

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chair
William J. Froehlich
Brian K. Hajek

In the Matter of
CHARLISSA C. SMITH
(Denial of Senior Reactor Operator License)

Docket No. 55-23694-SP
ASLBP No. 13-925-01-SP-BD01
April 24, 2013

MEMORANDUM AND ORDER
(Granting Motion to Compel Disclosure)

I. INTRODUCTION

Before this Atomic Safety and Licensing Board is a March 28, 2013, motion to compel filed by Charlissa C. Smith.¹ Ms. Smith seeks disclosure of eight withheld documents listed in the Nuclear Regulatory Commission (NRC) Staff Privilege Log submitted on March 21, 2013.² The NRC Staff filed an answer opposing Ms. Smith's motion to compel, alleging that seven of

¹ Request Motion to Compel Disclosure of Items on Attachment 2: Privilege Log Submitted on March 21, 2013 (Mar. 28, 2013) [hereinafter Motion to Compel]. The document is dated March 28, 2013, but was filed on March 29, 2013.

² Letter from David Cylkowski, Counsel for the NRC Staff, to Ronald M. Spritzer, William J. Froehlich, Brian K. Hajek, Atomic Safety and Licensing Board Members, attachment 2 (Mar. 21, 2013) (Charlissa Smith SRO License Denial Hearing File and Mandatory Disclosures Privilege Log - Initial Disclosures) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13080A505) [hereinafter Privilege Log]. The documents at issue have the following ADAMS Accession Numbers: ML13071A261, ML13071A228, ML13070A067, ML13070A050, ML13070A070, ML13071A226, ML13070A072, and ML13070A074. Privilege Log.

the documents requested are protected by the deliberative process privilege.³ The Staff withdrew its privilege claim with regard to document number ML13071A228, acknowledging that it does not represent opinions, recommendations, or advice pertaining to the development of some final agency decision; rather, "it is a statement of fact unrelated to on-going decision-making."⁴

II. BACKGROUND

On November 15, 2012, Charlissa C. Smith filed a demand for a hearing pursuant to 10 C.F.R. § 2.103(b)(1), challenging the denial of her application for a Senior Reactor Operator (SRO) license. The Board granted her demand for a hearing on February 19, 2013.⁵

If an SRO applicant passes both a written examination and operating test and meets the other requirements specified in 10 C.F.R. Part 55, he or she will be eligible to receive an SRO license.⁶ In March 2011, Ms. Smith took the written examination and the operating test for an SRO license at her place of employment, the Vogtle Electric Generating Plant.⁷ She failed the written examination and passed the operating test.⁸ Because she did not pass both components, Ms. Smith was not eligible to receive an SRO license at that time. In April 2012, Ms. Smith retook both the operating test and the written examination, this time failing the former and passing the latter.⁹ On June 5, 2012, she requested an administrative review of the denial

³ NRC Staff Answer Opposing Ms. Smith's Motion to Compel Discovery of Documents Protected by the Deliberative Process Privilege (Apr. 8, 2013) at 1 [hereinafter NRC Staff Answer].

⁴ Id. at 8; see id. attachment (Declaration of Ho Nieh) [hereinafter Nieh Declaration].

⁵ See Charlissa C. Smith (Denial of Senior Reactor Operating License), LBP-13-03, 77 NRC ___ (Feb. 19, 2013).

⁶ See 10 C.F.R. §§ 55.31, 55.43, 55.45.

⁷ LBP-13-03, 77 NRC at ___ (slip op. at 2).

⁸ Id.

⁹ Id.

of her SRO license application in accordance with NUREG-1021, “Operator Licensing Examination Standards for Power Reactors.”¹⁰ In response to Ms. Smith’s request, the Staff conducted an administrative review of her allegations.¹¹ In a November 15, 2012, letter, the Staff detailed its findings and ultimately upheld the denial of Ms. Smith’s SRO license application.¹²

The seven documents that are the subject of Ms. Smith’s Motion to Compel pertain to the Staff’s administrative review. In its Privilege Log, the Staff claimed that four documents—ML13071A261, ML13071A228, ML13070A067, and ML13070A050—qualify for the deliberative process privilege because they are “[e]mails with discussion of draft informal review.”¹³ As noted above, the Staff has withdrawn its privilege claim concerning ML13071A228. According to the Staff, the other three emails “contain the input of various individual Staff members related to the then-ongoing composition of the NRC Staff ‘Informal Review Results’ document,” which memorialized the review of Ms. Smith’s 2012 operating test failure.¹⁴

The Staff also asserts that the four other documents in dispute—ML13070A070, ML13071A226, ML13070A072, and ML13070A074—are protected by the deliberative process privilege because they are drafts of the Staff’s Informal Review Results document.¹⁵ The Staff

¹⁰ Id. at 3; see Operator Licensing Examination Standards for Power Reactors, NUREG-1021, at ES-502-1 to -5 (rev. 9 July 2004 & supp. 1 Oct. 2007) (ADAMS Accession Nos. ML 042320438, ML072970315).

