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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GTE SYLVANIA, INC., ET AL. *v.* CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1248. Argued November 28, 1979—Decided March 19, 1980

In connection with an investigation of hazards in the operation of television receivers, respondent Consumer Product Safety Commission (CPSC) obtained various accident reports from television manufacturers, including petitioners. Respondents Consumers Union of the United States, Inc., and Public Citizen's Health Research Group (requesters) sought disclosure of the accident reports under the Freedom of Information Act (FOIA), and the CPSC determined that the reports did not fall within any of the FOIA's exemptions and notified the requesters and the manufacturers that it would release the material on a specified date. Petitioners then filed suits in various Federal District Courts to enjoin disclosure of the allegedly confidential reports, which suits were consolidated in the Federal District Court for the District of Delaware. While those suits were pending, the requesters filed the instant action against CPSC, its Chairman, Commissioners, and Secretary, and petitioners in the Federal District Court for the District of Columbia, seeking release of the accident reports under the FOIA. That court dismissed the complaint while a motion for a preliminary injunction was still pending in Delaware, observing that the CPSC had assured the court that disclosure would be made as soon as the agency was not enjoined from doing so, and concluding, *inter alia*, that there was no Art. III case or controversy between the requesters and the federal defendants and therefore no jurisdiction. Ultimately, the Court of Appeals reversed, holding that there was a case or controversy between the requesters and the CPSC as to the scope and effect of the proceedings in Delaware, and that a permanent injunction which meanwhile had been issued in the Delaware proceedings did not foreclose the requesters' FOIA suit.

Syllabus

Held:

1. There is a case or controversy as required to establish jurisdiction pursuant to Art. III even though the CPSC agrees with the requesters that the documents should be released under the FOIA. While there is no case or controversy when the parties desire "precisely the same result," here the parties do not desire "precisely the same result," since the CPSC contends that the Delaware injunction prevents it from releasing the documents, whereas the requesters believe that an equitable decree obtained by the manufacturers in a suit in which the requesters were not parties cannot deprive them of their rights under the FOIA. Pp. 6–8.

2. Information may not be obtained under the FOIA when the agency holding the material has been enjoined from disclosing it by a federal district court. The Act gives federal district courts jurisdiction to order the production of "improperly" withheld agency records, but here the CPSC has not "improperly" withheld the accident reports. The Act's legislative history shows that Congress was largely concerned with the unjustified suppression of information by agency officials in the exercise of their discretion, but here the CPSC had no discretion to exercise since its sole basis for not releasing the documents was the injunction issued by the Federal District Court in Delaware. The CPSC was required to obey the injunction out of respect for judicial process, and there is nothing in the legislative history to suggest that Congress intended to require an agency to commit contempt of court in order to release documents. Pp. 8–11.

192 U. S. App. D. C. 93, 590 F. 2d 1209, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

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SUPREME COURT OF THE UNITED STATES

No. 78-1248

GTE Sylvania, Incorporated, et al., Petitioners, *v.* Consumers Union of the United States, Inc., et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March 19, 1980]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the issue whether information may be obtained under the Freedom of Information Act, 5 U. S. C. § 552, when the agency holding the material has been enjoined from disclosing it by a federal district court.

I

In March 1974 respondent Consumer Product Safety Commission (CPSC) announced that it would hold public hearing to investigate hazards in the operation of television receivers and to consider the need for safety standards for televisions. 39 Fed. Reg. 10929 (Mar. 22, 1974). In the notice the CPSC requested from television manufacturers certain information on television-related accidents. After reviewing the material voluntarily submitted, the CPSC through orders, 15 U. S. C. § 2076 (b)(1), and subpoenas, 15 U. S. C. § 2076 (b)(3), obtained from the manufacturers, including petitioners, various accident reports. Claims of confidentiality accompanied most of the reports.

Respondents Consumers Union of the United States, Inc., and Public Citizen's Health Research Group (the requesters) sought disclosure of the accident reports from the CPSC under the Freedom of Information Act. The requesters were given

access only to those documents for which no claim of confidentiality had been made by the manufacturers. As for the rest, the CPSC gave the manufacturers an opportunity to substantiate their claims of confidentiality. The requesters agreed to wait until mid-March 1975 for the CPSC's determination of the availability of those allegedly confidential documents.

