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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	)	
	)	Docket No. 52-322-OL-3
Long Island Lighting Company	)	(Emergency Planning)
	)	
(Shoreham Nuclear Power Station, Unit 1)	)	

MEMORANDUM IN SUPPORT OF FEMA'S APPEAL OF AN ORDER OF THE ATOMIC SAFETY AND LICENSING BOARD

Introduction

The matter before the Board presents a limited question with broad implications for the Federal Emergency Management Agency, the Nuclear Regulatory Commission and the effective evaluation and regulation of off-site emergency planning and preparedness. The central issue under consideration is whether the intervenor in this case has demonstrated so compelling a need for production of documents as to justify rejection of an otherwise proper assertion of executive privilege by the Director of FEMA.

The Nature of the Regional Assistance Committee

Oral argument before this Board on May 22, 1984 produced indications that a fuller discussion of the role and operation of the Regional Assistance Committees might be helpful to the Board in its deliberations, on the privilege issue.

The Regional Assistance Committees were established in 1980 as part of the comprehensive effort undertaken by the Federal Government to improve the level of protection afforded the public in communities adjacent to fixed

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nuclear generating facilities. Following the incident at Three Mile Island and the Kemany Commission Report, the President directed that FEMA's Director undertake responsibility to set policy and coordinate Federal agency programs designed to produce overall enhancements of off-site emergency preparedness and response, including evaluation of State and local government and utility emergency planning and response capabilities. The RAC concept was created through a deliberative, inter-agency process coordinated by FEMA and designed to integrate and reconcile a wide variety of Federal evaluations and liaisons with the State and local officials on off-site emergency planning and to facilitate and expedite Federal evaluations of readiness and response capabilities made mandatory by statute in P.L. 96-295 (94 Stat. 790) for NRC licensing considerations.

The implementing rules for the RAC proceeding are set forth in FEMA regulations at 44 CFR 351 and are basic to the FEMA approach to meeting its statutory mandate regarding evaluation of off-site emergency preparedness and response capabilities at fixed nuclear generating facilities nationwide. These committees, under the terms of 44 CFR 351.11(b), are utilized for these reviews at fully licensed facilities as well as those currently involved in the licensing process. This is true whether such reviews are conducted pursuant to 44 CFR 350 or the Memorandum of Understanding between FEMA and the NRC. (The only exception to the use of the RAC arose in FEMA's review of LILCO's first version of the LERO plan last June when time allotted by the NRC did not permit utilization of the RAC in Region II and the technical staff of Argonne National Laboratory did the review.)

The RACs, which are chaired by FEMA regional personnel are inter-agency and interdisciplinary. The RACs presently consist of representatives from the regional offices of the Nuclear Regulatory Commission, Environmental Protection Agency, Department of Health and Human Services, Department of Energy, Department of Transportation, United States Department of Agriculture, and the Department of Commerce.

The mission statement for RAC members reads as follows:

> "(b) The RACs will assist State and local government officials in the development of their radiological emergency plans and will review these plans and observe exercises to evaluate adequacy of the plans. Each Federal agency member of the RACs will support the functions of these committees by becoming knowledgeable of Federal planning and guidance related to State and local radiological emergency plans, of their counterpart State organizations and personnel, where their agency can assist in improving the preparedness and by participating in RAC meetings." 44 CFR 351.11(b)

The RACs exist in each of the 10 standard Federal regions, and are responsible for off-site safety reviews for plants located within the ambit of those regions.

Membership on a RAC is a collateral duty for the typical member. The member is expected to bring the expertise of the agency represented as well as his or her own individual experience and training to bear on matters presented to the RAC by the FEMA Regional Director for review.

The membership composition of the Region II RAC is set out in a chart at appendix A. A review of this chart in terms of job title and grade will

reveal that the Region II RAC consists of individuals who are relatively junior in rank and technical in their orientation. They are not political appointees and do not set Agency policy. The point was made quite accurately by the Licensing Board that expression of their views would not subject them to direct pressures from FEMA. It should be borne in mind that they are employees of agencies which in many instances have strong views on nuclear policy. It is important that the RAC members be given freedom from potential pressures that could arise from this reality.