¹¹ LBP-13-03, 77 NRC at __ (slip op. at 4).

¹² Id.

¹³ Privilege Log.

¹⁴ NRC Staff Answer at 2.

¹⁵ Privilege Log.

states these documents are revisions 1 through 4 of the NRC Staff's Informal Review Results document.¹⁶

III. DELIBERATIVE PROCESS PRIVILEGE

NRC regulations mandate that, in a Subpart L proceeding such as this, the Staff disclose or provide documents that support the Staff's review of the application or proposed action, together with "[a] list of all otherwise-discoverable documents for which a claim of protected or privileged status is being made."¹⁷ Among the categories of privileged documents, and the one at issue here, are "[i]nteragency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Commission."¹⁸ This is similar to Exemption 5 under the Freedom of Information Act (FOIA).¹⁹ The Board may therefore employ case law interpreting FOIA Exemption 5 when determining whether the deliberative process privilege applies in this NRC proceeding.²⁰

In general, FOIA mandates that agencies make available for public inspection a broad range of information, including the agency's organization, general methodology, rules of procedure, substantive rules, final opinions, and statements of policy and interpretation that

¹⁶ A redacted version of this document, revision 5, is available as part of the Staff's hearing file. See Informal Review Results – Charlissa C. Smith Senior Reactor Operator Applicant, Vogtle Electric Generating Plant (Rev. 5, Redacted) (undated) (ADAMS Accession No. ML13079A367) (unsigned); Informal Review Results – Charlissa C. Smith Senior Reactor Operator Applicant, Vogtle Electric Generating Plant (Rev. 5, Redacted) (Oct. 25, 2012) (ADAMS Accession No. ML13079A399) (signed).

¹⁷ 10 C.F.R. § 2.336(b)(3), (5).

¹⁸ 10 C.F.R. § 2.390(a)(5); see Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197 (1994); David Geisen (Ruling on Motion to Compel Production), LBP-06-25, 64 NRC 367, 380 (2006).

¹⁹ Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 n.30 (1984); accord. Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 484 n.103 (2008); Vogtle, CLI-94-5, 39 NRC at 197; Geisen, LBP-06-25, 64 NRC at 380.

²⁰ See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1163–64 (1982).

have been adopted by the agency.²¹ FOIA, however, specifically exempts nine categories of documents.²² An agency may avoid disclosing documents only if it proves that the documents fall within one of the nine exemptions.²³ Otherwise, the documents are presumed to be available for public inspection.²⁴ FOIA's purpose is to encourage disclosure, and, to that end, its exemptions are to be interpreted narrowly.²⁵ The government has the burden of proving that a requested document falls within one of FOIA's exemptions.²⁶

The FOIA exemption for inter- or intra-agency materials incorporates the deliberative process privilege, which protects documents that are prepared to assist an agency, board, or official to arrive at a decision.²⁷ The privilege serves three purposes: (1) to "protect[] creative debate and candid consideration of alternatives within an agency," thus improving policy decisions; (2) to guard against public confusion that could result from the release of policy-oriented discussions that occur prior to policy being made; and (3) to "protect[] the integrity of the decision-making process."²⁸

To qualify for the deliberative process privilege, "a document must be both (1) 'predecisional' or 'antecedent to the adoption of agency policy' and (2) 'deliberative,' meaning 'it

²¹ 5 U.S.C. § 552(a).

²² Id. § 552(b).

²³ Id.

²⁴ Id. § 552(c).

²⁵ U.S. Dep't of Justice v. Julian, 486 U.S. 1, 8 (1988); U.S. Dep't of the Air Force v. Rose, 425 U.S. 352, 360–61 (1976).

²⁶ 5 U.S.C. § 552(a)(3); see U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 142 n.3 (1989).

²⁷ See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 183 (1975); Dow, Lohnes & Albertson v. Presidential Comm'n on Broad. to Cuba, 624 F. Supp. 572, 573–74 (D.D.C. 1984).

²⁸ Vogtle, CLI-94-5, 39 NRC at 197 (quoting Jordan v. U.S. Dep't of Justice, 591 F.2d 753, 772–73) (D.C. Cir. 1978) (en banc)) (internal quotation marks omitted).

must actually be related to the process by which policies are formulated.”²⁹ In applying this privilege, “courts have allowed the government to withhold memoranda containing advice, opinions, recommendations and subjective analysis.”³⁰ They have held that documents “must be generated as part of a definable decision-making process that results in a final agency decision” and “must reflect the flow of opinions, recommendations, or advice between policymakers in formulating some type of definitive and conclusive ruling.”³¹ Factual material that does not reveal the deliberative process is not protected by this privilege, unless it is “inextricably intertwined” with the deliberative portions of the document or it could reveal the deliberative process being protected if it were disclosed.³² Pursuant to this standard, the deliberative process privilege has “been extended to draft documents, proposals, suggestions, instructions to work deletions and alterations into drafts, instructions to conduct an investigation, documents reflecting personal and advisory opinions, and rejections of recommendations.”³³

The privilege must be asserted by an individual who holds a sufficiently senior position such that he or she has control over the requested information and possesses a balanced perspective that enables him or her to discern the nature of the material at issue.³⁴ This person

²⁹ Nat'l Wildlife Fed'n v. Forest Serv., 861 F.2d 1114, 1117 (9th Cir. 1988) (quoting Jordan, 591 F.2d at 774); accord. Vogtle, CLI-94-5, 39 NRC at 197–98.