In March 1975 the CPSC informed the requesters and the manufacturers that the documents sought did not fall within any of the exemptions of the Freedom of Information Act, and that even if disclosure was not mandated by that Act, the CPSC would exercise its discretion to release the material on May 1, 1975. Upon receiving the notice, petitioners filed suit in the United States District Court for the District of Delaware and three other Federal District Courts[1] seeking to enjoin disclosure of the allegedly confidential reports. Petitioners contended that release of the information was prohibited by § 6 of the Consumer Product Safety Act, 15 U. S. C. § 2055, by exemptions to the Freedom of Information Act,[2] and by the Trade Secrets Act, 18 U. S. C. § 1905. Petitioners sought temporary restraining orders in all of the actions, and the CPSC consented to such orders in at least some of the

[1] GTE Sylvania, Inc., RCA Corp., Magnavox Co., Zenith Radio Corp., Motorola, Inc., Warwick Electronics, Inc., and Aeronutronic Ford Corp. filed individual actions in the District of Delaware. Matsushita Electronic Corp. of America, Sharp Electronic Corp., and Toshiba-America, Inc. filed actions in the Southern District of New York. General Electric Co. filed suit in the Northern District of New York. Admiral Corp. filed suit in the Western District of Pennsylvania. A 13th manufacturer, Teledyne Mid-America Corp., also brought suit, but that action was voluntarily dismissed. See *GTE Sylvania Inc.* v. *Consumer Product Safety Commission*, 438 F. Supp. 208, 210, n. 1 (Del. 1977).

[2] The theory of the so-called "reverse Freedom of Information Act" suit, that the exemptions to the Act were mandatory bars to disclosure and that therefore submitters of information could sue an agency under the Act in order to enjoin release of material, was squarely rejected in *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 290–294 (1979).

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cases. Subsequently the manufacturers' individual actions were consolidated in the District of Delaware, and that court issued a series of temporary restraining orders. Finally, in October 1975 the Delaware District Court entered a preliminary injunction prohibiting release of the documents pending trial. *GTE Sylvania Inc.* v. *Consumer Product Safety Commission*, 404 F. Supp. 352 (Del. 1975).

The requesters did not seek to intervene in the Delaware action, nor did petitioners or the CPSC attempt to have the requesters joined. Instead, on May 5, 1975, the requesters filed the instant action in Federal District Court for the District of Columbia, seeking release of the accident reports under the Freedom of Information Act. Named as defendants in that suit were the CPSC, its Chairman, Commissioners and Secretary, and all of the petitioners. In September 1975, while the motion for a preliminary injunction was still pending in Delaware, the District Court for the District of Columbia dismissed the requesters' complaint. The court observed that the CPSC had determined that the reports should be disclosed and had assured the court on the public record that disclosure would be made as soon as the agency was not enjoined from doing so. The court concluded that there was no Art. III case or controversy between the plaintiffs and the federal defendants [illegible]refore no jurisdiction. It also held that the complaint fai[illegible] state a claim against petitioners upon which relief could be granted since they no longer possessed the records sought by the requesters. Nor could petitioners be subject to suit under the compulsory joinder provision of Fed. Rule Civ. Proc. 19 (a) since that rule is predicated on the pre-existence of federal jurisdiction over the cause of action, which was not present here. 400 F. Supp. 848 (DC 1975).

The United States Court of Appeals for the District of Columbia Circuit reversed. 182 U. S. App. D. C. 351, 561 F. 2d 349 (1977). That court concluded that there was a

case or controversy between the plaintiffs and the CPSC on "the threshold question of the scope and effect of the proceedings in Delaware." *Id.*, at 354. In addition, the CPSC's conduct of the Delaware litigation was "not easily reconcilable with its ostensible acceptance of [the requesters'] argument that the requested documents should be disclosed." *Id.*, at 355.[3] The Court of Appeals held that the preliminary injunction issued by the Delaware court did not foreclose the requesters' suit under the Freedom of Information Act. That injunction did not resolve the merits of the claim, but instead was merely *pendente lite* relief. Thus the order could not bar the Freedom of Information Act suit in the District of Columbia, although it would weigh in the decision as to which of the two suits should be stayed pending the outcome of the other. The court concluded, however, that such balancing was not required because the Delaware court had entered an order "closing out" that case without further action.[4] The Delaware action was effectively dismissed and therefore the

[3] The Court of Appeals noted that the CPSC took 9 months from the date of the initial request for the documents to announce its determination that the material should be disclosed. In addition, the CPSC failed to make even *pro forma* opposition to the motions for temporary restraining orders and did not object to the manufacturers' requests for extensions of those orders. Finally, the CPSC moved to dismiss its own interlocutory appeal to the United States Court of Appeals for the Third Circuit, which motion was granted. 182 U. S. App. D. C., at 357, n. 27, 561 F. 2d, at 355, n. 27.

[4] The minute order entered by the Delaware District Court provided that "since the parties do not now know whether further action [after the grant of the preliminary injunction] is contemplated in this litigation, there is no need to maintain these cases as open litigation for statistical purposes." Accordingly, the clerk of that court was ordered to "close these cases for statistical purposes." The entry specifically stated that "[n]othing contained herein shall be considered a dismissal or disposition of the matter and should further proceedings become necessary or desirable, any party may initiate in the same manner as if this minute order had not been entered." Pet. App. A108.

