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Honorable Gregory B. Jaczko
Chair, Nuclear Regulatory Commission
U.S. Nuclear Regulatory Commission
Mail Stop O-16G4
Washington, DC 20555-0001

Dear Mr. Chairman:

I am writing to ask for your help in resolving an issue we are having with Mr. Gaudreau of the Nuclear Regulatory Commission (NRC) Office of Federal & State Materials and Environmental Management Programs, Division of Materials Safety and State Agreements, Source Management and Protection Branch. I am the Radiation Safety Officer for the non-profit Fred Hutchinson Cancer Research Center (FHCRC) in Seattle Washington. Our facility has several units that contain Materials of Concern (manufacturers JL Shepherd/MDS Nordion) and are vital to our mission of finding a cure for cancer.

Implementing the Increase Controls (IC) Order (EA 05-090) and the Fingerprinting requirement (EA-07-305) meant that we had to complete the Trustworthy and Reliable determination for more than 350 current workers and we expect 60 new workers annually. Taking into account the large number of users and our management's decision to avoid the ink fingerprint process, we opted for a security consultant who would use an electronic fingerprint device, and submit the prints and required files electronically.

The process of using our security consultant was satisfactory to all parties from 2007 until earlier this year when the staff of the Source Management and Protection Branch made the determination that we could no longer use a consultant to take and submit the fingerprints electronically. In Addition, the NRC staff stated that the consultant could no longer retrieve the completed Criminal History reports from the NRC. Our consultant works for a security firm, which also provides continuous security for our facility. Therefore our security consultant is a known and trusted party to whom we are sharing the criminal history reports and is not an unknown entity to our facility or its mission. This consultant has been specifically authorized to act on our (the licensee) behalf and coordinate with the NRC for all IC related fingerprint issues.

I questioned the NRC staff for the basis of their decision. A 1997 document from the FBI was presented as that basis. This document was interpreted by the NRC staff as legal basis for not allowing third parties to receive Criminal History reports.

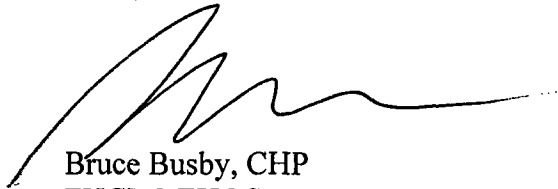
I have reviewed in depth the FBI regulations and the FBI's own procedures for handling the Criminal History reports; I found no regulatory or legal requirement as described by the NRC staff. I shared my findings again with the NRC staff, which again focused on the 1997 document as their proof and have again refused to consider our situation. I believe the criminal history reports can be handled by a security consultant for official business reasons.

Therefore, to settle this issue, I would like to ask the NRC General Council to review the requirements for whom, on behalf of the licensee, can take and submit the fingerprints in accordance with the Fingerprinting requirement (EA-07-305) and who can retrieve the Criminal History Reports from the NRC in accordance with the FBI requirements.

I would be happy to send all correspondence I have had with the NRC about this issue. I am enclosing the 1997 document aforementioned that was provided by the NRC staff.

Thank you for your time.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bruce Busby', with a long horizontal flourish extending to the right.

Bruce Busby, CHP
FHCRC EH&S
BioSafety and Radiation Safety Officer
P.O. Box 19024
J3-200 1100 Fairview Ave N
Seattle, WA 98109

Copy to: Brody

U.S. Department of Justice



Federal Bureau of Investigation

Criminal Justice Information
Services Division
Clarksburg, West Virginia 26306

October 24, 1997

Mr. Edward L. Halman
Director
Office of Administration
United States Nuclear Regulatory Commission
Washington, D. C. 20555-0001

Dear Mr. Halman:

Reference is made to your letter dated July 28, 1997, with enclosures, concerning the present practices utilized by the Nuclear Regulatory Commission (NRC) and their licensees, in handling criminal history record information (CHRI) obtained from the FBI.

The statutory authority governing the collection and release of FBI CHRI is Title 28, United States Code (U.S.C.), Section 534. In relevant part, that Section provides that:

(a) The Attorney General shall--

(1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records; . . .

(4) exchange such records and information with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.

(b) The exchange of records and information authorized by subsection (a) (4) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies.

L-4-1 FBI

QF03 Per: Jessie
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Release
page attached

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PDR



Mr. Edward L. Halman

The authority granted to the Attorney General under Section 534 has been delegated to the Director of the FBI. Access to FBI CHRI is further regulated by Title 28, Code of Federal Regulations (CFR), Section 20.33(a)(2) which allow dissemination of criminal history record information "to Federal agencies authorized to receive it pursuant to Federal statute or Executive order."

