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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
James A. Laurenson, Chairman
Dr. Jerry R. Kline
Mr. Frederick J. Shon

In the Matter of	Docket No. 50-322-OL-3
LONG ISLAND LIGHTING COMPANY	(Emergency Planning Proceeding)
(Shoreham Nuclear Power Station, Unit 1)	May 18, 1984 3:00 p.m., E.D.T.

MEMORANDUM AND ORDER RULING ON SUFFOLK COUNTY MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY FEMA

We have before us today a discovery dispute between Suffolk County and FEMA. While we have entertained frequent discussions concerning various such disputes between the County and FEMA in the past, the current dispute commenced on May 8 when Suffolk County filed a Motion to Compel Response to Request for Production of Documents by FEMA. The County's request recited the facts that the County served on FEMA a Request for Production of Documents on April 23 and that a prompt response was necessary in order to prepare for depositions next week and cross-examination of FEMA witnesses at the hearing beginning on May 29. The County asked us to require FEMA to respond to the request for documents by May 10.

We held a discussion with all parties on May 9 during the hearing in Hauppauge, NY. At that time, FEMA indicated that it intended to

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assert executive privilege and to withhold numerous documents. The Board established a schedule for the filing of the list of documents in question on May 14 and subsequent filing of briefs, and in camera submission of the documents. At that time we notified all parties that we would announce our ruling at a telephone conference at 3:00 p.m. on May 18, 1984. The FEMA list was served upon the Board on May 15 and the County asserts that it did not receive the entire list until then. The FEMA list identified 37 documents as responsive to the Suffolk County request for documents but FEMA claimed "executive privilege" for all 37 listed documents. FEMA characterizes these documents as "advisory memoranda, predecisional deliberations related to the RAC Review, or the input of the individual RAC members to the Final FEMA Report." (FEMA's Response to Suffolk County Request for Production of Documents at 9.) FEMA goes on to object to the request to provide what it says are "the predecisional thoughts and opinions of the individual RAC members." FEMA's brief goes on to state that "the FEMA RAC Review is not being litigated in this proceeding." (Pg. 10.)

Yesterday, FEMA filed in camera copies of 35 of 37 documents in question. At the same time, FEMA submitted an Affidavit of Gen. Louis Giuffrida, Director of FEMA, listing and describing the 37 documents in question and stating that he had examined the documents (except 4 which were delivered to us still sealed) and that he concluded that the production of these documents would be contrary to the public interest. He further asserted that "the production of these documents will have a chilling effect on this agency's ability to receive in written format

the comments, concerns and opinions of our staff." He also stated that it will adversely affect the ability of the RAC Chairman to receive written advice from representatives of the RAC.

Yesterday, Suffolk County filed its Motion and Brief to Compel Production of Documents. The County first complains about FEMA's response not being complete because additional documents may be identified. The County's arguments in support of the disclosure of all documents in question are as follows: (1) FEMA failed to satisfy the threshold standards for a proper assertion of executive privilege because the documents are not specifically described and there is no precise reason given by FEMA for preserving the confidentiality of the documents; (2) the executive privilege does not apply to these documents at all because they all consist of purely factual material concerning the RAC Review and do not concern FEMA policy; (3) even if they were privileged at one time, the privilege has been waived because FEMA intends to offer the RAC Report in evidence; and (4) the County claims that any chilling effect of releasing the documents is outweighed by the County's need to obtain the documents.

NRC Staff and LILCO both support FEMA's response and assertion of executive privilege. The LILCO brief in support of FEMA makes the argument that the FEMA RAC is analogous to the NRC ACRS and that the deliberations and advisory opinions of ACRS are protected by executive privilege.

No party has challenged the ruling principles of law which we have applied to assertions of executive privilege in our November 1, 1983

(Attachment A hereto) and March 6, 1984 (Attachment B hereto) Orders ruling on motions to compel production of documents. Therefore, we shall continue to assume that our legal analysis of the doctrine of executive privilege is correct. To recap those orders, we set forth specific procedural requirements for the assertion of the privilege. Furthermore, we have characterized the privilege, once it is established, as a qualified one. Upon a prima facie showing of executive privilege, the Board must employ a balancing test to determine whether to pierce the qualified privilege. (See pages 5-7, Attachment A, and pages 3-5, Attachment B.) Factors to be weighed and considered in favor of piercing the privilege and releasing the documents are the following: (1) importance of the documents to the Suffolk County case; (2) the unavailability elsewhere of this information; (3) the philosophy of broad discovery under NRC rules of procedure; (4) our prior decision in the dispute between LILCO and New York State where we found that LILCO's need for the documents outweighed New York's claim of harm resulting from disclosure; and (5) the fact that in most cases here, the authors of the documents in question are not subordinates of the persons to whom the documents are addressed and therefore the possibility of any "chilling effect" of disclosure is lessened.

On the other side of this scale are the following factors which weigh against disclosure: (1) future RAC participants may alter their advice or input if they know that their comments may become public; (2) disclosure will curtail free expression, integrity and independence of those responsible; (3) the relevant information concerning the bases for

the FEMA RAC findings can be adequately tested through cross-examination of the four FEMA witnesses at the hearing and the disclosure of the drafts and early discussions leading to the final report are not needed by Suffolk County; (4) the documents requested are not relevant to the issues in this proceeding, i.e., the admitted contentions rather than the RAC Review of the LILCO Plan; (5) what one member of the RAC may have thought about the Plan under review is not relevant or probative of anything; and (6) our November 1, 1983 Order essentially upheld the executive privilege and denied most Suffolk County requests to produce drafts of similar documents.

