



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

November 21, 2014

MEMORANDUM TO: Richard Correia, Director  
Office of Nuclear Regulatory Research  
Division of Risk Analysis

FROM: (b)(6)  
Office of Nuclear Regulatory Research  
Division of Risk Analysis  
Performance and Reliability Branch

SUBJECT: Concern about the Appearance of Obstruction of Justice

As part of my official duties, I have been tasked to perform a Freedom of Information Act (FOIA) review of numerous documents pertaining to flooding of U.S. nuclear power plants. The instructions and directions from the Nuclear Regulatory Commission's (NRC's) General Council staff to prevent the disclosure of official records containing NRC staff analysis and discussion of flood-related nuclear safety information - and the resulting defacto NRC policy to not publicly disclose that information - appear to meet the definition of *obstruction of justice* under United States federal statute law. I am concerned about my personal legal liability, with respect to these or other statutes, were I to carry out these instructions as directed. The discussion of applicable criminal law includes 18 U.S.C. 1512(c) (which addresses concealment of documents), 18 U.S.C. 1519 (characterized as the "anti-shredding" provision of the Sarbanes-Oxley Act), and 18 U.S.C. 2232(a) (addressing actions taken for the purpose of preventing authorized seizure).

The instructions and directions were issued by NRC General Council staff in September 2014 and subsequently distributed to NRC staff for immediate implementation by the Chief of FOIA (Freedom of Information Act), Privacy, and Information Collection within the NRC Office of Information Services (OIS).<sup>1</sup> The instructions were provided to me in October 2014 as guidance from OIS for redaction bracketing of official records pertaining to the discussion of flood-related nuclear safety concerns. Early in November 2014, this guidance was confirmed as defacto NRC policy and I was instructed to follow those directions.<sup>2</sup>

<sup>1</sup> See enclosed September 15, 2014, e-mail from Laura Pearson

<sup>2</sup> November 2, 2014, e-mail from Richard Correia, Director, United States NRC, Office of Nuclear Regulatory Research, Division of Risk Analysis

The directions from the Office of General Council discuss the scope of information to be withheld stating:

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The last sentence, above, is underlined just as it was in the instruction. The instructions and directions conclude stating (b)(5)

(b)(5)

The above instruction declares (b)(5) - supposing that release of the documents to the public could be illegal. This appears to contradict other statements, in the guidance, that public release of such information is discretionary. A more lenient interpretation of the guidance might envision that the General Council is attempting to position the agency in the best possible position to defend NRC's past actions in an anticipated legal challenge. To do this, the NRC and the agency's General Council have stated they (b)(5)

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(b)(5) Necessarily, the NRC General Council is advising the agency to diminish its commitment to openness, to diminish

good-faith adherence to FOIA law,<sup>3</sup> and (by obscuring the present and future visibility of the issue) to diminish its principal responsibilities to the public and public safety as the regulator; all this, to grasp for a more favorable legal position with the stated goals being:

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It is demonstrable that the NRC believes that significant dangers exist related to flooding at some nuclear power plants. The controversy centers on the question; *does the public have a right to know those dangers exist?* The agency has asserted that a public release of the general information about the danger can reasonably be expected to endanger life or physical safety.<sup>4</sup> This assertion confirms the NRC's perception that flood-related dangers are real, since (logically) if no danger existed, there would be no need to withhold the information from the public on the basis that the danger can be exploited. This leaves only the remaining question of whether disclosure of the general information about the danger is, in fact, reasonably expected to endanger life or physical safety. Whatever the threat, it must necessarily be perceived as serious and significant since, after much deliberation, the NRC has taken a bold action to restrict information that - on its face - speaks only of a nuclear safety issue and never mentions a security issue.<sup>5</sup>

As you know, a remarkable amount of time, money, and effort has been spent in analysis and debate of the above question - with the NRC making subsequent determinations to withhold much flood-related information under FOIA exemption 7(f). With scrutiny of these decisions underway, and with legal challenges expected in the near future (b)(5)

