



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

AUG 24 1976

All PM Personnel

PM OPERATING PROCEDURE 210, REVISION 1
PROCESSING REQUESTS TO WITHHOLD PROPRIETARY DATA FROM PUBLIC DISCLOSURE

This Revision makes a change to Section D. Documentation by eliminating the requirement for a separate memorandum to the Branch Chief summarizing the results of the review. The sample letters to the applicant are changed accordingly and incorporate the contents of the memorandum. The remainder of the procedure is essentially unchanged.

A. Application For Withholding Data

A copy of 10 CFR 2.790 is provided as Enclosure 1 and contains detailed requirements. Generally, a person who proposes that a document or a part be withheld from public disclosure on the ground that it contains trade secrets or privileged or confidential commercial or financial information shall submit an application for withholding, accompanied by an affidavit which:

- (1) identifies the document or part sought to be withheld and the position of the person making the affidavit, and
- (2) contains a full statement of the reasons and bases on which the withholding is claimed. This statement should address specifically those considerations listed in Part B of this procedure.

The affidavit must be executed by the owner of the information even though the information sought to be withheld is submitted to the Commission by a third party (an applicant for example). The application and affidavit must be submitted when the information is filed. The information sought to be withheld should be bound separately from the application and affidavit.

B. Criteria For Determination

10 CFR 2.790 states that the Commission shall determine whether information sought to be withheld from public disclosure is a trade secret or confidential or privileged commercial information and, if so, should be withheld. The following must be considered in making this determination:

- (1) whether the information has been held in confidence by its owner
- (2) whether the information is of a type customarily held in confidence by its owner and whether there is a rational basis therefor
- (3) whether the information was transmitted to and received by the Commission in confidence
- (4) whether the information is available in public sources
- (5) whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

If the staff determines that the information contains trade secrets or confidential or privileged commercial information based on the above considerations, it must then determine whether the right of the public to be fully apprised outweighs the concern for protection of a competitive position. If the information is deemed to be irrelevant or unnecessary to the performance of Commission functions, it shall be returned to the applicant.

Even if the request to withhold the information is approved, the Commission may require it to be subject to subsequent inspection:

- (1) under a protective agreement, by contractor personnel or non-NRC government officials
- (2) by the presiding officer in a proceeding
- (3) under protective order, by parties to a proceeding. (Note: this may occur also while a decision on withholding is pending).

If the request for withholding information is denied, the applicant will be so notified and given the reasons. The document will be placed in the Public Document Room in not less than 30 days unless the applicant requests its withdrawal. If withdrawal is not requested, the responsible PM will initiate a memo to the Chief of the Records Facilities Branch authorizing release of the documents to the public.

By definition, correspondence and reports to or from the NRC which identify procedures for safeguarding special nuclear material or detailed security measures for the physical protection of a licensed facility or plant, or information submitted in confidence by a foreign source, is deemed to meet the requirements for withholding from public disclosure.

C. Responsibilities

In most cases, reviews for withholding proprietary data will be made or coordinated by the LPM. Where the information is specific to a licensing case, special project review, topical report program or generic review the project manager should do as much of the evaluation as possible. If assistance of reviewers is required the project manager should arrange for the assistance and coordinate the activity to assure continuity and a timely determination. All proprietary reviews performed or coordinated by DPM personnel should be concurred in by appropriate DSS or DSE personnel.

For certain documents, such as vendor information supplied in response to DSS or DSE requests, information provided at meetings and generic reports such as ECCS documentation, DSS or DSE personnel will be responsible for the evaluation and determination.

The responsible person will do the following as soon as possible after receipt of the request:

- (1) review the application and the affidavit to assure that they are complete and acceptable with respect to the requirements of 10 CFR 2.790 (b) (1) (see part A of this procedure).
- (2) review the material sought to be withheld with respect to the criteria of 10 CFR 2.790 (b) (4) (see part B of this procedure).
- (3) balance the public's right to be fully apprised as to the bases for and effects of the proposed action against legitimate concerns for protection of a competitive position.
- (4) make a determination as to whether the application should be approved or rejected.