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preliminary injunction was "dead" and did not bar the Freedom of Information Act suit.[5] In addition, the CPSC's efforts in the Delaware action, which the court below considered "less than vigilant," and the resulting absence of full representation of the prodisclosure argument prevented the preliminary injunction from having preclusive effect.[6]

The manufacturers filed a petition for writ of certiorari. While that petition was pending, the Delaware District Court granted the manufacturers' motion for summary judgment and permanently enjoined the CPSC from disclosing the accident data. *GTE Sylvania Inc.* v. *Consumer Product Safety Commission*, 443 F. Supp. 1152 (Del. 1977). We granted certiorari, vacated the judgment of the Court of Appeals for the District of Columbia Circuit, and remanded the case "for further consideration in light of the permanent injunction" entered in Delaware. 434 U. S. 1030 (1978).

On remand, the Court of Appeals reaffirmed its holding that there was a case or controversy within the meaning of Art. III.[7] 192 U. S. App. D. C. 93, 100, 590 F. 2d 1209,

[5] On petition for rehearing the Court of Appeals was informed that the Delaware case had only been marked "closed" for statistical purposes and that in fact the Delaware case had become active again soon after the Court of Appeal's initial ruling. The court nevertheless concluded that "there appears no reason why the litigation should not proceed here," 184 U. S. App. D. C. 146, 147, 565 F. 2d 721, 722 (1977) (*per curiam*).

[6] The CPSC then moved the Federal District Court in Delaware to transfer that litigation to the District of Columbia pursuant to 28 U. S. C. § 1404. This motion was denied on the grounds that the Delaware action was much further advanced than the District of Columbia suit and a transfer at that late date would only delay a decision on the merits. *GTE Sylvania Inc.* v. *Consumer Product Safety Commission*, 438 F. Supp. 208 (Del. 1977).

[7] The CPSC had initially taken the position before the Court of Appeals that there was no Art. III case or controversy. However, when the case was first before this Court the CPSC announced that it was now persuaded there was a case or controversy, and it has continued to hold that view throughout this litigation. See Brief for Federal Respondents, at 21, n. 10; 192 U. S. App. D. C., at 100, n. 33, 590 F. 2d, at 1216, n. 33.

1216. The court also held that the Delaware permanent injunction should not prevent the continuation of the District of Columbia action. *Stare decisis* would not require deference to the Delaware court's decision if it was in error. Collateral estoppel was inapplicable because the requesters were not parties to the Delaware action and an agency's interests diverge too widely from the private interests of Freedom of Information Act requesters for the agency to constitute an adequate representative. Finally, the principle of comity did not mandate a different result since the requesters were not before the Delaware court. The court below concluded that "none of the familiar anti-relitigation doctrines operates to deprive nonparty requesters of their right to sue for enforcement of the Freedom of Information Act; rather, they remain unaffected by prior litigation solely between the submitters and the involved agency." 590 F. 2d, at 1219. The case was remanded to the District Court for a decision on the merits. If that court concluded that the Freedom of Information Act required disclosure of the reports, it could consider enjoining petitioners from enforcing their final judgment awarded by the Delaware court.

We granted certiorari, — U. S. — (1979), because of the importance of the issue presented.[8] We now reverse.

II

The threshold question raised by petitioners is whether there is a case or controversy as required to establish jurisdiction pursuant to Art. III. Petitioners urge here, as the District Court held below, that since the CPSC agrees with the requesters that the documents should be released under

[8] The United States Court of Appeals for the Third Circuit has affirmed the grant of the permanent injunction by the Federal District Court in Delaware, *GTE Sylvania Inc.* v. *Consumer Product Safety Commission*, 598 F. 2d 790 (CA3 1979), and we have granted certiorari to review that judgment. *Consumer Product Safety Commission* v. *GTE Sylvania Inc.*, No. 79-521, — U. S. — (1979).

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the Freedom of Information Act, there is no actual controversy presented in this suit. We do not agree.

The purpose of the case or controversy requirement is to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968). The clash of adverse parties "'sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.'" *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974), quoting *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). See also *Flast* v. *Cohen*, *supra*, at 96–97. Accordingly, there is no Art. III case or controversy when the parties desire "precisely the same result," *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 47, 48 (1971) (*per curiam*). See also *Muskrat* v. *United States*, 219 U. S. 346, 361 (1911).

The CPSC and the requesters do not want "precisely the same result" in this litigation. It is true that the federal defendants have expressed the view that the reports in question should be released and in fact notified the District Court that absent the Delaware injunction the information would be disclosed. See 400 F. Supp., at 853, n. 14. That injunction has been issued, however, and the basic question in this case is the effect of that order on the requesters. The CPSC contends that the injunction prevents it from releasing the documents, while the requesters believe that an equitable decree obtained by the manufacturers in a suit in which those seeking disclosure were not parties cannot deprive them of their rights under the Freedom of Information Act. In short, the issue in this case is whether, given the existence of the Delaware injunction, the CPSC has violated the Freedom of Information Act at all. The federal defendants and the requesters sharply disagree on this question, as has been evidenced at every stage of this litigation. If the requesters prevail on the merits of their claim, the CPSC will be subject to directly contradictory court orders, a prospect which the

federal defendants naturally wish to avoid. It cannot be said, therefore, that the parties desire "precisely the same result." The requirements of Art. III have been satisfied.[9]

III

The issue squarely presented is whether the Court of Appeals erred in holding that the requesters may obtain the accident reports under the Freedom of Information Act when the agency with possession of the documents has been enjoined from disclosing them by a federal district court. The terms of the Act and its legislative history demonstrate that the court below was in error.