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Selecting the applicable phrases from the law, 18 U.S.C. 1512(c) states:

<sup>3</sup> A Presidential memorandum, dated January 21, 2009, was issued to all executive departments and agencies emphasizing that the FOIA reflects a "profound national commitment to ensuring an open Government." President Obama called for federal executive departments and agencies to administer the FOIA with "a clear presumption: [i]n the face of doubt, openness prevails." The President directed departments and agencies not to withhold information "merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

<sup>4</sup> For example, the July 2011, *Screening Analysis Report for the Proposed Generic Issue on Flooding of Nuclear Power Plant Sites Following Upstream Dam Failure* does not contain specific design information. It does include locations of nuclear plants, applicable regulation, references to numeric flood levels and related numeric flood protection levels.

<sup>5</sup> Although it was issued with extensive redactions, the whole of Richard H. Perkins, Michelle T. Bensi, Jacob Philip, and Selim Sancaktar, *Screening Analysis Report for the Proposed Generic Issue on Flooding of Nuclear Power Plant Sites Following Upstream Dam Failure*, July 2011, (NRC ADAMS ML113500495) never mentions or discusses a security issue.

Whoever corruptly—(1)...conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding, or (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.<sup>6</sup>

Quoting from a Congressional Research Service report, "section 1512(c) covers only obstructions committed or attempted with 'corrupt' intent. Here, the courts have said that 'corruptly' means 'acting with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede, or obstruct the proceeding;' that it means 'acting with consciousness of wrongdoing.' It does not mean that the obstruction must be done with wicked or evil intent."<sup>7</sup> Because it is so clearly written, the guidance and defacto policy leaves little doubt that the motivation to prevent the public disclosure of the documentation is that the NRC and the NRC's General Council fear disclosure would show the courts that the agency had improperly used FOIA exemption 7(f) to withhold pertinent nuclear safety information from the public. Openly, the direction goes on to state<sup>(b)(5)</sup>

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<sup>(b)(5)</sup> Remarkably, all these justifications put the agency's narrower self-interest above the interest of the public, their safety, and the public's right to know of – both the government's conduct and the dangers the public is exposed to.

Similar sentiment is expressed in §1519. According to a Congressional Research Service report, "where subsection 1512(c) condemns obstruction of federal *proceedings* by destruction of evidence, §1519 outlaws obstruction of federal *investigations*."<sup>8</sup>

The applicable phrases being:

Whoever knowingly... conceals or covers up... any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States,... or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.<sup>9</sup>

<sup>6</sup> The full text of 18 U.S.C. 1512(c) is: Whoever corruptly—(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

<sup>7</sup> Charles Doyle, *Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities*. (Congressional Research Service, April 17, 2014), 14.

<sup>8</sup> Charles Doyle, *Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities*. (Congressional Research Service, April 17, 2014), 60.

<sup>9</sup> The full text of 18 U.S.C. 1519 is: Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any

~~Information which the U.S. Nuclear Regulatory Commission has labeled "Sensitive Internal Information" because of its~~

In discussing the applicability of §1519, the Congressional Research Service states:

It seems clear that the conduct which §1519 proscribes (prohibits) is not limited to conduct that impedes a *pending investigation*; the obstructed official consideration need be neither pending ("in contemplation of") nor take the form of an investigation ("investigation or proper administration of any matter")

The legal breadth of these provisions is currently before the U.S. Supreme Court (*Yates v. United States*) in consideration of whether the law applies to all tangible objects or mainly records – and its threshold of applicability given the seriousness of a crime. Nevertheless, the General Council guidance and NRC defacto policy appear to attempt to circumvent the *discovery* of bona fide official records relating to serious nuclear safety concerns.<sup>10</sup> Clearly, the agency has shown its preference that the public not be privy to that analysis and discussion. Irrespective of whether the courts would interpret the NRC's action as criminal obstruction of justice, and irrespective of the appearance that the NRC's action may *mirror* criminal behavior, it is similarly troubling that the agency is going through great contortion, not to assure nuclear safety, but to stave off a loss in court which would force the disclosure of nuclear safety information that the public has likely been entitled to from the beginning. The irony, here, is that a science-oriented organization, such as the NRC, would choose to prevail, not by strength of argument but, rather, the prescribed omission of unwelcome data from the public record.

