UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons

In the Matter of	)	
	)	
DARYL M. SHAPIRO	)	NRC Investigation No. 2-2006-17
	)	
	)	

CLI-08-06

MEMORANDUM AND ORDER

I. INTRODUCTION

This Matter is before the Commission on a Motion to Quash a subpoena issued by the NRC's Office of Investigations ("OI"). For the reasons stated below, we deny the Motion to Quash.

II. BACKGROUND

Nuclear Fuel Services, Inc. ("NFS") holds an NRC license issued pursuant to 10 C.F.R. Part 70, under which it operates a fuel fabrication facility located in Erwin, Tennessee. During March 2006, the NRC received an allegation that an NFS executive may have violated provisions of the NRC's Fitness-for-Duty regulations found in 10 C.F.R. Part 26. On March 31, 2006, under the referral provisions of the NRC's Allegation Management Program, the NRC referred the allegation to NFS and requested NFS to conduct an internal review of the events in question and report the results of that investigation to the NRC.

NFS hired Mr. Daryl Shapiro, an outside counsel, to conduct the investigation and prepare a report responding to the NRC's request. In an undated letter, Mr. Dwight Ferguson,

NFS' Chief Executive Officer, responded to the NRC's request, attaching a report prepared for NFS by Mr. Shapiro. The report summarized information collected during the investigation.

Subsequently, OI opened an investigation into whether NFS or the executive in question deliberately violated any NRC regulations. In the process, OI investigators interviewed numerous NFS employees under oath. Certain NFS employees made sworn statements that contradict some of the statements in the Shapiro Report. The contradictions are re-enforced by documents produced by NFS. The contradictions between the Shapiro Report and credible sworn testimony of NFS employees and documents produced by NFS suggest a violation of NRC regulations. S*ee*, *e.g.*, 10 C.F.R. §§ 70.9 and 70.10. Moreover, violations of these regulations may be referred to the Department of Justice as possible criminal violations of federal statutes. *See*, *e.g.*, 18 U.S.C. § 1001; 42 U.S.C. § 2273. Accordingly, OI subpoenaed Mr. Shapiro in an attempt to resolve those contradictions.

On January 7, 2008, Mr. Shapiro and NFS moved to quash the subpoena. 10 C.F.R. § 2.702(f). Mr. Shapiro and NFS argue that Mr. Shapiro's testimony would violate the attorney-client privilege. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Georgia Power Company* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181 (1995). In addition, Mr. Shapiro and NFS claim that Mr. Shapiro's notes and materials prepared in the course of the investigation are covered by the attorney work-product privilege. Finally, in lieu of complying with the subpoena, Mr. Shapiro offers to "receive written questions to the extent that the questions call for responses based upon non-privileged information." Motion at 10. For the reasons that follow, we deny the Motion to Quash, we decline to accept Mr. Shapiro's alternative offer, and we direct OI to establish a date for a formal interview with Mr. Shapiro.

III. SUMMARY

In *Upjohn*, the Supreme Court held that during an internal company investigation, all communications with company lawyers who were hired to provide advice to the company were privileged. 449 U.S. at 386. The Commission has applied *Upjohn* in rejecting a subpoena

issued in a proceeding before a panel of the Atomic Safety and Licensing Board. *Georgia Power Co.*, *supra*. Although the instant subpoena seeks to discover the source of potentially false statements in the Shapiro Report, any questioning of Mr. Shapiro would be directed at the communications between him and NFS employees that took place during his internal investigation. *Upjohn* holds that the communications between company employees and an attorney conducting an internal investigation presumptively fall within the attorney-client privilege. Thus, to overcome the privilege we must find that NFS has waived the privilege, either expressly or impliedly. As discussed more fully below, while NFS has not expressly waived the privilege, it has impliedly done so by voluntarily submitting the Shapiro Report to the NRC in response to the referral of the allegation for internal investigation.

IV. ANALYSIS

A. NFS Has Waived the Attorney-Client Privilege

The attorney-client privilege belongs to the client, not to the lawyer. Thus, the client may waive the privilege, either by an express waiver (*i.e.*, in this case by an appropriate company official saying "we hereby waive the privilege") or by an implied waiver (*i.e.*, in this case by the company taking some action inconsistent with maintaining the privilege). So far, no NFS official has expressly waived the privilege. But we find that NFS' submission of the Shapiro Report to the NRC in response to the NRC letter of March 31, 2006 constitutes an implied waiver of the privilege. Two different lines of cases support our conclusion.