³⁰ Nat'l Wildlife Fed'n, 861 F.2d at 1117 (quoting Julian v. U.S. Dep't of Justice, 806 U.S. 1411, 1419 (1986), aff'd, 486 U.S. 1) (internal quotation marks omitted); accord. Vogtle, CLI-94-5, 39 NRC at 198.

³¹ California v. Env'tl. Protection Agency, No. C 07-2055 JSW(JL), 2008 WL 5384623, at *5 (N.D. Cal. Dec. 22, 2008) (citing Bristol-Meyers Co. v. Federal Trade Comm'n, 598 F.2d 18 (D.C. Cir. 1978); Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973)).

³² Id. at *7; see also Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-05-33, 62 NRC 828, 843 (2005).

³³ California, 2008 WL 5384623, at *5 (citing Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill, 443 U.S. 340 (1979); McClelland v. Andrus, 606 F.2d 1278 (D.C. Cir. 1979); Ashley v. Dep't of Labor, 589 F. Supp. 901 (D.D.C. 1983)).

³⁴ Vermont Yankee, LBP-05-33, 62 NRC at 843; Geisen, LBP-06-25, 64 NRC at 383 (“[A] qualified person, ‘such as the head of the department or division, having both expertise and an

must be involved in the initial assertion of privilege.³⁵ Also, “the deliberative process privilege does not protect documents in their entirety; if the government can segregate and disclose non-privileged factual information within a document, it must.”³⁶

IV. PARTIES’ POSITIONS

In her Motion to Compel, Ms. Smith argues that she needs the allegedly privileged documents to demonstrate that she was denied an independent review of the 2012 operating exam results.³⁷ In reviewing the public disclosures submitted by the NRC Staff on March 21, 2013, Ms. Smith discovered Staff emails stating “that the initial recommendation of the independent review panel was [she] passed the simulator examination.”³⁸ Thus, the review panel initially “made a recommendation or decision consistent with issuing a reactor operator license.”³⁹ Among other things, the Staff’s public disclosures include an unsigned draft letter from Ho K. Nieh, Director of the Division of Inspection and Regional Support, notifying Ms. Smith that, after review, the Staff determined that she passed the operating test and would be issued a SRO license:

In response to your letter received by this office on June 5, 2012, the staff of the U.S. Nuclear Regulatory Commission (NRC) has reviewed the grading of the operating test administered to you during the period of March 26 to April 13, 2012, and reconsidered the proposed denial issued to you on xxxx, 2012.

overview-type perspective concerning the balance between the agency’s duty of disclosure versus its need to conduct frank internal debate’ must sign an affidavit asserting the privilege.” (quoting Vermont Yankee, LBP-05-33, 62 NRC at 846–47)).

³⁵ Vermont Yankee, LBP-05-33, 62 NRC at 849–50.

³⁶ Loving v. U.S. Dep’t of Defense, 550 F.3d 32, 38 (D.C. Cir. 2008) (citing Army Times Publ’g Co. v. U.S. Dep’t of Air Force, 998 F.2d 1067, 1071 (D.C. Cir. 1993)).

³⁷ Motion to Compel at 2–3.

³⁸ Id. at 2 (citing Email from David Muller to John McHale, Donald Jackson, Chris Steely (Sept. 20, 2012) (ADAMS Accession No. ML13079A350)).

³⁹ Id.

In light of the additional information you supplied and although the staff did not agree with all of your contentions, the staff has determined that you passed the operating test and satisfy the requirements of Title 10, Section 55.33(a), of the Code of Federal Regulations (10 CFR 55.33(a)) for approval of your license application. Region II will issue your reactor operator license pursuant to 10 CFR 55.51 and forward it to you under a separate cover letter.⁴⁰

Subsequently, however, the review panel issued a final decision confirming the decision of the Region II examination team that Ms. Smith failed the operating exam. Ms. Smith asserts that the review panel's determination should have been "based on the outcome of the grading sheet by the Independent Review Team," but that instead the determination was altered based on extensive input from the team that conducted the operating exam.⁴¹ She cites emails and other documents disclosed by the Staff reflecting the exam team's efforts to influence the review panel's decision.⁴² As a consequence, Ms. Smith maintains, a process that "was intended to provide due process by allowing a team independent of influence by Region II to review the data provided and make an objective decision" instead resulted in a process in which she "was essentially re-graded by Region II examiners."⁴³ She asserts that she needs the documents listed on the Staff's privilege log because they

will shed light on the reason why the decision of the Independent Review Board quickly changed The items on the Privilege Log are the responses by email (and attachments) to a decision that was made by the Independent Review Board. These items will identify that the grading [was] subjective and not based on the examination process. These items will also explain why the administrative review sustained the failure when initial information concluded that the applicant[']s overall grade was passing.⁴⁴

⁴⁰ Letter from Ho K. Nieh, Director, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation, NRC, to Charliisa C. Smith (undated) at 1 (ADAMS Accession No. ML13079A352).

