TERA

NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

PUBLIC MEETING

DISCUSSION OF "FULL ACCESS" PROVISION

OF COMMISSION PROCEDURES

Place - Washington, D. C.

Date - Monday, 22 October 1979 Pages 1-40

POOR ORIGINAL

883 199

Telephone:
(202) 347-3700

ACE - FEDERAL REPORTERS, INC.

Official Reporters

444 North Capitol Street
Washington, D.C. 20001

NATIONWIDE COVERAGE - DAILY

7910310 028

DISCLAIMER

This is an unofficial transcript of a meeting of the United States Nuclear Regulatory Commission held on Monday, 22 October 1979 in the Commissions's offices at 1717 H Street, N. W., Washington, D. C. The meeting was open to public attendance and observation. This transcript has not been reviewed, corrected, or edited, and it may contain inaccuracies.

The transcript is intended solely for general informational purposes. As provided by 10 CFR 9.103, it is not part of the formal or informal record of decision of the matters discussed. Expressions of opinion in this transcript do not necessarily reflect final determinations or beliefs. No pleading or other paper may be filed with the Commission in any proceeding as the result of or addressed to any statement or argument contained herein, except as the Commission may authorize.

883 200

CR7825

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

PUBLIC MEETING

DISCUSSION OF "FULL ACCESS" PROVISION

OF COMMISSION PROCEDURES

Room 1130
1717 H Street, N. W.
Washington, D. C.

Monday, 22 October 1979

The Commission met, pursuant to notice, at 10:12 a.m.

BEFORE:

DR. JOSEPH M. HENDRIE, Chairman

VICTOR GILINSKY, Commissioner

RICHARD T. KENNEDY, Commissioner

PETER A. BRADFORD, Commissioner

JOHN F. AHEARNE, Commissioner

ALSO PRESENT:

Messrs. Bicket and Ostrach.

al Reporters, Inc.

mgcBWH

PROCEEDINGS

(10:12 a.m.)

CHAIRMAN HENDRIE: Let's go ahead.

COMMISSIONER KENNEDY: It was specifically requested that the matter be scheduled when all five Commissioners would be present. I don't wish to discuss it unless they are. I consider it a vital matter, one affecting the legal activities of the organization.

CHAIRMAN HENDRIE: That's correct. I had forgotten the five Commissioner thing.

(Pause.)

Let us move ahead, then, on discussion of the full access provisions of Commission procedures. This is a matter which was raised by a concern of the General Counsel, and I think I would do best by asking the Counsel to outline the potential problem and then, Len, you can tell us what the conclusions of your office at the moment are on the potential problem.

MR. BICKWIT: This is our concern. It stemmed from a concern that Commissioner Kennedy had that you have an open-door policy where you take information from members of the organization in confidence, and you also have a section of the Energy Reorganization Act which states that the -- that each member of the Commission, including the Chairman, shall have full access to all information relating

POOR ORIGINAL

BWH

to the performance of his duties or responsibilities.

The question was raised whether these two pieces of your procedures are in conflict.

COMMISSIONER KENNEDY: One is law. The other is practice.

MR. BICKWIT: Law.

COMMISSIONER KENNEDY: I thought you were speaking with a broad Bostonian accent.

(Laughter.)

MR. BICKWIT: Our basic conclusion is that there is no conflict to the extent that the open-door policy represents an implicit agreement not to exercise rights of access, but that those rights are there and that an agreement, no Commissioner is required to enter into such an agreement. It is clear to us that --

COMMISSIONER KENNEDY: When you say implicit agreement, does that mean individual agreement or a collegial decision to such an agreement?

MR. BICKWIT: It means individual agreement.

COMMISSIONER KENNEDY: In other words, an individual may waive his own rights, but in no sense can the body waive the rights of any?

MR. BICKWIT: That is exactly right. Our conclusion was that you can enter -- each individual can enter into such an agreement consistent with the language of

POOR ORIGINAL

mcBWH

the statute.

COMMISSIONER GILINSKY: What agreement are you talking about?

MR. BICKWIT: We are viewing the open-door policy as an agreement among Commissioners to -- not to exercise rights of access which they have under the statute.

COMMISSIONER GILINSKY: The right would be exercised how?

CHAIRMAN HENDRIE: Creswell comes to see Peter, and the law says I am entitled to the extent that that contract would deal in any way with agency business, that I have a right to know all about that. But if I exercise that right, then Creswell has to recognize that when he comes and exercises the open-door policy with any member of the Commission, he is vulnerable to having everything he said made known to all Commissioners, and he may prefer to talk just to one or two.

So there is a difficulty, in principle.

COMMISSIONER GILINSKY: Can a Commissioner, under your interpretation of the law, ask that another Commissioner notify him of all open-door contacts?

MR. BICKWIT: Yes. All open-door contacts that relate to the business of the Commission.

COMMISSIONER GILINSKY: You limit that to contacts from the agency?

