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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF MEMORANDUM IN SUPPORT OF FEMA'S APPEAL OF MAY 18, 1984 LICENSING BOARD DISCOVERY ORDER

David A. Repka
Counsel for NRC Staff

June 1, 1984

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I. BACKGROUND

On May 21, 1984, the Federal Emergency Management Agency (FEMA), a non-party to this proceeding, filed a "Notice of Appeal and Request for a Stay of an Order of the Atomic Safety and Licensing Board." The Licensing Board Order was dated May 18, 1984, and granted certain discovery against FEMA.[1/] After oral argument on FEMA's stay request, the Appeal Board on May 23, 1984 granted the request and continued the stay pending consideration of FEMA's appeal of the Licensing Board discovery order on the merits. Memorandum and Order, May 24, 1984. In this brief the NRC staff addresses the FEMA appeal on the merits.

1/ It is well established in NRC jurisprudence that a third party to a proceeding, which opposed a discovery request before the Licensing Board, has the right to immediately appeal an order granting discovery. See Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 NRC 85 (1976).

The Licensing Board's May 18, 1984 Memorandum and Order granted in part, over a claim by FEMA of executive privilege, a Suffolk County motion to compel production of documents. The documents are all related to the FEMA Regional Assistance Committee (RAC) review of the LILCO Transition Plan for emergency preparedness at Shoreham. After an in camera review, the Board explicitly disagreed with Suffolk County and held that the documents listed by FEMA did "contain evaluations, advisory opinions, recommendations and deliberations which fall within 'executive privilege'." Memorandum and Order, at 6. The Board went on, however, to find that the executive privilege is qualified and that, on balance for 30 of the 37 documents, "the County's need to have these documents is greater than the harm or 'chilling effect' which such release will have on [FEMA's] decision making in the future." Memorandum and Order, at 7-8. The Licensing Board therefore granted the motion to compel production of the documents. FEMA appeals this determiniation.[2/]

II. ISSUES PRESENTED

A. Does the "Executive Privilege" Apply to the FEMA Documents Currently at Issue?

B. If the Privilege Applies, has Suffolk County Demonstrated an Overriding Need Justifying Discovery of the Documents?

2/ The procedural background surrounding this appeal by FEMA is set forth in greater detail by the Appeal Board in its Memorandum and Order ruling on FEMA's stay request, dated May 24, 1984. In the interest of efficiency, the Staff does not repeat all the detailed background here.

III. ARGUMENT

A. Executive Privilege Applies to the FEMA Documents Currently at Issue

At the outset the NRC staff notes that, except for a document generated by an NRC employee on the RAC, the NRC staff has not seen the documents for which FEMA asserts executive privilege. The Staff's arguments on the privilege are therefore necessarily generalized. However, the executive privilege is asserted by the Director of FEMA, General Louis O. Giuffrida, and the Staff has no reason to assume that the privilege is being asserted lightly. The Staff assigns great deference to the claim of privilege by a sister federal agency. Furthermore, the Licensing Board which reviewed the documents in camera determined that the executive privilege does apply to the documents for which FEMA claims the privilege. There is no reason that this Licensing Board determination, absent a de novo review of the documents, should be reversed by the Appeal Board.

Decision-making deliberations and mental processes of federal agencies and employees are protected in litigation by the "executive" or "deliberative process" privilege. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); United States v. Morgan, 313 U.S. 409 (1941) (Morgan IV). The privilege has been embodied in Exemption 5 of Section 552(b) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. See Montrose Chemical Corp. v. Train, 491 F.2d 63, 69-70 (D.C. Cir. 1974). The Supreme Court in Morgan IV wrote:

> Over the Government's objection the district court authorized the market agencies to take the deposition of the Secretary. The Secretary thereupon appeared in person at the trial. He was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates . . . But the short of the business is that the Secretary should never have been subjected to this

> examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." Morgan v. United States, 298 U.S. 468, 480. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." 304 U.S. 1, 18. Just as a judge cannot be subjected to such scrutiny, compare Fayerweather v. Ritch, 195 U.S. 276, 306-07, so the integrity of the administrative process must be equally respected. See Chicago B. & Q. Ry. Co. v. Babcock, 204 U.S. 585, 593.