ANALYSIS

Part 351 of the Federal regulations pursuant to Title 44 provides for the establishment of RACs and describes their duties. 44 C.F.R. § 351.10(b) provides for the establishment of Regional Assistance Committees in each of the 10 standard Federal regions. That section goes on to list the makeup of the RACs and concludes by stating: "The FEMA Chairperson of the RACs will provide guidance and orientation to other agency members to assist them in carrying out their functions." The function of the RAC is described in 44 C.F.R. § 351.11(b) to include the review of state and local radiological emergency plans and to observe exercises to evaluate the adequacy of such plans. The Federal agency members are charged with the responsibility of becoming knowledgeable about Federal planning and guidance in this area and where their agency can assist in improving the preparedness.

Turning first to the procedural objections of the County, we find that FEMA's submissions consisting of its Response and Affidavit of Louis O. Giuffrida adequately describe and designate the documents sought to be withheld. Likewise, these submissions by FEMA contain the precise reasons for preserving the confidentiality, i.e., the chilling effect on the agency's ability to receive written comments, concerns, and opinions from its staff and the chilling effect on the RAC Chairman's ability to receive such material from members of the RAC. Therefore, we reject this argument of Suffolk County.

Suffolk County next asserts that these documents are not privileged because they all relate to the RAC Review or the RAC Report which is attached to the FEMA testimony. Suffolk County asserts that this material consists of purely factual material. We disagree. While there are obviously facts contained in the documents, the thrust of these documents is that they contain evaulations, advisory opinions, recommendations and deliberations which fall within "executive privilege." We also find that the FEMA findings herein, as adopted from the RAC Report, involve the decision making process of government which is protected by executive privilege. Therefore, we find that FEMA has made a prima facie showing of executive privilege.

10 C.F.R. § 50.47(a)(1) states that no license may be issued without an NRC finding that offsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

10 C.F.R. § 50.47(a)(2) states that the NRC will base its finding under 10 C.F.R. § 50.47(a)(1) on a review of the FEMA findings and determinations as to whether state and local emergency plans (in this case the LILCO Transition Plan) are adequate and capable of being implemented.

The FEMA RAC Review submitted to NRC on March 15, 1984, constitutes the FEMA findings and determinations as specified in 10 C.F.R. § 50.47(a)(2). The RAC Review was an evaluation of Revision 3 of the LILCO Transition Plan against each planning element specified in NUREG-0654. Almost all of the Intervenors' contentions refer to specific sections of NUREG-0654 and allege deficiencies in the Plan.

Hence, the FEMA findings of the RAC Committee are directly relevant to the issues in controversy in this licensing hearing. In general, the parties should be permitted to inquire into those findings and the procedures which were followed to arrive at the FEMA concensus. Only by probing those findings and determinations will the parties and Board be able to assess the weight to be given to those findings and determinations in our review under 10 C.F.R. § 50.47(a)(2). Thereafter, we will consider and assess all relevant and probative evidence in ruling on the question of the reasonable assurance finding to be made by the NRC pursuant to 10 C.F.R. § 50.47(a)(1).

This brings us to the balancing test to determine whether the qualified privilege should be pierced in this instance. On balancing the competing interests, we find that, as to most documents, the County's need to have these documents is greater than the harm or

"chilling effect" which such release will have on decision making in the future. We are most impressed with the fact that the FEMA RAC Report now constitutes FEMA's findings for purposes of 10 C.F.R. § 50.47. In this regard, the RAC is clearly distinguishable from ACRS. Moreover, three members of the RAC will testify for FEMA. The FEMA testimony incorporates numerous references to the RAC Report. Under these circumstances, it would be unfair to deny the County access to the underlying documents and processes by which the RAC Report achieved its final form. By this holding, we do not mean to imply that the comments of any individual RAC member may be relevant or admissible. What we are saying is that the County should be able to discover the underlying documents that went into the formulation of the publicly disclosed RAC Report because the information sought appears reasonably calculated to lead to the discovery of admissible evidence. We are aware that there might be some "chilling effect" as a result of this decision, but we think it will be less than those cases where we have previously withheld discovery. As to the RAC members, most of them are not employees or subordinates of FEMA. Presumably, they submit their independent opinions concerning an evaluation of an emergency preparedness plan. We cannot see why those opinions would be different even if it were known that such opinions would become public. As to the opinions and advice of FEMA staff employees, we are only authorizing release of the draft documents concerning the RAC Review and RAC Report. We find that the other internal advice giving documents of FEMA staff should not be disclosed consistent with our November 1, 1983 and March 6, 1984 Orders.

This litigation concerns the contentions of Suffolk County. Almost all of the contentions are founded upon the County's claim that the LILCO Transition Plan fails to comply with the regulations and NUREG-0654. The RAC Report evaluates the LILCO Transition Plan against the criteria in NUREG-0654. FEMA intends to present testimony of three RAC members on May 29, in support of its findings in the RAC Report. Thus, we find that the documents which underlie the RAC Report are centrally important to the County's case in asserting that the LILCO Transition Plan does not comply with NUREG-0654. We do not find that cross-examination alone, without access to these documents, will be equivalent.

We have reviewed each of the 35 documents submitted to us in camera by FEMA. We incorporate FEMA's Response to Suffolk County's Request for Production of Documents, dated May 14, 1984, consisting of 11 pages and attached hereto as Attachment C. We order as follows: On page 5 through page 7 of Attachment C, the documents numbered 1-23 shall be released as underlying documents, authored by members of the RAC, which went into the process of formulating the final RAC Report. The request to produce Document Nos. 1-23 is GRANTED. (Items 2 and 23 were not submitted to us.)

As to Document Nos. 24, 27, and 28 on page 7 of Attachment C, FEMA asserts that the final drafts of the letter and memos have been released to Suffolk County. That appears to be true as to Nos. 24 and 28, but we do not see No. 27 on the list of documents released to Suffolk County. In any event, the Board finds that the final drafts of each of these 3 should be released but that there is no showing of need by the County

for the release of earlier drafts. The request to produce Document Nos. 24, 27, and 28 is DENIED.