POOR ORIGINAL

mcgbmh

MR. BICKWIT: No.

COMMISSIONER KENNEDY: The others are not open-door contacts. Ex parte questions arise there, but that is a different matter.

COMMISSIONER GILINSKY: Not ex parte --

COMMISSIONER KENNEDY: They may be.

COMMISSIONER GILINSKY: Hopefully nobody is going to have ex parte contacts.

COMMISSIONER KENNEDY: In principle, contacts of any kind that have any connection with the business of the agency under the full access principle, I guess could be the subject of a demand from any Commissioner that "All the rest of you fork over, fellows."

COMMISSIONER BRADFORD: It may go further than that. The open-door policy can be interpreted as a specific waiver of rights, but in areas where that policy doesn't exist, I suppose one could argue that, in fact, Commissioners have a duty to share information relating to the business of the agency, even without a demand.

COMMISSIONER KENNEDY: It never occurred to me that that was not the case. I just assumed that was the way the Commission functioned -- if a matter involving safety or something was raised by anybody or any aspect of our activities, that it would be shared with one's colleagues simply on the ground that that is the only way that business

POOR ORIGINAL

of the agency can be effectively conducted. I have always thought that was the case and proceeded in that light myself.

COMMISSIONER GILINSKY: I don't think you do or any other Commissioner does detail for other Commissioners all his discussions and contacts.

COMMISSIONER KENNEDY: I did not say that. I didn't say that, except as of course all contacts of mine are on the record.

COMMISSIONER GILINSKY: On the record in what sense?

COMMISSIONER KENNEDY: They are published in the public document room — every call in and out, every visitor.

COMMISSIONER GILINSKY: But the substance of the --

COMMISSIONER KENNEDY: But if there is any substance that affects the business of the agency, I make that known.

COMMISSIONER GILINSKY: If you say if any way affects the business of the agency, that is pretty broad.

CHAIRMAN HENDRIE: I think the full access language can be read to sweep in an extraordinarily wide fashion.

COMMISSIONER KENNEDY: I am speaking of the

POOR ORIGINAL

mccBWH

language — I am trying to find it here -- that the Counsel used in his memorandum when he said --

CHAIRMAN HENDRIE: "Information relating to the performance of his duties or responsibilities."

MR. BICKWIT: The only qualification we put on it was that you wouldn't want to read the statute as leading to an absurd result, so that on page eight, in the middle of page eight, we said the full access clause is "subject to an implicit limitation in cases where information has only remote or attenuated relationship to Commission business or where the relationship to Commission business is minimal compared to other interests which would be furthered by maintaining some element of confidentiality."

COMMISSIONER KENNEDY: Well judgment and concern for one's colleagues, in the last analysis, are really the keys.

MR. BICKWIT: Our reading was subject to that limitation. The clause does have a wide sweep that you can contract out of the exercise of those rights of access because the statute does say access. It doesn't say that you shall actually have this information. It says that you shall have access to it so that an agreement entered into can be legitimately entered into to waive your exercise of those rights of access, rights that you would continue to have. And our conclusion was also that any Commissioner can

POOR ORIGINAL

n--BWH

withdraw from that agreement at any point. Our reasoning there was that you simply cannot alienate a right that you have under statute. You can decide not to exercise it, but to decide in a manner that can't be revoked by a binding contract is, in effect, to give up the right of access, and that kind of alienation is frowned upon by courts, so that you can enter into an informal arrangement, but any member of the Commission could withdraw from that arrangement at any time.

COMMISSIONER AHEARNE: Would that have to be an explicit withdrawal?

MR. BICKWIT: I think it would be. Yes. I think the test would be, "Have you notified your fellow Commissioners" to the extent that they now know that you want access -- you want to exercise your right of access.

COMMISSIONER AHEARNE: It would be an explicit withdrawal in the particular focus that you have here from the open-door policy.

MR. BICKWIT: That's right, or from aspects of it.

COMMISSIONER BRADFORD: Could you then ask for information, even during the period when you had still been participating in the open-door policy?

MR. BICKWIT: I think you could. Yes.

COMMISSIONER KENNEDY: The point is that you are not supposed to have to ask for it. That establishes a

POOR ORIGINAL

presumption that you know that it occurred, which may or may not be the case.

MR. BICKNIT: Certainly if you have a right of access, you should not have to ask for the information; however, if policy had been entered into which relieved Commissioners of the duty to inform other Commissioners of the availability of such information to which the right related, then they would not be required under that informal arrangement to notify other Commissioners of the availability of the information.

COMMISSIONER BRADFORD: When you withdrew, presumably you do it with a note saying you now request information on open-door contacts during the following period.

COMMISSIONER AHEARNE: Or you could say, as far as you were concerned, that the open-door policy does not apply.

COMMISSIONER BRADFORD: In the future.