⁴¹ Motion to Compel at 3.

⁴² Id. at 2–5.

⁴³ Id. at 4.

⁴⁴ Id. at 5.

The NRC Staff states that, although the deliberative process privilege is a qualified privilege and the agency claiming the privilege bears the initial burden of demonstrating that it is applicable, once this demonstration is made, the moving party can only defeat the privilege by a demonstration of an overriding need for the material.⁴⁵ The Staff argues that Ms. Smith has failed to make that demonstration.

V. RULING ON THE MOTION TO COMPEL

A. The Staff's Claim of Privilege

The seven documents at issue are presumed to be public, unless the Staff can demonstrate that they are protected by the asserted privilege.⁴⁶ The party invoking the deliberative process privilege bears the burden of explaining with particularity how and why disclosure of the documents' substance would harm an identified deliberative function.⁴⁷ In attempting to assert this agency privilege, the Staff must remember "that the burden is on [it] to establish [its] right to withhold information from the public and [it] must supply . . . sufficient information to allow [the decision maker] to make a reasoned determination that [it was] correct."⁴⁸ Thus, the Staff must supply the Board "with precise and certain reasons for maintaining the confidentiality of the requested document[s]."⁴⁹ The explanation need not reveal the contents of the documents, but it must identify, with respect to a specific document or type of document, why that document should be protected from discovery and what specific harm

⁴⁵ NRC Staff Answer at 5 (citing Vogtle, CLI-94-5, 39 NRC at 198).

⁴⁶ See 5 U.S.C. § 552.

⁴⁷ Vogtle, CLI-94-5, 39 NRC at 198.

⁴⁸ Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 861 (D.C. Cir. 1980).

⁴⁹ Marriott Int'l Resorts, L.P. v. United States, 61 Fed. Cl. 411, 417 (2004) (alteration in original) (quoting Walsky Constr. Co. v. United States, 20 Cl. Ct. 317, 320 (1990)) (internal quotation marks omitted).

would result from its disclosure.⁵⁰ Because the Staff has not met its burden of demonstrating that the documents at issue should be protected by the deliberative process privilege, the documents are deemed public and are subject to disclosure.

In attempting to meet its burden, the Staff relies on the two-page Declaration of Mr. Ho Nieh, which was filed as an attachment to the Staff's response to support its claim of privilege.⁵¹

Mr. Nieh states that he has

personally reviewed the documents identified as protected by the deliberative process privilege in Attachment 2, and [has] determined, in accordance with the guidance set forth in Management Directive 3.4, that all of the documents, with the exception of document ML13071A228, contain predecisional information concerning the Staff's informal review of Charlissa C. Smith's 2012 operating test failure.⁵²

He opines generally that "[t]hese documents contain either the Staff's analyses, recommendations, opinions, or evaluations, and may not necessarily reflect the final agency position with respect to the matters discussed therein."⁵³ Mr. Nieh concludes, again in general terms, that "[t]he documents comprise part of the deliberative process necessary for the Staff's completion of the informal review."⁵⁴ He further states that he has

determined that disclosure of these documents could result in harm to the agency, in that it would (a) disclose the preliminary views of individual Staff members and/or the Staff and thus potentially could create confusion as to the actual policy or views of the NRC; (b) hinder the efficiency of the Staff, in that forced disclosure of its internal discussion could serve to chill future deliberations and could interfere with its ability to engage in free exchange of opinions and analyses prior to publishing its final decisions; and (c) imply or suggest

⁵⁰ Pac. Gas & Elec. Co. v. United States, 71 Fed. Cl. 205, 209 (2006).

⁵¹ See Nieh Declaration.

⁵² Nieh Declaration ¶ 3.

⁵³ Id. (emphasis added).

⁵⁴ Id.

incorrectly that matters considered before the final agency decision may somehow call into doubt the integrity of that final decision.⁵⁵

These cursory and conclusory assertions merely paraphrase the standards applicable to the deliberative process privilege without explaining how they apply to any specific document in dispute. “[C]onclusory assertions of privilege will not suffice to carry the Government’s burden of proof in defending FOIA cases.”⁵⁶ As the United States Court of Federal Claims stated concerning similar blanket claims of privilege, “such vague, general and conclusory statements—all purporting to apply to many documents but not connected to any particular document—fail to meet the requirement that defendant supply the court with precise and certain reasons for maintaining the confidentiality of the requested documents.”⁵⁷ As the court further explained,

Blanket assertions of the privilege are insufficient. Without indicating any specific, policy-oriented communication nor proffering any cogent reason for protecting it, the bare assertion that internal agency discussions will be “chilled” is nothing but a legal platitude asserted in the abstract.⁵⁸

Here, the Staff’s sweeping, undifferentiated claim that agency deliberations will be “chilled” is particularly unpersuasive because the Staff has disclosed other documents that reflect the agency’s administrative review of Ms. Smith’s 2012 operating test, without any apparent concern that disclosure of those documents will chill agency deliberations. The Staff makes no effort to explain any factor that distinguishes the seven disputed documents from those that discuss the same subject matter but for which no privilege was asserted.