D. Documentation

After completing the review and making the determination the responsible person will prepare the following:

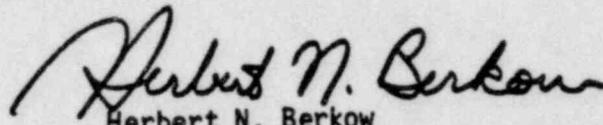
- (1) A letter to the applicant, for signature by the Branch Chief and concurrence by appropriate review personnel and OELD, notifying him of approval or rejection of his request. The letter should include a summary of the results of the review with respect to the various considerations, the balancing of public interest vs. company interest, and any other considerations associated with 2.790 (b) (4). Enclosures 2 and 3 are samples of approval and rejection letters.

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- (2) Occasionally it might be necessary to get clarification or additional justification from the applicant in order to make the determination. Enclosure 4 is a sample of a letter requesting additional information.

There are special situations where the same proprietary information will be used or referenced repeatedly over a period of time. An example is a vendor's analytical model which is used in support of several applications. It isn't possible to grant a blanket approval because the criteria for withholding are time-dependent. In such cases the complete review, as described in this procedure, will be made the first time the information is submitted. Subsequent submittals in connection with applications must be accompanied by a certification by the owner stating that his original application and affidavit which formed the basis of the staff's determination are accurate and current. The responsible person will do as much review as is necessary to reaffirm or reject the original determination. He will prepare a brief memorandum to the Branch Chief presenting the finding. A letter to the applicant is necessary only if the original determination has changed.

Note that the application, affidavit and the letter to the applicant are placed in the Public Document Rooms.



Herbert N. Berkow
Program Assistant to Director
Division of Project Management

Enclosures:

1. 10 CFR 2.790
2. Sample of Approval Letter to Applicant
3. Sample of Rejection Letter to Applicant
4. Sample of Letter Requesting Additional Information

cc: B. Rusche
E. Case
R. Heineman
H. Denton
V. Stello
M. Grossman
T. Engelhardt
J. Maynard
J. Cooke
J. Miller
T. Carter

the absence of a compelling reason for nondisclosure after a balancing of the interests of the person or agency urging nondisclosure and the public interest in disclosure, be exempt from disclosure and will be made available for inspection and copying in the NRC Public Document Room, except for matters that are:

(1) (i) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (ii) are in fact properly classified pursuant to such Executive order;

(2) Related solely to the internal personnel rules and practices of the Commission;

(3) Specifically exempted from disclosure by statute;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Interagency or intraagency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Commission;

(6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (i) interfere with enforcement proceedings, (ii) deprive a person of a right to a fair trial or an impartial adjudication, (iii) constitute an unwarranted invasion of personal privacy, (iv) 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, (v) disclose investigative techniques and procedures, or (vi) endanger the life or physical safety of law enforcement personnel;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(b) (1) A person who proposes that a document or a part be withheld in whole or part from public disclosure on the ground that it contains trade secrets or privileged or confidential commercial or financial information, shall submit an application for withholding accompanied by an affidavit which:

(i) Identifies the document or part sought to be withheld and the position of the person making the affidavit, and

(ii) Contains a full statement of the reasons on the basis of which it is claimed that the information should be withheld from public disclosure. Such statement shall address with specificity the considerations listed in paragraph (b) (4) of this section.

In the case of an affidavit submitted by a company, the affidavit shall be executed by an officer or upper-level management official who has been specifically delegated the function of reviewing the information sought to be withheld and authorized to apply for its withholding on behalf of the company. The affidavit shall be executed by the owner of the information, even though the information sought to be withheld is submitted to the Commission by another person. The application and affidavit shall be submitted at the time of filing the information sought to be withheld. The information sought to be withheld shall be incorporated, as far as possible, into a separate paper.

The affiant may designate with appropriate markings information submitted in the affidavit as a trade secret or confidential or privileged commercial or financial information within the meaning of § 9.5(a)(4) of this chapter and such information shall be subject to disclosure only in accordance with the provisions of § 9.12 of this chapter.

