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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

IN THE MATTER OF : DOCKET NO. 030-30485-EA
: :
INDIANA REGIONAL CANCER CENTER :
INDIANA, PENNSYLVANIA :
: :
(Byproduct Material : EA No. 93-284
License No. 37-28179-01) :

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

LICENSEE'S RESPONSE TO THE NRC STAFF'S RESPONSE AND
OBJECTIONS AND FOR PROTECTIVE ORDER
AND LICENSEE'S MOTION TO COMPEL PRODUCTION

I. INTRODUCTION.

Indiana Regional Cancer Center ("IRCC") or ("Licensee") herein responds to NRC Staff's Response and Objections to Licensee's Request for Production of Documents and Things dated April 25, 1994 and NRC Staff's Motion for Protective Order ("NRC Staff's Response, Objections and Motion for Protective Order"). In addition, Licensee files a Motion to Compel Production.

II. DISCUSSION.

A. LICENSEE'S RESPONSE TO NRC STAFF'S RESPONSE AND OBJECTIONS.

1. LICENSEE'S REQUEST.

Any and all electronic mail messages and any other communications and/or documents, including drafts, currently or formerly embodied on the computer system of the NRC, including but not limited to, any and all backup tapes and/or disks of any such communications, which related in any manner to the Indiana Regional Cancer Center, the suspension of the by-product material license No. 37-28179-01, the IIT Team which was assembled to investigate the Indiana, PA incident and the applicability of 10 C.F.R. 19, 20 and 35 (including all subparts) to said incident.

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2. LICENSEE'S RESPONSE TO OBJECTIONS AND TO MOTION FOR PROTECTIVE ORDER.

The Staff, in its NRC Staff's Response, Objections and Motion for Protective Order, sets forth objections to the instant document request of Licensee which are factually inaccurate and legally ineffective.

The subject document request comports with the requirements of Section 2.744(a) of the NRC regulations. The request provides not only the particular category of documents requested, but describes that category with exacting detail. To the extent that the Staff is unable to determine the self-evident relevance of the subject request, Licensee believes that the requested items by virtue of being related to matters at issue are directly relevant to the investigative and enforcement actions which the NRC has taken against the Licensee. Licensee's request, by its own terms, is limited to items which are relevant to the instant proceedings. The Staff objections asserting otherwise are disingenuous and unsupported supplying no basis for failure to respond to Licensee's valid request.

Similarly, Staff's objection that the applicability of 10 C.F.R., part 35, subpart G, should be excluded from the scope of the subject request is disingenuous. Any dismissal by the Atomic Safety and Licensing Board of issues regarding the applicability of 10 C.F.R. part 35, subpart G, does not

necessarily mean that E-mail communications pertaining to the applicability of 10 C.F.R. part 35, subpart G are devoid of information relevant to the instant action.

The Staff also asserts that Licensee's document request is unduly burdensome and oppressive. In support of this claim, the Staff offers certain arguments pertaining to its E-mail system. Such arguments, however, are undercut by the nature of previous NRC responses and by the capabilities of WordPerfect Office software.

The Staff asserts that ". . . The Staff is unable to search . . . for documents over ten working days old." See NRC Staff's Response, Objections, and Motion for Protective Order at 4. This claim is belied by the appendices to the NRC's Response to the Freedom of Information Act ("FOIA") request designated FOIA-94-71. The response to the FOIA request designated FOIA-94-71, with appendices, is appended hereto and incorporated herein by reference Exhibit "A." In Appendix B to the Response to the FOIA request designated FOIA-94-71, the NRC includes, in a list of documents being placed in the public document room, E-mail messages from R. Joseph DelMedico from November, 1993. In Appendix D to the NRC Response to the FOIA request designated FOIA-94-71, the NRC includes in the list of documents being withheld in their entirety, E-mail messages from November and December, 1993, from Daniel Holody.

The fact that the NRC can either produce or refuse to produce, in May 1994, E-mail messages that were created at least five months ago in 1993, indicates that the NRC archives E-mail messages within its office automation systems and that such E-mail messages are retrievable. See Verified Statement of William J. Lupinacci, III ("Lupinacci Verified Statement"), appended hereto as Exhibit "B" and incorporated herein by reference, at Paragraph 5.