⁵⁵ Id. ¶ 4. These statements in Mr. Nieh’s declaration appear to be a paraphrase from a Commission summary of the purposes of the deliberative process privilege. See Vogtle, CLI-94-5, 39 NRC at 197 (1994) (quoting Jordan, 591 F.2d at 772–73 (D.C. Cir. 1978)).

⁵⁶ Coastal States Gas Corp., 617 F.2d at 861.

⁵⁷ Pac. Gas & Elec. Co. v. United States, 70 Fed. Cl. 128, 140 (2006) (quoting Walsky, 20 Cl. Ct. at 320) (internal quotation marks omitted).

⁵⁸ Id. at 140–41 (quoting Greenpeace v. Nat’l Marine Fisheries Serv., 198 F.R.D. 540, 545 (W.D. Wash. 2000)).

For example, four of the allegedly privileged documents are drafts of the Staff's Informal Review Results document (revisions 1–4). Because draft documents are not presumptively privileged, the Staff must provide specific information to justify withholding them from disclosure.⁵⁹ Not only has the Staff failed to do so, but it acknowledges that “the hearing file contains two versions of the NRC Staff Informal Review Results document that predate revision 1,”⁶⁰ as well as redacted versions of revision 5 of that document (the final version).⁶¹ Thus, revisions 1–4 fall in between the initial and final versions of the Informal Review Results document that the Staff has disclosed.

Because an agency waives the deliberative process privilege for a document when it discloses the same document or one containing equivalent text,⁶² the question necessarily arises whether the Staff has waived any deliberative process privilege that might otherwise apply to revisions 1–4. To answer that question, the Board compared revision 1 to one of the earlier versions that the Staff has disclosed,⁶³ and revision 4 to the disclosed revision 5. With only limited exceptions, the allegedly privileged versions contain the same text as the versions

⁵⁹ Judicial Watch, Inc. v. U.S. Postal Serv., 297 F. Supp. 2d 252, 261 (D.D.C. 2004).

⁶⁰ NRC Staff Answer at 2–3 (citing Letter from Ho K. Nieh, Director, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation, NRC, to Charlissa C. Smith (undated) (ADAMS Accession No. ML13079A344); Letter from Ho K. Nieh, Director, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation, NRC, to Charlissa C. Smith (undated) (ADAMS Accession No. ML13079A352)).

⁶¹ NRC Staff Answer at 2 (citing Informal Review Results – Charlissa C. Smith Senior Reactor Operator Applicant, Vogtle Electric Generating Plant (Rev. 5, Redacted) (undated) (ADAMS Accession No. ML13079A367) (unsigned); Informal Review Results – Charlissa C. Smith Senior Reactor Operator Applicant, Vogtle Electric Generating Plant (Rev. 5, Redacted) (undated) (ADAMS Accession No. ML13079A399) (signed)).

⁶² See Sikorsky Aircraft Corp. v. United States, 106 Fed. Cl. 571, 580 (2012); U.S. Student Ass'n v. Central Intelligence Agency, 620 F. Supp. 565, 571 (D.D.C. 1985); see also Afshar v. Dep't of State, 702 F.2d 1125, 1133 (D.C. Cir. 1983).

⁶³ Letter from Ho K. Nieh, Director, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation, NRC, to Charlissa C. Smith (undated).

that the Staff has disclosed.⁶⁴ The Board also compared revisions 2, 3, and 4, again finding the text of all three documents to be largely equivalent. To be sure, revisions 1-4 show that the review board changed its grading of Ms. Smith's 2012 operating exam and that its ultimate determination changed from pass to fail, but one can also discern both the grading changes and the change in the ultimate result by comparing the versions of the Informal Review Results document that the Staff has disclosed. Thus, the Staff's unqualified claim of privilege for every sentence in revisions 1-4 is either totally invalid or massively overbroad. To make a valid claim of privilege, the Staff should have compared revisions 1-4 to the disclosed versions, identified any specific parts of revisions 1-4 that are deliberative in nature and not included in or evident from the disclosed versions, and provided the Board with a convincing explanation of why those parts (if any exist) meet the requirements of the deliberative process privilege. Having failed to do that, the Staff has failed to make a legally sufficient claim of privilege for revisions 1-4.

