UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
John H Frye, III, Chairman
Glenn O. Bright
Dr. Emmeth A. Luebke

Served Jan 19, 1984

In the Matter of THE REGENTS OF THE UNIVERSITY OF CALIFORNIA (UCLA Research Reactor)	Docket No. 50-142 OL (Proposed Renewal of Facility License) January 18, 1984

MEMORANDUM AND ORDER
(Establishing a Protective Order)

Contention XX advanced by CBG raises the question of the adequacy of UCLA's measures to protect against theft of special nuclear material (SNM) and sabotage. This Contention raises both legal and factual issues. The legal issues which could be resolved without access to sensitive information pertaining to UCLA's security measures have been resolved by the Board. (See LBP-83-25A, 17 NRC 927 [1983] and LBP-83-67, 18 NRC ____ [October 24, 1983].)

Progress toward resolution of the remaining issues has been slowed by the parties' inability to agree on an appropriate protective order and by the Board's decision to take up the issues not requiring a protective order first.

UCLA, CBG, and the City of Santa Monica have all proposed protective orders and affidavits of non-disclosure.[1/] Staff has not proposed a protective order and affidavit, but would appear satisfied with CBG's proposal provided certain modifications were made to it. (See Staff's May 13, 1982, response to CBG's April 16, 1982, motion to defer.) The proposed protective orders and affidavits submitted by the parties are modelled after those adopted by the Appeal Board in the Diablo Canyon proceeding. (See Pacific Gas and Electric Company [Diablo Canyon Nuclear Power Plant, Units 1 and 2], ALAB-592, 11 NRC 744 at 757-60 [1980]; ALAB-600, 12 NRC 3 at 14-17 [1980].)

Applicability of Protective Order

The principal difference of opinion between UCLA and Staff on the one hand and CBG and Santa Monica on the other involves the applicability of the protective order and affidavit. Both CBG and Santa Monica take the position that the protective order must apply to all parties. Their proposals begin with the statement:

> Counsel, representatives, witnesses, and necessary clerical personnel for all parties who have executed an Affidavit of Non-Disclosure in the form attached, shall be permitted access to "protected information" . . . .

1/ CBG's proposed protective order, affidavit of non-disclosure, and supporting memorandum of April 16, 1982; UCLA's and Santa Monica's proposed protective orders and affidavits of non-disclosure of July 12, 1982; CBG's response to UCLA's proposals of July 27, 1982, and addendum thereto of July 20, 1982.

In contrast, UCLA's proposal states:

> Counsel and witnesses for Intervenor Committee to Bridge the Gap . . . and for the City of Santa Monica . . . who have executed an affidavit of Non-Disclosure in the form attached shall be permitted access to "protected information" . . . .

CBG's rationale for its position begins with the proposition that UCLA and Staff maintain that less stringent security measures are required than those which CBG espouses. CBG then points to the need for it to justify its position with evidence which would become sensitive should that position ultimately be adopted by the Board. CBG points out that this evidence would not be considered sensitive under UCLA's and Staff's view of security requirements, while under CBG's it would. CBG also maintains that UCLA and Staff have been lax in their past treatment of sensitive information. In CBG's view no harm can come from affording CBG's evidence protection against the possibility that CBG's position might prove correct. Such protection requires a protective order and affidavit requirement which is, in CBG's view, applicable to all parties. If applicability is limited to CBG and Santa Monica, CBG sees a danger that its sensitive evidence might be disclosed by UCLA and Staff.

Staff points out that the Board lacks authority to dictate to Staff and UCLA whom of their personnel shall have access to the UCLA security plan. Staff goes on to argue that the laxities in protecting sensitive information pointed to by CBG in support of its proposal were not laxities at all because the information is not sensitive under the Staff's view of the regulations.

UCLA's position is set out in the discussion of this subject at the June 29, 1982, prehearing conference (See University's proposed protective order of July 12, 1982, Tr. 536-62.) UCLA essentially makes the same jurisdictional argument advanced by Staff and points to practical problems associated with imposing the same restrictions on the University as those imposed on intervenors. These seem to center on the University's need to divulge sensitive information to third parties, such as transporters of nuclear materials.

Both UCLA and Staff appear to focus on the fact that, in most instances, protective orders and affidavits of nondisclosure are designed to protect information in the hands of one party from disclosure by another party who wishes access to it. Because the first party "owns" the information, there is no need to apply restrictions to it.

Although both UCLA and Staff appear to recognize the need to protect sensitive information generated by CBG or Santa Monica (See Tr. 544-46), they do not appear to have focussed on CBG's specific point: if information which it "owns" is to be released to other parties, it is entitled to protection. Apparently CBG's information will be directed to what it sees as vulnerabilities in UCLA's security systems. (Tr. 555-56.)

CBG's point is well taken. Sensitive information generated by it or Santa Monica is just as proper a subject for protection under a protective order as UCLA's security plan. The solution is to make the protective order applicable to such information in the hands of UCLA and

Staff just as it is applicable to information furnished by UCLA and Staff to CBG and Santa Monica.