The Freedom of Information Act gives federal district courts the jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." 5 U. S. C. § 552 (a)(4)(B). This section requires a showing of three components: the agency must have (1) improperly (2) withheld (3) agency records. *Kissinger* v. *Reporters Committee for Freedom of the Press*, — U. S. —, — (1980). In this case the sole question is whether the first requirement, that the information has been "improperly" withheld, has been satisfied.

The statute provides no definition of the term "improperly." The legislative history of the Act, however, makes clear what Congress intended. The Freedom of Information Act was a revision of § 3, the "public information" section, of the Administrative Procedure Act, 5 U. S. C. § 1002 (1964 ed.). The prior law had failed to provide the desired access to information relied upon in government decisionmaking, and in

[9] We need not reach the requesters' argument that the clear conflict between them and the petitioners would produce the necessary case or controversy even if there was no such controversy between the requesters and the federal defendants. We also need not discuss the suggestion of the Court of Appeals that the CPSC does not in fact agree with the requesters that the documents should be disclosed even absent the Delaware injunction. See n. 3, *supra*.

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fact had become "the major statutory excuse for withholding Government records from public view." H. R. Rep. No. 1497, 89th Cong., 2d Sess., 3 (1966) (hereinafter H. R. Rep. No. 1497). See also *id.*, at 4, 12; S. Rep. No. 813, 89th Cong., 1st Sess., 3, 5 (1965) (hereinafter S. Rep. No. 813); *Environmental Protection Agency* v. *Mink*, 410 U. S. 73, 79 (1973). Section 3 had several vague phrases upon which officials could rely to refuse requests for disclosure: "in the public interest," "[relating] solely to the internal management of an agency," "for good cause found." Even material on the public record was only available to "persons properly and directly concerned." These undefined phrases placed broad discretion in the hands of agency officials in deciding what information to disclose, and that discretion was often abused. The problem was exacerbated by the lack of an adequate judicial remedy for the requesters. See generally H. R. Rep. No. 1497, at 4–6; S. Rep. No. 813, at 4–5; 112 Cong. Rec. 13007 reprinted in Freedom of Information Act Sourcebook, 93d Cong., 2d Sess., at 47 (1974) (remarks of Rep. Moss) (hereinafter Sourcebook); *id.*, at 52 (remarks of Rep. King); *id.*, at 71 (remarks of Rep. Rumsfeld); *Environmental Protection Agency* v. *Mink*, *supra*, at 79.

The Freedom of Information Act was intended "to establish a general philosophy of full agency disclosure," S. Rep. No. 813, at 3, and to close the "loopholes which allow agencies to deny legitimate information to the public," *ibid.* The attention of Congress was primarily focused on the efforts of officials to prevent release of information in order to hide mistakes or irregularities committed by the agency, S. Rep. No. 813, at 3; H. R. Rep. No. 1497, at 6; Sourcebook, at 69 (remarks of Rep. Monagan); *id.*, at 70 (remarks of Rep. Rumsfeld); *id.*, at 73–74 (remarks of Rep. Hall), and on needless denials of information. Examples considered by Congress included the refusal of the Secretary of the Navy to release telephone directories, the decision of the National Science Foundation

not to disclose cost estimates submitted by unsuccessful contractors as bids for a multimillion-dollar contract, and the Postmaster General's refusal to release the names of postal employees. See H. R. Rep. No. 1497, at 5–6.

Thus Congress was largely concerned with the unjustified suppression of information by agency officials. S. Rep. No. 813, at 5. Federal employees were denying requests for documents without an adequate basis for nondisclosure, and Congress wanted to curb this apparently unbridled discretion. Sourcebook, at 46–47 (remarks of Rep. Moss); *id.*, at 61 (remarks of Rep. Fascell); *id.*, at 70 (remarks of Rep. Rumsfeld); *id.*, at 71 (remarks of Rep. Skubitz); *id.*, at 80 (remarks of Rep. Anderson). It is in this context that Congress gave the Federal District Court under the Freedom of Information Act jurisdiction to order the production of "improperly" withheld agency records. It is enlightening that the Senate Report uses the terms "improperly" and "wrongfully" interchangeably. S. Rep. No. 813, at 3, 5, 8.

The present case involves a distinctly different context. The CPSC has not released the documents sought here solely because of the orders issued by the Federal District Court in Delaware. At all times since the filing of the complaint in the instant action the agency has been subject to a temporary restraining order or a preliminary or permanent injunction barring disclosure. There simply has been no discretion for the agency to exercise. The concerns underlying the Freedom of Information Act are inapplicable, for the agency has made no effort to avoid disclosure; indeed, it is not the CPSC's decision to withhold the documents at all.