The nature of the review deadlines established in the various licensing activites, require that the RAC process, while deliberate, must respond to short deadlines. While the review steps expected of the RAC members are basically technical and objective, clearly there are potentially contentious views that can accompany a RAC member's evaluations. This being the case, if the RAC member takes into account that his notes and draft comments or evaluation items may be ordered to be made public and subject to full examination by all parties by a Licensing Board, and that his individual reflections and decisions may have an important impact on licensing decisions on multi-billion dollar plants, a pressure will most certainly develop to have all actions taken by the RAC member made subject to review and coordination by higher agency authorities at the policy level. This will greatly detract from the character of responsiveness and objectivity now associated with the RAC process and potentially encourage "balancing" assessments by the corporate agency before its decisions can be accounted in the overall evaluation. It is important that RAC members be insulated from these pressures as well.

In addition to performing reviews of the kind involved in the instant litigation, the RACs also have an important role in advising and counseling State and local governments and their officials on improvements to off-site emergency preparedness and response capabilities. The threat of public release of candid, often brutally frank, assessments of individual RAC members on the plan or exercise operations inadequacies by State or local governments could compromise the ability of RAC members to counsel effectively with State and local officials as to responsibilities in their areas of expertise.

The Validity of FEMA's Exercise of Executive Privilege

The Federal Emergency Management Agency (FEMA) in a sworn affidavit by its Director, Louis O. Giuffrida, asserts that the thirty (30) documents which are the subject of this action are subject to the provisions of executive privilege.

Director Giuffrida was appointed by President Reagan, with the advice and consent of the Senate, and serves at the pleasure of the President at the pay scale established for Executive Level II positions. Federal statutory positions at comparable Executive levels include the Director, OMB, the Deputy Secretaries of the Cabinet Departments, the Administrators of the Veterans Administration and the Environmental Protection Agency and the Secretaries of the Military Departments. Director Giuffrida reports directly to the President and has a comprehensive array of statutory and Executive duties assigned and delegated by the President.

The privilege against disclosure of intragovernmental documents containing advisory opinion recommendations and deliberations is part of a broader executive privilege recognized by courts. The purpose of the privilege is to ensure that the decision-makers in government are provided

with candid and frank advice. U.S. v. Capitol Ser., Inc., 89 F.R.D. 578, 582-583. There is a public policy involved in this claim of privilege namely, insurance of frank discussion between subordinate and chief concerning administrative action. Kaiser Aluminum & Chemical Corp. v. U.S., 157 FS 939, 946.

The purpose of the privilege for predecisional deliberations is to insure that a decision-maker will receive the unimpeded advice of his associates. The theory is that if advice is revealed, associates may be reluctant to be candid and frank. It follows that documents shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since subsequent disclosure could inhibit the future free flow of advice, including analysis, reports and expression of opinion within the agency. Federal Open Market Committee v. Merrill, 443 U.S. 340, 359-360.

The executive or deliberative process privilege protects from public disclosure intragovernmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. (Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.C. 318 (D.D.C. 1966), aff'd 384 F.2d 979 979 (D.C. Cir.), cert. denied 389 U.S. 952 (1967).

For FEMA to function effectively in meeting its responsibilities it must be able to rely in the RAC process upon a candid exchange of ideas, not only among its own staff but also because of the collequial nature of the RAC's decisions, with personnel of other agencies.

The judiciary, the courts declare, is not authorized "to probe the mental processes" of an executive or administrative officer. This salutary

rule forecloses investigation into the methods by which a decision is reached; United States v. Morgan, 313 U.S. 409, 422. Kaiser Aluminum & Chemical Corp. v. United States, at 946-947; the matters considered; See Fayerweather v. Ritch, 195 U.S. 276, 306-307, 25 S.Ct. 58, 49 L.Ed. 193 (1904); DeCambra v. Rogers, 23, 189 U.S. at 122, 23 S.Ct. 519; the contributing influences; Chicago, B. & Q. Ry. Co. v. Babcock, 204 U.S. 585, 593, 27 Ct. 326; or the role played by the work of others; United States v. Morgan, at 422, Kaiser Aluminum & Chemical Corp. v. United States; results demanded by exigencies of the most imperative character. It is not the function of the court to probe the mental processes of the Secretary in reaching his conclusions. Kaiser Aluminum & Chemical Corp. v. U.S., at 946. Likewise, no judge could tolerate an inquisition into the elements comprising his decision; United States v. Morgan, 313 U.S. at 422; indeed, "[s]uch an examination of a judge would be destructive of judicial responsibility"; United States v. Morgan, 313 U.S. at 422, 61 S.Ct. at 1004; and by the same token the integrity of the administrative process must be equally respected.