Additional claims made by the Staff with regard to the computer system similarly are flawed. For example, the Staff claims that there is no search mechanism in its software files in the face of the fact that WordPerfect Office contains sophisticated search and retrieval capabilities which allows each individual E-mail user to search and retrieve messages that were sent, received, or archived from the mail box of each respective user. See Lupinacci Verified Statement at Paragraph 6. Additionally, software is available which permits the search of contents of all files on an entire computer disk so as to locate a character string specified by a particular searcher. See Lupinacci Verified Statement at Paragraph 7. Utilizing such software, a searcher could specify an appropriate string and the software would list every file on every computer disk directory containing such character string. See Lupinacci Verified Statement at Paragraph 7. With such software, the NRC or other

searcher, could, for example, list every file on every computer disk category that contained an appropriate character string.

See Lupinacci Verified Statement at Paragraph 7. Software compatible with the system purportedly used by the NRC is available. See Lupinacci Verified Statement at Paragraph 8.

Finally, the NRC's claims regarding the encryption also appear disingenuous. Licensee, in the absence of NRC encryption software, could utilize the same version of WordPerfect Office as is used by the NRC, load NRC supplied copies of the appropriate directory name utilized by the NRC for its subject documents, and its subdirectories and hidden files, which contain the encrypted E-mail files, and read them without difficulty. See Lupinacci Verified Statement at Paragraph 9.

Given the sophistication of the E-mail related software utilized by the NRC, the staff claims that the subject document request is unduly burdensome or oppressive is simply inaccurate and should not provide a basis for evading a valid document request. Licensee is further willing to eliminate any burden upon the NRC with regard to the instant request. Licensee is willing to run whatever computer searches are necessary to achieve compliance with Licensee's document request.

B. MOTION TO COMPEL PRODUCTION PURSUANT TO SECTION
2.744(c) OF THE NRC REGULATIONS.

Licensee hereby moves the Board to compel compliance with Licensee's subject request. Such motion should be granted for the reasons set forth above.

III. CONCLUSION.

For the reasons set forth above, the Board should deny the Staff's Motion for a Protective Order and grant Licensee's Motion to Compel Production Pursuant to Section 2.744(c) of the NRC Regulations.

Respectfully submitted,

WILLIAMSON, FRIEDBERG & JONES

DATED: June 9, 1994

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RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) REQUEST

RESPONSE TYPE

FULL PARTIAL

DATE MAY 10 1988

DOC# NUMBER(S) of response

REQUESTER

Marcy L. Colkitt

PART I - AGENCY RECORDS RELEASED OR NOT LOCATED (See criteria below)

- No agency records subject to the request have been located.
- No additional agency records subject to the request have been located.
- Requested records are available through another public information program. See Comments section.
- Agency records subject to the request that are identified in Appendix A are being made available for public inspection and copying at the NRC Public Document Room, 2120 L Street, N.W., Washington, DC.
- Agency records subject to the request that are identified in Appendix B are being made available for public inspection and copying at the NRC Public Document Room, 2120 L Street, N.W., Washington, DC, in a folder under this FOIA number.
- The nonproprietary version of the spreadsheet that was agreed to access in a telephone conversation with a member of my staff is now being made available for public inspection and copying at the NRC Public Document Room, 2120 L Street, N.W., Washington, DC, in a folder under this FOIA number.
- Agency records subject to the request that are identified in Appendix C may be inspected and copied at the NRC Local Public Document Room identified in the Comments section.
- Enclosed is information on how you may obtain access to and the charges for copying records stored at the NRC Public Document Room, 2120 L Street, N.W., Washington, DC.
- Agency records subject to the request are enclosed.
- Records subject to the request have been referred to another Federal agency(ies) for review and direct response to you.
- Fees
 - You will be billed by the NRC for fees totaling \$ _____.
 - You will receive a refund from the NRC in the amount of \$ _____.
- In view of NRC's response to this request, no further action is being taken on appeal letter dated _____, No. _____.

PART II - INFORMATION WITHHELD FROM PUBLIC DISCLOSURE

- Certain information in the requested records is being withheld from public disclosure pursuant to the exemptions as described in and for the reasons stated in Part II, E, C, and D. Any records not one of the documents for which any part of the record is being withheld are being made available for public inspection and copying at the NRC Public Document Room, 2120 L Street, N.W., Washington, DC in a folder under this FOIA number.

COMMENTS

SIGNATURE-DIRECTOR, DIVISION OF FREEDOM OF INFORMATION AND PUBLICATIONS SERVICES

RESPONSE TO 1st DEMAND FOR INFORMATION ACT (FOIA) REQUEST
(CONTINUATION)

FOIA NUMBER

FOIA - 94-71

DATE

MAY 10 1994

PART I B - APPLICABLE EXEMPTIONS

Records subject to this request that are classified in the approved exemption, C & D, are being withheld in their entirety or in part under the Exemption 4(a) and for the reasons given below pursuant to 5 U.S.C. 552(a) and 10 CFR 2.171(a) of NRC regulations.

