



OFFICE OF THE
GENERAL COUNSEL

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

December 8, 2010.

Gwendolen C. Lesh McLeod, Esq.
Haspel & McLeod, P.C.
77 South Washington Street, Suite 200
Rockville, Maryland 20850

RE: *Sampson v. Mott*, Case No. 88191 FL, Montgomery Co. (Md.) Circuit Court;
NRC File No. TR-10-04.

Counselor;

This Office has discovered a second subpoena *duces tecum*, dated November 5, 2010, which you caused to be served on the NRC seeking documents in connection with the above-captioned litigation. This second subpoena, like the subpoena dated November 30, 2010, which is designated TR-10-03 and addressed in our letter of December 6, 2010, is a "demand for information" within the meaning of 10 C.F.R. § 9.200 *et seq.* of the Commission's regulations and has been forwarded to the Office of the General Counsel in accordance with 10 C.F.R. § 9.201. This Office has assigned the processing number "TR-10-04" to this additional request; please refer to that number in future communications regarding this matter.

As with the subpoena in TR-10-03, this second subpoena seeks NRC records related to a named NRC employee. And as we noted in our initial letter, the subpoena is not supported by an affidavit explaining why you are requesting this information. See 10 C.F.R. § 9.202. This regulation requires 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. Upon your request, the NRC will treat the affidavit as "confidential" within the scope of Exemption 4 of the Freedom of Information Act.

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); *Moore v. Armour Pharmaceutical Co.*, 927 F.2d 1194, 1197 (11th Cir. 1991) (citing cases). See, e.g., *Boron Oil Company v. Downie*, 873 F.2d 67 (4th Cir. 1989); *Davis Enterprises v. U.S. EPA*, 877 F.2d 1118 (3d Cir. 1989), *cert. denied*, 473 U.S. 1070 (1990). Thus, unless you submit an appropriate affidavit within a reasonable time, your request will be denied.

Please prepare an affidavit addressing the criteria described above and submit it 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 an advance copy of your affidavit to me at 301-415-3200 or email it to me at charles.mullins@nrc.gov on the internet.

In addition, this subpoena – like the subpoena under review in TR-10-03 – seeks material from the employee's personnel file and subject to the requirements of the Privacy Act, 5 U.S.C. § 552a. Accordingly, even if you satisfy affidavit requirement, 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, as with the subpoena at issue in TR-10-03, 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, this Office will hold your request in abeyance pending your response. Please feel free to call me at 301-415-1618 with any questions regarding this matter.

Finally, we apologize for our delay in responding to this earlier-dated subpoena. The subpoena was misplaced and not forwarded promptly to the appropriate Division of the Office of the General Counsel.

Sincerely,



Charles E. Mullins
Senior Attorney
Office of the General Counsel