The conclusion that the information in this case is not being "improperly" withheld is further supported by the established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order. See *Howat* v. *Kansas*, 258 U. S. 181, 189–190 (1922); *United States* v. *Mine Workers*, 330

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U. S. 258 (1947); *Walker* v. *City of Birmingham*, 388 U. S. 307, 314–321 (1967); *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424, 439 (1976). There is no doubt that the Federal District Court in Delaware had jurisdiction to issue the temporary restraining orders and preliminary and permanent injunctions. Nor were those equitable decrees challenged as "only a frivolous pretense to validity," *Walker* v. *City of Birmingham*, *supra*, at 315, although of course there is disagreement over whether the District Court erred in issuing the permanent injunction.[10] Under these circumstances, the CPSC was required to obey the injunctions out of "respect for judicial process," *id.*, at 321.

There is nothing in the legislative history to suggest that in adopting the Freedom of Information Act to curb agency discretion to conceal information, Congress intended to require an agency to commit contempt of court in order to release documents. Indeed, Congress viewed the federal courts as the necessary protectors of the public's right to know. To construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as "improperly" withholding documents under the Freedom of Information Act would do violence to the common understanding of the term "improperly" and would extend the Act well beyond the intent of Congress.

We conclude that the CPSC has not "improperly" withheld the accident reports from the requesters under the Freedom of Information Act.[11] The judgment of the United States Court of Appeals for the District of Columbia Circuit accordingly is

Reversed.

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[10] We intimate no view on that issue, which is raised in *Consumer Product Safety Commission* v. *GTE Sylvania Inc.*, No. 79-521, cert. granted, — U. S. — (1979).

[11] We need not address the issue whether the principle of comity mandated that the District of Columbia court stay or dismiss the action because the Delaware court had jurisdiction over the manufacturers' suit prior to the filing of the requesters' complaint.

UNITED STATES OF AMERICA Exhibit A
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

John F. Ahearne, Chairman
Victor Gilinsky
Joseph M. Hendrie
Peter A. Bradford

In the Matter of PUBLIC SERVICE COMPANY OF OKLAHOMA, et al., (Black Fox Station, Units 1 and 2)	Docket Nos. STN 50-556 STN 50-557

MEMORANDUM AND ORDER ON CERTIFIED QUESTION:
RETURN OF GE NUCLEAR REACTOR STUDY

On May 30, 1979, the Licensing Board in this proceeding certified to the Commission the question whether the General Electric Nuclear Reactor Study and its related Sub-Task Force Reports, which is generally known, and hence will be referred to, as the Reed Report (for its principal author-director), should now be returned to General Electric. The Reed Report was obtained in confidence and is subject to a protective order. For reasons described more fully in this opinion, the Commission believes that it should not be returned.

General Electric has characterized the Reed Report as a product improvement study intended to enhance the availability and performance of GE's Boiling Water Reactors. When the Reed Report was completed in 1975, GE determined that 27 safety-related issues were raised in the context of the Report, that NRC was aware of each of them, and, thus, that GE need not report

them to the NRC under section 206 of the Energy Reorganization Act. However, GE did inform the NRC of the scope and purpose of the Report, its competitive sensitivity, and GE's own review of the Report for new or significant safety information. In October 1978 in the Black Fox proceeding, concerning whether to permit construction of two GE boiling water reactors at an Oklahoma site, intervenors, Citizens Action for Safe Energy, sought to cross-examine applicants' witnesses from General Electric with regard to the Reed Report. The Board suspended the examination and attempted to obtain a copy of the Report for in camera inspection by the parties, under a protective order, as to the 27 safety issues. Rather than produce the Report, General Electric, not a party to the Black Fox proceeding, offered to extract portions of the Report arguably pertaining to safety and to make those extracts available under protective order. The Board rejected the offer and issued a subpoena for the Report; GE responded with a motion to quash the subpoena. On January 2, 1979, GE proposed a settlement which the Board approved, thereby rendering moot the motion to quash.

The pertinent terms of the protective order are (1) the Reed Report is available to the Board in confidence, (2) verbatim extractions are available to counsel insofar as they relate to Intervenor's contentions and Board questions, and (3) the Reed Report is available to Intervenor's counsel to evaluate the faithfulness of the extractions. The parties also signed protective agreements which limited access to and use of the Report. After in camera evidentiary hearings on February 20, 27 and 28, 1979, the

extractions were admitted into evidence in camera. The Reed Report itself was never admitted into evidence. Certification to Commission at 5.

On February 13, and March 7, 1979, the Board received requests under the Freedom of Information Act (FOIA), 5 U.S.C. 552, for the Reed Report. Both requests were denied and no appeals were filed.[1/] After these FOIA denials, GE moved to have the Board return the Reed Report.[2/] This motion was also denied, in part because the Board was not bound by any protective agreement to return the Report and because of the possibility of administrative appellate review of the Board's decision.

The Board certified to the Commission on May 30, 1979 the question whether the Reed Report should be returned to GE. In the certification request, the Board Chairman recommended that the Commission return the report.