Document Nos. 25, 26, 31, 34-37 on pages 7 and 8 of Attachment C are drafts of various documents, documents with handwritten notes, and a compilation of RAC members' comments. For the reasons stated in connection with Document Nos. 1-23, we find that these documents should be released. As to Document Nos. 25, 26, 31, 34-37, the request to produce is GRANTED. (Item 35 consists of three drafts not two drafts as stated.)

Document Nos. 29 and 30 on page 7 of Attachment C are internal working papers concerning preparation for a press conference which was never held. We find that the County has established no need for these documents and the request to produce Document Nos. 29 and 30 is DENIED.

Document No. 32 on page 8 of Attachment C is an internal FEMA option paper concerning strategies for dealing with the Shoreham offsite emergency preparedness problem. We have reviewed this document and it is not relevant to the RAC Review or Report. We find that the "chilling effect" of releasing this document would outweigh any potential need of the County to see it. Therefore, the request to produce Document No. 32 is DENIED.

Document No. 33 on page 8 of Attachment C is a draft of a memorandum, the final draft of which FEMA indicates has been released to Suffolk County. This draft shall not be released for the same reasons stated in connection with Document Nos. 24, 27 and 28. The request to produce number Document No. 33 is DENIED.

Based upon this Order, we believe that FEMA and Suffolk County should be able to resolve their differences about additional RAC related documents which may be subsequently obtained by FEMA.

IT IS SO ORDERED.

ATOMIC SAFETY AND
LICENSING BOARD

JAMES A. LAURENSON, Chairman
Administrative Law Judge

DR. JERRY R. KLINE

FREDERICK J. SHON

Bethesda, Maryland

ATTACHMENT A

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
James A. Laurenson, Chairman
Dr. Jerry R. Kline
Mr. Frederick J. Shon

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In the Matter of	Docket No. 50-322-OL-3
LONG ISLAND LIGHTING COMPANY	(Emergency Planning Proceeding)
(Shoreham Nuclear Power Station, Unit 1)	November 1, 1983

MEMORANDUM AND ORDER RULING ON SUFFOLK COUNTY MOTION TO COMPEL FEMA TO PRODUCE DOCUMENTS

I. Procedural History

On September 19, 1983, Suffolk County (the County) filed a "Motion to Compel Discovery from FEMA (Federal Emergency Management Agency)." Some matters raised in that motion have been settled by the parties. However, as relevant here, the County requested discovery of the following: (1) all drafts of the Memorandum dated June 23, 1983 from Richard W. Krimm, Assistant Associate Director of FEMA to Edward L. Jordan of the NRC; (2) all drafts of a letter dated August 29, 1983 from Jeffrey S. Bragg, Executive Deputy Director of FEMA to William J. Dircks, Executive Director of Operations of NRC; and (3) written instructions from Gary D. Johnson, Executive Officer of FEMA to Fred Sharrocks, Senior Program Manager at FEMA regarding preparation of a

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draft FEMA response to the July 22, 1983 letter from William J. Dircks of the NRC.

On September 21, 1983, FEMA filed a response to the County's motion wherein FEMA asserted that the above listed documents were not subject to discovery because of "executive privilege." FEMA cited no authority in support of its position.

On September 26, 1983, we held a Discovery Conference in Washington, D. C. Efforts to settle this discovery dispute between the County and FEMA were unavailing. The Board notified FEMA that it had not properly invoked the claim of "executive privilege." However, FEMA was given a period of 15 days to perfect the claim of privilege by completing the following: (1) the claim must be asserted by the head of the agency, i.e., Louis O. Giuffrida, Director; (2) the claim must specifically describe and designate the documents sought to be withheld; (3) the claim must state the precise reasons for preserving the confidentiality of the documents; and (4) the documents for which executive privilege was claimed must be submitted under seal for the Board's in camera review if that became necessary. The Board invited the parties' attention to U.S. v. Capitol Service, Inc., 89 F.R.D. 578 (E.D. Wis. 1981). The Board also informed NRC Staff that its terse concurrence with FEMA's position was "wholly insufficient." (T. 590). All parties were given a period of one week to respond to FEMA's claim of privilege. (T. 602).

On October 12, 1983, FEMA submitted another response to the County's motion to compel discovery. Of the three disputed items listed

in the County's September 19, 1983 motion, FEMA asserted the claim of executive privilege as to items 1 and 2. FEMA did not address item 3. In addition to items 1 and 2, FEMA also asserted a claim of executive privilege for the following documents:

A. Those sections of a Briefing Paper on Shoreham prepared by the staff of Region II for Frank P. Petrone, Regional Director detailing his staffs identification of issues and recommendations.

B. Memorandum for Richard W. Krimm from Gary Johnson, Executive Officer in the Office of Natural and Technological Hazards dated June 7, 1983 concerning the response of FEMA to the NRC request of June 1, 1983.

C. Draft letter, never mailed, prepared for signature of Louis O. Giuffrida by the staff of the office of Natural and Technological Hazards in anticipation of a request by NRC for a FEMA review of the LILCO Transition Plan.

D. Portions of Status Report on Shoreham Nuclear Power Plant dealing with opinions of staff.

E. Analysis of a hypothetical question concerning LILCO, New York State and Suffolk County response to an accident at the Shoreham Nuclear Power Station.