In the following excerpt, the agency argues the use of exemption 5 is necessary to assure candid discussion among potentially shy nuclear regulators:

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Given the importance of the matter (the wide-ranging impact of this nuclear safety issue on both the United States economy and the physical safety of a large, dispersed population) a *reducto ad absurdum* is that the underlying reasons for all government decisions need never be shared with the public since (as the argument goes) the best decisions can only be obtained if the public is never to discover the true nature of the reasoning behind them. It seems far more likely, here, that the objective is to operate without transparency, to avoid

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department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

<sup>10</sup> Inferred from the government's argument that the issue's exploit may cause serious harm. See also, data and consequences discussed in Richard H. Perkins, Michelle T. Bensi, Jacob Philip, and Selim Sancaktar, *Screening Analysis Report for the Proposed Generic Issue on Flooding of Nuclear Power Plant Sites Following Upstream Dam Failure*, July 2011. See also, United States NRC staff non-concurrence, NCP-2014-010.

the need to defend a controversial position, and to escape culpability for what might be inferior conduct of the agency. What confidence can we have in decision makers who are unwilling to share their reasoning? Along similar lines, the guidance and direction from the NRC's general council is marked "Sensitive Internal Information - Attorney-Client Privilege". The General Council staff appears to be invoking this protection to prevent discovery (as if privileged legal advice) when it is actually guidance and direction, distributed as such, to subsequently become defacto policy.

Finally, the actions mirror obstruction of justice under 18 U.S.C. 2232(a) which deals with attempts to prevent the lawful seizure of evidence. Section 2232(a) mentions neither proceedings nor investigations; it simply outlaws destruction or removal of property in order to prevent the government from seizing it.<sup>11</sup> This last point is more removed than the previous two arguments. The proscribed offense involves a person authorized to seize property and the destruction or removal of the property (or attempts to destroy or remove the property) for the purpose of preventing its seizure. Here, it may only be relevant as an illustration of bad faith that the agency's policy deliberately impedes the lawful seizure of safety-related documents by the public. Nevertheless, the difference is only the reversal of roles between the government and the public; the actions, otherwise, seeming to align with the definition of obstruction of justice under the statute.

I am concerned that the agency's desire to preserve its assumed right to withhold nuclear flood-related safety information from the public has overshadowed the priority of providing proper, defensible, competent nuclear regulation and to provide an open environment in which to demonstrate the agency's proper conduct to the public. Given the arguments contained herein, I request additional guidance and recommend that the NRC reconsider its actions with deference to the agency's regulatory responsibilities.

Respectfully submitted,

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Enclosure:

September 15, 2014 e-mail from Laura Pearson

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<sup>11</sup> Charles Doyle, *Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities*. (Congressional Research Service, April 17, 2014), 64.

**From:** Pearson, Laura

**Sent:** Monday, September 15, 2014 7:49 AM

**To:** Brown, Natalie; Stevens, Margo; Argent, Nina

**Cc:** Hirsch, Pat

**Subject:** Fw: DRAFT FOR REVIEW - E-mail regarding "Memo on memo" issue

Nina- please disseminate to the FOIA team

Natalie/Margo- if we have anything going out, pull it back.

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Sent from my NRC Blackberry.

Laura Pearson

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~~This document contains information which the U.S. Nuclear Regulatory Commission has labeled "Sensitive Internal Information - Attorney-Client Privilege"~~

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