Before the Commission could act on that question, the Sunbelt Educational Foundation's FOIA request was filed on June 5, 1979. The request was denied by the Board on June 18 on the same grounds as the prior requests. An appeal was filed with the Commission on June 28. Another FOIA request, from the Prairie Alliance filed on September 26, 1979, was denied on the same grounds. Its appeal was filed November 12 and became consolidated with the existing appeal.

1/ The March 23 and 29 denials noted (1) that the Reed Report came into possession of the Board pursuant to a protective order, (2) that GE has submitted an affidavit asserting proprietary status, and (3) that the NRC was in the process of reviewing the claim.

2/ By letter dated April 13, 1979, GE assured the Board that if either the Licensing or Appeal Board desired to review the Reed Report in the future, it would be made available.

These appeals raised several important and controversial issues about the FOIA, including whether the Reed Report may be considered an "agency record" -- a question of first impression for the Commission -- or whether the Reed Report may be considered confidential for purposes of Exemption 4. 5 U.S.C. 552(b)(4). After extensive consideration, including several consultations with the Department of Justice, the Commission concluded that the Report should be deemed an "agency record" owing to NRC's apparent substantial control of the document as against any GE right of return. At the same time, the NRC staff reviewed a copy of the Report at GE's offices to determine whether to grant a GE request that the Report be treated as proprietary information. See 10 CFR 2.790. During the pendency of the appeal, the staff advised the Commission that it did not have an adequate basis to conclude that release of the Report would cause substantial harm to GE's competitive position. Finally, the Commission considered whether disclosure of the Report would impair the NRC's ability to receive similar information in the future. The Commission was evenly divided on this question. Chairman Ahearne and Commissioner Hendrie would withhold the Report; Commissioners Gilinsky and Bradford voted to release it. Commissioner Bradford has noted his own view that the NRC's examination of this document flowed not from the casual voluntary disclosure of its existence to two Commissioners at a luncheon but from the fact that its existence was revealed to the public in Congressional testimony some months later.

Under the FOIA, because a majority of the Commission did not vote to withhold the document, it must be released and, therefore, both appeals

have been granted by the Commission. The Commission intends to make a copy of the Reed Report available for inspection and copying in 20 days at its Public Document Room in Washington.

Accordingly, based on the above considerations, the Commission has decided that the Board should not return its copy of the Reed Report to the General Electric Company. The Commission vacates the Board's protective order and directs that the Board's copy of the Report be transmitted to the Office of the Secretary. This matter is remanded to the Board for other and further action not inconsistent with this Order when the Report is made publicly available.

It is so ORDERED.

For the Commission

John C. Hoyle

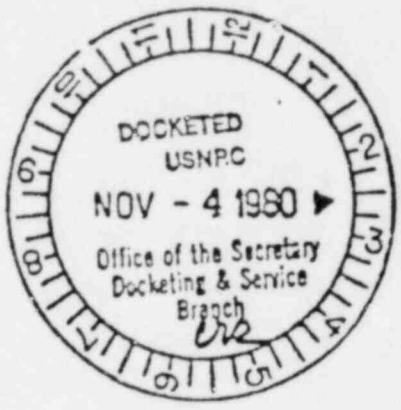
John C. Hoyle
Acting Secretary of the Commission

Dated at Washington, DC,
this 9th day of October, 1980.

Exh it B

#7

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



Commissioners:

John F. Ahearne, Chairman
Victor Gilinsky
Joseph M. Hendrie
Peter A. Bradford

In the Matter of

PUBLIC SERVICE CO. OF OKLAHOMA, et al.

(Black Fox Station, Units 1 and 2)

Docket Nos. 50-556
50-557

ADDENDUM TO OCTOBER 9, 1980 DECISION
ON CERTIFIED QUESTION

CLI-80-35

On October 9, 1980, the Commission ordered that the General Electric Nuclear Reactor Study (the Reed Report) be retained by the Commission for release under the Freedom of Information Act. CLI-80-35, 12 NRC ____ (1980). Commissioners Hendrie and Bradford have provided separate statements for inclusion in that decision. The Commission's October 9 decision is modified accordingly.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, DC,
this 4th day of November, 1980.

SECY-80-515
PDR/LPDR

Separate Views of Commissioner Hendrie,
Concurring in part and Dissenting in part

I am advised by the Office of the General Counsel that the Commission may not return the General Electric Nuclear Reactor Study, known as the Reed Report, to GE during the pendency of Freedom of Information Act claims for the Report. In that aspect of the October 9 order, I concur. However, I strongly disagree with the split Commission decision to disclose the Reed Report. NRC acquired the Reed Report through GE's voluntary cooperation on the written understanding that the confidentiality and privileged nature of the document would be respected by the Commission. Under these circumstances it is patently unfair to treat the document as an agency record and release it. The Commission's split decision to release the Reed Report welches on its assurances to GE, signals the industry to be much more circumspect in its dealings with NRC, and will hamper the Commission in the future in obtaining important information promptly from vendors and licensees. In short, not only is the Commission's decision to release the Reed Report a breach of its word; it is also dismal regulatory policy.

