

UNITED STATES
NUCLEAR REGULATORY COMMISSION
OFFICE OF THE GENERAL COUNSEL
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**RESPONSE TO PUBLIC COMMENTS ON PROPOSED PROCEDURES TO ALLOW
POTENTIAL INTERVENORS TO GAIN ACCESS TO RELEVANT RECORDS THAT CONTAIN
SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION OR SAFEGUARDS
INFORMATION**

On August 6, 2007, the U.S. Nuclear Regulatory Commission (NRC or Commission) announced the availability for public comment of proposed procedures concerning access to sensitive information in NRC adjudications (72 FR 43569; August 6, 2007). These procedures would enable potential parties (such as potential intervenors) to gain access to relevant records that contain Sensitive Unclassified Non-Safeguards Information (SUNSI) or Safeguards Information (SGI). In response to public comments, the Commission has modified the procedures and posted the finalized version on the NRC website (ADAMS Accession No. ML072900678). The following describes the comments received, the Commission's response to those comments, and the associated changes made to the procedures.

Background Information

Commission regulations in 10 CFR Part 2, “Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders” govern the conduct of NRC adjudicatory proceedings. Potential parties who may request a hearing or petition to intervene in a hearing under 10 CFR Part 2 may deem it necessary to obtain access to SUNSI (including, but not limited to, proprietary, confidential commercial, or security-related information) or SGI (as defined in 10 CFR 73.2) to meet Commission requirements for hearing requests or for intervention. The procedures developed by the Commission will be applicable to persons who have requested or who may request to participate in NRC adjudications conducted under 10 CFR Part 2, Subparts G, K, or L, and who, in connection with a particular proceeding, seek to gain access to such information.

Discussion of Comments and Responses

The Commission received two comment letters on the access procedures, one from a law firm that represents utilities and the other from an industry group. The comments were directed at four general topics: the legal status of the procedures; the appropriate scope of potential parties’ access to SGI; what potential parties must demonstrate to receive access to SUNSI and/or SGI; and the participation of applicants/licensees in the granting of, and challenges to, access determinations.

Although the Commission agreed with the concerns underlying several of the comments, it determined that changes to the procedures generally were not necessary to address those concerns. However, in light of changes being made to the Commission’s regulations

concerning when applicants and licensees may appeal access determinations to the Commission (10 CFR 2.311), the Commission has modified the procedures to clarify when parties other than the party requesting sensitive information may challenge grants of access, and to provide that Commission orders be used to confirm the use of the procedures in proceedings.

Legal Status of the Procedures

Both comment letters questioned the legal status and enforceability of the procedures and recommended that they be implemented through rulemaking, such as by adding an appendix to 10 CFR Part 2.

NRC Response:

As stated in the background information that accompanied the procedures for comment, the procedures would be included in a *Federal Register* notice of hearing or a notice of opportunity for hearing. Moreover, these procedures would not be employed automatically in all proceedings, but only to those the Commission deems appropriate. Although it is anticipated they will be appropriate for most proceedings involving SUNSI or SGI, the procedures already specifically exclude their application to license transfer adjudications or to the pending High Level Waste (HLW) Pre-License Application Presiding Officer proceeding (PAPO), or any subsequent adjudication regarding the Department of Energy's expected application for a construction authorization for a HLW repository. Likewise, if the Commission determines that these access procedures are unsuited for the particular circumstances of a prospective adjudication, the Commission may modify these procedures in (or omit them from) the hearing notice.

Although the Commission considers its previously proposed approach to be legally sound, the Commission has decided to modify the procedures to provide that their use in each proceeding be prescribed by Commission order as part of the associated *Federal Register* notice. The use of orders will serve to emphasize and make clear that the presiding officer or administrative judge or officer assigned, the parties and the potential parties will be legally bound by the procedures. Relatedly, the Commission is making a minor amendment to 10 CFR Part 2, the agency's rules of practice, to more directly deal with this approach. This amendment, a new paragraph in 10 CFR 2.307, delegates to the Office of the Secretary of the Commission the authority to issue orders with respect to procedures for access to sensitive information in agency proceedings.

Scope of Potential Parties' Access to SGI

One comment letter stated that potential intervenors should not have access to all security-related information in order to draft contentions and recommended that the Commission provide guidance to limit the extent of requests for SGI. The commenter suggested that access to a limited set of information – for example, only certain elements of a facility Security Plan – would be sufficient for a potential intervenor to describe alleged deficiencies for a contention. The commenter further stated that appropriate redactions would be necessary to protect sensitive and generic information in security plans.