We recognize the practical difficulties which this order may impose particularly with respect to any party's need to communicate with appropriate law enforcement agencies regarding security or with its own personnel or contractors with regard to its own sensitive information. Consequently we have adopted an exception to cover such communications. Should a party find it necessary to engage in other communications with a non-party which are prohibited by our Order, it should promptly notify us of its need for an additional exception to our Order.

Our Order also requires that all parties indicate the names and qualifications of those attorneys, representatives, witnesses, expert advisers, and clerical personnel who will have access to information covered by the Order. In accord with 10 CFR 2.744(e) and Diablo Canyon, ALAB-410, 5 NRC 1398 at 1404 (1977), the Board will pass on the qualifications of the witnesses and advisors to receive this information. Each party shall be permitted to challenge the qualifications of any person so designated by another party. Cf. Diablo Canyon, ALAB-592, supra, 11 NRC at 752. Unless individuals are added or deleted pursuant to our Order, and subject to the exception for appropriate law enforcement agencies, these individuals shall be the only individuals who on behalf of a party shall be permitted access to information generated by another party in connection with Contention XX. While it is our hope that this list of individuals will be short, we admonish the parties to include all those individuals who are expected

to have a need for access to sensitive information. In the case of UCLA and Staff, we anticipate that the list, should it include all those who normally have access to the security plan, might be extensive. Should that prove to be the case, UCLA and Staff should indicate which individuals will be primarily responsible for preparation and presentation of their cases and which individuals require access on an infrequent basis by virtue of their supervisory or other similar duties.

Each party, in its list of names, shall designate a lead attorney or representative who will have overall responsibility for the control of sensitive information in the hands of that party. Service of all sensitive information is to be made on that individual, who shall have responsibility to see to its proper distribution and control among that party's staff and experts.

Affidavits of Non-Disclosure

Once the lists of individuals to whom access shall be granted have been determined, we will determine whether it is necessary to require them to execute affidavits of non-disclosure. It is our preliminary view that, so long as the lists are not extensive and composed largely of professional persons, some lesser means of assuring an individual's acceptance of the terms of the protective order would be appropriate. In those circumstances, we believe that it may not be necessary to require any affidavit or statement from officers and full-time employees

of a party, but it may be necessary to require such an affidavit or statement from any other individual authorized access.

Clerical Services

Another point of disagreement between UCLA and CBG is whether UCLA should be required to furnish typing, reproduction, and mailing services of sensitive material for CBG. CBG maintains, without citation, that such an obligation was imposed on applicant in the Diablo Canyon proceeding.

We note that the final protective order and non-disclosure affidavit approved in Diablo Canyon did not contain such sweeping provisions. While applicant was required to furnish a facility for use by the intervenor while examining the plan, to pay for a safe to be purchased by intervenors, and to furnish typing and reproduction equipment, intervenor was to furnish the secretary and to mail all materials from the facility furnished by applicant. (See 12 NRC at 16-17.)

We do not believe the relief sought by CBG is appropriate in this case. While we do not know how much money either organization has budgeted for this proceeding, based on the presentations to date both UCLA and CBG seem to be operating on roughly equal budgets. And CBG has stoutly maintained that not only must the UCLA security plan be protected, but its own criticisms of it as well. We have drawn the protective order to cover both. Thus we are not presented with a

situation in which one party may appropriately be required to cover a portion of the expenses of another impecunious party entailed in protecting the first party's sensitive information. In the situation presented by this case, each party should bear its own expenses.

Location of UCLA Security Plan Available for Inspection

In July, 1982, CBG objected to UCLA's proposal to make the security plan available only at facilities located on the UCLA campus on the basis that to do so would seriously impair its ability to prepare its case. Then, in its memorandum on the status of Contention XX of December 13, 1983, (p.15) CBG reiterated a suggestion made earlier in 1983 that the security issues ". . . could be readily resolved by a hearing scheduled soon in which all parties and the Board tour the facility, review the security plan and security inspection reports, and the experts in an in camera setting expeditiously present opinions as to whether the security is adequate."

This is an alternative suggestion which may prove beneficial. For purposes of this discussion, however, we note that it obviates the need of the Board to consider whether UCLA's security plan should be made available off campus. We direct that the plan be made available at a facility to be provided by UCLA on its campus. Information which CBG or Santa Monica deems sensitive shall be placed with the plan and served on Staff.

Definition of Protected Information

CBG in its July 27, 1982, response to UCLA's protective order objects to UCLA's definition of protected information contained in its affidavit of non- disclosure on the grounds that it is too broad. CBG apparently believes that UCLA's proposal would ban any references whatsoever to UCLA's security plan, even those references which do not contain protected information.

We note, however, that the definition proposed by CBG is almost identical with that proposed by UCLA. We do not read either definition as broadly as CBG reads UCLA's. We find UCLA's definition to be preferable because it more precisely defines the information in question by including, in addition to the details of the security plan, information describing the features of the physical security system. We therefore adopt UCLA's definition.

