

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
JAMES CHAISSON)	Docket No. IA-14-025-EA
)	
)	ASLBP No. 14-932-02-EA-BD01

NRC STAFF RESPONSE TO
BOARD REQUEST FOR CLARIFICATION

On October 16, 2014, the Atomic Safety and Licensing Board (Board) issued a Request for Clarification (Concerning Proposed Protective Order), requesting the NRC Staff (Staff) to provide information regarding a proposed protective order submitted to the Board by the Parties.¹ The Board requested that the Staff provide its response to the Board no later than October 20, 2014.² Below, the Staff has provided the Board’s questions along with the Staff’s responses.

1. Please identify and explain the specific legal basis (statute, regulation, or case law) for the Staff’s claim that “Personal Privacy Materials” (PPM) are legally protected, privileged, or otherwise exempt from mandatory disclosure and/or discovery.³

The procedures governing this proceeding are provided in 10 C.F.R. Part 2, Subpart G, “Rules of Formal Adjudications.” The regulations regarding discovery against the NRC Staff state that “[t]he NRC staff shall . . . provide to the other parties . . . without awaiting a discovery request . . . [e]xcept for those documents . . . for which there is a claim of privilege or protected status, all NRC staff documents, data compilations, or other tangible things in possession, custody, or control of the NRC staff that are relevant to disputed issues alleged with particularity in the pleadings, including any Office of Investigations report and supporting exhibits. . . .” 10

¹ NRC Staff’s Report of Consultation Between the Parties, attach. 1, Proposed Protective Order (Governing Personal Privacy Materials) at 3 (Oct. 10, 2014).

² See Request for Clarification (Concerning Proposed Protective Order) (Oct. 16, 2014) at 1.

³ *Id.*

C.F.R. § 2.709(a)(6)(i)(A). If the Staff withholds a document as privileged, a party may serve the Staff with “[a] request for the production of an NRC record or document not available under § 2.390 by a party to an initial licensing proceeding” 10 C.F.R. § 2.709(b). Such a request “must identify the records or documents requested, either by individual item or by category, describe each item or category with reasonable particularity, and state why that record or document is relevant to the proceeding.” *Id.* The Staff may object to the production of a document where the document is “exempted from disclosure under § 2.390 and the disclosure is not necessary to a proper decision in the proceeding or the document or the information therein is reasonably obtainable from another source.” 10 C.F.R. § 2.709(c). Finally, to the extent the parties may dispute a claim of privilege, the requesting party may file a motion to compel regarding the production of a specific document with the presiding officer. 10 C.F.R. § 2.709(d). In ruling on a motion to compel, the presiding officer must consider the following factors when reviewing the requested documents *in camera*: “(1) The relevancy of that record or document; (2) Whether the document is exempt from disclosure under § 2.390; (3) Whether the disclosure is necessary to a proper decision in the proceeding; and (4) Whether the document or the information therein is reasonably obtainable from another source.” 10 C.F.R. §§ 2.709(d)(1) - (3).

As summarized above, Subpart G regulations provide that certain information may be exempt from discovery pursuant to 10 C.F.R. § 2.390. Section 2.390 requires final NRC documents to be publicly available and contains exemptions from public release that mirror the exemptions in the Freedom of Information Act (FOIA).⁴ The exemption applicable to “Personal Privacy Materials” is at 10 C.F.R. § 2.390(a)(7)(iii).⁵ Section 2.390(a)(7)(iii) specifically exempts from public release “[r]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . .

⁴ 5 U.S.C. § 552; see 10 C.F.R. §§ 2.390(a)(1) – (9).

⁵ The comparable FOIA exemption is at 5 U.S.C. § 552(b)(7).

[c]ould reasonably be expected to constitute an unwarranted invasion of personal privacy.” This exemption may be applicable to certain information contained in the NRC’s Office of Investigation (OI) Report and Exhibits, which are required to be disclosed to Mr. Chaisson pursuant to 10 C.F.R. 2.709(a)(6)(i)(A).⁶ The applicability of this privilege to the Staff’s investigation materials was most recently addressed in the *Geisen* enforcement proceeding.⁷ In *Geisen*, the Board noted that “the privacy privilege must first be analyzed under the NRC regulatory exemption and the comparable FOIA exemption.”⁸ The Board further provided that “[p]rivacy interests are defined using FOIA’s language but their weight is tempered by the capability in the discovery process of making limited disclosure to a litigant under a protective order, as contrasted with making the FOIA-required unconditional release to a member of the public.”

The privacy privilege available to the Staff regarding discovery is narrow, especially where a protective order protects information from public release. Nevertheless, information contained in a document withheld by the Staff as privileged must be evaluated on a case-by-case basis and is subject to a consideration of the factors in 10 C.F.R. § 2.709(d).⁹

2. The proposed definition of PPM states that PPM is whatever the Staff says it is. This is not acceptable. Please provide a definition of PPM that both demonstrably comports with a specific legal basis, as specified in response to paragraph 1, and that provides objectively determinable criteria for the Board to use if a dispute arises as to whether certain material constitutes PPM.¹⁰

⁶ To the extent the Staff does not claim a privilege, the Staff must provide a copy of the OI Report and Exhibits to Mr. Chaisson as part of its initial disclosures required by 10 C.F.R. § 2.709. The Staff’s initial disclosures and privilege logs are due by November 4, 2014. See Notice of Hearing Initial Scheduling Order, LBP-14-11 at 9 (Sept. 8, 2014).

⁷ *David Geisen*, LBP-06-25, 64 NRC 367 (Oct. 31, 2006) (rejecting the Staff’s claim of privacy privilege due to the protection provided via the use of a protective order).

⁸ *Id.* at 384.

⁹ For example, the names of witnesses interviewed by OI may be withheld in a FOIA request, but not discovery. See *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), LBP-81-50, 14 NRC 888 (Oct. 22, 1981) (finding that there is no legal right on the part of the NRC Staff to hold identities of witnesses confidential).

¹⁰ See Request for Clarification (Concerning Proposed Protective Order) (Oct. 16, 2014) at 2.

As discussed with respect to the Board's first question, the criteria for "Personal Privacy Materials" can be found in 10 C.F.R. § 2.390(a)(7)(iii) and only includes information that "[c]ould reasonably be expected to constitute an unwarranted invasion of personal privacy." Therefore, the Staff requests that the protective order incorporate this language into the definition of "Personal Privacy Materials."

Respectfully submitted,

/RA/

Christopher C. Hair
Counsel for NRC Staff

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing NRC STAFF RESPONSE TO BOARD REQUEST FOR CLARIFICATION, dated October 20, 2014, has been served over the Electronic Information Exchange, the NRC's E-Filing System, this 20th day of October 2014.

/Signed (electronically) by/

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