document is entitled to be withheld as safeguards:

In order for information to be withheld under section 147, it must be determined (a) that the information is "safeguards information; " i. e., that it "specifically identifies a licensee's or applicant's detailed ... security measures (including security plans, procedures, and equipment) for the physical protection of special nuclear material ... (or) byproduct material ... in quantities determined by the Commission to be significant to the public health and safety or the common defense and security," and (b) that the unauthorized disclosure of the information could have the requisite effect; i. e., that its disclosure "could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of theft, diversion, or sabotage of such material" Section 147(a)(1), (2) and (3)(B).

Virginia Sunshine Alliance v. NRC, 509 F. Supp. 863, 864 (D.D.C. 1981), *aff'd*, 669 F.2d 788 (D.C. Cir. 1981).

In the context of the PAPO Board's question, *Virginia Sunshine* may be used to show what elements should be considered to establish a *prima facie* case that a document is SGI -- that it fits the definitions in Section 147. The Staff believes that providing sufficient facts to establish each element of the safeguards protection claim would lead to revealing safeguards information. Even if individual SUI log entries did not reveal SGI, the aggregate could.

An analogy may be found in civil procedure regarding a claim of privilege or work product protection. The Advisory Committee notes for the 1993 amendments to Rule 26(b)(5) of the Federal Rules of Civil Procedure noted that in rare circumstances, some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be disclosed. Fed. R. Civ. P. 26(b)(5) 1993 Advisory Committee Notes. The Staff asserts that this logic can also be applied to the SUI log and safeguards, and that safeguards is a "rare circumstance" where the information is not disclosed.

In summary, the Staff believes the SUI log described in the Appendix F to the PTCMO is sufficient. Stating facts sufficient to establish a *prima facie* case that SGI is, in fact, SGI in the log would reveal the underlying SGI.

Respectfully submitted,

/RA/

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Dated at Rockville, Maryland
this 16th day of May, 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of the NOTICE OF APPEARANCE in the above captioned proceeding, have been served on the following persons this 16th day of May 2007, by Electronic Information Exchange.

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