In litigation involving FBI CHRI, the courts have ruled that Section 534 is restrictive as regards disclosure to private entities. This interpretation was most recently reaffirmed in the United States Supreme Court case, United States Department of Justice et al. v. The Reporters Committee for Freedom of the Press et al., 109 S.Ct. 1468 (1989). The Court held that rap sheet information implicates significant personal privacy interests. In recognizing such privacy interests, the court referred to the web of federal statutory and regulatory provisions (see, 28 U.S.C. 534, 28 CFR 20.30 - 20.38, and 50.12), that limit the disclosure of rap sheet information, and referenced the fact that as a matter of executive policy the Department of Justice (DOJ) has generally treated rap sheets as confidential and, with certain exceptions, has restricted their use to governmental purposes. The Court further emphasized the fact that Congress has authorized a careful and limited pattern of rap sheet dissemination to banks, local licensing officials, the securities industry, the nuclear power industry, and other law enforcement agencies (see, Public Law (Pub. L.) 92-544, 86 Stat. 1115; 15 U.S.C. 78q; and Pub. L. 99-399, 42 U.S.C. 2169). These three targeted enactments are consistent with the view that Congress understood and did not disapprove the FBI's general policy of treating rap sheets as nonpublic documents.

Your letter states that the NRC relies upon the statutory authority under Sections 145, 147 and 149 of the Atomic Energy Act, which are codified at 42 U.S.C. 2165, 2167 and 2169, respectively, for third party access to FBI criminal history data. Upon review of these Sections, only 42 U.S.C. 2169 (Section 149) pertains to fingerprinting for criminal history record checks. As stated in 42 U.S.C. 2169, "The Nuclear Regulatory Commission (in this Section referred to as the "Commission") shall require each licensee or applicant for a license to operate a utilization facility under Section 2133 or 2134(b) of this Title to fingerprint each individual who is permitted unescorted access to the facility or is permitted access to safeguards information under Section 2167 of this Title. All fingerprints obtained by a licensee or applicant as required in the preceding sentence shall be submitted to the Attorney General of the United States through the Commission

for identification and a criminal history records check." It further states that "Notwithstanding any other provision of law, the Attorney General may provide all the results of the search to the Commission, and, in accordance with regulations prescribed under this section, the Commission may provide such results to the licensee or applicant submitting such fingerprints" (emphasis added). In analyzing this statute, we do not see any language that would authorize dissemination of FBI CHRI to a third party private contractor working directly for the NRC or for the licensee. The NRC relies on its own regulations as the basis for using these third party private contractors to receive and process FBI CHRI. FBI policy and prior DOJ opinions restrict access to CHRI for noncriminal justice licensing/employment purposes to only those entities authorized by federal statute. The NRC cannot, by its own regulations, authorize access to FBI CHRI by a private contractor.

You also state that the NRC's historical practice has been to utilize contractor personnel, "in essence, as agents of the NRC." The DOJ, responding in a memorandum dated September 1, 1989, to a request for an opinion concerning dissemination of FBI CHRI by federally chartered or insured financial institutions (authorized recipients) to a private entity contracted by the institutions, stated that an independent contractor is not rendered an agent simply because he is compensated by the principal for his services. In any event, nothing in Section 534 (b) authorizes the release of CHRI to agents of authorized users. Further, the DOJ urged the FBI to exercise its discretion under Section 534(b) to cancel an authorized user's access rights to CHRI if the user enters into an agreement to share the information with such agents.

Based on the above analysis, we must conclude that the use of private contractors by the NRC and its licensees to receive and process FBI CHRI is prohibited by Section 534 and 42 U.S.C. 2169. The NRC and its licensees must, therefore, cease this practice.

If you have any further questions concerning this matter, please do not hesitate to contact me at (304) 625-3691.

Sincerely yours,



Bennie F. Brewer
Chief
Programs Support Section
Criminal Justice Information
Services Division

INFORMAL NOTE

February 18, 1998

To: Ms. Jessie Barnes
Nuclear Regulatory Commission

From: Storm M. Watkins *Swattans TMD*
FBI - Access Integrity Unit

Reference is made to your telephone call on 2/17/98 pertaining to the dissemination of a letter, dated October 24 1997, to the licensees of the Nuclear Regulatory Commission (NRC). The letter was addressed to Mr. Edward Halman of the NRC from the FBI Criminal Justice Information Services Division, Access Integrity Unit and pertained to the use of private contractors for processing FBI criminal history record information.

We have determined that there is no prohibition to your disseminating the above referenced letter to the licensees of the NRC.

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PDR DRG EUSDOJ
PDR

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