As noted in the Atomic Safety and Licensing Board's decision of May 18, 1984 no party has challenged the ruling principles of law which they applied to assertions of executive privilege in their November 1, 1983; Long Island Lighting Company (Shoreham Nuclear Power Station) LBP-83-72, 18 NRC 1221, 1227-28 (1983); and March 6, 1984; Long Island Lighting Company (Shoreham Nuclear Power Station) LBP-84-___, ___ NRC ___, ___ - __ (1984); orders ruling on motions to compel production of documents. The Board further finds that FEMA has made the requisite prima facie showing of executive privilege.

The starting point is the Director's affidavit which describes the general character of the documents in dispute and expresses his view as to the harm

which would follow their exposure. The Board should give great weight to Director Giuffrida's considered judgment as to the adverse impact the production sought upon both the immediate and long term public interest.

It is necessary therefore to consider the circumstances surrounding the demand for these documents in order to determine whether or not its production is injurious to the consultative functions of government that the privilege of non-disclosure protects.

The basic fallacy in the intervenor's approach lies in the fact that they are endeavoring to exploit what they consider to be weaknesses in FEMA's position without making any real case of their own. At best, the only position they can sustain is that, notwithstanding the strong showing made by FEMA there remains a speculative possibility that something to which they may legitimately be entitled is withheld. It is not, however, incumbent upon FEMA to negate all the possible uses production of the retained documents might serve; the requirement is that the claimants make a showing of necessity sufficient to outweigh the adverse effects the production would engender. U.S. v. Reynolds, 345 U.S. 811, U.S. v. Nixon, 419 U.S. 714, 715. The Atomic Safety and Licensing Board in its order of May 18, 1984 stated that "a balancing test" must be employed to determine if the privilege was to be pierced.

The primary question before the Appeal Board is whether Suffolk County has established the existence of exceptional circumstances or compelling need that would necessitate the overcoming of the privilege. The generally accepted means of determining whether executive privilege can be overcome with respect to production of documents is to determine whether exceptional circumstances are claimed by the party seeking the information contained

in the documents in question, and if claimed whether the exceptional circumstance is sufficient to overcome the public policy that established the agency's need to preserve confidentiality.

The Board instead set out its own balancing test wherein it indicated it weighed the 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) their prior decisions in the dispute between LILCO and New York State where the Board found LILCO's need for the documents outweighed New York's claim of harm resulting from disclosure, and 5) the fact that the authors of the documents in question are not subordinates of the persons to whom the documents are addressed and therefore, the possibility of a "chilling effect" of disclosure is lessened.

Weighing against disclosure according to the Board was the fact that 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 basis 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 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 prohibitive of anything, and 6) the November 1, 1983 order essentially upheld the executive privilege and denied most Suffolk County requests to produce drafts of similar documents.

The County, in its pleadings, fails to assert or indicate the compelling need or the existence of exceptional circumstances that would require the production of these documents.

Instead the Board arrives at the conclusion that the FEMA findings of the RAC Committee are directly relevant to the issues in controversy in this licensing hearing. Then disregarding its own determination that the privilege exists it states the traditional standard for discovery absent the assertion of a privilege that "the parties should be permitted to inquire into those findings and the procedures which were followed to arrive at the FEMA consensus".

The ASLB states 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; Long Island Lighting Company (Shoreham Nuclear Power Station) _____ EBP ____, 1984, p. 8; whether the conclusion is proper or not need not be debated here; what is important is the Board has applied the traditional test of what is discoverable absent the assertion of a privilege.

The most important aspect of the balancing test (if that is truly the test to be applied) is the weighing of the public harm that disclosure would cause against the benefits to the public of disclosure.

It certainly cannot be denied that Suffolk County could arguably be benefitted by each additional kernel of information it receives but that does not establish a compelling need to reject the policy considerations which surround the invocation of executive privilege in this case.

In determining the need of a party seeking discovery of documents under privilege, the availability of other means of obtaining the same or equivalent information, and the importance of the information in the documents themselves to the party's case, should be considered.

In the current dispute, the facts do not demonstrate a compelling need to overcome an admittedly well-founded assertion of executive privilege. The thirty documents in question are not the only means available to, or utilized by, Suffolk County to obtain discovery of FEMA.

