UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
METROPOLITAN EDISON COMPANY	)	Docket No. 50-289
(Three Mile Island Nuclear Station, Unit 1)	)	(Restart)

MEMORANDUM WITH RESPECT TO PUBLIC DISCLOSURE OF IDENTITIES OF INVOLVED INDIVIDUALS

LeBOEUF, LAMB, LEIBY & MacRAE
Suite 1100
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 457-7500

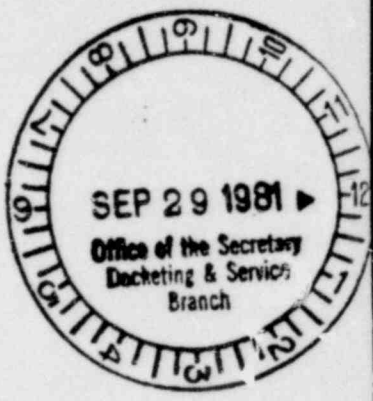
Attorneys for Two of the Three Involved Individuals

Of Counsel:

HARRY H. VOIGT
EUGENE R. FIDELL
MICHAEL F. McBRIDE

DS03
S
1/1

September 28, 1981



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
METROPOLITAN EDISON COMPANY	)	Docket No. 50-289
(Three Mile Island Nuclear Station, Unit 1)	)	(Restart)

MEMORANDUM WITH RESPECT
TO PUBLIC DISCLOSURE OF
IDENTITIES OF INVOLVED INDIVIDUALS

On behalf of one senior reactor operator* and the one other individual referred to in the Licensing Board's order of September 22, 1981, we hereby respond to the Licensing Board's invitation to address the subject of public disclosure of the identities of the individuals whose names are disclosed in the information provided by the NRC Staff to the Licensing Board.

Background

This matter arises in the context of a decision whether to authorize the operation of TMI-1. As we under-

---

* The other senior reactor operator referred to in the Licensing Board's September 22, 1981 order is represented by other counsel. No purpose is served by identifying either individual because their interests are identical with respect to disclosure. We are authorized to state that David E. Cole, Esq., attorney for the other involved senior reactor operator, joins in this memorandum.

stand it, the issue of any alleged cheating on examinations administered by Metropolitan Edison Company ("Met Ed") or the NRC is arguably related to the issue of the capability of Met Ed management safely to operate TMI-1.

In July, 1981, based on a review of the test answers of two senior reactor operators, NRC instituted an investigation into possible cheating on NRC-administered examinations for reactor operator and senior reactor operator's licenses. The two senior reactor operators involved were summoned to a meeting with officials of the Office of Inspection and Enforcement on July 31, 1981. Statements were prepared and signed by both senior reactor operators at that time. On the basis of those statements, the two senior reactor operators were terminated by Met Ed in August 1981.

The third individual named in the information provided by NRC Staff to the Licensing Board is also a client of the undersigned. He has been removed from licensed activities for Met Ed.

I.

DISCLOSURE OF THE NAMES
OF THE THREE INDIVIDUALS
WOULD ACCOMPLISH NO PURPOSE.

Disclosure of the identities of the three involved individuals would accomplish nothing. As we understand

it, intervenors to this proceeding have requested various documents from Met Ed and those documents are being provided without names or identifying information. Receipt of the documents (such as test papers) is all that is necessary to understand fully the issues raised by this matter. Disclosure of the individual's identities to the parties would only serve the idle curiosity of the parties. See Providence Journal Co. v. FBI, 460 F. Supp. 778, 789-90 (D.R.I. 1978); reversed on other grounds, 602 F.2d 1010 (1st Cir. 1979)(additional non-disclosure ordered); cert. denied, 444 U.S. 1071 (1980).

Both senior reactor operators (one of whom is represented by the undersigned) are no longer employed by Met Ed. Therefore, they cannot affect the capability of Met Ed management to operate TMI-1. If proof is desired that the two senior reactor operators have been terminated, we believe that the Licensing Board should obtain such proof and assure the parties of that fact.

With respect to the third individual, there is also no reason to disclose his identity. He has been removed from licensed activities by Met Ed. If the Licensing Board desires proof of that fact, it too could be obtained. The Licensing Board could then similarly assure the parties of the fact of his removal.

In either case, disclosure of the individual's identity would not aid in the Licensing Board's or the parties' understanding of the facts with respect to the incidents involved. Disclosure would not advance the Licensing Board's determination as to whether to authorize operation of TMI-1. In short, no useful purpose would be served by disclosure.

II.

DISCLOSURE MIGHT IRREPARABLY INJURE THE INVOLVED INDIVIDUALS.

Disclosure of the identities of the involved individuals could irreparably injure them. For example, another TMI employee who is also a client of the undersigned was the subject of a threat against his life in a telephone call to his home in 1980. Other TMI employees and their families have been the victims of anonymous, threatening telephone calls following disclosure of their identities in the news media or by other means. The individuals involved have remained in the area. The senior reactor operator and the other individual whom we represent have a strong desire to remain anonymous for the sake of their families and themselves, particularly because they desire to remain in the community.