313 U.S. at 421-22. The Court therefore ruled that the deposition inquiring into the Secretary's mental processes was impermissible. In NLRB v. Sears, Roebuck & Co., the Supreme Court further articulated the policy behind the executive privilege. The Court wrote that the privilege is necessary to protect the governmental decision-making process because inquiry into that process would discourage "open and frank discussion" between managers and subordinates on legal and policy matters. 421 U.S. at 150. See also Kaiser Aluminum and Chemical Corp v. United States, 157 F.Supp. 939, 945 (Ct. Cl. 1958). In the NLRB case the executive privilege was specifically claimed and upheld for advisory, pre-decisional, memoranda.

The executive privilege has also been recognized in NRC cases. In Consumers Power Co. (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117 (1980), the privilege was found to apply to certain NRC staff documents. In Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974), the privilege was found to apply to ACRS internal opinions, memoranda, and advice. The privilege has even been found to apply to certain Suffolk County documents in this

proceeding. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144 (1982).

The documents for which FEMA asserts executive privilege in this case are all related to the FEMA RAC review of the LILCO Transition Plan. The documents are all derived from the collegial process of reviewing the LILCO Transition Plan and writing the final FEMA RAC report, published February 10, 1984. See Affidavits of Giuffrida, McIntire, and Kowieski, attached to the FEMA memorandum of May 21, 1984. The documents include notes of individual RAC members, advisory memoranda or correspondence, internal pre-decisional evaluations and comments, inputs of individual RAC members to the FEMA RAC Chairman, and drafts of the RAC report. Id. These documents, as identified by FEMA, are generally of the type encompassed by the executive privilege. Id. Disclosure would undermine the collegial decision-making process which is essential to the functioning of the FEMA RAC. The final RAC report necessarily represents a consensus of the RAC members. Id.

It is true, as cited by Suffolk County, that "purely factual" documents, or factual matters "severable" from policy matters, are not protected by the executive privilege. EPA v. Mink, 410 U.S. 73, at 87-88 (1972). However, the Licensing Board below reviewed the FEMA documents at issue and apparently determined that the "thrust of these documents is that they contain evaluations, advisory opinions, recommendations and deliberations which fall within 'executive privilege'." Memorandum and Order, at 6. Contrary to Suffolk County's arguments, evaluations of the LILCO Transition Plan against the criteria of NUREG-0654 are not "factual

matters." The Licensing Board wrote that FEMA findings discussed in the documents "involve the decision making process of government which is protected by executive privilege." Memorandum and Order, at 6 (emphasis added). Absent a de novo inspection of the documents by the Appeal Board revealing some severable factual matters in the FEMA documents, the Licensing Board's decision that the executive privilege attaches to the documents should not be reversed.3/

B. Suffolk County has not Demonstrated an Overriding Need Justifying Discovery of the Documents

It is agreed that in a litigation context the executive privilege is a qualified privilege. Courts must balance the governmental interest for the privilege against the needs of litigants seeking discovery. See EPA v. Mink, 410 U.S. 73, at 86 (1976). However, the burden for having privileged information disclosed rests on those who seek to have the information revealed in the face of a valid claim of privilege. See U.S. v. Nixon, 418 U.S. 683, at 713-714 (1974); Smith v. FTC, 403 F.Supp. 1000, at 1015-16 (D. Del. 1975); see also United States v. Reynolds, 345 U.S. 1, 11 (1953). The Licensing Board in this case ostensibly performed this objective balancing test and found that the County's needs outweighed FEMA's needs. However, beyond itemizing factors on each side, the Licensing Board provided little rationale for assignment of weight to

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3/ The Staff would of course have no objection if the County, FEMA, or the Board could reach some accommodation, by which the County could get access to the documents it would like to see in form which also protects FEMA's interests. Judge Edles at oral argument, Tr. 14 & 74, suggested that the parties address whether deletion of names would resolve FEMA's concerns regarding the need to keep the documents privileged. Without seeing the documents or being privy to all of FEMA's concerns, the NRC staff cannot address this question.

the individual factors. See Memorandum and Order, at 7-9. As discussed below, the Board erred in holding that the County's needs for the documents outweighed the importance of the privilege attached to the documents. The County's showing of need does not rise to a level sufficient to override FEMA's privilege.