(2) A person who submits commercial or financial information believed to be privileged or confidential or a trade secret shall be on notice that it is the policy of the Commission to achieve an effective balance between legitimate concerns for protection of competitive positions and the right of the public to be fully apprised as to the bases for and effects of licensing or rule making actions, and that it is within the discretion of the Commission to withhold such information from public disclosure.

(3) The Commission shall determine whether information sought to be withheld from public disclosure pursuant to this paragraph: (i) is a trade secret or confidential or privileged commercial or financial information; and (ii) if so, should be withheld from public disclosure.

(4) In making the determination required by paragraph (b) (3) (i) of this section, the Commission will consider:

(i) Whether the information has been held in confidence by its owner;

(ii) Whether the information is of a type customarily held in confidence by its owner and whether there is a rational basis therefor;

(iii) Whether the information was transmitted to and received by the Commission in confidence;

(iv) Whether the information is available in public sources;

(v) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

(5) If the Commission determines, pursuant to paragraph (b) (4) of this section, that the record or document contains trade secrets or privileged or

§ 2.790 Public inspections, exemptions, requests for withholding.

(a) Subject to the provisions of paragraphs (b), (d), and (e) of this section, final NRC records and documents,* including but not limited to correspondence to and from the NRC regarding the issuance, denial, amendment, transfer, renewal, modification, suspension, revocation, or violation of a license, permit, order, or regarding a rule making proceeding subject to this part shall not, in

* Such records and documents do not include handwritten notes and drafts.

confidential commercial or financial information, the Commission will then determine (i) whether the right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position and (ii) whether the information should be withheld from public disclosure pursuant to this paragraph. If the record or document for which withholding is sought is deemed by the Commission to be irrelevant or unnecessary to the performance of its functions, it shall be returned to the applicant.

(6) Withholding from public inspection shall not affect the right, if any, of persons properly and directly concerned to inspect the document. The Commission may require information claimed to be a trade secret or privileged or confidential commercial or financial information to be subject to inspection: (i) under a protective agreement, by contractor personnel or government officials other than NRC officials; (ii) by the presiding officer in a proceeding; and (iii) under protective order, by parties to a proceeding, pending a decision of the Commission on the matter of whether the information should be made publicly available or when a decision has been made that the information should be withheld from public disclosure. In camera sessions of hearings may be held when the information sought to be withheld is produced or offered in evidence. If the Commission subsequently determines that the information should be disclosed, the information and the transcript of such in camera session will be made publicly available.

(c) If a request for withholding pursuant to paragraph (b) of this section is denied, the Commission will notify an applicant for withholding of the denial with a statement of reasons. The notice of denial will specify a time, not less than thirty (30) days after the date of the notice, when the document will be placed in the Public Document Room. If, within the time specified in the notice, the applicant requests withdrawal of the document, the document will not be placed in the Public Document Room and will be returned to the applicant. Provided, That information submitted in a rule making proceeding which subsequently forms the basis for the final rule will not be withheld from public disclosure by the Commission and will not be returned to the applicant after denial of any application for withholding submitted in connection with that information. If a request for withholding pursuant to paragraph (b) of this section is granted, the Commission will notify the applicant of its determination to withhold the information from public disclosure.

(d) The following information shall be deemed to be commercial or financial information within the meaning of § 9.5 (a) (4) of this chapter and shall be subject to disclosure only in accordance with the provisions of § 9.12 of this chapter:

(1) Correspondence and reports to or from the NRC which identify a licensee's

or applicant's procedures for safeguarding licensed special nuclear material or detailed security measures for the physical protection of a licensed facility or plant in which licensed special nuclear material is possessed or used;

(2) Information submitted in confidence to the Commission by a foreign source.

(e) The presiding officer, if any, or the Commission may, with reference to the NRC records and documents made available pursuant to this section, issue orders consistent with the provisions of this section and § 2.740(c).

Effective date: This amendment shall become effective on April 21, 1976.

(Sec. 161, Pub. L. 85-703, 68 Stat. 948 (42 U.S.C. 2201); Sec. 103, Pub. L. 83-703, 68 Stat. 936 (42 U.S.C. 2153); Sec. 201, Pub. L. 93-438, 88 Stat. 1243 (42 U.S.C. 8841).)