The FEMA claim of privilege was made by its Director, Louis O. Giuffrida. His affidavit states that he personally examined the documents in controversy and concluded that their production would be contrary to the public interest. He asserted that the seven categories of documents "consist of intra-departmental memoranda and communications containing opinions, recommendations and deliberations pertaining to decisions" subsequently made by FEMA. He went on to say that the disclosure of these documents "will have a chilling effect on the

ability of this agency to receive in written format the comments, concerns and opinions of our staff." Affidavit of Louis O. Giuffrida, at 3.

On October 19, 1983, Suffolk County filed a Supplemental Response in support of its motion to compel production of the documents. The County first claims that the Affidavit of Director Giuffrida is defective because it is unsigned. The County also asserts that FEMA failed to comply with the criteria listed by the Board at the Discovery Conference. Finally, the County asserts that the doctrine of "executive privilege" is not available to FEMA because that agency is not engaged in policy formation. The County claims that FEMA "is engaged only in rendering its factual findings." Suffolk County Supplemental Response at 10. Thus, the County's argument goes, "executive privilege" may only be asserted in connection with policy formulation and since FEMA formulates no policy in connection with the documents in controversy here, it is not entitled to claim privilege.

In spite of the Board's prior characterization of the NRC Staff position on this issue as "wholly inadequate," NRC Staff elected not to respond to FEMA's claim of executive privilege.

II. ISSUES

Whether discovery of the documents in question is precluded by the doctrine of "executive privilege" and whether FEMA properly invoked "executive privilege" in this matter.

III. APPLICABLE LAW

The scope of discovery in NRC proceedings is quite broad. The pertinent rule is as follows:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding . . . . It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

10 CFR § 2.740(b)(1). (Emphasis supplied.)

Although not cited by any party to this dispute, the prior Licensing Board in the instant matter was called upon to decide whether the County could prevent disclosure of some of its documents because of "executive privilege." In Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144 (1982), the County opposed LILCO's discovery requests for emergency planning documents because of, inter alia, executive privilege of the County. The Licensing Board summarized the applicable law concerning "executive privilege" as follows:

> The executive privilege is a qualified privilege, and does not attach to purely factual communications, or to severable factual portions of communications, the disclosure of which would not compromise military or state secrets. EPA v. Mink, 410 U.S., at 87-88; Smith, supra, 403 F. Supp., at 1015. Furthermore, even communications which fall within the protection of the privilege may be disclosed upon an appropriate showing of need. United States v. Leggett & Platt, Inc., 542 F. 2d 655, 658-659 (6th Cir. 1976) cert.

> denied, 430 U.S. 945 (1977). See also Smith, 403 F. Supp., at 1015-1016. In determining the need of a litigant seeking the production of documents covered by the executive privilege, an objective balancing test is employed, weighing the importance of the documents to the party seeking their production and the availability elsewhere of the information contained in the documents against the government interest in secrecy. Legget & Platt, supra, 542 F. 2d, at 658-659.

Id. at 1164-5. It is clear that executive privilege in connection with state secrets or military secrets, the disclosure of which would threaten national security, is a matter of absolute privilege. See Kinoy v. Mitchell, 67 FRD 1 (S.D.N.Y. 1975). However, since the only claim of executive privilege asserted by FEMA here is that disclosure of the documents would be harmful to the decision making process of the agency, we agree with the statement of the prior licensing board in Shoreham that this is a "qualified privilege."

As pertinent here, "executive privilege" has been described by several other names: deliberative process of government privilege, governmental functions privilege, and intra-governmental documents privilege. The case law discussing this privilege has also considered exemptions under the Freedom of Information Act. 5 U.S.C. 552(b)(5). This statutory provision exempts from required disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency." This provision has been interpreted by the courts in harmony with the doctrine of "executive privilege" so that deliberative materials produced in the administrative decision making process are protected from disclosure

while purely factual materials are not protected from disclosure. See Branch v. Phillips Petroleum Co., 628 F. 2d 873 (5th Cir. 1981). Agency documents which reflect advisory opinions, recommendations, or deliberations fall within "executive privilege." U.S. v. Capitol Service Inc., supra, at 582. The reason for protecting the confidentiality of communications between high government officials and those who advise and assist them is to achieve the goal of receiving the most candid advice without regard for appearances or self interest of the adviser. U.S. v. Nixon, 418 U.S. 683, 705 (1974).

The U.S. Supreme Court in EPA v. Mink, 410 U.S. 73 (1973), set forth rules for separating factual material from "deliberative information" through in camera inspection, in cases brought pursuant to the Freedom of Information Act. The same procedure has been followed in "executive privilege" cases. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966) aff'd on opinion below, 384 F. 2d 979 (D.C. Cir.) cert. den. 389 U.S. 952 (1967).

> [C]ourts should not hesitate to make a private examination of disputed materials upon a reasonable showing that it can serve a purpose truly useful to a party actually or potentially entitled to some discovery . . . . In camera inspection in executive privilege cases is appropriate where it appears with reasonable clarity that the party seeking production is entitled to access to some of the materials demanded. Examination in this type of situation enables the separation of what should be disclosed from what should not be revealed . . . ."

Id. at 331.

IV. OPINION

We begin our analysis and review of this controversy by assessing the affidavit of FEMA's Director, Louis O. Giuffrida, in the light of our announced prerequisites and the County's objections. First, we note that our copy of the affidavit is signed by Director Giuffrida and his signature is notarized. There is no reason to doubt the validity of the signature. Accordingly, the County's objection that the affidavit is defective because it is unsigned will be overruled.