1. Suffolk County has not shown a need to discover FEMA's decision-making process, as opposed to the factual matters underlying the FEMA RAC findings. The Licensing Board has explicitly characterized the thrust of the documents at issue in this proceeding as containing "evaluations, advisory opinions, recommendations, and deliberations." Memorandum and Order, at 6. The County argues that the privileged documents are necessary to "probe" the basis for FEMA's findings and FEMA testimony. The County further argues that it is "entitled" to this discovery and that FEMA has waived any privilege by including the RAC findings in the direct testimony. These arguments fail, however, to separate two forms of inquiry: one which is permissible and the other which unnecessarily encroaches on the governmental privilege. It is true that the County should be able to discover the technical rationale and factual considerations underlying the final FEMA decisions. The County may also inquire into the expertise upon which FEMA relies for its decisions. These inquiries are necessary and proper in order to challenge the FEMA "rebuttable presumption" created by 10 C.F.R. § 50.47(a). However, inquiry, such as the present document request, broadly directed at the minute pre-decisional process of the RAC review, goes beyond the scope of what the County is "entitled" to inquire into. There is simply no entitlement to know each component of the final FEMA consensus report. FEMA has not waived the privilege that applies to the deliberative process,

and the County must show a compelling need to discover such protected information.

This distinction between discoverable bases for testimony and privileged mental processes is highlighted by the decision in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-30, 10 NRC 594 (1979). The Board wrote that "various steps in the analyses and thinking processes of expert witnesses in arriving at their conclusions are discoverable, as bearing upon the bases for their opinions as well as their credibility as witnesses." 10 NRC at 595. This type of discovery is categorically permissible, however, only until it reaches a privileged area. In the case of an individual witness the privilege could be the attorney work-product privilege. In the case of government witnesses the applicable privilege could be the executive privilege. Both privileges protect the process of reaching a final position, not the rationale for that position.[4/] The Board in South Texas held that the discovery requested in that case had not reached a point of encroaching upon privileged matters. Therefore, no showing of additional need for the discovery which would override the privilege was required. However, in the present case, where the FEMA documents were held by the Licensing Board to be privileged, the County in seeking discovery must

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4/ As suggested by Judge Edles in oral argument, Tr. 39-43, these two privileges are similar in nature. See also Tr. 74. The work-product privilege, analogous to the executive privilege, protects the memoranda, statements, and other documents which are part of the witness-attorney interaction in preparation for trial. Discovery is not precluded for relevant and non-privileged facts which may be important to impeach a witness' testimony. However, for privileged information from the testimony preparation process, the burden is on the discoverer to show specific need. See Hickman v. Taylor, 329 U.S. 495, at 511-512 (1947).

show an overriding need for inquiring into decision-making processes and cannot merely claim "entitlement" to discover the basis of expert testimony.

The question of a need to inquire into the privileged decision-making process was discussed in Kaiser Aluminum and Chemical Corp. v. United States, 157 F.Supp. 939, 945 (Ct. Cl. 1958). That case involved a contract dispute between the company and the government. The company sought from the government all documents relevant to the process of reaching the final contract between the parties. Justice Reed for the court wrote that the documents were privileged and not discoverable. The issue before the Court in Kaiser Aluminum was not the process of reaching the final contract, but the breach of a clause of the contract. The final contract and the facts upon which to determine if a breach occurred were available from other sources and there was no need to inquire into the privileged decision-making process. Similarly, the Appeal Board held in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469 (1981), that privileged names of confidential informants could not be divulged based only on speculation that the names might be important to the discoverer. The issue was not the names of confidential informants, but the substance and validity of the allegations. Speculation that the names of the informants might lead to discovery of other evidence was not sufficient to breach a privilege. To defeat a privilege the would-be discoverer must somehow show that the privileged matter is in issue in the proceeding.

Similarly, in this case, the issue is not the process by which the FEMA RAC reached its determination, but whether the determination is

rational. The County presumably seeks to uncover evidence that the FEMA determination was not based upon proper consideration. At this point, however, the County is merely speculating and has failed to meet its burden of showing need for the privileged documents going to the review process. Upon deposition of the RAC Chairman the County may find evidence of some need to see the FEMA documents underlying the RAC determinations. To date, however, there is only speculation and no showing of a need for the documents has been made.

The Licensing Board, in its Memorandum and Order, at p. 8-9, holds that "it would be unfair to deny the County access to the underlying documents and processes by which the RAC Report achieved its final form." The Board also writes that the documents are "centrally important to the County's case." These passages demonstrate that the Licensing Board has failed to address the key analytical distinctions in deciding whether or not to release privileged documents. As we have stated, the County must show a legitimate "need" which outweighs an important government privilege. The Board fails to recognize the difference between the County's rights to discover facts and the technical rationale for the FEMA findings and its limited rights to inquire into the process by which the RAC report achieved its final form. Inquiry into that privileged process is not automatically central to a County challenge to the presumptions created by 10 C.F.R. § 50.47(a), and whether the LILCO off-site emergency response plan meets the requirements of 10 C.F.R § 50.47(b). A strong showing of particular need to inquire into the FEMA process is necessary to override FEMA's interests.