Dated at Washington, D.C. this 15th day of March, 1976.

For the Nuclear Regulatory Commission.

SAMUEL J. CHEEK,
Secretary of the Commission.

[FR Doc. 76-8140 Filed 3-19-76; 8:45 am]



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20565

Enclosure 2

SAMPLE OF APPROVAL LETTER TO APPLICANT

Docket No.

Gentlemen:

By your application and affidavit dated () you submitted (description of documents) and requested that they be withheld from public disclosure pursuant to 10 CFR 2.790.

Your reasons for requesting our withholding of this information were (describe justifications given in application).

We have reviewed your application and material based on the requirements and criteria of 10 CFR 2.790. (Give a brief description of the balancing of interests).

We have determined that disclosure of the information addressed in your application is not required in the public interest nor by 10 CFR 9. We therefore approve your request for withholding pursuant to Section 2.790 of 10 CFR Part 2.

In accordance with 10 CFR 2.790, we are withholding (description of documents) from public inspection as proprietary. Withholding from public inspection shall not affect the right, if any, of persons properly and directly concerned to inspect the documents. If the need arises, we may send copies of this information to our consultants working in this area. We will, of course, assure that the consultants have signed the appropriate agreements for handling proprietary data.

Sincerely,

Branch Chief

Concurrence: originator, B.C., appropriate reviewers, OELD (J. Maynard)
Distribution: Central Files, PDR, LPDR, Boyd, appropriate branch file, AD, LA, BC, originator, OELD, ACRS (16), others as appropriate



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Enclosure 3

SAMPLE OF REJECTION LETTER TO APPLICANT

Docket No.

Gentlemen:

By your application and affidavit dated () you submitted (description of documents) and requested that they be withheld from public disclosure pursuant to 10 CFR 2.790.

Your reasons for requesting our withholding of this information were (describe justifications given in application).

On (date), we notified you that we had completed our review of the application and documents and concluded that you had not supplied sufficient justification (information) for our withholding this information from public disclosure (for our making the necessary determination). On (date) we received your additional information.*

We have reviewed your application and all the supporting information based on the requirements and criteria of 10 CFR 2.790. (Give a brief description of the balancing of interests.)

We have concluded that you have not provided adequate justification for withholding this information from public disclosure. (Describe bases for denial of request.)

We also have concluded that disclosure of this information is required in the public interest and by 10 CFR Part 9. Therefore, in accordance with 10 CFR 2.790 your request to withhold (description of documents) from public disclosure is denied.

*This paragraph to be inserted only if a request for additional information was previously sent.

In not less than thirty days from the date of this letter, the subject documents will be placed in the Public Document Rooms. If, within thirty days of the date of this letter, you request withdrawal of the documents, they will not be placed in the Public Document Room and will be returned to you.

Sincerely,

Branch Chief

Concurrence: originator, B.C., appropriate reviewers, OELD (J. Maynard)
Distribution: Central Files, PDR, LPDR, Boyd, appropriate branch file,
AD, LA, BC, originator, OELD, ACRS (16), others as appropriate



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Enclosure 4

SAMPLE OF LETTER REQUESTING ADDITIONAL INFORMATION

Docket No.

Dear Applicant:

By your application and affidavit dated () you submitted (description of documents) and requested that they be withheld from public disclosure pursuant to 10 CFR 2.790.

Your reasons for requesting our withholding of this information were (describe justifications given in application).

We have reviewed your application and conclude that you have not presented sufficient justification (information) for our withholding this information from public disclosure (for our making the necessary determination). (Give specific reasons and requests as appropriate).

Accordingly, in not less than thirty days from the date of this letter, we will place the subject material in the Public Document Room unless you provide additional justification (information) or request withdrawal of the documents.

Sincerely,

Branch Chief

Concurrence: originator, B. C., OELD (J. Maynard)
Distribution: Central Files, PDR, LPDR, Boyd, appropriate branch file, AD, LA, BC, originator, OELD, others as appropriate.