NRC Response:

The Commission agrees with the comment that not all security-related information is appropriate for release to potential parties for preparing contentions; that access should be denied if the

information is not necessary for the potential party to describe alleged deficiencies corresponding to specific Commission security requirements; and that appropriate pre-release redactions would be necessary to protect sensitive and generic issues in documents such as Security Plans.

However, the procedures already emphasize that a “need to know” is a prerequisite for access to SGI, and that this means that the information must be “indispensable,” not merely of interest or of potential value. Need to know in the context of these procedures certainly must not be understood as authorizing unrestricted disclosure or less scrutiny than ordinarily would be applied in connection with an already-admitted contention. As discussed in the background to the procedures, this understanding comports with Part 73 and with past Commission proceedings. The NRC staff (or Boards reviewing NRC staff determinations) must accordingly preserve that view of what SGI can be disclosed for the limited purpose of contention preparation. Because this analysis is highly fact-specific, the Commission does not consider it useful at this time to include detailed guidance as part of the procedures. The NRC staff’s experience with need to know analysis, the availability of presiding officer review informed by Commission precedent, and the availability of expedited Commission review under revised 10 CFR 2.311 will further ensure adequate protection of SGI. The Commission has, however, added footnotes to the procedures reiterating that broad SGI requests are insufficient and that NRC staff redaction of information from requested documents before their release may be appropriate to comport with the need to know requirement.

Criteria for Access to SUNSI and/or SGI

Both commenters stated that for proper protection of SUNSI and SGI, additional criteria should be met before potential parties receive SUNSI or SGI. One commenter recommended that potential parties be required to demonstrate knowledge of the requirements for protecting SUNSI and SGI. Another commenter recommended stringent conditions for potential parties' access to SGI, including that review of the information be conducted at an NRC facility under active monitoring and that access to SGI also be subject to a "balancing test" that would weigh the risk of disclosure against the potential that disclosure could enhance the common defense and security. The same commenter recommended that the optional "pre-clearance" process described in the procedures – allowing potential parties seeking access to SGI to request initiation of the necessary background check up to 180 days in advance of an application – be made mandatory in order to reduce delays in adjudication.

NRC Response:

The Commission agrees with the comments that potential parties must be knowledgeable of the requirements for protecting SUNSI and SGI before access can be granted. However, the requirements of 10 CFR Part 73 (as well as inspections conducted by the NRC staff of a recipient's physical/electronic SGI storage capabilities) apply to any person producing, receiving, or acquiring SGI, and release of SUNSI or SGI will be subject to a protective order signed by the recipient. These restrictions will ensure that potential parties are aware of and will abide by their obligation to protect the information from unauthorized disclosure. In light of these factors, the Commission does not agree with the comment that a potential party's review of SGI must be conducted at a secure NRC facility and under active monitoring. Such a test is not part of the regulatory framework for the protection of SGI against unauthorized disclosure. However, the Commission has noted in the final procedures that recipients may opt to view SGI

at the NRC's facility rather than establish their own SGI protection program to meet SGI protection requirements.

Similarly, the Commission does not agree that the procedures should employ a "balancing test" for access to SGI. As explained above, the need to know requirement already serves to restrict disclosure of SGI to circumstances when the information is indispensable to a potential party's participation in the proceeding. Because this showing must be combined with the likelihood of establishing standing and a demonstration of technical competence, no further demonstration that the requestor has made "a positive contribution to the enhancement of the common defense and security" is necessary for protecting SGI or would be consistent with allowing public participation in NRC proceedings.

Finally, the Commission disagrees with the comment that the SGI "pre-clearance" process described in the procedures should be made mandatory. The objective of the pre-clearance process is to minimize unnecessary delays in preparing (and, if appropriate, adjudicating) security-related contentions. Resolution of such contentions will be more efficient and effective for all participants if potential parties who anticipate raising contentions on security issues likely to involve access to SGI do seek pre-clearance. Also, the Commission anticipates that genuinely interested potential parties will find it advantageous to do so. However, because of the possibility that the pre-clearance will not ultimately be useful to the potential party – for example, if no application is ultimately submitted and docketed – it is not appropriate to require potential parties to seek it or face the risk of later being summarily denied access.

Nevertheless, as stated in the procedures, potential parties should not expect additional

flexibility in contention admissibility timelines if they decide not to exercise the pre-clearance option.