In this context it should also be noted that in its previous papers filed on this issue, the County has often argued that it is

entitled to the FEMA documents because, pursuant to 10 C.F.R § 2.740(b)(1), the information sought could lead to the discovery of admissible evidence. See, e.g., "Suffolk County Memorandum in Opposition to FEMA's Appeal and Request for Stay of May 18 Board Order Compelling Production of Documents by FEMA," May 23, 1984, at 18. This argument is misplaced. The County ignores that the discovery standard of § 2.740(b)(1) is not the only standard to be met in the face of a valid claim of privilege. As discussed above, the County is required to show, not only that the documents could lead to relevant information, but that it has a need for the documents great enough to outweigh the claim of privilege. See Consumers Power Co. (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, at 120. An argument that the documents may lead to important evidence is insufficient alone to defeat a privilege.

2. The County has not sufficiently shown a need for the documents given the amount of other discovery from FEMA in this case. Much information has already been made available to the County by FEMA with respect to the RAC review. Depositions of four designated FEMA witnesses, including the RAC Chairman, will be conducted prior to the hearing. These depositions will provide an excellent opportunity for the County to inquire into the factual bases and rationale for the FEMA RAC findings and the FEMA direct testimony. The Staff also assumes that the depositions will be free and open opportunities for the County to determine such details of the FEMA review as it deems necessary to challenge the "presumption" given to the FEMA findings by 10 C.F.R. § 50.47(a). Finally, Suffolk County will have an ample opportunity at the hearing itself to cross-examine the FEMA witnesses and to establish its case. Given this context,

the County's argument that it "needs" the information protected by the executive privilege is extremely questionable. The information available to the County, through both documents and depositions, should provide the County with the factual underpinnings of the FEMA process without compromising the FEMA deliberative process.

3. The Commission has previously addressed the question of a claim of executive privilege for ACRS documents versus a claim of need in discovery in Virginia Electric Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974). The Commission found in this case that the executive privilege did apply to ACRS deliberative documents. However, the Commission affirmed a Licensing Board decision to nevertheless release the documents because of the intervenors' need for the documents.

The North Anna case is instructive for the present situation. The Commission allowed the Licensing Board's exercise of discretion in conducting its balancing test in North Anna for two reasons. First, the Commission found that the information sought by the intervenors involved a safety issue such that the Commission "believed it imperative that all information concerning [the safety issue] be made public." 7 AEC at 315. Second, the Commission found that the information "was necessary for a proper decision and was not obtainable elsewhere." 7 AEC at 314. Given these two factors the Commission would not say that the Licensing Board had abused its discretion in conducting the need versus privilege balancing test.

The North Anna case demonstrates that in order to defeat a claim of executive privilege, the privileged documents should raise an important

issue in the proceeding. The issue would not necessarily have to be a safety issue, but, as discussed above, it should put the deliberative process itself in issue. Second, the information sought should not be reasonably attainable from sources which would not compromise the privilege. In the present case, Suffolk County has failed to make the necessary showing on either of these two points. The County, as discussed above, has not shown any issue raised by the FEMA RAC process which creates a need for the documents. Further, as also discussed above, the County has not shown how otherwise available discovery will not serve its objective of inquiring into the rationale of the FEMA findings. Given these two factors, the Appeal Board is not compelled to defer to the Licensing Board's exercise of discretion in this case.

IV. CONCLUSION

For the reasons stated above, the NRC staff concludes:

a) The Licensing Board found that executive privilege does attach to the FEMA documents at issue in this proceeding. That determination should not be disregarded absent a de novo inspection of the documents.

b) Suffolk County has not demonstrated a need for the privileged documents which overrides the policies behind the executive privilege.

Therefore, the Licensing Board's May 18, 1984 discovery order should be reversed.

Respectfully Submitted,

David A. Repka

David A. Repka
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 1st day of June, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MEMORANDUM IN SUPPORT OF FEMA'S APPEAL OF MAY 18, 1984 LICENSING BOARD DISCOVERY ORDER" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by double asterisk, by hand or telecopier, this 1st day of June, 1984.

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