The first line of cases addresses whether the attorney-client and attorney work-product privileges have been waived when regulated companies disclose investigative materials to government agencies. The courts deciding these cases have assumed, without discussion, that the privileges were waived with respect to the particular agency to which the investigative materials were disclosed. This situation has frequently arisen in the context of the "voluntary disclosure" program of the Securities and Exchange Commission ("SEC"). Under the voluntary disclosure program, the SEC allows the corporation under investigation to "investigate and

reform itself, thus saving the government the considerable expense of a full-scale investigation and prosecution." *In re Sealed Case*, 676 F.2d 793, 800 (D.C. Cir. 1982).

The cases that discuss attorney-client and attorney work-product privileges in the context of this voluntary disclosure program have generally limited their discussion to whether the privilege covering the voluntarily disclosed information has also been waived with respect to private parties in civil litigation over the same subject matter. In these cases, the Courts accept that the privilege holder has waived its privilege as to the agency that received the investigative materials. *See, e.g., Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1418 (3d Cir. 1991); *In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984); *In re Sealed Case*, 676 F.2d 793.[1]

The referral process under the NRC's Allegation Management Program is very similar to the SEC's "voluntary disclosure" program. In both programs, the government agency refers a matter to the regulated entity to allow the entity to perform an internal investigation and report the results of the investigation – and the regulated entity's corrective actions – back to the regulator. The regulated entity (in this case, NFS) was not required to participate in the program. Instead, NFS' participation in the Allegation Management Program was voluntarily.

Moreover, submission of the Shapiro Report itself was voluntary. NFS was not compelled to submit the Shapiro Report itself to the NRC. Instead, NRC's Region II "request[ed]" NFS to investigate the allegation and report the results of its investigation to the agency. In some cases, licensees report "the results" of the investigation to the NRC without submitting the report itself. The NRC Staff then decides whether to seek

[1] Though not at issue here, the majority view is that voluntary disclosure of internal investigative materials to a government agency waives the attorney-client and work-product privileges not only with respect to the particular agency, but also as to third parties. *Compare Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) *with In re Sealed C*ase, 676 F.2d at 825.

the report or proceed on the basis of the licensee's response. Here, though, NFS chose to submit the actual report.

If NFS had not fulfilled the NRC's request for information, the NRC clearly had the statutory authority to conduct its own investigation into the allegations. But the NRC's authority to act does not compromise the voluntary nature of the disclosure of the Shapiro Report. After all, if an SEC-regulated corporation refuses to participate in the voluntary disclosure program, the SEC (like the NRC) still possesses regulatory authority to conduct its own investigation. The key point is that, with respect to both agencies' programs, the disclosure of the investigative materials to the regulator in both cases is voluntary rather than compelled. *See In re Subpoenas Duces Tecum*, 738 F.2d at 1373 ("The distinction between voluntary disclosure and disclosure by subpoena is that the latter, being involuntary, lacks the self-interest which motivates the former. As such, there may be less reason to find waiver in circumstances of involuntary disclosure."). Submitting information to a government agency is voluntary even if the company submitting the information feels pressure to do so as a result of its dealings with the federal government. *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997).[2]

One possible difference between the SEC and NRC programs is that the SEC program explicitly offers leniency for past misconduct in exchange for cooperation. *In re Sealed Case*, 676 F.2d at 801. But while the NRC does not explicitly offer leniency in referrals under its Allegation Management Program, the NRC's Enforcement Policy specifically states that, among other factors, the NRC considers whether a licensee had self-identified the violation and taken appropriate corrective action when determining

[2] *See also Teachers Ins. and Annuity Ass'n of Am. v. Shamrock Broad. Co., Inc.*, 521 F. Supp. 638, 642 (S.D.N.Y. 1981) ("[T]here is no basis for concluding that Teachers' disclosure to the SEC was involuntary or compelled. While Teachers made the disclosure pursuant to an agency subpoena, Teachers could have objected to the subpoena on the grounds of privilege…. Instead, Teachers chose to produce the material requested without objection.").

whether to assess a civil penalty for violation of NRC regulations, and determining the amount of any penalty. *See* NRC Enforcement Policy at 22-26, available at http://www.nrc.gov/about-nrc/regulatory/enforcement/enforce-pol.pdf. Thus, cases applying the SEC's "voluntary disclosure" program appear applicable to the NRC's Allegation Management Program.