COMMISSIONER AHEARNE: Or in the past. That you are withdrawing from that —

COMMISSIONER BRADFORD: You have to make it explicit as to the past. I think if somebody sent around a note saying we are now withdrawing from the open-door policy, I would assume on the fact of that note that they were withdrawing retroactively as well.

POOR ORIGINAL

MMCBWH

COMMISSIONER KENNEDY: One could argue that the open-door policy remained in effect, but in fact the confidentiality of the whole matter would be retained among the Commissioners, but it would be understood that conveyance of the information to one Commissioner is conveyance to them all, which is what the law says.

COMMISSIONER AHEARNE: If we would go that route, I would want to at least publish a notice to all employees to make it clear.

COMMISSIONER KENNEDY: Of course.

COMMISSIONER GILINSKY: Let me ask something here. It seems to me that what the law says is that Commissioners have got to have equal information as it relates to decisions that come before them. Now it is one thing to say that if someone comes into your office and says that some pressure vessel is cracked, you have got to tell all of the other Commissioners. On the other hand, I don't think you have to say who it is that came in.

COMMISSIONER KENNEDY: I would agree with that. I would agree with that.

MR. BICKWIT: I would agree with it to the extent that who it came from is not relevant to the performance of the duties and responsibilities.

COMMISSIONER GILINSKY: If it is not relevant, then —

POOR ORIGINAL

COMMISSIONER KENNEDY: I agree with that. If the individual, for example, were aware that what he would say would have to be passed to one's colleagues on the Commission out that whether his identification with that would be made known would be up to him. That is, he could request confidentiality as to his own conveyance of this information out not as to the information. It seems to me that the open-door policy would remain fully unaffected.

COMMISSIONER BRADFORD: There are cases we're raising of the problem that it would identify the person who brought it to you

COMMISSIONER KENNEDY: Conceivably.

COMMISSIONER AHEARNE: I think automatically.

COMMISSIONER KENNEDY: In such a case, the two matters are inextricable, and it seems to me the law suggests that they should be conveyed.

COMMISSIONER AHEARNE: I have no problem with however we come out. I just think we just ought to make it clear to all employees of the agency what it is, at least certainly the gist, I think, of the comments. Some of the comments are different than I believe the employees and certainly I understood the open-door policy was. And if that is the way that the Commission wants to go, that is acceptable to me.

MR. BICKWIT: The Commission is free to go with

POOR ORIGINAL

mcBwH

the explanation of the open-door policy as it is now understood by those employees. It is just a question of what the Commission wants to do.

COMMISSIONER AHEARNE: But what you are pointing out is that it has to be a unanimous agreement.

MR. BICKWIT: This is one qualification I want to enter into. I don't think one Commissioner can, through his own action, require that this information be made available to the other four Commissioners.

COMMISSIONER AHEARNE: But it certainly can be —

MR. BICKWIT: Be made available to that Commissioner.

COMMISSIONER AHEARNE: Correct.

MR. BICKWIT: I am also saying that the Commission can decide that — all five Commissioners can decide that they are not going to do that.

POOR ORIGINAL

BWH

The conclusion we came to basically is, whatever you do — I think this is pretty much what you are saying — you ought to be clear about it.

COMMISSIONER AHEARNE: The employees must be clear.

MR. BICKWIT: That's right.

COMMISSIONER KENNEDY: And that Commission — I would say that NUREG-0567 does not make that clear.

MR. BICKWIT: You ought to decide exactly what it is that is to be protected and exactly to what extent, if there is to be any forebearance as to exercise of rights of access, exactly what extent that forebearance is to take. So that in looking at the points that need clarification, this may not be an exclusive list, but we thought it ought to be clarified whether source or substances is to be protected, whether source to the extent it is not inextricably bound up with substance is to be protected, even if substance is not to be protected.

COMMISSIONER AHEARNE: Whose judgment would that be?

MR. BICKWIT: Each individual Commissioner.

COMMISSIONER AHEARNE: For example, let's say someone comes to me and says they have got some information, and we have an outstanding request — let's say, Commissioner Kennedy has made it clear he wants to have

POOR ORIGINAL

BWH

access to all information. Now, is it my judgement --

COMMISSIONER KENNEDY: The law made that clear.

COMMISSIONER AHEARNE: But the open-door policy was different, and we are changing it.

COMMISSIONER KENNEDY: No policy ever overtakes law. Am I correct, Counselor?

MR. BICKWIT: You are correct in that statement, but our reading is that this policy can be entered into, consistent with the law.

COMMISSIONER KENNEDY: Fine.

COMMISSIONER AHEARNE: If I can continue, whose judgment is it whether or not those are sources inextricably tied to the substance? Is it mine, or is it Commissioner Kennedy's?

MR. BICKWIT: If that is to be the principle, that sources to be protected only to the extent that it is not inextricably involving substance, I think as a practical matter it will have to be the judgment of the Commissioner who has the information.

