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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD '94 JUN 10 10:57

IN THE MATTER OF : DOCKET NO. 030-31765-^{EA}
: :
ONCOLOGY SERVICES CORPORATION :
(Byproduct Material : EA No. 93-006
License No. 37-28540-01) :

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

I. INTRODUCTION.

Oncology Services Corporation ("OSC") 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 Oncology Services Corporation, the suspension of the HDR by-product material license No. 37-28540-01, held by Oncology Services Corporation, 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 appears 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.

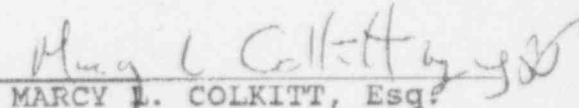
III. CONCLUSION.

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,

DATED: June 9, 1994 _____

BY:


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RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) REQUEST

NRC FOIA REQUEST NUMBER(S): 36-91

RESPONSE TYPE: FINAL PARTIAL

DATE: MAY 10 1988

DOCKET NUMBER(S) (if applicable):

REQUESTER

Marcy L. Colkitt

PART I - AGENCY RECORDS RELEASED OR NOT LOCATED (See checkbox 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 distribution system. See Comments section.

Agency records subject to the request that are identified in Appendix(es) A are already 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(es) 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 proposal(s) that you agreed to accept 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(es) _____ 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 located 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.

Fee

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 one or more exemptions described in and for the reasons cited in Part II, B, C, and D. Any released portions of the documents for which only 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

[Empty space for comments]

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

[Handwritten Signature]

RESPONSE TO INFORMATION ACT (FOIA) REQUEST
(CONTINUATION)

FOIA NUMBER

FOIA - 94-71

DATE

MAY 10 1994

PART II B - APPLICABLE EXEMPTIONS

Records subject to the request that are described in the enclosed Appendix(es) C & D are being withheld in their entirety or in part under the exemption No.(s) and for the reason(s) given below pursuant to 5 U.S.C. 552(b) and 10 CFR 2.176(a) of NRC regulations.

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

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

3. The withheld information is specifically exempted from public disclosure by statute. (Exemption 3)

Section 141.146 of the Atomic Energy Act, which prohibits the disclosure of Restricted Data or Formerly Restricted Data (42 U.S.C. 2161-2165).

Section 167 of the Atomic Energy Act, which prohibits the disclosure of Information Relating to Safeguards Information (42 U.S.C. 2167).

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

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

The information is considered to be proprietary information pursuant to 10 CFR 2.790(d)(1).

The information was submitted and received in confidence pursuant to 10 CFR 2.790(d)(2).

XX 5. The withheld information consists of investigatory or disciplinary records that are not prepared through discovery during litigation. (Exemption 5), Adversely Affecting

XX 5.1. Ongoing Process: Disclosure of investigatory information would tend to reveal the date and time schedule of steps essential to the ongoing process. Where records are withheld in this category, the facts are most likely intertwined with the investigatory information. There also are no reasonably segregable facts available because the number of the facts would impede an effective inquiry into the investigatory process of the agency.

XX 5.2. Attorney Work Product Privilege: Documents prepared by an attorney in connection with litigation.

XX 5.3. Attorney-Client Privilege: Confidential communications between an attorney and his/her client.

6. The withheld information is exempted from public disclosure because its disclosure would result in a clearly unwarranted invasion 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)

Disclosure could reasonably be expected to interfere with an enforcement proceeding because it would reveal the scope, location, and focus of enforcement efforts, and thus could adversely affect efforts to take action to enforce potential violations of a provision of NRC regulations from investigations. (Exemption 7(A))

Disclosure could constitute an unwarranted invasion of personal privacy. (Exemption 7(C))

The information consists of copies of memoranda and other information the disclosure of which could reasonably be expected to reveal identities of confidential sources. (Exemption 7(D))

OTHER

PART II C - DENYING OFFICIALS

Pursuant to 10 CFR 2.251(e) and/or 2.251(f) of the U.S. Nuclear Regulatory Commission regulations, it has been determined that the information withheld is exempt from disclosure or disclosure of the information or disclosure is contrary to the public interest. The persons responsible for the denial are those officials identified below as denying officials and the Director, Division of Freedom of Information and Publications Service, Office of Information, for any records that are referred to the Executive Director for Operations (EDO).