FEMA has produced numerous other documents to Suffolk County and identified at least fifty of those released documents that were directly responsive to Suffolk County's motion to compel production documents relating to the RAC review.

In addition, Suffolk County has the final RAC review, and FEMA has agreed to produce its four witnesses in the manner requested by the County for two days of depositions. These witnesses were intimately and extensively involved in the development of the RAC review and findings.

Nor did the Licensing Board in the application of its balancing test attempt to determine the impact of the release of some of these documents (without individual comments) in the outcome of the balance. The Board instead decided to require the production of all documents relating to the RAC review. This is certainly not the minimum relief necessary. Though not stated, it appears that the underlying thought of the Board is that the County needs to obtain the comments of the individual RAC members in order to effectively question the end product. If this is the supposition, it is erroneous. Suffolk County has not made the requisite showing that it was impractical to obtain factual opinions on the same subject by other means to justify the compelling need that is required to overcome the assertion of executive privilege.

The individual opinions of the RAC members are irrelevant to this proceeding. The RAC submitted its final report which reflects the collegial judgment of the RAC. The RAC review is included as a portion of the testimony which further addresses the contentions which are the issues in litigation before the ASLB. The FEMA witnesses have indicated that the purpose of their testimony is to address the contentions relating to off-site preparedness at the Shoreham Nuclear Power Station which are properly the matter before the ASLB. Further, the FEMA witness panel has indicated their testimony (p. 11, ques. 8, FEMA testimony) represents the current FEMA evaluation of the LILCO Transition Plan, Revision 3.

The mere fact that many of the contentions are framed in terms of asserted non-compliance, of various NUREG 0654 standards and elements does not necessarily shift the primary focus of the proceeding, nor of Suffolk County's own case to an analysis of the RAC review. It is expected, rather that as in most hearings the issues raised in contentions will deal with compliance or non-compliance with recognized standards since according to NRC's own regulations challenges to the standards themselves are not proper areas of inquiry before an ASLB.

Further, the affidavits of Kowieski and McIntire substantiate the assertion of harm to the RAC process from release of the thirty RAC documents made initially in the affidavit of Director Giuffrida. The Licensing Board did not have these later affidavits before it; thus its finding of harm to the agency from disclosure of the thirty documents at issue could not have comprehended this additional level of detail and extent of asserted harm. However, these affidavits offer a graphic measure of

harm. FEMA's national program for off-site safety at nuclear power plants would suffer grave compromise should FEMA be compelled to release the thirty requested documents.

The confidentiality of the comments and concerns of the RAC members is important to their ability to carry out their assigned task. The Indian Point ASLB (Tr. 12206-12227) recognized the chilling effect that disclosure of their individual comments would have and limited the scope of discovery to a team execrit in order to balance the needs of the intervenors while still insuring that the individual observations would not be disclosed.

Both the Commission and the Atomic Safety and Licensing Board (transcript 12217-12220) in the Matter of Consolidated Edison Company of New York, et al. (Indian Point) addressed a similar compelling issue as it related to the discovery of the individual impressions of observers at an Exercise. (It should be noted a substantial number of these observers were contractors or employees of government agencies other than FEMA). The Commission, in particular Commissioners Roberts and Ahern raised very serious concerns as to the chilling effect of releasing individual execrit forms (exercise critique forms utilized to record individual observations, evaluations and comments relating to an exercise of a Radiological Emergency Preparedness Plan). Consolidated Edison Co. of New York (Indian Point) slip opinion, August 20, 1982 (Roberts at p. 3, Ahern at p. 5).

Freedom of Information Act

In a Freedom of Information Act request of the Federal Emergency Management Agency (FEMA), Suffolk County has sought the production of a large number of broadly described documents. The vast majority of these documents have been released by FEMA. However, FEMA has refused to produce the thirty documents at issue in this matter, relying upon the executive "deliberative process" privilege embodied in 5 U.S.C. § 552(b)(5) (1976) (hereinafter "Exemption 5"). Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency." Id. The Courts have construed this exemption to exempt from disclosure documents which are protected from civil discovery under the executive, deliberative process privilege. EPA v. Mink, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980).

The deliberative process privilege exempts "all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153, 95 S.Ct. 1504, 1517, 44 LED.2d 29, ____ (1975). King v. IRS, 684 F.2d 517, 519 (7th Cir. 1982). In order to be exempt, such documents must be both "predecisional," i.e., generated before the adoption of agency policy or final agency decision, and "deliberative," i.e., reflecting the give and take of the consultative process. King, 684 F.2d at 519; Coastal States, 617 F.2d at 866. "The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." Id.