Furthermore, as Ms. Smith shows, the Staff has disclosed emails and other documents that provide detailed information about the agency's internal discussions leading to the Independent Review Panel's final decision.⁶⁵ For example, the Staff disclosed a document entitled "Region II Recommendations/ Comments on the 'Final' Independent Review Panel Document, October 12, 2012," which appears to be the Region II exam team's response to an

⁶⁴ Although it may be possible for a presiding officer to make a determination about the validity of a privilege claim without reviewing a document in camera if the affidavit outlining the reasons for nondisclosure is sufficiently detailed, see Pacific Gas & Electric Co., (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-08-7, 67 NRC 361, 372 n.7 (2008), the general nature of the Staff's claims in this instance makes that impossible. In such a situation, a board can request that a document be provided to it for in camera inspection. See 10 C.F.R. § 2.709(d). Here, however, a Board request to the Staff to provide copies of revisions 1-4 and the three emails at issue for in camera review was unnecessary because the Board members, by virtue of being agency personnel, already have secure access to the documents via the nonpublic portion of the agency's ADAMS system.

⁶⁵ Motion to Compel at 2-5.

Independent Review Panel Document concluding that Ms. Smith passed the operating exam.⁶⁶

The Region II document begins by stating:

This response to the Review Panel's conclusion is intended to show the NRR Program Office, the most accurate evaluation of the applicant's performance. The following conclusions by Region II's Exam Team are based on the observation of three examiners with extensive Industry and NRC experience. Region II considered the Review Panel's Report in combination with the Exam Team's first hand observation of the applicant's performance and applied the guidance of NUREG-1021 to provide the Program Office with an accurate evaluation that is defensible by the only three examiners that actually observed the applicant's performance.

The Region II Exam Team concluded, with the opportunity of hindsight and deeper evaluation, that the initial evaluation as documented in the denial was largely accurate. The Region II Exam Team did, however, agree with some aspects of the Review Panel's Report for assigning some errors to additional rating factors. Region II's final conclusion is that the original denial should be sustained.⁶⁷

This introduction is followed by the exam team's ten-page detailed critique of the Independent Review Panel document, including specific recommendations as to how the Panel should change its analysis of Ms. Smith's performance.⁶⁸ The Region II document concludes with a chart detailing the exam team's suggested grading of Ms. Smith's 2012 operating test.⁶⁹ The Region II document discloses more about internal agency deliberations than anything the Board can discern in the seven disputed documents, yet the Staff evidently concluded its disclosure would not chill agency deliberations or harm other protected agency interests.

The Staff's disclosure of the Region II document does not waive the deliberative process privilege because its text is not equivalent to that of any document the Staff seeks to withhold. Nevertheless, to make a persuasive claim of privilege, the Staff must explain why disclosure of

⁶⁶ See Region II Recommendations/Comments on the "Final" Independent Review Panel Document (Oct. 12, 2012) (ADAMS Accession No. ML13071A242).

⁶⁷ Id. at 1.

⁶⁸ See id. at 2–11.

⁶⁹ Id. at 11.

revisions 1–4 to the Informal Review Results document and the three disputed emails would chill agency deliberations, while disclosure of other documents that reflect the agency’s internal review in greater detail does not have such an effect. The Staff’s Response to the Motion to Compel fails to address this inconsistency. Instead, the Staff’s declaration provides only a sweeping, undifferentiated claim of privilege and legal boilerplate.

The Staff’s privilege log is also insufficient to support application of the deliberative process privilege. The agency’s regulations require the NRC Staff to “disclose or provide to the extent available . . . [a] list of all otherwise-discoverable documents for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents.”⁷⁰ The adequacy of the privilege log with respect to the sufficiency of the information contained therein is particularly important with respect to Subpart L proceedings “because without ‘sufficient information’ as to what allegedly makes the document ‘deliberative,’ the challenger is forced to shoot in the dark and face a substantive answer by the document withholder, without the right to reply.”⁷¹ With regard to the first four documents, the Staff’s Privilege Log states only that they are “emails with discussion of draft informal review.”⁷² With regard to the latter four documents, the Privilege Log merely states that they consist of “draft informal review[s].”⁷³ These cursory statements are “patently inadequate to permit a court to decide whether the exemption was properly claimed.”⁷⁴

⁷⁰ 10 C.F.R. § 2.336(b)(5) (emphasis added).

⁷¹ Vermont Yankee, LBP-05-33, 62 NRC at 839–40. As noted in the Board’s February 19, 2013, Order granting Ms. Smith’s hearing demand, the instant matter is proceeding pursuant to Subpart L. LBP-13-03, 77 NRC at ___ (slip op. at 18).

⁷² Privilege Log.

⁷³ Id.

⁷⁴ Coastal States Gas Corp., 617 F.2d at 861.