COMMISSIONER AHEARNE: So if I give it to Commissioner Kennedy on the substance, and he asks who did it come from, it is my judgment, not his, whether I give that to him. Is that what you are saying?

MR. BICKWIT: If that is your policy.

COMMISSIONER AHEARNE: I am now talking about

POOR ORIGINAL

BWH

"consistent with the law."

COMMISSIONER KENNEDY: If you were to do that and you asked me the question, my answer — if you gave me the information and I said — my question wouldn't be specifically who. I couldn't care less about who specifically. I would be interested in whether the individual concerned was someone who, in your judgment, your judgment, was someone who (a) would be likely to be in possession of the facts of which he spoke, (b) that he would be likely to be someone who was in a position to reasonably and rightly interpret those facts as he was putting them forward to you and, therefore, was a credible source. That would be the only concerns I would have, and if you assured me on that ground that that was the case and you didn't wish to confide in me — and I am using this as a hypothetical — didn't wish to confide in me the name of the individual, at that point I couldn't care less, having been assured by you of the credibility of the source. That is all I would be caring about.

COMMISSIONER AHEARNE: That's fine, Dick, but I would like to have General Counsel answer the question. If after I have done this and relayed the substance, and I conclude that I do not have to divulge the name, and Commissioner Kennedy for whatever reason asks, "What is the name", what does the law say? Do I have to divulge the

POOR ORIGINAL

name?

MR. BICKWIT: The law says he can have that name if the name is relevant to the duties and responsibilities.

COMMISSIONER AHEARNE: But that gets down to judgment. If you were to say, I must know the name to understand that information --

MR. BICKWIT: And you say not, then under those circumstances, you could run into litigation. As a practical matter, you have possession of the information. He does not. He will have to make that judgment. A suit could lie against you, and although as we mentioned in the paper, we know of no precedent for any such suit, and the court would ultimately make that determination of whether it was relevant.

COMMISSIONER AHEARNE: Thank you.

COMMISSIONER BRADFORD: If I had to bet, I think I would say that the better argument would be with the Commissioner requesting the name. That is, if it seemed to him to be essential in some way to determine the reliability of the safety information, the source of it, it would be hard to withhold it.

COMMISSIONER KENNEDY: That would, I think, be a judgmental matter. As I said, my own view would be, as to any of my colleagues if I were in that position and asking for the information, my concern would only be as to the

POOR ORIGINAL

credibility, and I would accept the judgment in that matter of my colleagues who say they believe this individual, the source, that he asked that it be protected. For my own part, I would be inclined to protect that confidentiality to the extent that I could do so, so long as I was aware of the substance of the matter. And if my colleague then said in his judgment that the individual was a credible purveyor of this information, then it seems to me I would be satisfied.

If he were to assert to me that I think the guy is credible or the individual is credible and deserves to be heard, I would say, "Fine. Now let's see what we can do about looking into the facts and where that leads us." That is what I would propose to do, and it wouldn't matter to me particularly where the indidual came from as long as my colleague felt he came from the right place.

MR. BICKWIT: That is really the question I think each individual Commissioner has to address.

COMMISSIONER KENNEDY: It is the retention of the information, to protect the confidentiality of the purveyor of the information, that I consider certainly at least unwise because it is impossible for people -- they can never shed the responsibility. It rests with them. They can never shed that responsibility, but they cannot discharge it either if they are not in possession of information which is available. It seems to me that is the issue, and the thing

POOR ORIGINAL

BWH

to do is how to find the way in which that information can be conveyed, and if confidentiality is important, retain it to the extent that that is possible.

It seems to me that is not an unreasonable proposition.

COMMISSIONER BRADFORD: The troublesome case may be somebody who is in possession of information that would by its nature reveal who it came from and might have a relationship of some sort with one or two Commissioners from — dating back years, so that he has special confidence, and he really might be deterred from coming forth with it if he felt it had immediately to be shared with the whole Commission on whatever basis.

The important thing about the open-door policy, as I understood it, was that it assured employees that they could come forward more or less on their own terms. I certainly would agree both with the legal conclusion as to other Commissioners. It may not be possible to give an absolute assurance of confidentiality, and also what I took to be your point, Dick, is that the confidentiality in any case should only extend to the minimum necessary to protect the employee.

COMMISSIONER KENNEDY: That' right.

COMMISSIONER BRADFORD: At the same time, I would hate to rewrite the policy in such a way that the

POOR ORIGINAL

hypothetical case that I began with would be one which the employee would feel safer sitting on the information than coming forward with it.

COMMISSIONER AHEARNE: I would have no problem with rewriting it and saying any information that came to any of us would be assumed to have come to all of us, including the name of the individual.

COMMISSIONER BRADFORD: You don't think in some cases that would discourage someone coming forward?

COMMISSIONER AHEARNE: I think I would be willing to probably risk that slight chance, if the mechanism is that — I think any open-door policy is going to — its longer term success is going to depend upon some actual cases and how they have worked, and if it turns out that it works well with the five of us having the information, then it will be very readily apparent to people, and they will come forward. And if it works badly, even with coming to one of us, then it won't work.