Second, the County claims that the FEMA affidavit should be rejected because it fails to comply with the criteria established for that affidavit by the Board during the Discovery Conference. We find that FEMA Director Louis O. Giuffrida is the head of his agency. The Giuffrida affidavit describes the seven documents sought to be withheld. The affidavit asserts that FEMA Director Giuffrida personally examined the documents in controversy and invoked "executive privilege" to prevent disclosure of "intra-departmental memoranda and communications containing opinions, recommendations, and deliberations pertaining to decisions" of FEMA. He further stated that disclosure of the documents would have a "chilling effect" on the ability of FEMA to receive written comments and opinions in the future. We find that, for the purpose of asserting "executive privilege," the seven FEMA documents are described and the reason for preserving confidentiality is articulated. Hence, we find that FEMA has complied with our order concerning the prerequisites

of the claim of executive privilege. The objections of Suffolk County to the FEMA affidavit are overruled.

This leads us to the County's claim that the doctrine of "executive privilege" is not available to FEMA because the privilege is only available to protect against disclosure of communications regarding policy formulation and FEMA does not engage in policy formulation in this matter. We find that the County is mistaken. Executive privilege is not limited to policy formulation but extends to the agency's decision making process. In Kaiser Aluminum & Chemical Corp. v. U.S., 157 F. Supp. 939 (Ct. of Claims 1958), Justice Reed (Retired), sitting by designation held,

> The document sought here was a part of the administrative reasoning process that reached the conclusion embodied in the contracts with Kaiser and Reynolds. The objective facts, such as the cost, condition, efficiency, terms and suitability are otherwise available. So far as the disclosure of confidential intra-agency advisory opinions is concerned, we conclude that they belong to that class of governmental documents that are privileged . . . .

Id. at 946.

While we agree with the County that purely factual material is not privileged, it is unproductive to attempt to distinguish "policy formulation" from "decision making" or "administrative reasoning." As long as the documents in controversy consist of advisory opinions, recommendations or deliberations in the agency decision making process, we find that they fall within the doctrine of "executive privilege." Thus, the County's agrument that we should not consider FEMA's assertion

of privilege, for failure to specify the type of policy formulation involved, is rejected.

Although we find in favor of FEMA concerning its claim of the existence of "executive privilege" here, that does not end the matter. We have previously stated that the privilege is a qualified one. This requires us to balance the need for the privilege against the need of the County to have the documents. With this standard in mind, we begin our review of Director Giuffrida's affidavit asserting "executive privilege" for seven documents. We shall discuss them in the order listed therein.

"(a.) All drafts of a memorandum . . . ."

At the outset we note that the final version of this memorandum, from FEMA to NRC on June 23, 1983, is public information which has been served on all parties. We find that the drafts which led up to the final product are privileged and the County has failed to establish compelling reasons for disclosure. We see no reason to examine the drafts. The County's motion to compel production of these drafts is DENIED.

"(b.) All drafts of a letter . . . ."

Again we note that the final version of the letter drafted August 29, 1983 from FEMA to NRC is publicly available. We see no reason to examine these drafts. For the same reasons listed concerning drafts of the memorandum above, we DENY the County's motion to compel production of these documents.

"(c.) Those sections of a Briefing Paper on Shoreham prepared by the Staff . . . for . . . Regional Director . . . detailing his staff's identification of issues and recommendations."

We find this to be the type of opinion and recommendation squarely protected by the privilege. The County again failed to establish any compelling need for the document which would suffice to overcome the privilege. We found no reason to examine this document. FEMA's claim of "executive privilege" is SUSTAINED.

"(d.) Memorandum . . . dated June 7, 1983 concerning the response of FEMA to the NRC request of June 1, 1983."

Although we previously found that FEMA had properly identified this document for a claim of privilege, FEMA's description of the memorandum led us to believe that part of it may be discoverable. Accordingly, we unsealed the documents and examined this memorandum. We find that the memorandum contains factual material which can be separated from the privileged material. Prior to the last paragraph on page 1, the memorandum contains only factual, non-privileged matter. Beginning with the last paragraph on the first page, the remainder of the memorandum is privileged. The County has not established a compelling reason for disclosure of the privileged material. To clarify this matter, FEMA shall produce a copy of the June 7, 1983 memorandum from Gary D. Johnson to Richard W. Krimm through the paragraph ending with the phrase, "in preparation of FEMA's response to NRC." As to the remainder of that memorandum, FEMA's claim of privilege is SUSTAINED.

"(e.) Draft letter, never mailed . . . ."

For the reasons stated in connection with draft memorandums and draft letters in parts (a.) and (b.) supra, we uphold FEMA's claim of executive privilege and find no reason to review this document.

"(f.) Portions of Status Report . . . ."

"(g.) Analysis of a hypothetical question . . . ."

In connection with these two documents, we concluded that the documents in question should be reviewed in order to balance the competing interests. Accordingly, the Board examined the portions of the status report and analysis of a hypothetical question and concluded that neither document contained discoverable factual material and that both documents contained opinions, deliberations and recommendations which should be withheld. FEMA's claim of "executive privilege" as to these items is SUSTAINED.

In addition to the documents described above, Suffolk County, in its Motion to Compel Discovery from FEMA, requested production of written instructions from Gary D. Johnson of FEMA to Fred Sharrocks of FEMA concerning preparation of a draft response to a letter from NRC. FEMA has not asserted "executive privilege" or otherwise objected to the production of this material. Accordingly, Suffolk County's motion to compel production of these written instructions is GRANTED.

V. ORDER

WHEREFORE IT IS ORDERED that FEMA shall submit to Suffolk County the following documents: (1) Page 1 of a memorandum dated June 7, 1983 from Gary D. Johnson to Richard W. Krimm through the paragraph ending with the phrase, "in preparation of FEMA's response to NRC;" and (2) written instructions from Gary D. Johnson to Fred Sharrocks concerning preparation of a FEMA response to a July 22, 1983 letter from William J. Dircks of NRC.

IT IS FURTHER ORDERED that as to all other documents for which "executive privilege" was claimed, as identified in the Suffolk County Motion to Compel Discovery from FEMA and the October 12, 1983 FEMA response, the FEMA claim of "executive privilege" is SUSTAINED and the Motion to Compel Discovery is DENIED.