The Board therefore concludes that the Staff has failed to provide the requisite “precise and specific reasons” for maintaining the confidentiality of the documents requested by Ms. Smith. The Staff has not “proffer[ed] any cogent reason for protecting” the documents it seeks to withhold.⁷⁵ Nowhere does Mr. Nieh’s Declaration or the Staff’s privilege log provide “‘precise and certain’ reasons” for withholding the documents, nor do they “explain why, particularly, the documents in question here are so sensitive that disclosure would compromise the agency decision-making process to such a degree that the public interest in full disclosure is outweighed.”⁷⁶ “[A] blanket approach to asserting the privilege is unacceptable and is itself grounds for denying invocation of the privilege.”⁷⁷

B. The Balance of Competing Interests

Instead of addressing its burden to establish that the documents in question are privileged and supporting its position with a detailed and specific declaration, the Staff focuses on whether Ms. Smith’s request demonstrates “some overriding need or special circumstances” that would warrant disclosure of the documents.⁷⁸ But the “overriding need or special circumstances” test only applies after a showing that the requested materials are covered by the deliberative process privilege. For the reasons just explained, that showing has not been made here.

⁷⁵ See Greenpeace, 198 F.R.D. at 545.

⁷⁶ Resolution Trust Corp. v. Diamond, 773 F. Supp. 597, 604–05 (S.D.N.Y. 1991); see Reino de Espana v. Am. Bureau of Shipping, No. 03CIV3573LTSRLE, 2005 WL 1813017, at *13 (S.D.N.Y. 2005) (“While the Privilege Log identifies and describes the documents sought to be protected, it fails to give precise and certain reasons for asserting confidentiality over the documents.”).

⁷⁷ Kaufman v. City of New York, No. 98CIV.2648(MJL)(KNF), 1999 WL 239698, at *4 (S.D.N.Y. 1999).

⁷⁸ NRC Staff Answer at 8 (quoting Shoreham, ALAB-773, 19 NRC at 1343).

In any event,

[a] claim of deliberative process privilege, even when properly established, is not absolute. The deliberative process privilege is qualified, requiring the court to balance the interests of the parties for and against disclosures. The privilege may “be defeated by a showing of evidentiary need by [a] plaintiff[] that outweighs the harm that disclosure of such information may cause to the defendant.”⁷⁹

Thus, “[s]trong competing interests must be weighed against the government’s interest in nondisclosure. Foremost is the interest of the litigants, and ultimately of society, in accurate judicial fact finding.”⁸⁰ Here, the Board concludes that the balance of the competing interests would require disclosure of the seven disputed documents even had the Staff asserted a valid claim of privilege.

The Staff correctly identifies the factors the Board should consider in balancing Ms. Smith’s need for disclosure against the agency’s interest in confidentiality:

(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the ‘seriousness’ of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.⁸¹

Turning to the first of these factors, evidence is relevant if it has some tendency to make Ms. Smith’s allegations more or less likely.⁸² The seven disputed documents satisfy that test because they help explain the process by which the independent review board arrived at its final decision denying Ms. Smith’s appeal. They are relevant to Ms. Smith’s allegation that, because of excessive influence of the exam team on the administrative review, she was effectively denied an independent determination whether she failed the 2012 operating test.

⁷⁹ Sikorsky Aircraft Corp., 106 Fed. Cl. at 577 (second and third alterations in original) (citations omitted) (quoting Alaska v. United States, 16 Cl. Ct. 5, 11 (1988)).

⁸⁰ In re Franklin Nat’l Bank Sec. Litig., 478 F. Supp. 577, 582 (E.D.N.Y. 1979).

⁸¹ NRC Staff Answer at 8–9 (quoting In re Subpoena Served upon Comptroller of Currency, 967 F.2d 630, 634 (D.C. Cir. 1992)).

⁸² See Fed. R. Evid. 401.

The Staff does not appear to dispute Ms. Smith's claim that she was entitled to an independent review of the exam team's finding. and the agency's guidance states that the appeal board shall not include anyone who was involved with the applicant's licensing examination, which is consistent with Ms. Smith's claim that she was entitled to an independent review.⁸³ Moreover, the Staff's November 15, 2012, letter sustaining the denial of Ms. Smith's SRO application refers to the "independent review" of Ms. Smith's appeal.⁸⁴ Also, the Staff document entitled "Region II Recommendations/ Comments on the 'Final' Independent Review Panel Document, October 12, 2012" refers to the "Independent Review Panel."⁸⁵ Ms. Smith may therefore question whether the agency complied with its stated policy of providing an independent administrative review of the grading of SRO license examinations.

Without the disputed documents, however, Ms. Smith will have access only to the documents that the Staff has chosen to disclose, such as the final version (revision 5) of the Informal Review Results document and the two versions that precede revision 1. This will leave a gap in the administrative record, making it more difficult for this Board to understand the process by which the review board's determination changed from an initial finding that Ms. Smith passed the 2012 operating test to a final ruling sustaining the exam team's determination that she failed. In particular, revisions 1-4 will help this Board determine the point(s) at which the review board's analysis changed, which will in turn help us decide whether the changes were connected with the exam team's alleged efforts to alter the outcome. The disputed emails also appear to concern changes to the Informal Review Results document and may help in

⁸³ NUREG-1021 at ES-502-4.