COMMISSIONER GILINSKY: If all of the information is to be shared, they might as well go to the Chairman.

COMMISSIONER KENNEDY: It just might be that individuals would be more comfortable discussing the information with one or another of us.

COMMISSIONER AHEARNE: Right. I would have no problem with a policy that says — any open-door

POOR ORIGINAL

application or process with respect to any one Commissioner must be understood that the material including the individual will be shared with all, but the five will then keep it at the same level of confidentiality.

All I would like is to make it very clear -- everybody understands.

COMMISSIONER BRADFORD: I would put a clause at the end saying something along the line that the information will be shared to the maximum extent compatible with the individual's desire for confidentiality.

COMMISSIONER KENNEDY: Are you talking about the substance? You would withhold substance if the man wanted the substance protected?

COMMISSIONER GILINSKY: It seems to me that individuals have got to -- in coming up, want to correct some problem that can only come as a result of Commission action, and that can only come if other Commissioners know about it. So the problem, it seems to me, needs to be shared if it is important enough anyway.

Someone ought to find a way to protect individuals to the extent that their identity is not critical.

COMMISSIONER AHEARNE: We ought to be able to protect, whether one of us knows the individual or five of us know the individual, we ought to be sufficiently responsible that we can protect that individual. I don't

POOR ORIGINAL

think that I would want to conclude that if an individual is known to more than one or two of us, that therefore he is in jeopardly or she is in jeopardly.

COMMISSIONER BRADFORD: The problem isn't in the reality as we see it.

COMMISSIONER KENNEDY: It is the perception. That's right.

COMMISSIONER AHEARNE: Of course. And that is why I say the practice will end up being what will determine rather than the explicit policy.

COMMISSIONER BRADFORD: You can't slide over the phrase, "if the information is important enough", because I think we all agree that in the case of important safety information, it would have to be shared. The difficulty that arose in the Creswell case, which is the one that I am most familiar with, is in the time period required to assess just how important the information was, given that the individual in question had a very strong desire to have it all kept confidential and given that we had no immediate way to determine whether it was highly significant. The question was what to do during this period in which we devised a mechanism getting a better handle on how significant it was.

Now I agree with John that I wouldn't have any difficulty sharing the information and the identity with

POOR ORIGINAL

T BWH

other Commissioners in terms of my own perception of how the Commission works. But I have to say that I think in terms of Creswell's perception of the Commission, if that had been the rule, it is at least possible that he would not have come forward at all.

COMMISSIONER KENNEDY: Then we ought to do something about changing the perception.

COMMISSIONER BRADFORD: It might be worth asking him that question.

COMMISSIONER GILINSKY: I don't think you can get around the fact that increasing the number of persons who know about confidential matters increases the risk of a breach of confidentiality. However responsible all the Commissioners are, the fact is that they have assistants, and there is always the possibility that such confidentiality will be breached. And from the point of view of someone speaking of, talking to one of the Commissioners, it seems not an unreasonable way to view the situation.

COMMISSIONER AHEARNE: Since we have now broached the subject, I think we now have to reach a resolution of the subject. It would appear to me appropriate to have some new language drafted that would address it, and perhaps General Counsel working with Commissioner Kennedy, since he seems to be --

POOR ORIGINAL

COMMISSIONER KENNEDY: I am only one. I have heard a substantial number of statements at the table which sound very much like my own. There are nuance differences, but not very much, and it seems to me, Counsel, on the basis of this very extensive discussion and his previous very careful and thorough analysis, ought to be able to draft some language which would be helpful to the Commission in reaching a conclusion about how it should deal with these things.

For my own part, I think I share the view which Mr. Gilinsky has that, if I understand it correctly, that whereas there is no doubt about sharing the substance of the information because that goes to our statutory responsibilities, and after all as he so well puts it, if a decision — if an action has to be taken in the interest of safety, the Commission has to take it, and if the Commissioners don't know about it, they are not likely to.

POOR ORIGINAL

As to the confidentiality, I certainly agree that whatever we might do or whatever we might feel, people will tend to feel that they would rather in some cases, in the interest of confidentiality, speak with one rather than five, just because five people are less likely to be confidential than one -- not because anyone of them is. It is just the way life is. So if it is possible to protect that confidentiality if it does not directly affect -- and I indicated earlier my own view about how that could be taken care of -- if it does not directly affect the character of the information, it seems to me that confidentiality can be protected as to the individual but not the substance.

MR. BICKWIT: Why don't we try our hand at something.

COMMISSIONER KENNEDY: That's just my view.

CHAIRMAN HENDRIE: For myself, I would have no difficulty in agreeing with providing, for myself at least, that where someone under the open-door policy addresses himself to another Commissioner, that I simply will not ask who the individual was and that as the matter goes along, whether or not I am eventually told who the open-door was, would depend on the open-door and the Commissioner to whom that individual talked.