The deliberative process exemption has a number of purposes. It protects creative debate and candid consideration of alternatives within the decision-making body by assuring that all members feel free to provide the ultimate decision-maker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism. Russell v. Department of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States, 617 F.2d at 866. The privilege serves to protect against premature disclosure of proposed policies before they have been finally formulated or adopted. Russell, 682 F.2d at 1048; Coastal States, 617 F.2d at 866. It also serves to protect against confusing the issues or misleading the public by dissemination of documents suggesting reasons and rationales for courses of action which were not in fact the ultimate reasons for the final decisions or actions taken. Coastal States, 617 F.2d at 866. As the U.S. Court of Appeals for the District of Columbia recently stated, the deliberative process privilege protects the integrity of the decision-making process itself by confirming that officials should be judged by what they have decided, "not for matters they considered before making up their minds." Russell, 682 F.2d at 1048 (citing Jordan v. United States Dept. of Justice, 591, F.2d 753, 772-3 (D.C. Cir. 1978)). All of these purposes militate against disclosure of the documents at issue in the case at bar.

All of the documents sought by Suffolk County were created by or for the use of members of the FEMA Regional Assistance Committee (hereinafter

"RAC"). In this instance, the RAC was convened to examine the LILCO Transition Plan for the Shoreham Nuclear Power Station and to prepare a report, i.e., review, of the plan for transmission to the Nuclear Regulatory Commission.

Each of the documents sought by Suffolk County falls into one of the following categories: (1) individual comments on the plan provided for the RAC Chairperson's review; (2) personal notes and impressions of RAC members or FEMA employees; (3) summaries of RAC member comments; (4) non-final drafts of documents developed by or for the RAC; and (5) documents prepared for consideration of the RAC in reviewing the LILCO transition plan. All of these documents are of the type that are protected from disclosure by the deliverative process privilege.

Items 1-19 requested by Suffolk County are individual review comments of RAC members, consultants and FEMA staff provided to the RAC Chairperson. Item 31 is the notes and impressions of a FEMA employee concerning the RAC review. Such notes are considered to be intra-agency or inter-agency memorandums. Conoco, Inc. v. United States Dept. of Justice, 687 F.2d 724, 727 (3rd Cir. 1982). These items clearly are pre-decisional. They were prepared for use in completing the final RAC review.

These notes contain the recommendations, proposals, suggestions and other comments reflecting the mental processes and personal opinions and positions of the writer rather than the policy of the agency. Such documents consistently have been held to be part of an agency's deliberative process and clearly privileged. See, e.g., Sears, 421 U.S. at 153, 95 S.Ct. at 1517, 44

LED 2d at ____ (the deliberative process privilege protects all papers which reflect the agency's group thinking); Coastal States, 617 F.2d at 866 (the deliberative process privilege covers recommendations, proposals, suggestions and other documents reflecting the writer's opinion rather than agency policy); United States v. American Telephone and Telegraph Co., 524 F.Supp. 1381, 1386-87 (D.D.C. 1981) (evidence concerning mental processes of the FCC part of deliberative process and thus is privileged). Thus, items 1-19 are exempt from disclosure requirements and FEMA should not be required to produce them.

Items 20-23 are individual personal notes of the RAC members regarding a RAC meeting held on January 20, 1984. Items 20, 21 and 22 have been seen only by the authors. Item 23 was viewed only by its author and agency counsel. These notes were not created pursuant to any FEMA regulation or directive, or for distribution through normal agency channels. Rather, they are the property of the individual writers created solely for their own purposes. For example, they are used to refresh the writer's recollection, when helpful. Such personal, handwritten notes do not constitute agency records for purposes of 5 U.S.C § 552(b)(5); thus, disclosure cannot and should not be required. See British Airports Authority v. CAB, 531 F.Supp. 408, 415-16 (D.D.C. 1982) (disclosure of such notes not required); Porter County Chapter of the Izaak Walter League, Inc. v. AEC, 380 F.Supp. 630, 633 (N.D. Ind. 1974) (individual AEC member notes

prepared for own use in environmental review are not agency records and are protected from disclosure).