⁸⁴ Letter from Ho K. Nieh, Director, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation, NRC, to Charlissa C. Smith (Nov. 15, 2012), at 1 (ADAMS Accession No. ML12307A152). Similarly, the Staff document entitled "Region II Recommendations/ Comments on the 'Final' Independent Review Panel Document, October 12, 2012" repeatedly refers to the "Independent Review Panel."

⁸⁵ Region II Recommendations/Comments on the "Final" Independent Review Panel Document (Oct. 12, 2012).

resolving the same question. Thus, the disputed documents will help the Board understand whether the exam team's efforts in fact brought about a change in the independent review board's determination such that, as Ms. Smith claims, the administrative review process amounted to little more than a regrading of her 2012 operating test by the exam team. Thus, the first factor favors disclosure.

Although the Staff has disclosed other evidence related to the process by which the review board reached its final decision, the disputed documents constitute a missing gap in the Staff's decision-making process regarding Ms. Smith's appeal of the grading of her 2012 operating exam, and Ms. Smith lacks any other means to obtain the missing evidence. Denial of the Motion to Compel would not only make it difficult for Ms. Smith to prove her case, but, of equal importance, would deprive the Board of a complete record on which to base its decision. Even where the government identifies significant reasons for nondisclosure, the interest in "[a]ccurate judicial factfinding is predominant. This factor is powerful in a situation like that presented here, where no satisfactory alternative source of information exists."⁸⁶ Consequently, factor two supports disclosure.

The third factor, the seriousness of the litigation, also supports disclosure. The importance of this litigation to Ms. Smith is obvious: the denial of her application for an SRO license has a direct and adverse impact upon her livelihood and her professional career. The Board also finds the issue presented to be a serious one. As explained, there is evidence to show that the exam team had significant input into the independent review board's decision-making process. Whether that input was so substantial as to effectively deny Ms. Smith an independent review is a question that the Board can resolve only after it has heard and considered all the evidence. The Board can say, however, that the issue Ms. Smith presents is

⁸⁶ In re Franklin Nat'l Bank Sec. Litig., 478 F. Supp. at 577.

certainly “not the frivolous claim of an idle mischief maker,”⁸⁷ and that it merits full consideration upon an adequate record.

The fourth factor, the role of the government in the litigation, favors disclosure when the government is a party to the litigation and has been accused of unlawful conduct (other than a violation of its FOIA obligations).⁸⁸ The concern is that, when government conduct is challenged, claims of privilege may be used to obtain a litigating advantage.⁸⁹ Courts disfavor government efforts to “place[] a portion of privileged material at issue while self-servingly retaining the rest.”⁹⁰ Therefore, in this case the fourth factor favors disclosure, although the Board makes no finding that the Staff has attempted to misuse the privilege.

The fifth factor necessarily favors the Staff to some extent. Here, however, the risk of future timidity by NRC employees is attenuated for two reasons. First, as previously explained, the Staff has disclosed documents that appear to provide more information about internal agency discussions than do the disputed documents. The Staff’s willingness to disclose documents such as the “Region II Recommendations/Comments on the ‘Final’ Independent Review Panel Document” suggests that the Staff is not greatly concerned that disclosure will deter agency personnel from candidly expressing their views in other reviews. Second, if, unlike in this case, the Staff presents an appropriately focused claim of privilege, the Board can issue a protective order to preclude or limit the disclosure of specific information where it would likely have a chilling effect, while making the balance of the contested information publicly available.

The Board accordingly finds that the first four factors favor disclosure, and that the fifth factor, although favoring the Staff’s position to a limited extent, is insufficient to overcome the

⁸⁷ Bank of Dearborn v. Saxon, 244 F. Supp. 394, 402 (E.D. Mich. 1965).

⁸⁸ See Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena, 40 F.R.D. 318, 329 (D.D.C. 1966), aff’d., 384 F.2d 979 (D.C. Cir. 1967).

⁸⁹ See id.

⁹⁰ Sikorsky Aircraft Corp., 106 Fed. Cl. at 580 (citation omitted).

weight of the other factors. This is therefore a case where “overriding need or special circumstances” would support granting the Motion to Compel had the Board agreed with the Staff’s claims of privilege.⁹¹

V. ORDER

For the foregoing reasons, Ms. Smith’s March 28, 2013, Motion to Compel is GRANTED. The NRC Staff shall promptly produce the seven documents at issue as well as document number ML13071A228, for which the Staff withdrew its claim of privilege.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Ronald M. Spritzer, Chair
ADMINISTRATIVE JUDGE

/RA/

William J. Froehlich
ADMINISTRATIVE JUDGE

/RA/

Brian K. Hajek
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 24, 2013

⁹¹ NRC Staff Answer at 8 (quoting Shoreham, ALAB-773, 19 NRC at 1343).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
CHARLISSA C. SMITH) Docket No. 55-23694-SP
)
)
(Reactor Operator License for Vogtle)
Electric Generating Plant))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Granting Motion to Compel Disclosure) LBP-13-05** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Clara I. Sola]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
This 24th day of April 2013.