Now in saying that, I think I would then leave it to the discretion of the Commissioner who receives the

POOR ORIGINAL

1gcbWH

open-door visit to decide what pursuit of the merits of the issue is appropriate and on what scale and whether you feel that you ought to come and tell me about it immediately and the rest of us or whether you want to poke around first or whatever.

I think the open-door policy is calculated to cover the broadest possible range of employee interests in talking to one or another of the heads of the agency and can run all the way from highly personal matters to very impersonal concerns about agency conduct and so on. I think there needs to be some range of discretion, as I don't particularly feel a need to have Commissioners rushing to notify me that some individual doesn't like the air conditioning in their office or there isn't any and there ought to be some or they don't like the way the Payroll Department is treating them or the supervisor has been harsh.

It may be that for any given case, there ought to be some looking because you don't want to be unresponsive to these individual concerns, especially where somebody has felt strongly enough about them to want to come and talk to one of the heads of the agency. On the other hand, I can't see necessarily that each one of those mandates a vigorous Commission initiative in the collegial sense. I would just leave it up to whoever hears it to decide what level of

POOR ORIGINAL

action and whether the rest of us all need to hear about it immediately or it is a matter of looking around and calling a few people first to see what it is.

But I don't have any difficulty in saying for myself that I will not ask you who the individual was in the sense of exercising any right I may have under the legislation. I don't know whether that sort of a view is held uniformly across the table. If it were, then I think it might serve as the basis for what is now then an expressed public discussion and agreement among us that visits, the identity of the visitors, under the open-door policy may be kept confidential, if the visitor wishes, from other Commissioners as well as from the outside world.

COMMISSIONER GILINSKY: How do you distinguish open-door visits from other visits?

CHAIRMAN HENDRIE: Well, the ones I have had are for the most part -- I am trying to think if there have been any exceptions -- I can't remember one -- distinguished that way by the visitor. That is, I have had visits in which people said, "I would like to come and talk to you confidentially under the open-door policy." I think, at least among a number of employees -- I can't say for sure on the part of all, but at least on the part of a number of employees, it is viewed as a mechanism in which the employee says, "Open-door. I want to talk to Hendrie."

POOR ORIGINAL

agcBWH

Then there is a direct channel and, indeed, access that nobody will say, "No. Not this year." And the visits I have had — there haven't been an enormous number, but a few, and they have all been identified by the visitor.

COMMISSIONER GILINSKY: Because if it is an open-door visit, he doesn't have to inform his supervisor.

CHAIRMAN HENDRIE: Yes. It is a way in which anybody can come to talk on any subject without having breached any organizational protocol. All you have to do is say, "Open door", and that means that those intermediate steps -- checking with supervisors and on up the line and so on -- you don't have to do it.

I think it is a very useful safety valve.

COMMISSIONER KENNEDY: Not only that. Presumably then, he also is protected from any retribution on the part of any of those people in between.

CHAIRMAN HENDRIE: Yes.

COMMISSIONER KENNEDY: It is a right of his to do this, and it cannot be infringed.

MR. DORIE: Generally, visits that are out of channels and normally the result of some frustration on the part of an individual, but the system (inaudible). Therefore, he goes straight to a Commissioner.

CHAIRMAN HENDRIE: And the open-door also applies at other levels down the line. That is, you open-door to

POOR ORIGINAL

mgcBWH

the EEO, open-door to your office director and so on.

What is the feeling among the Commissioners? If we felt this way uniformly, did not seek to exercise, to give names of open-door visitors under the law, would that provide a sufficient basis for simply maintaining the language of the policy as it is, or do you feel some other discussion needs to be laid out?

COMMISSIONER KENNEDY: I share John's view in this regard. The clear indication now is -- I don't know what the employees think. I guess they feel that when they come, the fact of the conversation will be a confidential matter.

COMMISSIONER BRADFORD: Or at least can be.

COMMISSIONER KENNEDY: Yes. And I think they should be disabused of that, if our view is no, the fact that such a conversation has occurred can't be kept confidential, among the Commissioners that is. It can be as far as the staff is concerned but not as to the Commissioners. But the identity of the individual, as the Chairman suggests, unless it becomes, as Commissioner Gilinsky has pointed out, inextricably linked with the substance, it can be protected it seems to me.

COMMISSIONER GILINSKY: There would be situations where you just regard the whole matter as not important enough.

COMMISSIONER KENNEDY: Oh, yes. Sure. I mean the

POOR ORIGINAL

MGCBWH

air conditioning problem or some guy, as he did one day, called up and was calling from the middle of Kentucky. He was terribly upset because he couldn't seem to get anybody to pay attention. They had lost his checks, and he wasn't getting his -- I would be delighted to give you the full story on all that, but we helped him find out where the checks were.