Item 37 is 26 pages of a flip chart titled Shoreham Review Compilation of RAC comments with the RAC members individual clearly identifiable as such. These documents were prepared prior to the final RAC review and are clearly pre-decisional. They are a cut and paste comparison - with additional staff analysis of Items 1-19, discussed above. See supra. text p. 3-4. To allow disclosure of this document, while preventing disclosure of the original documents, would defeat the purpose of the deliberative process privilege. These documents should be protected from disclosure on the same basis as Items 1-19. Id. Furthermore, disclosure of such compilations which permit inquiry into the mental processes of the group by revealing what factors were considered to be significant in reaching a proper decision, or how the factors were evaluated, is disallowed. Playboy Enterprises, Inc. v. Department of Justice, 677 F.2d 931, 936 (D.C. Cir. 1982). The same result applies here.

Items 25, 26, 35 and 36 are draft documents developed by or for the RAC. Item 25 is a draft of proposed definitions and categories distributed for consideration of the RAC in preparing the review. Item 26 is a sample of 4 pages of a non-final draft of the review; Item 35 is the drafts of the review annotated with individual notes of FEMA employees and contractors. Item 36 is revision 1 of a draft of the LILCO Plan Review of the LILCO Transition Plan. None of these items were final products. Rather, they were documents written before the final report. They, like the other documents at issue, reflect the agency "give and take" process leading

up to the final review. Such draft documents consistently have been held to be pre-decisional and exempted from disclosure. King, 684 F.2d at 519; See also Coastal States, 617 F.2d at 866, 868 (deliberative documents that are drafts of what will become a final document are exempt from disclosure).

Item 34 is a confidential memorandum to the RAC members concerning the legal issues to be considered in the RAC review as well as a preliminary analysis of those issues. To allow disclosure of this memorandum would reveal what factors were considered to be significant in formulating the final review. Such disclosure is prohibited. See Playboy, 677 F.2d at 936 (documents revealing what or how factors were exempt from disclosure).

The public interest in upholding the deliberative process privilege far outweighs the need for the information sought as evidence. The RAC members have indicated that disclosure of the documents sought would prevent them from providing uninhibited opinions or recommendations in the future. If such disclosure were allowed, they could be subject to public ridicule and criticism, as well as to criticism from their employers. RAC members may not always have advocated popular positions. It is well-established that

> [h]uman experience teaches us that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interest to the detriment of the decision-making process.

United States v. Nixon, 418 U.S. 683, 705, 94 S.Ct. 3090, 3106, 41 LEd. 2d 1039 (1974); Coastal States, 617 F.2d at 866. To release such documents has the clear potential of inhibiting the candid comments of the RAC

members. Audio Technical Services v. Department of the Army, 487 F.Supp. 779, 783 (D.D.C. 1978). The cost of such an eventuality in terms of efficiency and quality of decision-making would be great. Id.; Mead Data Central, Inc. v. U.S. Department of the Air Force, 575 F.2d. 932, 936 (D.C. Cir. 1978).

Furthermore, Suffolk County would suffer no prejudice as a result of withholding the sought documents. The final RAC report is available for Suffolk County's review. That final review speaks for itself. Accord American Telephone and Telegraph Co., 524 F.Supp. at 1387. The comments and drafts leading up to that review are irrelevant. Id. The RAC members and the RAC Chairperson reached consensus on the final review. Further illumination thereof is unnecessary, especially given the harm that would result from disclosure of the documents at issue.

Attorney-Client/Attorney Work Product Privileges

A review of the cases dealing with the attorney-client or attorney work product privilege indicates that in those cases where the privilege applies a strong showing is needed to overcome the privilege.

As Rule 26 and Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed 451 (1947) make clear, work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship . . . We think a far stronger showing of necessity and unavailability by other means . . . would be necessary. Upjohn Company v. U.S., 449 U.S. 373 at 688, 101 S.Ct. 677, 66 L.Ed 594. The Board should consider the corresponding opportunity to employ its own experts to formulate

opinions therein. Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984, 994.

The party seeking to overcome the assertion of the privilege must establish "necessity or justification . . . denial would unduly prejudice the preparation of petitioners case . . . or cause hardship or injustice (Hickman v. Taylor) . . . balancing the discoverants interests in disclosure of the materials . . . and the government's interests in their confidentiality.