Participation of Applicants/Licensees

A commenter stated that the relevant applicant or licensee should have an opportunity to have input concerning the propriety of providing SUNSI or SGI to the requesting party. The commenter also stated that, as in the proposed interlocutory review rule to amend 10 CFR 2.311, applicants and licensees (as well as the NRC staff) should have an opportunity to participate in challenges to access determinations.

NRC Response:

The Commission agrees in part with the comment that the relevant applicant or licensee should have an opportunity to have input concerning the propriety of providing SUNSI or SGI to the requesting party. However, sufficient opportunity will be provided as part of the process to challenge certain SUNSI access determinations before a presiding officer (or subsequently to the Commission per 10 CFR 2.311, which governs interlocutory review in NRC proceedings). As explained below, no further role for applicants or licensees in the SUNSI or SGI determination is appropriate.

The procedures do not address information possessed solely by a licensee or applicant, and thus, the initial access determinations at issue for both SUNSI and SGI are made by the NRC staff. Particularly given the short timeframes for making these determinations, soliciting applicant/licensee comment on most initial determinations is not likely to be efficient or practicable. Moreover, especially in the case of SGI, the NRC has a robust regulatory obligation

and interest to ensure that access to the information is provided only to those authorized to receive it. However, for SUNSI whose disclosure could independently harm a party's interest, the Commission agrees that allowing input from that party is warranted.

Consistent with the Commission analysis of the final § 2.311 rule, the Commission has revised the access procedures to clarify that an applicant/licensee may challenge favorable access determinations, but only with respect to SUNSI whose release would harm a party's interest independent of the proceeding (such as proprietary information). The interests of applicants/licensees in sound access determinations will be protected by the opportunity to challenge these rulings by the NRC staff before the presiding officer or other officer designated to rule on information access issues. The changes to the procedures include notification of the applicant/licensee when such an access determination has been made, as well as inclusion of associated deadlines for disputing access. The Commission has also referenced the provisions of 10 CFR 2.311 in the procedures, which would allow the NRC staff and requester (for both SUNSI and SGI) and other affected parties (for certain SUNSI) to appeal access determinations to the Commission.

Changes to the Procedures

As discussed above, the Commission revised the procedures in response to public comments and made conforming updates to the background information that accompanies the procedures. The Commission added a footnote to the procedures to reiterate that broad SGI requests are insufficient and that redaction of information from requested documents may be appropriate to comport with the need to know requirement. The Commission also clarified when an applicant/licensee may raise challenges to NRC staff grants of access to SUNSI, including when those other affected parties are notified of a determination concerning SUNSI whose release would harm their interest independent of the proceeding. The Commission updated the general target schedule to include deadlines for such notifications and challenges. Finally, the NRC staff provided that Commission orders be issued, as part of the Federal Register notice of hearing or a notice of opportunity for hearing, to emphasize and make clear that the procedures are binding in each proceeding. This change would also involve a minor change to 10 CFR Part 2, delegating authority to the Office of the Secretary of the Commission to issue such orders with respect to procedures for access to sensitive information in agency proceedings.

The Commission also made changes on its own initiative. The Commission referenced the 10 CFR 2.311 process by which the NRC staff and other parties may appeal access determinations to the Commission. The Commission also added footnotes referencing the recently finalized E-Filing Rule to remind requesters that although the initial requests submitted to the NRC staff under the procedures are not filings covered by the rule, subsequent appeals to the Board or the Commission would be subject to E-Filing requirements. The Commission corrected outdated references to the applicable forms and fees. The appropriate fingerprint card is Form FD-248; also, because Form SF-85 must now be filled out electronically, the Commission has

specified in the procedures how requesters can access the online form by providing information to the Office of Administration. With respect to fees, because the cost of the background check is likely to change periodically, the Commission added footnotes indicating that it will state the applicable amount when the procedures are noticed in a given Federal Register notice, and providing a contact point in the Office of Administration for potential parties seeking “pre-clearance” background checks to confirm the current amount. Also, the Commission clarified that recipients of SGI may choose to view SGI at the NRC’s facility rather than establish their own SGI protection programs; in some cases, this option could save the time and resources of conducting inspections of the requester’s facility.

The Commission also made several minor grammatical and procedural corrections, such as clarifying that an SGI request letter need not include additional copies of background check forms/fees, emphasizing that certain criteria (like the “trustworthy and reliable” finding) are only needed for SGI, not SUNSI, and reiterating that the procedures will be included in a hearing notice only when the circumstances of the particular proceeding make it appropriate.

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