But I suppose that is a simple thing that one would just pick up a phone and say, "Hey, this guy got lost; can you help him?" And sure enough, they didn't know he was lost.

CHAIRMAN HENDRIE: Did it turn out you were able to help hime?

COMMISSIONER KENNEDY: Yes.

CHAIRMAN HENDRIE: Let me write your name down.

(Laughter.)

COMMISSIONER KENNEDY: You would be surprised people don't realize they are lost. But I think that is what you are talking about. And the guy calls up and says his air conditioning doesn't work, which is a very serious thing to him, and something that should be dealt with. But on the other hand, it probably doesn't deserve a Commission meeting.

It seems to me there are the three considerations. But in a substantive matter, I am not

POOR ORIGINAL

ngc8WH

concerned about the individual himself. I am concerned about the substance of the matter, being confident in my own mind that everything is being done that will lead to whatever we need to know to resolve the issue, if there is one. And I think we all would feel that way.

But as to the individual, I don't care who he is. It doesn't bother me that I don't know, so long as my colleague is confident that that individual is a credible purveyor of the information. That's all I am concerned about.

I think that is essentially what the Chairman is suggesting.

COMMISSIONER BRADFORD: I think I have no difficulty with a policy that says that if the information has safety significance, to that extent it will be shared with the other Commissioners.

CHAIRMAN HENDRIE: I think -- my feeling is that open-door visitors who may prefer to remain, not to be identified very broadly, I don't recall any that I have talked to who would not be delighted if I took the substance of the matter and discussed it with other Commissioners. After all, one of the reasons it is coming up --

COMMISSIONER KENNEDY: They want a solution.

COMMISSIONER BRADFORD: Creswell originally took the position that he really -- that at least initially he

POOR ORIGINAL

mgcBmH

wanted --

COMMISSIONER AHEARNE: Now, there is an interesting case in point. He brought the information to Peter and me, and we talked with him and tried to figure out exactly what should be done. And we told him that what we were concluding we would do is ask I&E and NRR to look into that particular plant. But we also told him at the stage that we went forward and made that request, we were going to have to share that information with the other Commissioners, which we did the same day.

COMMISSIONER BRADFORD: That is the problem we referred to earlier.

COMMISSIONER AHEARNE: So the day we went to I&E, we went to the other Commissioners to explain what we were doing, but, yes.

POOR ORIGINAL

COMMISSIONER AHEARNE: I have no problem with anything that we are going to do. The law says it doesn't refer to safety; it refers to both the --

CHAIRMAN HENDRIE: They sweep a whale of a lot broader than safety.

COMMISSIONER AHEARNE: So it isn't a safety issue in many of the issues. It might be quite different. I think it would be, after this issue has been raised and, particularly given some of the General Counsel's points, I think that any employee should well recognize that the open-door is a policy, but the overriding aspect is the legal requirement, and I think I would certainly have to tell any employee that the way the law is written, that if any Commissioner wants to know not only the substance but who is giving it, there is a serious question as to whether that Commissioner doesn't have the right to get that and that although a current body or group may say they don't have to, I think at least the employees I have spoken with felt that the open-door policy as it stood at present was one where even when they raised a substantive issue, that that didn't have to be divulged.

Now I think it is clear that that is not the case. I would have to say that I would not want an employee believing that there is a high probability that the name would guarantee to be protected. That is why I would be

POOR ORIGINAL

comfortable with saying that any information, including the name -- they ought to consider it divulged to five.

COMMISSIONER BRADFORD: Is there a way to solicit views from staff representatives of some sort as to what the effect of a change in that direction would be? I don't know whether the labor representatives would be the right people to ask. In a sense, of course, I know what the answer is going to be, but I guess I would like to hear --

CHAIRMAN HENDRIE: Peter, there is. Recently the dissent book went around, draft, and so on. There is some detailing of open-door, the open-door policy in there, and it is sort of a good place to have it laid out among the other mechanisms in that area. And what I am beginning to think is that Counsel ought to confer with Commissioners and see about some -- about a -- some possible amended language in the open-door policy which would point out that because the power and authority of the Commission to act is vested in the collegial commission and because the law, in fact, says that the Commissioners all have -- must have access, have a right to have access at any rate, to everything that affects the performance of their duty, that open-door visitors should recognize that for a Commissioner to help them, it is very likely going to be necessary that at least the substance of their difficulties be made known to the other Commissioners and that that may also include -- may

POOR ORIGINAL

include having to say who the open-door visitor was.

I think it could also include, however, the Commission's expressed intent to maintain every reasonable element of confidentiality and protection of the individual that can be maintained. I would propose that you draft something along this line, which would simply amend the open-door language as laid out in the differing views book and then provide some explanation of the background, including the fact that there has been this discussion, that Commissioners have noted that there was a potential difficulty between confidentiality under open-door and the full access provisions of the Act and that, hence, this amendment to the open-door policy language seems appropriate. And then we circulate that to the whole list of people that are on the differing opinions review list, which is — covers all employees and assorted organizations. Well, it certainly includes the union, all kinds of organizations who have been interested in these questions of employee rights and access to Commissioners and open-door policies and so on and, in effect, provides you an extremely broad list of people whom you have invited to comment.