The Licensing Board can take notice of the fact that sentiment by some persons in the Harrisburg area is

intensely antagonistic to Met Ed and to TMI employees in general. We believe that, in the circumstances of this case, it is clear that disclosure of these individuals' identities could be seriously adverse to them.

III.

THE LICENSING BOARD SHOULD WEIGH THE INTERESTS AND CONCLUDE THAT THE BALANCE CLEARLY LIES WITH NON-DISCLOSURE.

The law governing the question of disclosure here is set forth in 5 U.S.C. § 552(b)(7), Exemption 7 to the Freedom of Information Act; see 10 C.F.R. §2.790 (1981) (same language as FOIA). Exemption 7 protects from disclosure:

> "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel. . . ."

The pertinent purpose of Exemption 7 is to prevent an "unwarranted invasion of personal privacy" (emphasis added). Clearly, disclosure here would constitute an "invasion of

personal privacy." The question is whether it would be warranted or unwarranted.

Disclosure of the identities of these individuals would clearly be unwarranted. Exemption 7 disclosure decisions require a balancing of the interests in disclosure versus non-disclosure. E.g., Nix v. United States, 572 F.2d 998 (5th Cir. 1978); Ferguson v. Kelley, 448 F. Supp. 919 (N.D. Ill. 1978); Forrester v. U.S. Dept. of Labor, 433 F. Supp. 987 (S.D.N.Y. 1977), affirmed, 591 F.2d 1330 (2d Cir. 1978); see also Department of the Air Force v. Rose, 425 U.S. 352, 370-73 (1976) (Exemption 6); Campbell v. U.S. Civil Service Commission, 539 F.2d 58, 62 (10th Cir. 1976) (public interest in disclosure must give way to superior private interest in non-disclosure under Exemption 6). Where no public interest is served by disclosure, and considerable private interests would be served by non-disclosure, non-disclosure is the only possible result. See Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579 (1975)(privileged information not discoverable).

Even if there were a public interest in disclosure, the private interests here are so great as to outweigh any benefit from disclosure. Where disclosure might cause personal jeopardy, and non-disclosure will not interfere

with the necessary adjudicatory decision to be made, the Licensing Board should choose non-disclosure.

IV.

IN THE ALTERNATIVE, A STRONG PROTECTIVE ORDER SHOULD BE REQUIRED.

We have just shown that public disclosure of identities of our clients is clearly inapropriate and should be rejected. Assuming that the Licensing Board nevertheless determines to release the names of the three individuals to the other parties, we believe that this should be done subject to a protective order, as urged by Staff counsel in her letter of September 18, 1981.

We further believe that the protective order proposed by the Commission's Staff would be improved if it were changed in the following aspects:

1. Staff's proposed order defines as "private information" the names of two individuals. As the Board has noted in its September 22, 1981 memorandum and order, three individuals are identified in the documents. The protective order should be reworded to include all three.

2. In its September 22 memorandum and order, the Board has questioned the availability of enforcement sanctions in the absence of a written non-disclosure agreement. The Board's question is a valid one. We

believe that this problem can be solved by adding to the proposed protective order a provision that any person receiving a copy of the documents agrees, as a condition of such receipt, to be bound by the terms of the protective order and requiring each recipient to sign a copy of the protective order indicating his awareness of its contents and his agreement to be bound by it.

3. As a further aid to possible enforcement of the proposed protective order, we suggest the addition of language stating in substance that the order is issued pursuant to the Atomic Energy Act of 1954 within the meaning of 42 U.S.C. §§ 2280 and 2282, that the parties agree to be subject to the penalties provided for by those sections, and that any violation of the order may result in an enforcement action or the imposition of a civil penalty pursuant to those sections.

4. Depending upon the outcome of the October 2 prehearing conference, it is possible that further filings of either prepared testimony or pleadings may take place and that one or more parties may want to refer to private information in such a filing. A provision should be added to the proposed protective order to require that any filing containing private information shall be made in a separate, sealed envelope appropriately labeled and

that any filing under seal shall not become part of the public record.

5. The order should provide that copies of documents containing private information shall be numbered by the NRC Staff and that all copies shall be returned to the Staff at the conclusion of this matter (at a time to be fixed by the Board).

6. Finally, any order authorizing disclosure should not become effective for ten working days so as to permit meaningful review of the Board's action before it becomes moot. Cf. 10 C.F.R. §2.788 (1981) (ten days to file application for stay of decisions of Licensing or Appeal Boards). Such an order would be final and appealable. Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311), 3 NRC 85 (1976); Consumers Powers Co. (Midland Plant, Units 1&2), ALAB-122, 6 AEC 322 (1973).

Conclusion

Disclosure of the identities of the involved individuals is inappropriate and should not be permitted. If the Board should provide for such disclosure, it should

do so only under the terms of a protective order as described herein.

Respectfully submitted,

LeBOEUF, LAMB, LEIBY & MacRAE

By Harry H. Voigt
Partner

Suite 1100
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 457-7500

Attorneys for Two of the Three Involved Individuals

Of Counsel:

EUGENE R. FIDELL
MICHAEL F. McBRIDE

September 28, 1981