ATOMIC SAFETY AND
LICENSING BOARD

JAMES A. LAURENSON, Chairman
Administrative Law Judge

Bethesda, Maryland

ATTACHMENT B

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
James A. Laurenson, Chairman
Dr. Jerry R. Kline
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In the Matter of	Docket No. 50-322-OL-3
LONG ISLAND LIGHTING COMPANY	(Emergency Planning Proceeding)
(Shoreham Nuclear Power Station, Unit 1)	March 6, 1984

MEMORANDUM AND ORDER RULING UPON LILCO'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND OBJECTIONS OF GOVERNOR MARIO CUOMO

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A. Procedural History

On February 6, 1984, LILCO filed a "Motion to Compel Expedited Production of Documents by New York State." On February 8, we issued an "Order Establishing Expedited Response Schedule." On February 13, Governor Cuomo filed a Memorandum in Opposition to the Motion to Compel Production. On February 13, Suffolk County also filed a "Response" to LILCO's motion. On February 15, we held a conference telephone call and advised the parties that New York State was ordered to produce a list of all documents requested and to provide copies of the documents to which New York had no objection. On February 23, 1984, New York produced copies of certain documents, an explanation concerning other documents which could not be identified or located, and objections to the

production of the remaining documents for the following reasons: relevancy, executive privilege, attorney-client privilege and attorney work product. LILCO presented an oral argument concerning New York's objections on February 24, 1984. (Tr. 3883-3889.) On February 27, New York submitted an Affidavit of David Axelrod, M.D., Chairman of the New York State Disaster Preparedness Commission. Dr. Axelrod certified that he personally reviewed each of the withheld documents and was claiming "executive privilege" for certain documents. His affidavit further asserts that the release of these documents "would have a chilling effect on the ability of the DPC to receive written comments, concerns and opinions of its staff." On February 28, LILCO filed a "Motion for Leave to Make and Supplement Replies, etc." On February 29, counsel for New York and LILCO sent us letters concerning this dispute. On March 1, the Board conducted a conference call with counsel for New York and LILCO at which time we advised them of our ruling on each document in question. New York and LILCO were informed that this Order would be put in writing. On March 2, counsel for Suffolk County sent us a letter protesting the fact that the County had not been included in the conference telephone call of March 1. The County also suggested a procedure for future conference calls.

B. Issue

Whether the documents in question are privileged and, if so, whether such privilege is outweighed by LILCO's need for the documents.

C. Applicable Law

On November 1, 1983, we issued a "Memorandum and Order Ruling on Suffolk County Motion to Compel FEMA to Produce Documents," In the Matter of Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1) LBP-83-72, 18 NRC ___ (1983). Therein, we discussed at length the law applicable to "executive privilege." We set forth procedural requirements for asserting the privilege as well as the fact that it is, insofar as relevant here, a qualified privilege which requires a balancing test. Thereafter, we conducted an in camera inspection of certain FEMA documents. We held that some were privileged and others were not. Insofar as New York asserts "executive privilege" here, we reaffirm our prior analysis. Indeed, none of the parties to the instant dispute challenge our prior conclusions of law or their application.

To recap our prior conclusions on the doctrine of "executive privilege," we first held that the claim of "executive privilege" must (1) be asserted by the head of the agency; (2) specifically describe the documents sought to be withheld; (3) state precise reasons for preserving confidentiality of the specific documents; and (4) be accompanied by the documents themselves, under seal, for possible in camera inspection by the Board. If the governmental agency makes a prima facie showing of the above criteria, the Board will then find that the privilege is a qualified one and will balance the litigant's need for the documents against the government's assertion of the "chilling effect" on its decision making process.

In connection with the instant dispute, we re-examined the guidance of the federal courts in the application of the balancing test. In U.S. v. Leggett & Platt, Inc., 542 F.2d 655 (6th Cir. 1976), the court stated,

> The district court properly applied a balancing test in determining whether LP could pierce the qualified governmental official information privilege to obtain the investigatory files . . . . To override the government interest in secrecy, the court must find that LP's objective, rather than its subjective need for the documents overrides the governmental interest in secrecy.

Id. at 658. The court went on to identify the factors to be considered including the following: the importance of the documents to the party's case and the availability elsewhere of the information contained in the documents. Id. at 659.

In A. O. Smith v. FTC, 403 F. Supp. 1000, 1015-6 (D. Del. 1975), Judge Schwartz states as follows:

> While the exact showing necessary to surmount a governmental claim of privilege is unclear, what is basically involved in each case is an ad hoc balancing of individual need for the materials against the harm resulting from any such disclosure. In fact, it is this assessment of individual need that most completely distinguishes adjudications of executive privilege under the Freedom of Information Act, where an individual's need for materials is deemed irrelevant. [Citations Omitted.]

In Kinoy v. Mitchell, 67 F.R.D. 1, 11 (S.D.N.Y. 1975) the test was stated as follows:

> This type of information is protected by a qualified, not an absolute privilege, so

> that the claim of privilege made by the Government may be overcome by a litigant's showing of need for the material great enough to outweigh the policies favoring nondisclosure. Or the Court may reconcile the competing interests, after in camera inspection of the documents, by ordering partial disclosure, or disclosure subject to a protective order.

The Court went on to state:

> The factors which the Court considers are many and complex. The deliberative and decision-making process of Government officials are held confidential to preserve the free expression, integrity and independence of those responsible for making the determinations that enable government to operate.

Ibid.

And finally,

> Against these considerations favoring nondisclosure, the courts weigh the needs of the litigant seeking disclosure, keeping in mind the philosophy of broad discovery which the Federal Rules of Civil Procedure embrace. Discovery is most likely when the material is centrally important and the litigant has no other means of obtaining equivalent proof of his allegations or defenses.