The second line of cases that supports implied waiver involves cases where the holder of the privilege placed the report "in issue." Courts have held that if the company claims that the internal investigation establishes it has met its obligation, for example, the requirement to investigate a sexual discrimination charge, then the company has waived the attorney-client privilege associated with the internal investigation. *E.g.*, *McKenna v. Nestle Purina PetCare Co.*, 2007 U.S. Dist. LEXIS 8876 (S.D. Ohio 2007); *McGrath v. Nassau Health Care Corp.*, 204 F.R.D. 240, 247-48 (E.D.N.Y 2001); *Brownell v. Roadway Package Sys., Inc.*, 185 F.R.D. 19, 25 (N.D.N.Y. 1999); *Worthington v. Endee*, 177 F.R.D. 113, 118 (N.D.N.Y. 1998); *Harding v. Dana Transp.*, 914 F. Supp. 1084, 1096 (D.N.J. 1996). In effect, the company places the contents of the report in issue by claiming that the investigation is sufficient or that it meets regulatory requirements. The company cannot then use the attorney-client privilege to withhold details of the investigation. Put another way, the company cannot use the privilege as both a shield and a sword.

In *Brownell*, for example, the defendant company claimed that it had investigated claims of sexual harassment and that its own internal investigation showed that the company acted reasonably in response to the allegations. 185 F.R.D. at 21. However, the company also claimed that the statements made in the course of the investigation were protected by both the attorney-client privilege and the attorney work-product privilege and were not subject to discovery. *Id*. The Court rejected that argument, stating that if the defendant invoked the investigation as an "affirmative defense," it could not withhold the statements on which the investigation was based. 185 F.R.D. at 25 (citations omitted).

Here, the purpose of a referral under the Allegation Management Program is essentially the same as the investigations described in the sexual discrimination cases cited above: the NRC refers the allegation to the licensee so that the licensee may conduct its own internal investigation into the matter and report the results back to the NRC. After reviewing the report submitted by the licensee, the NRC may decide either to (1) perform follow-up inspections or reviews, (2) ask the licensee for additional information to answer questions that have arisen, (3) dispatch OI to perform an investigation, or (4) accept the report as credible and the self-imposed corrective action as sufficient and take no additional action. Thus, the accuracy and veracity of the report itself is placed in issue when it is submitted by an NRC licensee in response to a referral under this Program. If the NRC finds a false statement or other deficiency, the NRC is entitled to look behind the report in an effort to ensure that the agency has accurate information. Thus, an NRC licensee waives the attorney-client privilege regarding information in the report when, as here, it submits the investigative report in response to a referral under the agency's Allegation Management Program.

In this case, NFS submitted the Shapiro Report in an effort to convince the NRC that it had appropriately addressed the referred allegation. In fact, Mr. Shapiro himself telephoned two different NRC officials to question the need for an OI investigation because he believed that his investigation and report had addressed and resolved the referred allegation. Thus, NFS clearly put the contents of the Shapiro Report in issue when it submitted that document in response to the referral under the Allegation Management Program.

B. The Work-Product Privilege Is Inapplicable

Mr. Shapiro and NFS argue that the attorney work-product privilege, which covers attorney-prepared documents in anticipation of litigation, also shields Mr. Shapiro from providing documents to OI. "The privilege protects both 'fact' work product, which consists of documents prepared by an attorney that do not contain the attorney's mental impressions, and opinion work product, which does contain an attorney's mental impressions." Motion at 7, citing *In re Grand*

Jury Proceedings #5 Empanelled January 28, 2004 v. Under Seal, Defendant, 401 F.3d 247, 250 (4th Cir. 2005).

But the NRC is not seeking Mr. Shapiro's notes or other papers with his mental impressions; instead it is seeking his testimony about the discrepancies between the report he prepared and the testimony of NFS employees. Therefore, we need not consider the work-product issue. In any event, nothing in the record before us indicates that the Shapiro Report was prepared in anticipation of litigation. The work-product privilege covers only "documents and tangible things that are prepared *in anticipation of litigation or for trial* by or for another party or its representative (including another party's attorney….)." Fed. R. Civ. P. 26(b)(3) (emphasis added).

C. Mr. Shapiro's Offer is Unacceptable

We decline Mr. Shapiro's offer to "receive written questions." That offer provides no assurance that the Commission will receive the information necessary to determine the source of the contradictions between the Shapiro Report and both the testimony of NFS officials and NFS documents. By the offer's own terms, Mr. Shapiro has made no commitment to discuss matters he considers privileged. Given the Commission's need to determine who has submitted false or inaccurate information to the agency in this case, we must insist on direct testimony by Mr. Shapiro, who is the only person capable of explaining the statements appearing in his report.

V. CONCLUSION

For the foregoing reasons, we deny the Motion to Quash. We direct OI to negotiate a suitable date for Mr. Shapiro's interview so that Mr. Shapiro's testimony is taken within two weeks from the date of this Order.

IT IS SO ORDERED.

For the Commission

/RA/

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Andrew L. Bates
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 27th day of March 2008.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-08-06) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 27th day of March 2008