Thus what emerges from the Morgan cases is the principle that those legally responsible for a decision must in fact make it, but that their method of doing so - their thought processes, their reliance on their staffs - is largely beyond judicial scrutiny. KFC National Management Corp. v. NLRB, 497 F.2d 298 (2nd Cir. 1974). See also U.S. v. Morgan, 313 U.S. 409.

Chilling Effect

Preventing disclosure of the documents at issue in this case would not be a novel or unique result. The courts have protected such documents prepared by or for groups similar to the RAC. In the Audio-Technical Services case, for example, the court found that the candid comments of the members of the evaluation and selection team, which had been convened to analyze and review technical proposals, were exempt from disclosure under the deliberative process privilege. 487 F.Supp. at 783. Further, the United States Claims Court recently held that disclosure of the evaluation sheets and working papers of members of a Source Evaluation Board would have a chilling effect upon the nature of the evaluation process.

Planning Research Corporation v. United States, 4 Cl. Ct. 283 (1983). Like the RAC, the SEB finally reached a consensus. Id. at _____. The process of achieving consensus was a dynamic one, "during which members' opinions . . . could, and did, change many times." Id. The Court saw no reason to inquire into the process leading to the final decision given the adverse effect of such an inquiry. The same result is appropriate here.

The Appeals Board is correct in its analysis that the chilling effect of the release of different documents varies according to the nature of the document, its content, its organization and its identification of or with a particular individual.

The most conspicuous example of the chilling effect is where one's own individual work is clearly identifiable. If an individual knows that in the future his remarks and comments will be held up for public view and dissection he will most certainly follow the most conservative course. The Court observed the practical human phenomena of "playing it safe" and the temptation to temper candor in favor of appearances when public dissemination of written remarks is expected, all to the detriment of the decision-making process. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150. Though, the Board should accept the claim of executive privilege as asserted by the head of an independent agency, if it determines the necessity to overrule the privilege for what it judges to be public policy considerations it should grant the minimum relief necessary.

In its weighing of the public interest the Appeal Board has to consider the impact of disclosure on the future of this proceeding. There is no need to reiterate the concerns of FEMA's officials as expressed in their affidavits as previously submitted to this Board.

But it is clear that discovery is a continuing process. If these documents are released and FEMA attempted to utilize the present RAC procedures any party to this proceeding would be able to order the production of the RAC comments as received, the evaluations and comparisons as made by FEMA employees and consultants and the compilations of drafts as completed.

Conclusion

For the foregoing reasons,

1) The Atomic Safety and Licensing Appeal Board should absent a de nova review of the documents, uphold the Licensing Board's finding that FEMA has made the requisite prima facia showing of executive privilege.

2) The Atomic Safety and Licensing Board should reverse the Licensing Board's order of May 18, 1984 as it relates to the release of documents as the facts do not establish a compelling need for the production of the privileged documents sufficient to override the policies behind executive privilege.

Respectfully submitted,

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DATE: JUN 1 1984

APPENDIX A

LIST OF RAC MEMBERS IN FEMA REGION II

Name of Reviewer	AGENCY	TITLE	GRADE	Reporting to (Title)	How long individual has been with RAC	
					Years	Months
Herbert Fish (Official RAC member)	DOE	DOE, RAC member	GS-14	Director, Radiological Controls, Office of Nuclear Safety	2	4
Paul Lutz (Official RAC Member)	DOT	Regional Emergency Transportation Representative, Regions I & II	GS-14	Regional Emergency Transportation Coordinator	5	0
Ronald E. Bernacki (Official RAC Member)	FDA	Regional Radiological Health Representative	GS-13	Assistant Regional Director for Compliance, GM-14	5	0
Robert J. Bores (Official RAC Member)	NRC	Technical Assistant, Division of Engineering and Technical Programs	GM-14	Director, Division of Engineering and Technical Programs SES	0	7
Cheryl Molina (Official Reviewer)	USDA	Management Analyst	GS-12	George E. Bickerton (Official RAC member) Director, Office of Emergency Planning, GM-15	4	2
Joyce Feldman (Official Reviewer)	EPA	Health Physicist	GS-12	Paul A. Giardina (Official RAC member) Regional Radiation Representative GM-14	0	5

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'84 JUN -4 P2:11

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the Federal Emergency Management Agency's "Memorandum in Support of FEMA'S Appeal of an Order of the Atomic Safety and Licensing Appeal Board" have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk, by hand this 1th day of June 1984:

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