



OFFICE OF THE
GENERAL COUNSEL

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

September 30, 2009

Charles J. Janus, Esq.
6504 Old Branch Avenue, #206
Temple Hills, Maryland 20748

RE: *Martin v. McBride*, No. CAP-09-00919, Prince George's Co. (Md.) Circuit Court.
NRC File No. TR-09-05

Dear Counselor:

You recently served a subpoena *duces tecum* on Mr. John Walker, an NRC employee, demanding that he deliver official NRC files to you for use in the above-captioned proceeding. Your record constitutes a "demand for information" as defined in the NRC's regulations at 10 C.F.R. § 9.200 et seq. Pursuant to 10 C.F.R. § 9.201, your request has been referred to the Office of the General Counsel for a response. This Office has assigned the processing number "TR-09-05" to your request; please refer to that number in any future correspondence on this matter.

Your subpoena seeks the "official travel records" of a named NRC employee for a specified period of time. Initially, NRC regulations require that a subpoena or other "demand for information" be supported by a "statement or affidavit" by the requesting attorney explaining (1) what information is sought by the request; (2) what issues are involved in the litigation; (3) how the information sought is relevant to the issues in litigation; and (4) why the information is not available from another source. See 10 C.F.R. 9.202. If the requesting party does not comply with the agency's regulations governing these requests, the agency may deny the request. *United States ex rel Touhy v. Ragen*, 340 U.S. 462 (1951); *Boron Oil Company v. Downie*, 873 F.2d 67 (4th Cir. 1989).

In this case, you have not submitted an affidavit with the subpoena that you served on the NRC. Please submit your affidavit to:

Stephen G. Burns, General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, Maryland 20852
ATTENTION: Charles E. Mullins, Senior Attorney

In the interests of timely action, you may fax your request to me at 301-415-3200 or email it to me at charles.mullins@nrc.gov on the internet.

In addition, an NRC employee's official travel records fall under the protection of the Privacy Act, 5 U.S.C. § 552a ("the Act"). Accordingly, even assuming that your affidavit satisfies the NRC's regulations at 10 C.F.R. § 9.200, et seq., the NRC still cannot release the requested records unless you either provide a release signed by the individual (in this case, the NRC employee), demonstrate that you meet another provision of the Act that authorizes the release of the records, or demonstrate that the records do not fall within the Act.

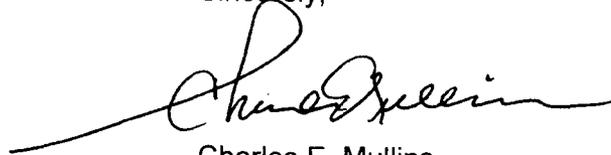
The Act allows the NRC to release the records "pursuant to the order of a court of competent jurisdiction." 5 U.S.C. § 552a(b)(11). See also 10 C.F.R. § 9.80. As a general proposition, the Privacy Act "cannot be used to block the normal course of judicial proceedings, including court-ordered discovery." *Clavir v. United States*, 84 F.R.D. 612, 614 (D.D.C. 1979). But it is also clear that a subpoena issued by a court clerk is not a "court order" within the meaning of the Privacy Act. *Doe v. DiGenova*, 779 F.2d 74-77-85 (D.C. Cir. 1985), *on remand*, 642 F.Supp. 624 (D.D.C. 1986), *aff'd in part and reversed in part* 851 F.2d 1457 (D.C. Cir. 1988).

For purposes of Privacy Act compliance, the NRC considers itself legally bound only by a court order from the U.S. District Court for the District of Maryland (or other Federal district court with appropriate jurisdiction); it is not bound by a state court order under the principles of sovereign immunity. Nevertheless the General Counsel will give serious consideration to an order from the state court judge in your action stating that the records are relevant, competent, and material to the case and requesting that the agency release the records. In the alternative, you may submit a release signed by the NRC employee.

At present, you have submitted only a subpoena, not a court order. In addition, you have not submitted the affidavit required by the applicable NRC regulations. Accordingly, the General Counsel has denied your request at this time for failure to comply with the agency's regulations. If you submit an affidavit and a court order as described above, the General Counsel will reconsider this decision.

Please feel free to call me at 301-415-1618 or email me if you have any questions on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles E. Mullins", written over a horizontal line.

Charles E. Mullins
Senior Attorney
Office of the General Counsel