For this we can thank not only the Commissioners who have voted for release but the Department of Justice as well. Urged by one of its members the Commission decided to solicit the Department's advice on whether the Reed Report was an agency record for purposes of the Freedom of Information Act. The Department advised that it was an agency record and that the Department would refuse to defend in court the contrary position. It is well to recall at this point that the Reed Report is a product improvement study intended by GE to study the marketing and economic aspects of the availability and performance of GE's boiling water reactors. NRC had no involvement in the creation or core planning and execution of the document, and it was created without regard to any NRC regulatory program. When it was completed in 1975 GE reviewed the Report to determine whether it contained any safety-related information reportable to the NRC under Section 206 of the Energy Reorganization Act. GE concluded that it did not since NRC was aware of all safety issues mentioned in the Report, but nevertheless reported the results of its review to the NRC Chairman. The NRC senior staff thereupon reviewed the Reed Report in GE offices in 1976, concluded that the focus of the Report was marketing rather than safety, and that the NRC did not need a copy of the Report for its work. The matter was thoroughly explored by Congress 4-1/2 years ago. See Hearings on "Investigation of Charges Related to Nuclear Reactor Safety," before the Joint Committee on Atomic Energy, 94th Cong., 2d Sess., Vol. 1 (Feb.-March 1976).

As I noted at the outset a Commission Licensing Board later obtained the Reed Report in confidence from GE during administrative hearings on the licensing of the Black Fox nuclear power plant. An appropriate protective order, recognizing that confidence, was entered into. Given these facts the Department's position that the report is an NRC record seems to me wholly misguided. The Department's advice revealed a fundamental misunderstanding of the facts and a patent lack of deference due the views of this agency on the importance to its regulatory charter of promptly obtaining information that might have a bearing on nuclear safety issues. The NRC regulatory program has always relied on voluntary industry cooperation, especially in providing

access to information that might otherwise not have been required to be submitted to the NRC. Disclosure of such information, provided in confidence to assist the NRC, will undermine that important aspect of the agency program. Groups, such as GE, will be less likely to produce such documents for NRC's use, and the Commission will become mired in subpoena enforcement proceedings to procure the information it wants. Even if NRC were to prevail in such proceedings, the cost to the agency in time, resources, and lack of prompt information would be high.

For these reasons I believe that disclosure of the Reed Report is a grave mistake. This should be an object lesson for those who would deal with NRC with any sense of trust. From this turn of events, I must strongly dissent.

STATEMENT OF COMMISSIONER BRADFORD

This case does not turn on a breach of confidence by the Nuclear Regulatory Commission. The extension of confidential protection to the Reed Report depended on a 1978 NRC staff conclusion, specifically described as preliminary, that the Report contained proprietary information. Neither the current staff position nor the Commission opinions dispute that in fact the Reed Report does not contain proprietary information. Without proprietary information or some other basis for confidentiality, an agency record cannot be withheld given the strong public interest in full access to nuclear safety information that is embodied in our applications of the Freedom of Information Act. The Nuclear Regulatory Commission protected this document for the five years during which it was believed to contain proprietary information. Indeed, it remains protected to this day in order that General Electric may have its day in court.

To understand fully why the Nuclear Regulatory Commission's relationship with the nuclear industry is not at issue here, one must begin with an accurate history of the NRC's dealings with the Reed Report. The most significant points are as follows:

1) The Reed Report was not reported to the NRC. Its existence was disclosed orally in "very general"[1/] terms to the Chairman and one other Commissioner at a luncheon at the San Francisco airport on August 21, 1975. This is not "reporting" as that term is normally used in nuclear regulation. Of course, GE was not required to report the document.

1/ "Investigation of Charges Relating to Nuclear Reactor Safety," Hearings of the Joint Committee on Atomic Energy, February 18, 23, and 24, and March 2 and 4, 1976. Volume II, p. 1774.

However, claims that GE voluntarily reported it to the NRC are excessive.

2) The Reed Report was mentioned in passing to the New York Society of Security Analysts by GE Chairman Reginald Jones in a question-and-answer session on December 17, 1975. The contents of the Report were not mentioned, other than that they "confirmed" GE's general approach to the nuclear business. The document was described as "overwhelming . . . . a five-foot shelf."

3) The general nature of the Reed Report became public in February, 1976, not as a result of the luncheon five months earlier, but because three GE engineers resigned in protest of safety deficiencies. These engineers discussed the Report in testimony before Congress on February 18, 1976, and GE then described it further at subsequent Joint Committee sessions.

4) Beginning the following Sunday, February 22, nine days before the NRC was due to respond to the former GE engineers' testimony, two members of the NRC staff reviewed the Report for the first time. This review was explicitly "as a result of the February 18 testimony,"[2/] not the August 21 luncheon. It did conclude that, while numerous safety matters were discussed, no new safety concerns were raised by the document. It made no determination as to whether the Report contained proprietary information. Instead of a five foot shelf, the document reviewed totaled 713 pages and was three and one-half inches thick.