DENYING OFFICIAL	AFFIRMATION	RECORDS DENIED	APPELLATE OFFICIAL	
			EDO	SECRETARY
Karen D. Cyr	Dep. Gen. Counsel for Hearings, Enforcement and Administration	C/1, D/1, D/2, D/3 and D/4		XX
Thomas J. Harlin	Regional Administrator, Reg. I	C/2, C/3, D/7, D/8, D/9, D/10, D/11	XX	
James Lieberman	Director, Office of Enforcement	D/5 and D/6	XX	

PART II D - APPEAL RIGHTS

The denial by each denying official identified in Part II.C may be appealed to the Appellate Official responsible there. Any such appeal shall be filed in writing within 30 days of receipt of this response. Appeals must be addressed, as appropriate, to the Executive Director for Operations, or the Secretary of the Commission, or to the Inspector General, U.S. Nuclear Regulatory Commission, Washington, DC 20585, and should clearly state on the envelope and in the letter that it is an "Appeal From an Initial FOIA Denial."

Re: FOIA-94-71

APPENDIX A
DOCUMENTS ALREADY AVAILABLE IN THE PDR

NUMBER	DATE	DESCRIPTION
1.	2/4/94	Letter from James Lieberman to Marcy Colkitt. PDR Accession No. 9402090109
2.	2/4/94	Letter from James Lieberman to Marcy Colkitt. PDR Accession No. 9402090112
3.	12/23/92	Letter from Richard W. Cooper, NRC Region I, to Douglas Colkitt, subject: Special Inspection No. 030-31765/92-001. PDR Accession No. 9301050060
4.	93/03/29	Letter from Richard W. Cooper to Carolyn Horowitz, subject: Routine NRC Inspection No. 030-32493/93-001. PDR Acc. No. 9301050071

APPENDIX B
DOCUMENTS BEING PLACED IN THE PDR

NUMBER	DATE	DESCRIPTION
1.	1/24/94	Letter from Marcy Colkitt to Charles Hehl. (1 page)
2.	1/21/94	Letter from Marcy Colkitt to Marian Zabler. (1 page)
3.	1/21/94	Letter from Marcy Colkitt to Marian Zabler. (1 page)
4.	11/8/93	E-mail from R. Joseph DeImedio. (1 page)
5.	11/4/93	E-mail from R. Joseph DeImedio. (1 page)
6.	4/16/93	Transcript of Enforcement Conference in re: Radiation Oncology at Marston. (110 pages)
7.	6/1/90	Application for Material License. (18 pages)

APPENDIX C
DOCUMENTS BEING RELEASED IN PART

NUMBER	DATE	DESCRIPTION
1.	4/2/93	Handwritten note from Steve Lewis to Jenny Longo, (1 page), withheld, with the following attachments: a) handwritten notes concerning the information, (23 pages), withheld; b) 11/2/92 memo; c) 7/29/92 handwritten notes concerning suspects and CP's, (1 page), withheld; d) 2/23/93 memo from J. Fitzgerald to S. Hayes, subject: Draft Suspects-Related to Oncology Services Corp., (1 page), release; e) Subpoena, (1 page), release; and f) draft <u>draft</u> <u>draft</u> <u>draft</u> , (4 pages), withheld. Exemption 5
2.	7/7/93	Note from Daniel Heledy regarding enforcement conference (1 page) release withheld pursuant to Exemption 5
3.	4/9/93	Memo from James Ryan to Thomas Martin, subject: Enforcement Conference with Radiation Analysis Center at Marlton, Marlton, New Jersey, (2 pages), released, with the following attachments -a) 4/8/93 Notice of License Meeting, (2 pages), released; b) 4/8/93 letter from Richard COOPER to Carolyn Horowitz regarding routine inspection, (2 pages), released; c) 3/29/93 letter from Richard Cooper to Carolyn Horowitz attaching Routine NRC Inspection No. 630-32493, (19 pages), released; d) 3/9/93 letter from M. Thompson to Carolyn Horowitz regarding Confirmatory Order Modifying License, (2 pages), released; e) 2/5/93 letter to Carolyn Horowitz regarding Confirmatory Action Letter, (3 pages), released; and f) Draft Notice of Violation, (4 pages), withheld, Exemption 5.

APPENDIX D
DOCUMENTS BEING WITHHELD IN THEIR ENTIRETY

NUMBER	DATE	DESCRIPTION
1.	Undated	Annotated 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 Colkitt of Radiation Oncology Center at Marlton from T. Martin. c. Undated draft "Notice of Violation and Proposed Imposition of Civil Penalty" 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 I, to James Lieberman, OS, 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 Colkitt 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 D
DOCUMENTS BEING WITHHELD IN THEIR ENTIRETY
(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 Jenny Longo, OGC to Joe DeMedico, GE, subject: Potential Violations by OSC of NRC Requirements. (1 page) Exemption 5
5.	1/24/94	Memo from Thomas Martin to James Lieberman, 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 THEIR ENTIRETY
(Continued)

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