Protected Information in the Public Domain

CBG objects to ¶ 2 of UCLA's affidavit of non-disclosure on the ground that it would prohibit the disclosure of protected information which is in the public domain. CBG believes that limiting permissible disclosure to information contained in the public record of this proceeding is too narrow.

CBG's view is in accord with Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-24, 11 NRC

775 (1980). However, UCLA's ¶ 2 was taken verbatim from the affidavit of non-disclosure used in Diablo Canyon as it was modified to reflect this decision. We believe CBG misapprehends the impact of this provision. When read in conjunction with the definition of protected information contained in UCLA's ¶ 1(a) (which reflected the decision in CLI-80-24), the provision is in accord with CBG's position.

Copying of Protected Information

CBG also objects to ¶ 3 of UCLA's affidavit on the ground that its prohibition of copying of protected information would seriously impair its ability to prepare its case. We note that this provision also came verbatim from the Diablo Canyon affidavit. Nonetheless, we perceive that it could create practical problems for all parties should it be necessary to prepare written testimony or written responses to Staff's motion for summary disposition. Consequently, we have incorporated an appropriate exception.

Record Keeping

Paragraph 7 of UCLA's affidavit similarly is taken from the Diablo Canyon affidavit. CBG views it as an unnecessary record keeping requirement which would hamper its ability to prepare its case. We view the provision as salutory, and, in light of CBG's position quoted above

regarding the expeditious completion of proceedings on this contention, unlikely to be burdensome.

Corroboration of Protected Information

CBG reads ¶ 8 of UCLA's affidavit as imposing a prohibition on the corroboration of information obtained by it independently of this proceeding. Apparently CBG believes it would be forbidden to use protected information to test the veracity of other relevant information gained by it. Indeed, the provision seems amenable to that interpretation. However, because it too was taken from the Diablo Canyon affidavit, a perusal of ALAB-600 reveals the true intent:

> We think it important, however, to reemphasize the Commission's warning: those subject to the protective order may not corroborate the accuracy (or inaccuracy) of outside information by using protected information gained through the hearing process . . . .
>
> Moreover, some elaboration of the caveat is useful. Rumors, gossip and speculation abound and sometimes get into print. It is one thing for a reporter to speculate or guess that something is so or quote an undisclosed source to the same effect. It would be quite another, however, for an individual who is known to possess the facts to repeat what otherwise would be only rumor, gossip or speculation. In the latter instance, his doing so may make his statements corroborative of the actual facts. This follows because reports from undisclosed and uncertain sources are likely to be treated skeptically, but the same information announced by an individual in a position to know is liable to be credited.
>
> Similarly, receipt of protected information may position the recipient to gather and collate from the public domain otherwise useless bits and pieces of information into a reproduction of the security plan. In such circumstances, simply the public revelation of the information as a coherent mass may corroborate protected information.

> These examples are obviously not exhaustive. But they point up the caution those receiving protected information must exercise in making public utterances about the security plan for the applicant's facility. We therefore stress to those who receive protected information that rumors and gossip from uninformed or unauthorized sources do not necessarily mean that protected information has become public knowledge to the extent that they are free to join in discussing it publicly. Cf., Alfred A. Knopf v. Colby, 509 F.2d 1362, 1370-71 (4th Cir. 1975). We add our caution to the Commission's and urge that all privy to the security plan exercise the utmost restraint in discussing its contents lest it be compromised. And it should be unnecessary to remind all counsel again of the American Bar Association Canons restricting statements made during the course of an administrative proceeding. See ABA Disciplinary Rule 7-107.

12 NRC at 6-7. We have modified the UCLA proposal to reflect its true intent and adopted it in our Protective Order.

Like the Appeal Board in Diablo Canyon, we also think it important to reemphasize the Commission's warning with regard to the corroboration of information in the possession of someone not subject to the protective order. There has been and continues to be an active interest in this proceeding by the news media. All parties should use extreme caution in any communications which they have with the press on the subject of security. Under the circumstances here present we believe the wisest course is not to communicate with anyone not subject to the protective order on the general subject of security. However, this decision must be left to each individual subject to the protective order.

Segregation of Proceedings Not Dealing with Sensitive Information

In its proposed protective order, CBG included a provision (¶ 6) that all proceedings should be open to the public unless the physical security plan were under consideration. UCLA objects to this as unnecessary. We agree with UCLA. It is unlikely that proceedings can be so segregated, particularly in light of the fact that we have already considered the matters which did not involve sensitive information. Nor do we believe that CBG would seriously advance this provision today.

In consideration of the foregoing, it is this 18th day of January, 1984, ORDERED that:

1. No later than January 25, 1984, each party shall serve its proposed list of authorized persons, the name of its lead attorney or representative, and the location of any designated facilities or designated offices. Each party shall serve with its proposed list of authorized persons a description of the function each such person is to perform and the qualifications of its experts and witnesses.

2. No later than February 1, 1984, any party who objects to the qualifications of the experts and witnesses of any other party shall file those objections.

3. All service shall be by Express Mail or its equivalent.

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