How does that strike you as a way of moving forward?

COMMISSIONER GILINSKY: Fine.

POOR ORIGINAL

CHAIRMAN HENDRIE: Let us agree to do that, then. What that means then is that we will have to regard the final, sort of final Commission decision and final language on this matter as part of, in due time when we get comments back, adoption of the differing views policy book and specifically within it the open-door policy provisions.

COMMISSIONER KENNEDY: That's correct. Going, however, with the caveat that the Counsel's original admonition is that we cannot collegially abridge the rights which are conveyed to us individually by the law.

COMMISSIONER KENNEDY: I think the background and explanation section of this memorandum has to note that.

MR. BICKWIT: Let me ask one policy question on this. What is the view on retroactivity of this policy?

COMMISSIONER AHEARNE: I thought you made it clear that if the Commissioner requests the information, he has to have it.

MR. BICKWIT: I know. But we also tried to make it clear that the Commissioners can agree that they not go to the full extent of what the law requires.

COMMISSIONER GILINSKY: I have not had any open-door contacts that I can remember for the last year, maybe two years.

COMMISSIONER AHEARNE: None at all?

COMMISSIONER GILINSKY: I don't think so.

883 235

POOR ORIGINAL

mfcBWH

CHAIRMAN HENDRIE: Are you sure?

(Laughter.)

COMMISSIONER KENNEDY: It's interesting, Peter, if you can think of one and the rest of us can't.

(Laughter.)

CHAIRMAN HENDRIE: Vic, I can think of one within the past two years.

COMMISSIONER GILINSKY: I guess I don't remember, unless you say something about it.

CHAIRMAN HENDRIE: You just don't remember it as an open-door.

Well, let's see. Do you have to speak to it? Isn't it problem enough?

MR. BICKWIT: You can go anyway you want to.

CHAIRMAN HENDRIE: I think a discussion which points out that under the law that Commissioners have that access right, even though they may voluntarily forego it in a given case makes it clear or is as clear as I care to make at this time.

COMMISSIONER BRADFORD: I don't have personally any pressing need for retroactivity. As I understand, you raised the standard that if we adopt a new policy, will it apply to open-door contacts while the present policy was in effect?

MR. BICKWIT: Yes.

POOR ORIGINAL

COMMISSIONER BRADFORD: I would be more comfortable, since those contacts took place under the employee's understanding of the rule as written, that we not make this policy retroactive.

CHAIRMAN HENDRIE: That's fine with me. That is perfectly consistent --

COMMISSIONER KENNEDY: It is fine with me on the presumption, of course, that my colleagues will have, as they always have -- make available to all of their colleagues those things which bear directly upon the responsibilities of the agency, and, therefore, we don't need to make it retroactive because, in fact, it would have been --

CHAIRMAN HENDRIE: Is it so clear we are changing --

COMMISSIONER AHEARNE: I think it is clear to employees. Yes.

CHAIRMAN HENDRIE: Certainly the language will change.

COMMISSIONER GILINSKY: We are not changing all that much.

CHAIRMAN HENDRIE: I am not sure we are doing more than recognizing explicitly something which has been --

COMMISSIONER KENNEDY: I am not. I have no idea what others think.

POOR ORIGINAL

CHAIRMAN HENDRIE: However, I think to be, as they say, perfectly clear about the matter that a memorandum circulated to the same distribution with differing views document, since it would amend some language and that draft differing views policy book, I think it would be appropriately treated that way.

COMMISSIONER BRADFORD: It will be circulated for comment.

CHAIRMAN HENDRIE: Yes. The intent would be to circulate the explanation and the proposed new language, background of the —

COMMISSIONER KENNEDY: But in doing that now, it should be understood, whatever the comments may be, they cannot be deemed to have any effect unless an individual Commissioner wishes to allow them to be, because it is a matter which rests not with the collegial body but with the individual Commissioners as Counsel has well pointed out, and that should be clear.

It should not be understood to be in the normal sort of comments action where the collegial body will be — will reflect those comments.

COMMISSIONER BRADFORD: The commentor has to convince all five Commissioners instead of just three.

CHAIRMAN HENDRIE: The commentors might have better language to explain the matter or the policy or

POOR ORIGINAL

mrcBWH

point out some aspect that we haven't quite focused on here.

COMMISSIONER KENNEDY: It is just the way it is presented. I didn't want to give that misapprehension.

CHAIRMAN HENDRIE: All right. We have the agreement to go ahead that way. It would be useful for us to see drafts of that. People may want to see that the tone agrees with what they have understood from this meeting.

Let us close on this subject now.

(Whereupon, at 11:15 a.m., the hearing was adjourned.)

POOR ORIGINAL