Id. at 12.

The "Attorney-Client Privilege" and "Work Product Doctrine" were discussed in detail in an earlier Memorandum and Order Ruling on LILCO's Motion to Compel Discovery of Suffolk County Emergency Planning Documents of the other licensing board at 16 NRC 1144, 1157 et. seq. (1982). We adopt and apply the tests discussed therein. Without belaboring the point, it should be noted that we have sustained each and

every objection of New York which was founded upon "attorney-client" or "work product" privilege.

D. Application of the Law to the Documents in Controversy.

In connection with several documents, New York objected to the motion to compel production for the reason that the document was believed to be "irrelevant because it concerns a plan prepared by LILCO in the spring of 1982, which plan relied on the County and the State for implementation." (emphasis in original.) Objections of Governor Mario Cuomo, etc. at 3. Other relevancy objections were lodged against production of documents dealing with DPC rules and regulations. Id. at 5. Suffice it to say that the liberal provisions of Rule 26 of the Federal Rules of Civil Procedure have been incorporated in the NRC Rules of Practice. The applicable NRC discovery rule provides that "it is not ground for objection that th information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 10 C.F.R. § 2.740(b)(1). In each instance where New York asserts a relevancy objection, we find that the discovery of the New York State review of the earlier LILCO plan and the DPC procedures are reasonably calculated to lead to the discovery of admissible evidence. All of New York's relevancy objections are overruled.

In the majority of instances we sustained New York's claim of "executive privilege." The principal area in which we overruled New York's assertion of "executive privilege" is the review and assessment

of LILCO's earlier emergency evacuation plan by New York's employees. For purposes of identification, these documents are designated and listed below as Nos. 1, 2, 12, 15-23, and 30. At the outset we note that many of these documents are primarily factual and, hence, no "executive privilege" attaches to purely factual material. For example, the New York review of LILCO's earlier emergency evacuation plan found many elements required by NUREG-0654 to be "missing." However, intertwined with this factual material are other assessments of "adequate" or "inadequate." Such subjective determinations constitute advisory opinions or recommendations which are included within "executive privilege." Hence, we found that most of the above documents fall within "executive privilege."

Pursuant to our prior discussion of the qualified nature of "executive privilege," we next proceed to the balancing test of weighing LILCO's need for the documents against New York's need for secrecy. At the present time, New York has become an active participant in opposition to LILCO. New York expects to present witnesses who will testify concerning deficiencies or inadequacies in LILCO's current plan. We, therefore, conclude that fairness dictates that LILCO should be given access to prior assessments of LILCO's earlier evacuation plan in order to determine whether it can impeach New York's witnesses with prior inconsistent statements about the same or similar provisions of the plan. Obviously, this information is not available to LILCO through any other means. We find that LILCO has a compelling need to see these documents. On the other hand, New York's fear of a "chilling effect on

the ability of the DPC to receive written comments, concerns, and opinions of its staff" is less compelling. The documents in question concern advice that was given more than a year ago about a plan that is no longer viable. While this does not mean that discovery of such information will not lead to admissible evidence, it does mean that the "chilling effect" is less than it would be for a viable plan. Moreover, the nature of the "comments, concerns, and opinions" contained in the document is such that we find that disclosure of these documents will have little, if any, "chilling effect." Frankly, New York is not entitled to have its cake and to eat it too. As an active participant in this proceeding, its interests in preserving secrecy are outweighed by LILCO's need to have these documents to effectively cross-examine New York's witnesses.

As we explained to New York and LILCO in our telephone conference call of March 1, 1984, we have numbered each of the documents (or groups of documents) in question. We will proceed through this list of 36 documents in the order in which they are listed beginning at the bottom of page 3 of Governor Cuomo's Objections. The description of each document by New York was inadequate for us to rule upon the assertion of the privilege without conducting an in camera inspection. Therefore, we have read each of the 36 documents and applied the tests enumerated above. Where we agree with New York, we have SUSTAINED its objection and DENY the motion to compel production of the document. Where we find for LILCO, we OVERRULE New York's objection and GRANT the motion to

compel production of the document. In a few instances, we have SUSTAINED the objection in part and OVERRULED the objection in part.

Document Date	Objection	Ruling
1. 6-1-82	Irrelevant; Executive Privilege	OVERRULED; We find that this document is subject to Executive Privilege, but that LILCO's need to have this document outweighs New York's need for secrecy for the following reasons: (1) LILCO may be able to show that New York witnesses who will testify against the current plan made prior assessments which are contrary to their present testimony; and (2) the form in which the assessment is made is such that disclosure of the document is not likely to have a "chilling effect."
2. Undated	Irrelevant; Executive Privilege	SUSTAINED as to page 1 because of Executive Privilege containing opinions of the author, but OVERRULED as to the "comments." The comments are primarily factual and LILCO's need for these "comments," which are not available elsewhere, outweighs New York's need for secrecy.
3. 5-17-82	Executive Privilege	OVERRULED. We find this to be a factual account of a meeting, and it does not qualify as executive privilege.
4. 5-14-82	Executive Privilege	SUSTAINED. These appear to be handwritten notes containing personal