5) Seventeen months later, the NRC staff did find that the three and one-half inch version of the Reed Report was proprietary information and so informed General Electric in a July 10, 1978 letter from Roger Mattson to Glenn Sherwood.

2/ Ibid, p. 1495.

6) On August 25, 1978, the Commission was advised by its Office of Policy Evaluation that that office could not "see the basis for categorizing the entire list of items as proprietary."

7) In a December 27, 1978 letter to Congressman John Dingell, the Commission made clear that it considered the staff's August determination regarding proprietary information to be tentative. Specifically, it noted that the Report was the subject of agency litigation and indicated that "the Commission normally treats documents of this type as proprietary, pending a final determination (emphasis added)." The letter, itself a public document, states that General Electric will be notified.

8) On October 18, 1978, the Licensing Board in the Black Fox case issued a subpoena requiring GE to produce the Reed Report. GE moved to quash the subpoena on October 30. On January 2, 1979, GE proposed a settlement which the Board approved, thereby rendering moot the motion to quash. The Board's order noted that the Report was available "in confidence." The order makes clear that this "in confidence" status is based upon the proprietary information contained in the document.

9) On June 5, 1979, a Freedom of Information Act request for the Reed Report was filed by the Sunbelt Educational Foundation. This request was denied by the Black Fox Licensing Board on June 18. An appeal was taken in a letter of June 28.

10) On March 19, 1980, in the context of the Sunbelt FOIA appeal, the General Counsel asked the Justice Department whether the document constituted an agency record within the meaning of the Freedom of Information Act. This request was made as a result of a 3-2 Commission vote (Commissioners Hendrie and Ahearne dissenting). The Department replied

that the Reed Report was an agency record. Both the Commission and the Justice Department took the position that if the document contained proprietary information, such information could still be withheld.

11) On September 9, 1980, the NRC staff in effect revoked the July 10, 1978 letter and concluded that "General Electric has not provided the agency with sufficient bases to support the view that public disclosure of the Reed Report would cause substantial harm to its competitive position." Since this memorandum notes that the Reed Report is now some five years old, it may not be entirely inconsistent with the equally brief determination that the document was proprietary that was made in July 1978, when the material was somewhat more current.

12) On October 16, 1980, the Commission split 2-2 and thereby failed to apply any of the Freedom of Information Act exemptions. No Commissioner argued, then or now, that the proprietary information exemption was applicable.

* * *

The foregoing chronology makes very clear that the Commission's ability to cooperate with the nuclear industry is not at issue here. The only difficult question in this case is the narrow one presented by the Commission's having to disregard the fact that the document in question is in the Licensing Board's possession "in confidence." In this context, two points must be understood:

First, given that the document is an agency record, the confidence in which it is held derives entirely from General Electric's claim that

it is proprietary. Had the NRC review shown it to be proprietary, it would have been withheld.

Second, the fact is that the subpoena for the Reed Report would very likely have been enforced had GE not entered into the confidential agreement. Had that happened, the document would in all likelihood be public already. Hence, to term this phase of the case an example of "voluntary" cooperation is again somewhat misleading. The alternative from GE's point of view was not to withhold the document; it was to be compelled to produce it. Even granting the possibilities of delay in litigation, it is a mistake to visualize this as a situation in which the company had a choice that would have enabled it to keep the document to itself and chose instead to cooperate "voluntarily."

In conclusion then, assertions to the effect that the NRC will no longer be able to rely on voluntary industrial cooperation "especially in providing access to information that might not have otherwise have been required to be submitted to the NRC" are unfathomable. Vendors and utilities remain under an affirmative duty to provide safety-significant information. That has never been an issue in this case. If the NRC requires access to documents to verify their lack of safety significance, visits to company offices or other protective arrangements remain as available and as effective as they have been for five years in this case. Licensing proceedings in which documents containing proprietary information must be reviewed will not be subverted by the Freedom of Information Act because proprietary information will be protected. Self-flagellating statements to the effect that the NRC is no longer to be trusted are more likely to undermine cooperation than is a clear

understanding of what has actually occurred in the case of the Reed Report.

#7

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COMUMBIA

GENERAL ELECTRIC COMPANY
175 Curtner Avenue
San Jose, CA 95125

Plaintiff,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.
1717 H Street, N.W.
Washington, D.C. 20555

Defendant.

CIVIL ACTION NO.
NO. 80-2659

FILED

OCT 31 1980

JAMES E. DAVEY, Clerk

ORDER

This action is transferred under Title 28, United States Code, Section 1404(a), to the United States District Court for the Central District of Illinois. The General Electric Nuclear Reactor Study (the "Reed Report") or its contents are not to be released by defendant pending disposition of that issue by the United States District Court for Central District of Illinois.

So Ordered:

UNITED STATES DISTRICT JUDGE

Dated:
October 31, 1980

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PDR/LPDR