1. The withheld information is properly withheld pursuant to Executive Order (Exemption 1)

2. The withheld information relates to the internal personnel rules and practices of NRC. (Exemption 5)

3. The withheld information is substantially privileged from public disclosure by Federal law. (Exemption 5)

Section 141.148 of the Atomic Energy Act, which provides the maximum of RESTRICTED DATA or Formerly Restricted Data in 42 U.S.C. 2181-2186.

Section 147 of the Atomic Energy Act, which provides the maximum of UNCLASSIFIED RESTRICTED INFORMATION in 42 U.S.C. 2187L.

4. The withheld information is a trade secret or confidential information that is being withheld for the reasons indicated. (Exemption 4)

The information is withheld to be confidential business (proprietary) information.

The information is withheld to be confidential information pursuant to 10 CFR 2.7906(a)(1)

The information was submitted and received in confidence pursuant to 10 CFR 2.7906(a)(2).

5. The withheld information consists of information of investigatory nature that can be obtained through discovery during any hearing. (Exemption 6, Applicable Provisions)

Discovery Process: Discovery of professional information from 1980 to 1988 (the case and more extensive if used against the Commission process) without access and release in their entirety, the facts are directly relevant to the proceedings. There are no materials in process that have been discovered the result of the case would create an adverse effect on the process.

XXI Applicable provisions: Confidential information that is submitted in confidence in a hearing.

XXI Applicable provisions: Confidential information that is submitted in confidence in a hearing.

6. The withheld information is withheld from public disclosure because its disclosure would reveal a confidential source of personal privacy. (Exemption 6)

7. The withheld information consists of records compiled for law enforcement purposes and is being withheld for the reasons indicated. (Exemption 7)

Disclosed under Exemption 7 (A) is information that is withheld from public disclosure because it would reveal the extent, scope, and status of ongoing or future activities and thus could identify confidential sources of information of a violation of NRC regulations.

Disclosed under Exemption 7 (A) is information that is withheld from public disclosure because it would reveal the extent, scope, and status of ongoing or future activities and thus could identify confidential sources of information of a violation of NRC regulations.

The information consists of names of individuals and other information the disclosure of which would reasonably be expected to result in the identification of confidential sources. (Exemption 7 (D))

OTHER

PART I C - DENYING OFFICIALS

Pursuant to 10 CFR 2.231(a) and 2.231(c) of the U.S. Nuclear Regulatory Commission regulations, if the Commission determines that the information withheld is exempt from disclosure by statute and that its disclosure or compromise is contrary to the public interest, the denial of disclosure for 10, 30, 60, or 90 days will be considered unless the Commission determines that the Commission should be advised to the Executive Director for Operations (EDO).

DENYING OFFICIAL

INITIALS

RECORDS DATED

APPELLATE OFFICIAL

DENYING OFFICIAL	INITIALS	RECORDS DATED	APPELLATE OFFICIAL
Karen A. Cox	Dep. Gen. Counsel for Hearings, Enforcement and Administration	C/1, D/1, 3/2, 3/7 and 3/8	DO SECRETARY 3
Thomas T. Wadley	Regional Administrator, Reg. Director, Office of Enforcement	C/2, C/3, D/7, D/8, 3/8, 3/10, 3/11	DO SECRETARY 3
James Lieberman	Director, Office of Enforcement	3/5 and 3/6	DO SECRETARY 3

PART I D - APPEAL RIGHTS

The denial by said denying official identified in Part I.C may be appealed to the Appellate Officer within three (3) business days of receipt of this response. Appeals must be addressed, in addition to the Executive Director for Operations, to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20545, and should clearly state on the envelope and in the appeal that it is an "Appeal to a denied FOIA Request."