			observations of the author. LILCO's need for this document does not overcome New York's need for secrecy.
5.	4-26-83	Executive Privilege	SUSTAINED. LILCO's need to know does not outweigh New York's need for secrecy.
6.	3-4-83	Executive Privilege	SUSTAINED. Same as No. 5.
7.	3-7-83	Executive Privilege, Attorney-Client and Work Product	SUSTAINED. Attorney-client and work product privilege.
8.	2-23-83	Executive Privilege, Attorney-Client and Work Product	SUSTAINED. Same as No. 7.
9.	1-19-83	Executive Privilege	SUSTAINED. Same as No. 5.
10.	2-16-83	Executive Privilege, Attorney-Client and Work Product	SUSTAINED. Same as No. 7.
11.	2-11-83	Executive Privilege	SUSTAINED. Same as No. 5.
12.	1-30-82, error--should be 11/30/82	Executive Privilege--merely a staff advisory rating which was never acted upon by DPC	SUSTAINED only as to the 2-page cover memo; OVERRULED as to the 13 pages of review for the reasons in No. 1 and 2.
13.	12-6-82	Executive Privilege	SUSTAINED. Same as No. 5.
14.	Various Dates	Executive Privilege	SUSTAINED. Same as No. 5.
15.	11-24-82	Executive Privilege	OVERRULED. LILCO's need to see this otherwise unavailable information outweighs New York's need for secrecy.
16.	11-23-82	Executive Privilege	OVERRULED. Same as No. 15.
17.	11-19-82	Executive Privilege	OVERRULED. Same as No. 15.

18.	11-15-82	Executive Privilege	OVERRULED. Same as No. 15.
19.	10-25-82	Executive Privilege	OVERRULED. Same as No. 15.
20.	9-16-82	Executive Privilege	OVERRULED. Same as No. 15.
21.	9-13-82	Executive Privilege	OVERRULED. Same as No. 15.
22.	9-8-82	Executive Privilege	OVERRULED. Same as No. 15.
23.	5-17-82	Executive Privilege	OVERRULED. This is a purely factual document to which executive privilege does not attach.
24.	11-9-82	Executive Privilege	SUSTAINED. Same as No. 5.
25.	7-23-83	Executive Privilege and Attorney-Client Privilege	SUSTAINED. For the reasons set forth in document No. 5 with the exception that a clean copy of the letter dated June 23, 1982 from Howard E. Pachman to Chairman Hennessey shall be released since this letter is not privileged.
26.	5-18-82	Executive Privilege, Work Product and Attorney-Client	SUSTAINED. Same as No. 7.
27.	7-18-83	Executive Privilege, Attorney-Client and Work Product	SUSTAINED. Same as No. 7.
28.	7-1-83	Executive Privilege; Irrelevant	OVERRULED. The page 1 memorandum is purely factual and executive privilege does not attach. The attachment is not privileged and we have previously denied New York's relevancy objection to this.
29.	6-27-83	Executive Privilege, Attorney-Client and Work Product	SUSTAINED. Same as No. 7.

30.	6-20-83	Executive Privilege, Attorney-Client and Work Privilege	SUSTAINED as to the first six pages of legal memoranda for the reasons set forth in No. 7. However, the attachments appear to be the same attachments previously ordered to be released in our ruling concerning document No. 1. To the extent that New York objects to release of the review and rating, that objection is OVERRULED and those two attachments to the memoranda are ordered to be released.
31.	5-17-83	Executive Privilege, Attorney-Client and Work Privilege	SUSTAINED. Same as No. 7.
32.	5-11-83	Executive Privilege, Attorney-Client and Work Privilege	SUSTAINED. Same as No. 7.
33.	4-29-83	Executive Privilege, Attorney-Client and Work Privilege	SUSTAINED. Same as No. 7.
34.	4-29-83	Executive Privilege, Attorney-Client and Work Product	SUSTAINED. Same as No. 7.
35.	5-18-83	Executive Privilege, Attorney-Client and Work Product	SUSTAINED. Same as No. 7.
36.	Undated	Executive Privilege, Attorney-Client and Work Product	SUSTAINED. Same as No. 7.

E. Suffolk County's Objections to Conference Call Advising LILCO and New York of the Board's Rulings in This Discovery Dispute.

On March 2, 1984, one of the attorneys for Suffolk County sent the Board a letter stating that "the County strenuously objects to this Board's conduct." The County was upset that it had not been included in the conference call of March 1, to hear the Board's ruling on this discovery dispute between LILCO and New York. The County notes that it had previously taken a position on this matter on February 13. The County's February 13 "Response" consisted of two sentences supporting the argument of New York and opposing LILCO's motion.

In light of all the circumstances, we believed that the instant dispute was between LILCO and New York concerning whether New York would be compelled to produce documents which it claimed to be privileged. We convened the conference call to notify LILCO and New York of our rulings so that they could take steps to implement the ruling when it was written. The Board confesses that it not only neglected to include Suffolk County in the conference call but also omitted NRC Staff, FEMA, Shoreham Opponents Coalition, North Shore Committee Against Thermal and Nuclear Pollution, and the Town of Southampton. Unless the County presents facts to support its assertion that we "have often made statements of pertinence to the parties that are not later memorialized in written orders," we shall disregard such a claim. We have endeavored to minimize telephone conference calls because of the difficulties presented in conducting such calls with eight parties. In the future,

we will consider Suffolk County's request that a transcript be made of each such call.

ORDER

WHEREFORE IT IS ORDERED that LILCO's Motion to Compel Production of New York State Documents is GRANTED as to the documents listed and designated above as follows: 1, 3, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 28.

IT IS FURTHER ORDERED that LILCO's Motion to Compel Production of New York State Documents is DENIED as to the documents listed and designed as follows: 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 24, 26, 27, 29, 31, 32, 33, 34, 35 and 36.

IT IS FURTHER ORDERED that LILCO's Motion to Compel Production of New York State Documents is GRANTED IN PART and DENIED IN PART as more fully sent forth above as to the documents listed and designated as follows: 2, 12, 25 and 30.

ATOMIC SAFETY AND
LICENSING BOARD

JAMES A. LAURENSON, Chairman
Administrative Law Judge

Bethesda, Maryland