Re: FOIA-94-71

APPENDIX A
DOCUMENTS ALREADY AVAILABLE TO THE FBI

NUMBER	DATE	DESCRIPTION
1.	2/4/94	Letter from James Liebman to Marty Colkin. FOIA Accession No. 9402090109
2.	2/4/94	Letter from James Liebman to Marty Colkin. FOIA Accession No. 9402090112
3.	12/23/92	Letter from Richard W. Cooper, EAC Region I, to Douglas Colkin, subject: Special Inspection No. 030-31765/92-001. FOIA Accession No. 9301050060
4.	93/03/29	Letter from Richard W. Cooper to Carolyn Morwitz, subject: Routine NSC Inspection No. 030-32493/93-001. FOIA Acc. No. 9301050071

Re: FCIA-94-71

APPENDIX B
DOCUMENTS BEING PLACED IN THE FBI

NUMBER	DATE	DESCRIPTION
1.	1/26/94	Letter from Nancy Colkins to Charles Mehl. (1 page)
2.	1/21/94	Letter from Nancy Colkins to Marian Zabler. (1 page)
3.	1/21/94	Letter from Nancy Colkins to Marian Zabler. (1 page)
4.	11/5/93	E-mail from R. Joseph DelBenedino. (1 page)
5.	11/4/93	E-mail from R. Joseph DelBenedino. (2 pages)
6.	4/16/93	Transcript of Enforcement Conference in re: Radiation Oncology at Maricopa. (110 pages)
7.	6/1/90	Application for Material License. (18 pages)

APPENDIX B
DOCUMENTS BEING WITHHELD IN THEIR ENTIRETY

NUMBER	DATE	DESCRIPTION
1.	Undated	Announced draft memo from James Taylor to the Commissioners, subject: Proposed Civil Penalties to Oncology Services Corporation and Radiation Oncology Center at Marlton, with attachments. (39 pages) Exemption 5
2.	1/25/94	OGC Enforcement Control Sheet, attaching the following records: a. Mark-up OGC draft enforcement action against Radiation Oncology Center at Marlton. b. Undated draft letter to Douglas Colkett of Radiation Oncology Center at Marlton from T. Martin. c. Undated draft "Notice of Violation and Proposed Imposition of Civil Penalties" to Radiation Oncology Center at Marlton. (12 pages) Exemption 5
3.	1/25/94	OGC Enforcement Control Sheet, attaching the following records: a. Draft memo from Thomas Martin, NRC Region 3, to James Lieberman, CE, subject: Proposed Enforcement Action to Oncology Services Corporation and Radiation Oncology Center at Marlton, with enclosures: 1. Undated draft memorandum to the Commissioners from James Taylor, subject: Proposed Civil Penalties to Oncology Services Corporation and Radiation Oncology Center at Marlton. 2. Undated draft letter to Douglas Colkett from T. Martin. 3. Undated draft "Notice of Violation and Proposed Imposition of Civil Penalties." b. 1/24/94 Memo from T. Martin to J. Lieberman, subject: Proposed Enforcement Actions to Oncology Services Corporation and Radiation Oncology Center at Marlton, with enclosures:

APPENDIX B
 DOCUMENTS BEING WITHHELD BY OTHER AGENCIES
 (Continued)

NUMBER	DATE	DESCRIPTION
		1. Undated draft memo from J. Taylor to the Commissioners, subject: Proposed Civil Penalties to Oncology Services Corp. and Radiation Oncology Center at Marlton.
		2. Undated draft letter from T. Martin to Douglas Colkitt.
		3. Undated draft Notice of Violation and Proposed Imposition of Civil Penalty to Radiation Oncology Center at Marlton.
		4. Undated draft letter from T. Martin to Douglas Colkitt.
		5. Draft Notice of Violation and Proposed Imposition of Civil Penalties. (53 pages) Exemption 5
4.	5/18/93	Memo from Jeany Longo, OSC to Joe DeMedico, CE, subject: Potential Violations by OSC of NRC Requirements. (1 page) Exemption 5
5.	1/24/94	Memo from Thomas Martin to James Liebman, subject: Proposed Enforcement Actions to Oncology Services Corporation and Radiation Oncology Center at Marlton, with attachments. (33 pages) Exemption 5
6.	2/7/94	Conversation Record between OI and DOJ. (1 page) Exemption 5
7.	Undated	Region I annotated draft Notice of Violation. (9 pages) Exemption 5
8.	2/9/93	Enforcement Panel Briefing Form regarding OSC. (1 page) Exemption 5
9.	11/6/93	E-mail from Daniel Holody regarding Radiation Oncology/Marlton. (1 page) Exemption 5
10.	12/4/93	E-mail from Daniel Holody regarding draft Notice of Violation for Marlton. (1 page) Exemption 5

Re: FOIA-94-71

APPENDIX B
DOCUMENTS BEING WITHHELD IN FULL EXEMPTION
(Continued)

NUMBER	DATE	DESCRIPTION
11.	12/4/93	E-mail from Daniel Holody regarding OSC/Marine Commission Paper. (1 page) Exemption 5